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## Comparative Study of Certain Due Process Requirements of the European Human Rights Convention

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# COMPARATIVE STUDY OF CERTAIN DUE PROCESS REQUIREMENTS OF THE EUROPEAN HUMAN RIGHTS CONVENTION\*

THOMAS BUERGENTHAL\*\*

## I. INTRODUCTION

### A. *The Convention and Its Institutions*

THE European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> is an attempt by the member states of the Council of Europe, as its preamble declares, "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration [of Human Rights]."<sup>2</sup> To date, the Convention has been ratified by fifteen Western European countries.<sup>3</sup> Of the eighteen states which by virtue of their membership in the Council of Europe are eligible to adhere to the Convention,<sup>4</sup> only France, Switzerland and Malta have not as yet acceded to it.<sup>5</sup>

The Convention<sup>6</sup> guarantees, very generally speaking, the right to life (Art. 2), the right not to be tortured or to be subjected to inhuman or degrading treatment (Art. 3). It outlaws slavery (Art. 4) as well as arbitrary arrest and detention (Art. 5), and proclaims the right to a fair and public trial (Art. 6). In addition to a prohibition against *ex post facto* laws (Art. 7), the Convention protects the individual in his private and family life (Art. 8), accords him freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10) and the right of peaceful assembly (Art. 11). It also assures to men and women of marriageable age the right to marry and found a family (Art. 12). The first protocol to the Convention supplements this list with the recognition of the right to peaceful enjoyment of one's possessions (Art. 1), besides providing that no one shall be denied the right to education (Art. 2). It also contains an undertaking

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1. The Convention was signed in Rome on November 4, 1950, and became effective on September 3, 1953. The First Protocol to the Convention, which guarantees three additional rights, was signed in Paris on March 20, 1952. It entered into force on May 18, 1954. The equally authentic English and French texts of the Convention and the Protocol may be found in 1 European Commission of Human Rights, Documents and Decisions [hereinafter cited Yearbook] 4 (1955-57), as well as in 213 U.N.T.S. 222 and 262 (1955).

2. The Universal Declaration of Human Rights was adopted by the U.N. General Assembly in 1948. See U.N. General Assembly, Resolution 217 (III) of December 10, 1948, G.A.O.R. III. 1, Resolutions (A/810), at 71.

3. The following states have ratified the Convention: Austria, Belgium, Cyprus, Denmark, West Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom.

4. Pursuant to Article 66 of the Convention only members of the Council of Europe may become parties to the Convention. On this organization, see Robertson, *The Council of Europe* (2d ed. 1961).

5. While France has been a member of the Council of Europe since its inception, Switzerland joined it on May 6, 1963, and Malta on April 29, 1965.

6. On the Convention generally, see Vasak, *La Convention Européenne des Droits de l'Homme* (1964); Robertson, *Human Rights in Europe* (1963); Weil, *The European Convention on Human Rights* (1963).

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by the contracting states to hold free elections by secret ballot at reasonable intervals (Art. 3).<sup>7</sup> Pursuant to Article 14 of the Convention, the enjoyment of these rights must be secured without discrimination based on sex, race, color, national or social origin, etc. And under Article 13 "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>8</sup>

It should, of course, be noted that most of these rights are subject to rather broad limitations and "*ordre public*" escape clauses. In time of war or other public emergency threatening the life of the nation, the member states may, furthermore, avail themselves of the right of derogation from all but the most fundamental provisions of the Convention, but only "to the extent strictly required by the exigencies of the situation."<sup>9</sup> They may in addition, either when signing or ratifying the Convention, reserve the right to apply certain specific domestic laws then in force, which might be inconsistent with the provisions of the Convention.<sup>10</sup> It should be emphasized however that few substantial reservations have been made by the contracting states.<sup>11</sup>

By ratifying the Convention, the contracting states undertake to secure the rights it proclaims "to everyone within their jurisdiction."<sup>12</sup> In other words, the Convention protects every person in these countries irrespective of his nationality<sup>13</sup> with the possible exception of diplomatic and foreign military personnel who may not, strictly speaking, be within the "jurisdiction" of a contracting party.

To ensure that the member states honor their obligations, the Convention provides for the establishment of a European Commission of Human Rights and a European Court of Human Rights.<sup>14</sup> The Commission's<sup>15</sup> jurisdiction is both

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7. Additional rights are guaranteed in Protocol No. 4 to the Convention, which was signed in Strasbourg on September 16, 1963. It has not as yet entered into force. This Protocol is reprinted in Council of Europe, *European Convention on Human Rights: Collected Texts* [hereinafter cited *Collected Texts*] § 1 (4th ed. 1965).

8. On this subject, see Buerghenthal, *The Domestic Status of the European Convention on Human Rights*, 13 *Buffalo L. Rev.* 354 (1964); Golsong, *The European Convention on Human Rights Before Domestic Courts*, 38 *Brit. Yb. Int'l L.* 445 (1962).

9. Convention, Art. 15. For the application of this provision, see "Lawless" Case (Merits), *European Court of Human Rights, Judgment of July 1, 1961*, 4 *Yearbook* 438 (1961).

10. Convention, Art. 64.

11. See *Collected Texts* § 5(d), where the texts of the various reservations can be found.

12. Convention, Art. 1.

13. Pursuant to Article 16 of the Convention, restrictions on the political activities of aliens may, however, be imposed by the contracting parties.

14. Convention, Art. 19. For an extensive analysis of the functions of these institutions, see Golsong, *The Control Machinery of the European Convention on Human Rights*, in *The European Convention on Human Rights* 38 (*Int'l & Comp. L.Q. Supp.*, Publ. No. 11, 1965). See also Monconduit, *La Commission Européenne des Droits de l'Homme* (1965).

15. The numerical composition of the Commission, no two members of which may be nationals of the same state, is equal to the number of states that have ratified the Convention. Convention, Art. 20. Under this scheme it is possible for each contracting state to have one of its nationals serve on the Commission. The Convention does not, however, compel this result, since it seems to permit the election of a person who is not a citizen of any of the member states.

compulsory and facultative. That is to say, by ratifying the Convention, a state is deemed to have accepted the Commission's jurisdiction to pass on complaints submitted by other contracting parties charging that state with a violation of the Convention.<sup>16</sup> However, the Commission has jurisdiction to hear complaints lodged by individuals only if the allegedly delinquent state has recognized the so-called right of private petition,<sup>17</sup> which requires a separate declaration and is optional. To date eleven countries have accepted the Commission's jurisdiction to hear such individual complaints.<sup>18</sup>

The Commission performs quasi-judicial, investigatory and conciliatory functions. It may only hear a case after all domestic remedies provided by the state against which the complaint is directed have been exhausted,<sup>19</sup> and after it has satisfied itself that the petitioner has made out a *prima facie* case that he is the victim of a violation of one of the rights guaranteed in the Convention.<sup>20</sup> To the extent that the Commission, in thus passing on the admissibility of a complaint,<sup>21</sup> of necessity applies and interprets the Convention in a particular case, it performs judicial functions.<sup>22</sup> Here it might parenthetically be noted that, since its decision rejecting an application as inadmissible is final, the effectiveness of the Convention depends in large measure upon the manner in which the Commission interprets it at this stage.<sup>23</sup>

If the Commission has held a petition to be admissible, its investigatory and conciliatory functions begin. It will then undertake a full investigation of the case and, if the facts disclose a breach of the Convention, attempt to induce the parties to reach a friendly settlement of the dispute "on the basis of respect for Human Rights as defined in this Convention."<sup>24</sup> If no such settlement can be reached, the Commission must submit a report to the Committee of Ministers of the Council of Europe,<sup>25</sup> setting out the facts of the case, the Commission's opinion with regard to the merits of the allegations and any recommendations it desires to make.<sup>26</sup> Within three months after filing this report the Commission may,

16. Convention, Art. 24.

17. Convention, Art. 25.

18. These states are: Austria, Belgium, Denmark, West Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

19. Convention, Art. 26.

20. Convention, Arts. 25 and 27.

21. Pursuant to Article 27(2), "the Commission shall consider inadmissible any petitions submitted under Article 25 [private petitions] which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition."

22. Schwelb, *On the Operation of the European Convention on Human Rights*, 18 Int'l Organization 558, 560 (1964).

23. For a somewhat critical, albeit diplomatic, analysis of the Commission's work by two distinguished judges of the European Court of Human Rights, see Rolin, *Has the European Court of Human Rights a Future?*, 11 How. L.J. 442 (1965); Mosler, *Kritische Bemerkungen zum Rechtsschutzsystem der Europäischen Menschenrechtskonvention*, in *Festschrift für Hermann Jahrreiss* 289 (1964).

24. Convention, Art. 28(b).

25. The Committee of Ministers consists of government representatives of member states of the Council of Europe. See generally, Robertson, *The Council of Europe* 24-40 (2d ed. 1961).

26. Convention, Art. 31.

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under certain circumstances to be discussed below, refer the case to the European Court of Human Rights.<sup>27</sup> But if the matter has not been submitted to the Court, the case will have to be decided by the Committee of Ministers, whose judgment is final.<sup>28</sup>

The jurisdiction of the Committee of Ministers to decide the case may be ousted, if within a period of three months after it has received the Commission's report, the matter is referred to the Court.<sup>29</sup> The right to submit the dispute to the Human Rights Court is reserved to the Commission and to interested contracting states.<sup>30</sup> However, since the Convention makes the recognition of the Court's jurisdiction optional,<sup>31</sup> it may only hear the case if the states involved in the dispute have accepted its jurisdiction.<sup>32</sup> To date, eleven states have recognized the compulsory jurisdiction of the Court.<sup>33</sup> The Court's judgment is final<sup>34</sup> and its decisions are binding upon the parties to the case.<sup>35</sup> While this tribunal lacks the power to reverse or set aside domestic court judgments or to annul national legislation,<sup>36</sup> its ruling that such an act violates the Convention requires the state in question to remedy the situation. The Court is, furthermore, empowered to "afford just satisfaction to the injured party," if the appropriate relief is not fully available in the domestic forum.<sup>37</sup>

Since 1959, when the Human Rights Court was formally established,<sup>38</sup> only three cases have been referred to it. It has decided two of these.<sup>39</sup> The third one, known as the "Belgian linguistic cases," has only recently been referred to the

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27. Convention, Arts. 32 and 47.

28. Convention, Art. 32. See Langer, *Die Entscheidungsbefugnis des Ministerausschusses des Europarates gemäss Art. 32 [der] Menschenrechtskonvention*, 18 *Neue Juristische Wochenschrift* [hereinafter cited N.J.W.] 2234 (1965).

29. The jurisdiction of the Court extends to all cases involving the interpretation and application of the Convention. Convention, Art. 45.

30. Pursuant to Article 48 of the Convention, a case may be submitted to the Court by the Commission and a member state which meets any one of the following qualifications: (a) its national is alleged to be the victim of the purported breach of the Convention; (b) it referred the case to the Commission; (c) the complaint filed with the Commission was lodged against it.

31. Convention, Art. 46.

32. Convention, Art. 48. In addition to this requirement, the Commission must also have acknowledged its failure in procuring a friendly settlement of the dispute. Convention, Art. 47.

33. Austria, Belgium, Denmark, West Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

34. Convention, Art. 52.

35. Convention, Art. 53.

36. Robertson, *Human Rights in Europe* 103 (1963).

37. Convention, Art. 50. For an analysis of this provision and the domestic effect of the Court's judgments, see Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member States*, in *The European Convention on Human Rights* 79, 94-105 (Int'l & Comp. L.Q., Supp. Publ. No. 11, 1965). See also Vis, *La réparation des violations de la Convention Européenne des Droits de l'Homme*, 10 *Annales de la Faculté de Droit et des Sciences Politiques et Economiques de Strasbourg* 279 (1961).

38. Pursuant to Article 56 of the Convention, eight contracting states had to recognize the Court's compulsory jurisdiction before it could be established.

39. "Lawless" Case (Preliminary objections and questions of procedure), *European Court of Human Rights, Judgment of November 14, 1960*, 3 *Yearbook* 492 (1960); "Lawless" Case (Merits), *European Court of Human Rights, Judgment of July 1, 1961*, 4 *Yearbook* 438 (1961); "De Becker" Case, *European Court of Human Rights, Judgment of March 27, 1962*, 5 *Yearbook* 320 (1962).

Court.<sup>40</sup> The Commission, on the other hand, has in the meantime decided close to 3,000 applications. Approximately one per cent of these have been ruled admissible. But whether it rejects or accepts a complaint, the Commission interprets the Convention. Accordingly, despite the limited record compiled by the Court thus far, the opinions rendered by the Commission form a large body of case law, which throws considerable light on the scope and legal efficacy of the Convention and shapes its domestic application.<sup>41</sup>

B. *The Convention and Its Legal Setting*

The preamble to the Convention describes the signatories of the Convention as "the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law." While this description is accurate in a very broad historical sense,<sup>42</sup> the Convention is applicable to widely divergent legal systems and institutions. It has been ratified by such exponents of the common law tradition as the United Kingdom and Ireland, and by Continental European nations broadly classifiable as civil law countries. These may, of course, again be broken down into groups closely related to the French, to the Scandinavian and the German legal system. As a result the Convention, both in terms of its terminology and substantive provisions, is a compromise instrument that seeks to establish legal principles capable of application in all of these divergent systems.

The application of its provisions nevertheless creates difficulties on both the domestic and international planes. This is not surprising, for what may be an easily applicable rule of law in one state may pose complex problems in another.<sup>43</sup> Legal institutions vary from country to country, even if they belong to the same legal system, and much more so if they do not. They color the meaning of words, they delimit the role of law, they control the functions of judges and they shape the mentality of lawyers. It is accordingly one thing to articulate, as does the Convention, a common European standard of legality relating to fundamental human rights; it is quite another to apply it to and in fifteen different countries. This standard is superimposed upon existing legal systems and thus leaves intact domestic law and institutions. It merely requires of them that they safeguard the rights which the Convention guarantees. The Convention

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40. This case, consisting of a number of applications filed against Belgium that were joined by the Commission, was referred to the Court on June 24, 1965. See European Commission of Human Rights, Minutes of the 56th Plenary Session, Council of Europe, Doc. DH(65) No. 5, p. 3 (1965).

41. See Mosler, *The Protection of Human Rights by International Legal Procedure*, 52 Geo. L.J. 800, 804-805 (1964). See also, McNulty, *The Practice of the European Commission of Human Rights*, 11 How. L.J. 430 (1965).

42. See Scheuner, *Comparison of the Jurisprudence of National Courts With That of the European Commission and Court of Human Rights and With That of the Committee of Ministers: Rights Other Than the Rights in Court Proceedings*, Council of Europe, Doc. H/ Coll. (65) No. 16, pp. 11-12 (1965).

43. See, e.g., Van Emde Boas, *La Convention Européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales dans la Jurisprudence Néerlandaise*, [1962] European Yearbook, Vol. 1, p. 226, at 232-33.

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Institutions charged with the duty of ensuring the enforcement of these rights accordingly perform a function similar to that of the United States Supreme Court when it reviews the constitutionality of state action.<sup>44</sup>

Given this setting, it should not come as a surprise that the most difficult provisions of the Convention to apply are those relating to procedural due process of law.<sup>45</sup> Fairness in the administration of justice, more than any other legal principle, is not susceptible to concise definition. It has a different meaning in different countries. History and tradition shape and distort it. It can be safeguarded in a variety of ways, depending upon a given institutional context. In an adversary or accusatorial system of justice, certain rights may be deemed to be fundamental, for it cannot fairly operate without them. In an inquisitorial system of justice these rights may be validly denied, for they may be adequately safeguarded by other means. To judge these divergent procedures according to a common standard of fairness—a function entrusted to the Convention Institutions—is therefore no easy matter.<sup>46</sup> It requires an understanding of the procedural intricacies of the particular legal system in which the case arose, for fairness in the administration of justice is basically a relative concept. This is particularly true of procedural due process in criminal cases. Each country has its own institutions to safeguard the rights of individuals.<sup>47</sup> Whether they measure up to the standard enunciated in the Convention must therefore be decided by asking to what extent they achieve the desired balance between the rights of the individual and the interest of society in effective law enforcement. But since legal institutions differ from country to country, the rule governing in one case will not necessarily be determinative in another despite an identical factual context.

A study of the manner in which the Convention Institutions and national courts have interpreted the due process provisions of the Convention, which we shall here attempt, must therefore be sensitive to the institutional divergence to which they are applicable. It should, however, not be forgotten that the Convention *does* enunciate a standard to which domestic law must conform. If a particular law does not so conform, the state concerned is under an obligation to rectify the situation. It cannot therefore be admitted that an awareness of and respect for institutional divergence requires more than the recognition that fairness in the administration of justice can be achieved in various ways. But if the particular method does not measure up to the standard set by the Convention,

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44. See Greenberg & Shalit, *New Horizons for Human Rights: The European Convention, Court and Commission of Human Rights*, 63 Colum. L. Rev. 1384 (1963).

45. See Scheuner, *Die Grundrechte der Europäischen Menschenrechts-Konvention in ihrer Anwendung durch die Organe der Konvention*, in *Festschrift für Hermann Jahrreiss* 355, 377 (1964).

46. The task of the U.S. Supreme Court may well be less difficult to the extent that the Constitution, unlike the Convention, applies basically to a homogeneous legal system.

47. See generally, Snee & Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 Ohio St. L.J. 467 (1960).

the fact that it is the outgrowth of a cherished and long-established principle of national law does not justify its continued existence.<sup>48</sup>

It is in this spirit that we shall approach our analysis of the procedural due process provisions of the Convention as they have been applied by the Convention Institutions and national courts. In doing so, we shall confine our discussion to Article 6 of the Convention,<sup>49</sup> which provides:

(1) 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offense has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defense;

(c) 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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

## II. DUE PROCESS OF LAW IN CRIMINAL CASES

### A. The "Fair Trial"

The full scope of Article 6 in criminal cases depends largely upon the meaning ascribed to the "fair hearing" provision contained in Article 6(1). That is to say, the initial question that must be asked is whether Article 6 ex-

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48. This is a notion some national courts find very difficult to accept, mainly because they are unwilling to concede the possibility that their system of administration of justice may be wanting in one or the other respect. See, e.g., Liebscher, *Austria and the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 J. Int'l Comm'n Jurists 282, 287 (1963).

49. To the extent that we are not here dealing, except parenthetically, with Article 5, which protects an individual against illegal arrest and detention, our study of procedural due process under the Convention is incomplete. For an analysis of Article 5, see Buergenthal, *Comparison of the Jurisprudence of National Courts With That of the European Commission and Court of Human Rights and With That of the Committee of Ministers: Rights in Court Proceedings*, Council of Europe, Doc. H/Coll. (65) No. 15, pp. 4-19 (1965).



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haustively defines the limits of the notion of a fair trial. An affirmative answer would proceed on the assumption that a judgment pronounced at a public trial by an independent and impartial tribunal established by law conforms to the requirements of Article 6, provided that the accused was also accorded the rights guaranteed in paragraphs (2) and (3). Such a restrictive interpretation might be permissible as a matter of strict statutory construction. It would, however, greatly stifle the development of a truly enlightened system of due process of law, whose establishment must be viewed as the aim of the Convention. Since its language does not, furthermore, compel this limiting interpretation, the European Commission of Human Rights quite properly rejected it. It concluded instead:

Article 6 of the Convention does not define the notion of "fair trial" in a criminal case. Paragraph 3 of the Article enumerates certain specific rights which constitute essential elements of that general notion, and paragraph 2 may be considered to add another element. The words "minimum rights," however, clearly indicate that the six rights specifically enumerated in paragraph 3 are not exhaustive, and that a trial may not conform to the general standard of a "fair trial," even if the minimum rights guaranteed by paragraph 3—and also the right set forth in paragraph 2—have been respected.<sup>50</sup>

This holding is of profound importance because it enables the Convention Institutions to scrutinize domestic criminal procedure for violations of the Convention unhampered by rigid rules limiting their authority. For if Article 6 does not delimit the concept of a "fair trial," the requirements inherent in it must of necessity be articulated by the Commission and eventually by the Court. The jurisdiction of the Commission, as far as this provision is concerned, must by virtue of this ruling grow in direct proportion to the Commission's evolving notions of procedural fairness. Since the Commission has asserted the power to interpret the notion of a "fair trial" unrestrained by limiting textual restrictions, it is now in a position to formulate standards of procedural fairness consistent with the changing demands of justice. The member states must therefore be continually responsive to this trend to avoid committing violations of the Convention. It is accordingly not surprising that two countries recently amended their codes of criminal procedure to anticipate such consequences.<sup>51</sup> This process will no doubt continue.

In applying the fair trial provision of Article 6(1) the Commission has adopted the following approach:

In a case where no violation of paragraph 3 is found to have taken place, the question whether the trial conforms to the standard laid down

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50. App. No. 343/57, *Nielsen v. Denmark* (Merits), 4 Yearbook 494, 548 (1961).

51. For the amendment of the Austrian Code of Criminal Procedure, see Federal Law of July 18, 1962, [1962] Bundesgesetzblatt für die Republik Österreich, No. 226, p. 1129, 5 Yearbook 340 (1962); Federal Law of March 27, 1963, [1963] Bundesgesetzblatt für die Republik Österreich, No. 66, p. 167. The German Code of Criminal Procedure was amended in 1964. See Gesetz zur Änderung der Strafprozessordnung und des Gerichtsverfassungsgesetzes vom 19 Dezember 1964, [1964] Bundesgesetzblatt I., No. 63, p. 1067.

by paragraph 1 must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular aspect of the trial or one particular incident. Admittedly, one particular incident or one particular aspect even if not falling within the provisions of paragraphs 2 or 3, may have been so prominent or may have been of such importance as to be decisive for the general evaluation of the trial as a whole. Nevertheless, even in this contingency, it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether or not there has been a fair trial.<sup>52</sup>

The Commission has repeatedly reaffirmed this principle, which simply means that the fairness of a trial cannot be judged on the basis of the article's enumerated requirements.<sup>53</sup>

Its emerging jurisprudence provides us, however, with some guidelines as to what the Commission regards to be fundamental elements of a fair trial. In *Pataki & Dunshirn v. Austria*,<sup>54</sup> it fully espoused the so-called "equality of arms" principle, which lays down the requirement that in all criminal proceedings the defense must be accorded a status of complete procedural equality vis-à-vis the prosecution. Here the Attorney General, who appealed a conviction to obtain a heavier sentence, appeared before the Austrian appellate tribunal at the hearing of the case, while the defendants and their counsel were excluded therefrom. To the Commission this was a violation of the procedural equality basic to a fair hearing, notwithstanding the fact that the defendants were given an opportunity to submit written pleadings. The Commission proceeded on the assumption that the Attorney General, being present at the hearing, could influence the court. Since this opportunity was not accorded to the accused they were unable to contest any statements the Attorney General may have made. The resultant inequality, in the opinion of the Commission, was therefore "incompatible with the notion of a fair trial."<sup>55</sup> It mattered not that under Austrian law the Attorney General is not strictly speaking a prosecutor, because in this case his interests were adverse to the defendant.

52. *Nielsen v. Denmark*, *supra* note 50, at 548-50.

53. See, e.g., App. No. 788/60, *Austria v. Italy*, Report of the Plenary Commission of 31 March 1963, Council of Europe, Doc. A. 84.548, pp. 224-25 (1963).

54. App. Nos. 596/59 and 789/60, *Pataki & Dunshirn v. Austria*, Report of the Commission of 16 September 1963, Council of Europe, Doc. A. 78.768, pp. 49-50 (1963). The Commission reached the same conclusion in App. Nos. 834/60 *et seq.*, *Glaser v. Austria* (Admissibility), Report of the Commission of 17 December 1963, Council of Europe, Doc. —, p. 66 (1964).

55. *Pataki & Dunshirn v. Austria*, *supra* note 54, at 50.

It is, of course, arguable that the principle of equality of arms has its source in the provisions of Articles 6(3)(b) and 6(3)(c). The articulation of this concept would thus not compel giving the fair trial provision of Article 6(1) a meaning broader than that implicit in Articles 6(2) and 6(3). However, the Commission has expressly, and I think wisely, refused to adopt this approach. Leaving open the question whether such an interpretation would be permissible, it has concluded that it did not have to pass on this point, "since it is beyond doubt that in any case the wider and general provision for a fair trial, contained in paragraph (1) of Article 6, embodies the notion of 'equality of arms.'" App. Nos. 542/59 and 617/59, *Ofner & Hopfinger v. Austria* (Merits), Report of the Commission of 23 November 1962, Council of Europe, Doc. A. 78.827, p. 78 (1963); *Pataki & Dunshirn v. Austria*, *supra*, at 49.

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In passing on the fairness of criminal proceedings the Commission has, furthermore, indicated that it would in this context look into charges of prejudicial press coverage, coerced confessions, prosecution behavior calculated to arouse the jury, and bias attributable to the composition of the jury especially in a territory torn by ethnic strife.<sup>56</sup> Consistent with its view, however, that isolated instances of unfairness need not necessarily vitiate the legality of the entire proceedings, the Commission has in such cases also been careful to ascertain whether these objectionable practices could and were in fact cured at the appellate<sup>57</sup> or even the trial level.<sup>58</sup>

### B. *Specific Rights of the Criminal Accused*

It will be recalled that Articles 6(2) and 6(3) accord a person "charged with a criminal offense" certain specific rights. Since the stage at which a person is formally charged with the commission of a crime may vary from country to country, it is apparent that the word "charged" should not be understood in the technical sense which one or the other member state might ascribe to it. This the Commission has only partially recognized in a 1963 decision. Taking note of the fact that the German Code of Criminal Procedure distinguishes between a criminal defendant (*Angeklagter*), and one who has merely been indicted (*Angeschuldigter*), the Commission ruled that the latter "although not yet an '*Angeklagter*' under the Code of Criminal Procedure, becomes at that stage 'charged with a criminal offense' within the meaning of Article 6. . . ."<sup>59</sup> The Commission nevertheless rejected the applicant's contention that he had been deprived of the rights accorded him in Article 6(3) of the Convention. It found that the acts of which he complained—failure to provide adequate facilities for the preparation of his defense—took place before he had been indicted. What the Commission has overlooked, the U.S. Supreme Court has recently recognized in *Escobedo v. Illinois*,<sup>60</sup> namely, that a person may be a criminal accused in all but form. This would be true, for example, if the facts in the case indicate that in the eyes of the law enforcement agencies he had ceased to be merely a suspect. In the diverse legal systems to which the Convention applies, the formal stages in the criminal proceedings neither can nor should be determinative of the issue here under consideration. They simply do not provide a realistic basis of differentiate between an accused and one who is merely a suspect. A test that could provide a meaningful solution would seek to ascertain at what stage of a criminal proceeding the rights guaranteed in Articles 6(2) and 6(3) must be accorded to assure complete fairness in the ensuing trial.

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56. See App. No. 788/60, *Austria v. Italy*, Report of the Plenary Commission of 31 March 1963, Council of Europe, Doc. A. 84.548, pp. 224-25 (1963); App. No. 1476/62, 11 Collection of Decisions of the European Commission of Human Rights [hereinafter cited Collection] 31, 42-43 (1963).

57. *Austria v. Italy*, *supra* note 56, at 209; App. No. 323/57, 1 Yearbook 241 (1955-57).

58. App. No. 343/57, *Nielsen v. Denmark* (Merits), 4 Yearbook 494, 560-62 (1961).

59. App. No. 1216/61, 11 Collection 1, 6 (1963).

60. 378 U.S. 478 (1964).

In this connection it should also be noted that the Commission has repeatedly held that, as a general rule, a person whose conviction has become final is not entitled to the rights guaranteed in Articles 6(2) and 6(3), since he is no longer merely "charged with a criminal offence." This issue presents itself in cases involving convicts who, in seeking to obtain a new trial after judgment has become final, claim that the determination of their motion is subject to the provisions of Article 6.<sup>61</sup> The Commission has, however, rightly noted that Article 6 would apply notwithstanding a final conviction, if it is subsequently reopened and new charges are lodged against the defendant.<sup>62</sup> Logically, the same result should obtain even if no new charges are filed, once the case is re-examined on the merits.

### 1. *The Presumption of Innocence*

Article 6(2) provides that "everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law." The Commission considered the scope of this provision in considerable detail in the case of *Austria v. Italy*.<sup>63</sup> This litigation arose out of criminal proceedings that took place in Italian courts. They resulted in the conviction of a number of youths belonging to the German-speaking minority in Italy, who were charged with the murder of a customs official. Before the Commission, Austria, the complainant, charged that in the course of the proceedings the Italian courts had violated the presumption of innocence. In support of this contention, Austria alleged that confessions were extracted from the accused by threats and by actual maltreatment, that the prosecution was permitted by the court to indulge in vitriolic attacks calculated to prejudice the jury against the defendants, and that certain legal conclusions were not substantiated by the evidence. The Commission rejected these allegations on the merits,<sup>64</sup> but in doing so provided us with considerable insight as to how it will interpret Article 6(2). Basic to this provision, in the Commission's view, is the notion that courts must not approach a criminal case with the assumption that the accused committed the crime in question. To use the Commission's words, "the onus to prove guilt falls upon the prosecution, and any doubt is to the benefit of the accused."<sup>65</sup> The defendant must be given the opportunity to refute the evidence fully and freely. To be lawful, furthermore, the conviction must be based on direct or indirect evidence "sufficiently strong in the eyes of the law to establish his guilt."<sup>66</sup> To the Commission, "Article 6(2)

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61. See, e.g., App. No. 914/60, 4 Yearbook 372 (1961), holding that person seeking a re-opening of the proceedings (*Wiederaufnahme des Verfahrens*) was not entitled to protection under Art. 6(2). *Id.* at 376.

62. See App. No. 2136/64, 13 Collection 116, 120 (1964).

63. App. No. 788/60, *Austria v. Italy*, Report of the Plenary Commission of 31 March 1963, Council of Europe, Doc. A.84.548, pp. 224-25 (1963).

64. *Id.* at 207-12.

65. *Id.* at 208.

66. *Ibid.*

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is thus primarily concerned with the spirit in which the judges carry out their task. . . ."<sup>67</sup>

In assessing this spirit, the Commission will, for example, examine charges of misbehavior by the prosecution. The assumption here is that if the court does not check it, this may indicate that the tribunal has itself prejudged the case. By the same token, if the court accepts confessions procured by illegal means, the Commission will hold that the defendant was denied the right guaranteed him under the Convention to be proved guilty according to law.<sup>68</sup> Presumably, an illegal confession within the meaning of the Convention would be one procured by subjecting a person to torture or inhuman or degrading treatment.<sup>69</sup>

A question that is by no means easy to answer and left unresolved in *Austria v. Italy*, concerns the power of the Convention Institutions to examine allegations that the prosecution did not sustain the requisite burden of proof. The Convention does not, of course, tell us what the extent of that burden must be. As we have seen, the Commission has indicated that the evidence must be "sufficiently strong in the eyes of the law to establish . . . guilt." The question remains: in the eyes of what law, the law of the convicting state or the law of the Convention? Presumably, there is a limit beyond which the law of the convicting state may not go; it may not expressly or implicitly, for example, shift the burden of proof to the defendant. But beyond this, there is a wide range of cases that cannot be so easily decided. Here the demarcation line between errors of law or fact, which the Convention Institutions may not pass upon, and violations of the Convention, is blurred because, due to the nature of the standards enunciated in Article 6, errors of fact or law may themselves amount to a denial of the rights Article 6 guarantees. Accordingly, it is interesting to note that in rejecting the Austrian contention that the Italian courts based their findings of homicidal intent on insufficient evidence, the Commission stated that it was "not competent to substitute its own assessment of the evidence for that of the national courts but can only pronounce as to whether the domestic courts have committed any abuse or procedural irregularity."<sup>70</sup> This formula does not, of course, help resolve our question. It may nevertheless indicate that the Commission will leave to national courts wide discretion in weighing the evidence, provided only that in doing so they proceed on the assumption that all reasonable doubts will be resolved in favor of the accused. In other words, the Commission's inquiry will be concerned primarily with the attitude that domestic tribunals bring to the case rather than with their ultimate assessment of the evidence, provided it bears a rational relation to the facts actually proved.

The right guaranteed in Article 6(2) of the Convention raises a very interesting question with regard to one German penal law provision. Under Article 245a of the German Penal Code the possession of burglar's tools by a

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67. *Ibid.*

68. *Ibid.*

69. Convention, Art. 3.

70. *Austria v. Italy*, *supra* note 63, at 211.

person who has previously been convicted, for example, of grand larceny or larceny recidivism, is a criminal offense unless it appears from the surrounding circumstances that they "were not intended for use in the commission of punishable acts."<sup>71</sup> In 1958 a lower German court refused to enforce this provision on the ground that it violated Article 6(2) of the Convention.<sup>72</sup> In its view this resulted from the fact that the German law in question required the conviction of an individual, not because it had been proved that he intended to use these tools to commit an offense, but because the law makes this assumption whenever the defendant cannot rebut it. This, the court ruled, was inconsistent with the principle *in dubio pro reo* and with the Convention, because it compelled the accused's conviction without proof of guilt. In 1963, however, an appellate tribunal rejected this interpretation.<sup>73</sup> It reasoned that the applicable provision of the German Penal Code did not establish a presumption of guilt (*Schuldvermutung*) but merely a rebuttable evidentiary presumption (*widerlegbare Beweisvermutung*). Once it was interpreted in this manner, Article 245a could not, in this court's opinion, be said to violate Article 6(2) of the Convention. The U.S. Supreme Court recently reached a somewhat analogous conclusion in *United States v. Gainey*.<sup>74</sup> Here the Court sustained the constitutionality of a federal statute which provides that the unexplained presence of the defendant at an illegal still shall be deemed sufficient evidence to authorize conviction for carrying on an illegal distilling business. In his dissenting opinion, Justice Black echoed the thoughts expressed by the lower German tribunal in the following words:

Undoubtedly a presumption which can be used to produce convictions without the necessity of proving a crucial element of the crime charged—and a sometimes difficult-to-prove element at that—is a boon to prosecutors and an incongruous snare for defendants in a country that claims to require proof of guilt beyond a reasonable doubt.<sup>75</sup>

## 2. *The Enumerated Minimum Rights*

### (a) *The right to know the charges*

The Convention, in Article 6(3), accords a person charged with a criminal offense five so-called "minimum rights." The first of these, set out in Article 6(3)(a), entitles him "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him." In interpreting this provision, the Commission has ruled that under it the defendant "has the right to be informed not only of the grounds for the accusation, that is, not only the acts with which he is charged and on which his indictment is based,

71. English translation from Mueller & Buergenthal, *The German Penal Code* (1961).

72. Judgment of Landgericht/Heidelberg, 3 October 1958, 12 N.J.W. 1932 (1959) (Ger. Fed. Rep.). For a critical discussion of this case, see Schröder, *Zur Zulässigkeit gesetzlicher Beweisregeln im Strafrecht*, 12 N.J.W. 1903 (1959).

73. Judgment of Oberlandesgericht of Braunschweig, [hereinafter cited OLG] 11 April 1963, 18 Monatsschrift für Deutsches Recht [hereinafter cited M.D.R.] 342 (1964) (Ger. Fed. Rep.).

74. 380 U.S. 63 (1965).

75. *Id.* at 83.

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but also of the *nature* of the accusation, namely, the legal classification of the acts in question.<sup>76</sup> To the Commission, this right is closely linked to Article 6(3)(b), which entitles the accused to adequate time and facilities for the preparation of his defense.<sup>77</sup> It will accordingly examine an allegation charging a violation of Article 6(3)(a) by asking to what extent its denial has adversely affected the applicant's effective preparation of his defense.<sup>78</sup>

It is no doubt true that all of the rights guaranteed in Article 6 are closely interrelated. But by examining a complaint based on Article 6(3)(a) from the point of view of the rights guaranteed in Article 6(3)(b), the Commission seems to have watered down the meaning of Article 6(3)(a), because it has thus ascribed a relative meaning to a right formulated in absolute language. That this was not the intention of those who drafted the Convention would seem to be apparent from the fact that they formulated Article 6(3)(a) as a right separate and distinct from that accorded in Article 6(3)(b). By giving Article 6(3)(a) an identity of its own, they must be understood to have determined that the defense is, as a matter of law, prejudiced whenever the defendant is not informed "promptly" and "in detail" of the charges against him. If this assumption is correct, it is the Commission's task under Article 6(3)(a) to ascertain whether the requisite information was conveyed promptly and in sufficient detail. But it should not be able to speculate whether, in any given case, non-compliance with this requirement adversely affected the preparation of the defense, since the Convention proceeds on that assumption.

In the light of the foregoing, I have some doubts as to the soundness of the Commission's adjudication of one of the allegations advanced in the *Nielsen* case.<sup>79</sup> The applicant here contended that he was not informed of the charges against him in sufficient detail. The indictment accused him of planning and instigating an attempted robbery that led to a homicide. It did not, however, describe the manner in which the crime was perpetrated, nor did it indicate that the prosecution intended to prove that the defendant committed these offenses by means of the hypnotic influence he exercised over the actual perpetrator. The Danish courts, furthermore, denied counsel's motion to compel the prosecution to state whether the term "instigate," referred to in the indictment, encompassed the notion of hypnotic suggestion. The Commission, nevertheless, ruled that Article 6(3)(a) had not been violated.<sup>80</sup> It reasoned that the term "instigate" was sufficiently broad to cover hypnotic influence. In its view, furthermore, counsel must have been aware of the nature of the prosecution's case, because he was furnished with a lengthy report relating to psychiatric and hypnotic tests

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76. App. Nos. 542/59 and 617/59, *Ofner & Hopfinger v. Austria* (Merits), Report of the Commission of 23 November 1962, Council of Europe, Doc. A. 78.827, at 31 (1963) (Italics in original).

77. *Ibid.*

78. *Id.* at 74-77.

79. App. No. 343/57, *Nielsen v. Denmark* (Merits), 4 Yearbook 494 (1961).

80. *Id.* at 538.

performed on the actual perpetrator of the offenses allegedly masterminded by the defendant.<sup>81</sup>

These findings are actually irrelevant under Article 6(3)(a). In the first place, the issue here is not whether the language of the indictment is broad enough to cover hypnotic suggestion, but whether the indictment, being so broad, did in fact convey to the defendant in detail the requisite information about the nature of the charges against him. Besides, the finding that the defense could surmise how the prosecution planned to prove its case is not relevant under Article 6(3)(a). If it were, the right guaranteed in Article 6(3)(a) would be illusory, for sooner or later every defendant can figure out what it is that he is being charged with. In my opinion, the whole purpose of Article 6(3)(a) is to obviate the need for this type of speculation on the part of the defense.

(b) *The right to an effective defense*

As indicated earlier, Article 6(3)(b) entitles a person charged with a criminal offense "to have adequate time and facilities for the preparation of his defense." Here it should initially be noted that of the five minimum rights guaranteed in Article 6(3), this one is the least susceptible to precise delimitation. Whether or not it has been violated is of necessity a question that will depend upon the specific facts of the case and its legal setting. A number of general observations can, however, be made. It may be assumed, for example, that this provision would be violated if the prosecution interfered unreasonably with the necessary consultations between defense counsel and his client. The same would be true if counsel were denied access to relevant documents; although here it should be noted that its denial to the accused personally will not constitute a breach of the Convention if access was accorded to his attorney in due time to permit him to consult with the defendant.<sup>82</sup> It is equally clear that, as a rule, short time limits within which to file appeals will not give rise to a cause of action under this provision, especially if the pleadings can be meaningfully supplemented at the subsequent hearing.<sup>83</sup> But, where the documentary evidence is voluminous, the failure to grant a reasonable extension of time to enable counsel to examine it may amount to a violation of Article 6(3)(b).<sup>84</sup>

The full implications of this provision have not as yet been explored by the Convention Institutions. The provision may be broad enough, however, to require the prosecution to disclose any facts which, if known to the defense, would aid it in the preparation of its case.<sup>85</sup> It should, however, be noted that this prob-

81. *Id.* at 536.

82. See *Ofner & Hopfinger v. Austria*, *supra* note 76, at 34-36.

83. App. No. 441/58, 2 Yearbook 391, 395 (1958-59).

84. See App. No. 2122/64, *Wemhoff v. Germany* (New Complaints), 15 Collection 1, 5 (1965).

85. Under English law, the duty of the prosecution is in this respect quite extensive. See Archbold, *Pleading, Evidence & Practice in Criminal Cases* 572-73 (Butler & Garsia eds. 1962). See also, *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963), where it was held that the failure of the prosecution to advise the defense that two psychiatrists consulted by the district attorney had found the defendant to be mentally incompetent constituted "such



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lem, which is emerging as an interesting constitutional question in the United States,<sup>86</sup> does not play as significant a role in some Continental European legal systems as it does in the common law.<sup>87</sup> This is due to the fact that in the former the record or so-called dossier of the state's pretrial investigations of the case is made available to the defense.<sup>88</sup> But since the identity of police informers is not as a rule disclosed in this record, it is not unreasonable to assume that the Convention Institutions will sooner or later have to decide to what extent such non-disclosure may be prejudicial to the defense.<sup>89</sup>

### (c) *The right to counsel*

Under Article 6(3) (c) the criminal accused 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." The indigent defendant's right to counsel is thus not absolute, since it is limited by the requirements of justice.<sup>90</sup> But one need only compare the holding of the United States Supreme Court in *Betts v. Brady*<sup>91</sup> with its decision in *Gideon v. Wainwright*,<sup>92</sup> to recognize the growth potential of the "requirements of justice" concept. The Commission has already acknowledged that the failure to assign counsel on appeal may violate this provision of the Convention as well as the principle of "equality of arms"<sup>93</sup> which, as we have seen, it considers to be an inherent element of a fair trial. If the right to counsel is thus tied to the "equality of arms" principle, it is certainly arguable that the "requirements of justice" dictate the assignment of counsel in criminal cases of any consequence. And that, sooner or later, may well mean *all* criminal cases.

For the time being, however, the Commission is not likely to carry the implications of its own pronouncements to such a conclusion. This is apparent

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fundamental unfairness in the trial of a criminal case as to amount to a denial of due process." *Id.* at 85.

86. See Note, 74 Yale L.J. 136 (1964).

87. For the difficulties encountered by English defense attorneys, see Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 Colum. L. Rev. 94 (1966).

88. A similar, if more limited, rule appears to be emerging in the United States. For the federal practice, see the recently enacted revision of Fed. R. Crim. P. 16, reprinted in 39 F.R.D. 69 (1966). A more extensive pre-trial disclosure procedure has recently been adopted by one United States Attorney. See Memorandum of Jon O. Newman, United States Attorney for the District of Connecticut, 2 Crim. L. Bull. 23 (Oct. 1966). Some states, notably California and Vermont, have also broadened the scope of pre-trial discovery. For a collection of cases as well as excellent discussion of this trend, see Traynor, *Ground Lost & Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964). For a persuasive argument in favor of the 'better practice,' see Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 Wash. L.Q. 279.

89. See *Roviaro v. United States*, 353 U.S. 53 (1957), where trial court's failure to compel disclosure of identity of undercover agent was held to be prejudicial error.

90. App. No. 127/55, 1 Yearbook 230, 231 (1955-57).

91. 316 U.S. 455 (1942).

92. 372 U.S. 335 (1963). The indigent defendant's right to legal aid under English law is much less extensive. See Cross, *Confessions and Cognate Matters: An English View*, 66 Colum. L. Rev. 79, 91-92 (1966).

93. App. Nos. 834/60 *et seq.*, *Glaser v. Austria (Admissibility)*, Report of the Commission of 17 December 1963, Council of Europe, Doc. —, at 66 (1964).

from its holding in a 1960 case. Here the Commission expressed the view that a comparison of the English and French texts of Article 6(3)(c) indicates that the right it guarantees does not even require the appointment of an attorney as such, but merely a person qualified to provide legal assistance.<sup>94</sup> As a result, the Commission found that Article 6(3)(c) had not been violated, where the attorney assigned to the defendant did not handle the case himself, but was represented in the proceedings by his legal trainee (*Referendar*).<sup>95</sup> Without necessarily disagreeing with the Commission's theoretical construction of Article 6(3)(c), it should be emphasized that this provision requires the Commission to ascertain not only whether legal assistance was provided but also whether in the particular case the interests of justice were fully served by the legal service rendered by a law clerk rather than an attorney. That much would seem to be implicit in the notion of "equality of arms" and in the right to adequate facilities for the preparation of one's defense guaranteed in Article 6(3)(b). Even assuming therefore that the Commission is right in holding that Article 6(3)(c) does not require the assignment of an attorney, this does not relieve it of the duty to ascertain to what extent the individual in question did *in fact* provide meaningful legal assistance. It may perhaps be permissible for reasons of policy to rely on the sometimes unrealistic presumption that a lawyer admitted to the bar is fully qualified to render adequate legal service.<sup>96</sup> No such counter-vailing considerations exist where assigned counsel has not as yet reached this exalted status.

Finally, it should also be noted that the Commission has ruled that in those cases in which counsel must be assigned, the indigent accused does not have the right to compel the designation of a person of his own choice.<sup>97</sup> Under German law, his choice will as a rule be respected. To that extent, of course, German law exceeds the requirements of the Convention as interpreted by the Commission. However, as a 1958 decision of the Federal Constitutional Court indicates, that right is by no means absolute even in Germany.<sup>98</sup> In this case, the defendant was accused of engaging in illegal activities on behalf of an outlawed political organization. Since the lawyer whose assignment he requested was deemed by the lower court to be subservient to the wishes of that group, his petition was denied on the ground that the attorney in question might, for political reasons, act contrary to the best interests of his client. The Constitutional Court sustained this ruling as a reasonable exercise of judicial discretion which violated neither

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94. App. No. 509/59, 3 Yearbook 174, 182 (1960). The Commission reached this conclusion, even though the French text of Article 6(3)(c) refers to an "avocat," because its English counterpart only speaks of "legal assistance."

95. *Id.* at 180-82. A *Referendar* is a person who has obtained his law degree, but who has not yet completed the statutory training in the courts and law offices required for admission to the bar.

96. Compare *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487 (1963), with *Edwards v. United States*, 256 F.2d 707 (D.C. Cir. 1958).

97. App. No. 646/59, 3 Yearbook 272, 276-78 (1960).

98. Judgment of Bundesverfassungsgericht, 16 December 1958, 9 Entscheidungen des Bundesverfassungsgerichts 36 (1959) (Ger. Fed. Rep.).

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the German Federal Constitution nor the Convention.<sup>99</sup> This tribunal did not, however, consider the question whether the defendant could not in reliance on this same reasoning contend that a lawyer unsympathetic to his political views might for that very reason act contrary to his best interests. The notion implicit in this judgment certainly cuts both ways.

The wholly unwarranted extent to which this principle can be stretched was demonstrated not long ago. While the language of Article 6(3)(c) appears to entitle an accused who has the requisite means to retain his own attorney the unrestricted right to do so, at least one case indicates that the Commission does not share this view.<sup>100</sup> From the rather skimpy facts given, it seems that in this case the accused was not allowed to engage a certain attorney to represent him in a criminal prosecution arising out of the defendant's illegal political activities. In all likelihood, the attorney in question was thought to be associated with the same political group. While the Commission noted that it could reject the application for failure to exhaust domestic remedies, it chose instead to decide the case on the merits by holding that

. . . the right to defend oneself through legal assistance of one's own choosing, as guaranteed by Article 6, paragraph (3), subparagraph (c), of the Convention . . . is not an absolute right, but limited by the right of the State concerned to make regulations concerning the appearance of lawyers before the courts; . . . therefore, the State has full discretion to exclude lawyers from appearing before the courts . . .<sup>101</sup>

The Commission would, of course, be right if the retained attorney was disbarred or not qualified to appear before certain courts. To that extent the right to be represented by counsel of one's own choosing is not absolute. This and no more should follow from the power of each state to control and regulate admissions to its bar. Where the attorney has not been thus disbarred or previously disqualified, the right of an accused to retain any willing member of the bar would seem to be absolute. A different interpretation of Article 6(3)(c) deprives it of any real meaning.

### (d) *The right to examine witnesses*

Under Article 6(3)(d) a person charged with a criminal offense is entitled "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Since this provision is formulated in terms of two distinct rights, we shall deal with them separately. It must, however, be recognized that until a witness has been examined and all the facts are in, it is rather unrealistic to characterize him as adverse or favorable to the defense. To the extent that this is true, the rights guaranteed in Article 6(3)(d) are inseparable.

### (i) *The right to obtain the attendance and examination of witnesses for the*

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99. *Id.* at 38-39.

100. App. No. 722/60, 5 Yearbook 104 (1962).

101. *Id.* at 106.

*defense*: In some member states the decision whether to call a witness is made by the court. Before the attendance of a witness can be compelled by the parties, it must be shown that his testimony would have probative value. In these states the right "to obtain the attendance . . . of witnesses" plays a much more significant role than it does in the common law system where the parties themselves decide who shall be called to the stand and, if a witness refuses to attend, counsel may have him subpoenaed as a matter of course. In states applying this latter rule, the right guaranteed in Article 6(3)(d) is important primarily because it entitles the accused to examine witnesses on the basis of full equality with the prosecution.<sup>102</sup> However, once the witness is on the stand, the admissibility of his testimony is much more strictly controlled in common law countries than it is in the civil law system, which knows few exclusionary rules.<sup>103</sup>

As a result of these institutional differences, the Convention Institutions face a host of problems in applying the standard laid down in Article 6(3)(d). In civil law countries, for example, the accused's right "to obtain the attendance . . . of witnesses on his behalf *under the same conditions* as witnesses against him," (emphasis added) cannot be judged in terms of the opportunity given him to call a witness for every one offered by the prosecution, or by denying him the right to decide himself whom to put on the stand. It will depend upon the probative character of the testimony the witness might offer. But since the determination whether to call a certain witness is made before he has had an opportunity to testify, it is no doubt subject to some conjecture as to what he might say on the stand. This is true notwithstanding the fact that in some of these countries the court makes its decision in reliance upon the extensive findings contained in the report of the investigating magistrate, who will as a rule have explored every aspect of the case. But as every trial lawyer knows, the facts as revealed in the course of a trial may sometimes differ dramatically from the statements of witnesses made before the trial. It is, therefore, probably easier to decide whether Article 6(3)(d) has been violated, if one can scrutinize the record to see to what extent the judge interfered with the examination of a witness. To draw this conclusion from the simple refusal to call a witness at one or the other stage of the proceedings will be more difficult, for the judge may at that time have had good reason for assuming that the proffered testimony was not relevant.

Besides, the decision whether or not certain evidence is relevant—a crucial issue under civil and common law procedure albeit at a different stage of the proceedings—depends in large measure upon one's view of the facts. Thus, if a judge finds facts *A*, *B*, and *C* to have been proved, fact *D* may be irrelevant. It

102. For some of the problems that might arise in this connection, see, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965); *In re Oliver*, 333 U.S. 257 (1948).

103. But apart from the fact that the institution of juries has led the common law to develop rules designed to exclude evidence that may well be relevant, the test employed by the civil law judge in deciding whether to call a witness will not differ significantly from the criterion by which a common law court tests the admissibility of testimony in terms of its probative value.

could however be relevant if his findings regarding fact *A*, *B*, or *C* are erroneous. The question accordingly arises whether the Convention Institutions, in applying Article 6(3)(d), are bound by the findings of fact made by domestic courts. This is but another way of asking, if a Continental judge has not called a witness whose anticipated testimony he considered to lack probative value, or if a common law judge has excluded certain testimony as being irrelevant, how will the Convention Institutions draw the line between a simple error of fact on the one hand, and a violation of the Convention on the other?

The jurisprudence of the Commission throws some light on this question. Initially it should be noted that the Commission has repeatedly stated that Article 6(3)(d) does not entitle "the accused to call everyone, in particular persons who are not in a position to assist by their statements in elucidating the truth; . . . in other words, paragraph (3)(d) does not prohibit the Court from refusing to summon persons who cannot be 'witnesses on his behalf' within the meaning of that . . . paragraph."<sup>104</sup> In its view, this provision is designed to place the defendant "on an equal footing with the prosecution as regards the hearing of witnesses."<sup>105</sup> Domestic courts have taken a similar position. Thus, the Belgian Supreme Court has held that Article 6(3)(d) does not deprive a judge of his rights to refuse to call a witness, if in his view the proffered testimony could not affect the outcome of the case. It reasoned that such a decision could not impair the requisite procedural equality between the prosecution and the defense, since the judge has the power to deny a similar request by the prosecution.<sup>106</sup> While the facts given in this case are inadequate to examine this question, it should be recalled that the Commission has, as we just saw, expressed the view that the mere existence of formal equality between prosecution and defense may nevertheless give rise to a violation of Article 6(3)(d), if a court does not call a witness who is in a position to "elucidate the truth." Domestic courts will accordingly have to do more than merely examine the formal equality of the parties.<sup>107</sup>

But, while the Commission has in its *obiter dicta* pronouncements ascribed to Article 6(3)(d) a very broad scope, it has applied the article most restrictively. This is well illustrated by the case of *Austria v. Italy*.<sup>108</sup> The defense here sought

104. See *e.g.*, App. No. 617/59, *Hopfinger v. Austria* (Admissibility), 3 Yearbook 370, 390-392 (1960). Parenthetically, it should be noted that this test would not be applicable, for the reasons previously explained, to cases coming from common law jurisdictions.

105. App. No. 1134/61, 4 Yearbook 378, 382 (1961).

106. Judgment of Cour de Cassation, 20 July 1962, [1962] *Pasicrisie Belge* 1238, 1239 (Belgium).

107. While it is clear that the failure of a court to call a witness who cannot by his testimony help in elucidating the truth does not violate Article 6(3)(d), it may still be an open question, as far as concerns the jurisprudence of the Convention Institutions, whether the court has the duty, on its own motion, to examine witnesses capable of providing probative evidence, even if the defense has inadvertently failed to make such a request. At least one domestic court has answered this question in the negative. See Italy, Corte Suprema di Cassazione, Judgment of 6 February 1962, 87 *Foro Italiano* II. 315 (1962).

108. App. No. 788/60, *Austria v. Italy*, Report of the Plenary Commission of 31 March 1963, Council of Europe, Doc. A. 84.548, at 224-25 (1963).

to rebut the prosecution's contention that the deceased customs official was either thrown into the river bed alive or that he was already dead when pushed in. It contended that he had fallen in accidentally while trying to escape his pursuers. Thus the state and position of the body when found was a crucial element in the case. The question which the Commission accordingly had to resolve was whether the Italian courts, by hearing two witnesses for the prosecution, who had seen the body before it was moved, violated Article 6(3)(d) because they refused defense counsel's request to call the medical examiner who had certified the decedent's death. Since this physician had examined the deceased after the body had been moved, the motion was denied on the theory that his testimony could not be relevant. It was argued before the Commission, however, that he had observed certain traces of rock fragments on the body of the deceased, which tended to substantiate the theory advanced by the defense regarding the cause of death. This physician was, furthermore, present at the autopsy that was performed by a medical expert, who was heard by the court and supported the prosecution's case. Austria therefore contended that the Italian courts had violated Article 6(3)(d) since, under these circumstances, the medical examiner who was not called was the only witness the defense could offer to support their theory.

The Commission rejected this contention. In doing so, the Commission noted initially that its inquiry would not be limited to ascertaining whether under Italian law the right to call witnesses is assured to the defense and prosecution alike on conditions of equality. It had to be determined also "whether the . . . court created any inequality of treatment in its application of the law."<sup>109</sup> According to the Commission, no proof of such inequality had been adduced. In reaching this conclusion, the Commission looked to the information available to the judge when he made his decision not to call the witness in question. Here it concluded that he had not been advised that the witness had been present at the autopsy. All he knew was that the prospective witness had seen the body only after it had been moved. To this latter factor the Commission may have ascribed considerable importance, because the defense's motion to hear this witness at the scene of the crime was denied at the same time that permission was granted to question the only two witnesses who had actually seen the body before it had been moved. Since the defense made its motion in this context and failed to explain fully its reasons for wanting to call this witness, the Commission seems to have concluded—its opinion is by no means clear—that the court could reasonably assume (a) that the witness was being offered to testify to the location of the corpse, and (b) since he had seen the body only after it was moved, that his testimony would not be relevant on that point.<sup>110</sup> Significantly, the Commission never examined the question whether the failure to call this witness at *any* stage of the proceedings violated Article 6(3)(d); for it could be argued

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109. *Id.* at 113.

110. *Id.* at 114-15.

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that the information he had to offer was the only evidence, apart from the *ipse dixit* of the defendants, that might have cast doubt on the prosecution's case.<sup>111</sup>

In trying to understand the holding of this case, it must be emphasized that it is not clear what the Commission would have decided, had it concluded that the Italian court was wrong in assuming that the proffered witness had not seen the body before it was moved or that it was advised of his presence at the autopsy. As a result, one can do little more than speculate on the wider implication of this case; that is, how the Commission will draw the demarcation line between errors of fact or law on the one hand, and violations of Article 6(3)(d) on the other. It seems, however, that the Commission will limit its review functions under the second half-sentence of Article 6(3)(d) to a single inquiry. It will simply ask whether, at the time the decision was made to call or not to call a certain witness, the judge acted arbitrarily by denying one side an equal hearing on the specific point in issue, considering all the information reasonably available to him. That proof of actual arbitrariness seems to be the test is further evidenced by a 1963 case.<sup>112</sup> The applicant here alleged that an expert witness called by the court was biased against her and asked to be allowed to offer another expert. Her motion was denied. In *disposing* of this case, the Commission ruled that

whereas the court refused permission to the Applicant to call such further expert evidence and based its decision on the ground that Dr. Y, who was a highly qualified expert with an established reputation, had given his evidence in a completely objective manner; whereas the Applicant has not shown that the court by this decision refused her the right to call a witness in such circumstances as would constitute a violation of Article 6, paragraph 3(d); whereas, consequently, this part of the Application is manifestly ill-founded and should be rejected. . . .<sup>113</sup>

Apart from the fact that it may well be impossible to show that an expert witness is biased or at least so wrong as to cast doubt on his objectivity without calling another expert, the fact remains that the Convention does not place that heavy a burden on a criminal defendant. It would seem, on the contrary, that he has a cause of action under Article 6(3)(d) whenever he can show that the witness, whose attendance he unsuccessfully requested, was in a position to testify with regard to any disputed issue in the case and that counsel so informed the court. In other words, the test should be whether the domestic court's failure to call the proffered witness could actually have prejudiced the defendant's case, and not whether the judge did so "intentionally." It matters not that the court's action was prompted by ill-will or by honest bad judgment. Article 6(3)(d) should apply whenever a person's testimony was not heard, to the

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111. See, in this connection, the forceful dissenting opinion by Professor Ermacora. *Id.* at 116-19.

112. App. No. 1476/62, 11 Collection 31 (1963).

113. *Id.* at 43-44.

possible detriment of the accused, because he will then have been denied the right to counter the evidence adduced against him.

As the cases we have discussed indicate, the Commission apparently proceeds on the assumption that it cannot hold that Article 6(3)(d) has been violated solely because a domestic court has not called a witness whose testimony, in the Commission's view, might have been relevant. To do so, it probably assumes, would require the Commission to substitute its own findings of fact for those of national courts. But if, as may well be the case, Article 6(3)(d) cannot be meaningfully applied without doing just that, then the Convention by necessary implication authorizes this type of judicial review.

(ii) *The right to examine adverse witnesses*: Article 6(3)(d), as will be recalled, also guarantees to a criminal accused the very important right "to examine or have examined witnesses against him." One aspect of the case of *Austria v. Italy*<sup>114</sup> presented an interesting and by no means easy question relating to the interpretation of this right. In the course of the proceedings, the Italian court ordered the hearing moved to the scene of the crime to clarify the evidence relating to the position of the deceased's body. That inspection was attended by the court, the two witnesses who had found the body, one of the defendants, the prosecution and counsel for the other defendants. It appears that the defense attorneys had previously informally asked the court to permit the remaining defendants to be present and that this was denied. No formal motion was, however, made. It also appears that once at the scene, the investigation was broadened beyond its original scope. As a result, the only defendant who was there, and whose testimony had incriminated the other accused, was also questioned. The Austrian Government accordingly contended before the Commission that the absence of the remaining defendants violated their rights under Article 6(3)(d). The Commission rejected this argument. It noted that the defendants, according to their own testimony, had no knowledge regarding the location of the body. And while it admitted that it "would have been better" if the one defendant had not been questioned in the absence of the remaining accused, it found that the failure of the defense attorneys to ask for an adjournment to permit their attendance constituted a waiver and could be regarded as such by the Italian courts.<sup>115</sup>

This decision raises two interesting points. The first was expressly considered by Father Beauford in his dissenting opinion. He argued that even if one were to assume that the defense had through error or omission waived the defendants' rights, this was not dispositive of the case. In his view "judges are obliged to protect and safeguard the rights of an accused person as enumerated in the Convention. There is no need for the accused to make formal application to exercise these rights. Judges should guarantee them automatically."<sup>116</sup> In his dissenting opinion, Professor Ermacora makes the same point.<sup>117</sup>

114. App. No. 788/60, *Austria v. Italy*, Doc. A. 84.548 (1963).

115. *Id.* at 142.

116. *Id.* at 146.



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While in this case one might seriously disagree with the Commission's conclusion that the defense had in fact waived its rights,<sup>118</sup> the argument of the dissenting members of the Commission regarding the duty of domestic judges under the Convention presents certain problems. Under an adversary system of criminal procedure of the common law type, the function of a judge is primarily that of a referee between two contending parties. Except in certain exceptional cases (e.g., if the accused is not represented by counsel), defendant cannot on his own motion enforce rights which his attorney does not invoke. Given this legal setting, the argument made by the dissenters, if accepted, could interfere with counsel's conduct of the defense and would require an extensive reshaping of the governing rules of criminal procedure and, for that matter, a large body of substantive civil and criminal law doctrine having its source in the peculiarities of the adversary system. On the other hand, in a system of criminal justice where the judge performs a much more active role in the conduct of a trial, the argument made by the dissenters, that the court has a duty to assure the defendant the rights guaranteed in the Convention whether or not he invokes them, may well have considerable validity. At any rate, it is clear that this question cannot be decided in the abstract. It requires in each case a detailed examination by the Convention Institutions of the function a judge performs in the particular member state.

The second point has to do with the fact that Article 6(3)(d) does not expressly entitle the defendant to be present when witnesses against him are examined. This right of confrontation must, however, be implied from the words "to examine or have examined witnesses against him." In *Austria v. Italy*, the Commission, as we have seen, proceeded on the assumption that the accused is entitled to be present when witnesses against him are examined. A contrary interpretation would also be inconsistent with the provisions of Article 6(1) pursuant to which "everyone is entitled to a . . . public hearing."

Closely related to the right of confrontation is the question of the extent to which Article 6(3)(d) entitles the accused to obtain the disclosure of a police informer's identity. The Convention Institutions have not as yet had an opportunity to pass on this issue, which may arise in a number of different contexts. Knowledge of the informer's identity may be indispensable to the accused in establishing a defense of entrapment, or to prove illegal search, seizure or arrest. Here the informer may well be the only witness whose testimony could assist the defendant to establish his innocence. In that event the undercover agent would be a witness "on behalf" of the accused, whom the defendant should be able to examine pursuant to the provisions of Article 6(3)(d). In some countries, furthermore, out-of-court statements by witnesses, who cannot readily be produced at the trial, are admissible.<sup>119</sup> Here it is possible, especially where national

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117. *Id.* at 149.

118. On this point, I find Professor Ermacora's contrary argument more persuasive. *Id.* at 150-51.

119. See Hammelmann, *Hearsay Evidence, A Comparison*, 67 L.Q. Rev. 67 (1951).

security is involved, for the prosecution to call police officers to testify to statements made to them by an informer without disclosing his identity. While the admission of such testimony is surrounded by various safeguards to assure reliability, the fact remains that the accused does not have the opportunity to question the informer. It is not surprising, therefore, that at least one domestic court was in 1962 called upon to decide whether this practice contravenes Article 6(3)(d). The defendants in this case were charged with the violation of a law outlawing political activities on behalf of the Communist Party by seeking office on an independent ticket. To show that these individuals were in fact subservient to the will of the Communist Party, the prosecution called a police officer to the stand. He testified that he had interrogated a number of informers who had attended a West German Communist Party meeting held in East Berlin, that at this conference the plan was devised to run Communist functionaries for office in West Germany as independents, and that the defendants were present at that meeting. This was denied by the defendants, who moved for the disclosure of the informers' identities to permit them to be questioned in court. This motion was denied. On appeal the defense charged that its denial violated Article 6 of the Convention. The appellate court sustained the lower court's ruling. It held that the rights guaranteed in Article 6 had not been infringed, because the police officer rather than the informers was the witness against the defendants within the meaning of Article 6(3)(d).<sup>120</sup>

The notion implicit in this judgment is, to say the least, preposterous.<sup>121</sup> If accepted, a state could, for so-called reasons of national security, dispense with witnesses at a trial altogether by substituting police officers instead. That would certainly make for much more expeditious criminal proceedings. It would, however, be totally inconsistent with the notion of a fair and public hearing guaranteed in Article 6(1) and with Article 6(3)(d). Article 6(3)(d) assures the defendant the right to examine witnesses against him. It does not say that this function can be performed by a police officer out of court who can then testify thereto. In such a case the police officer is not a witness. He is a conduit of one-sided information, no matter how fairly he may have conducted the interrogation—a fact to which the court ascribed considerable importance—because his interests are not the same as those of the defendant. The defendant, if he knows who the informer is, might be in a position to impeach his veracity by evidence not known to the police. This he cannot do by questioning the police officer, who is not at liberty to divulge the name of the informer. The practice sanctioned by the court is thus totally inconsistent with the notion of a fair trial in a democratic society. Needless to say, it also violates Article 6(3)(b), because it deprives the accused of adequate facilities for the preparation of his defense in that he is forced to defend himself against charges made by anonymous persons.

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120. Judgment of Bundesgerichtshof, 1 August 1962, 15 N.J.W. 1876, 1877 (1962) (Ger. Fed. Rep.).

121. See *Jencks v. United States*, 353 U.S. 657 (1957).

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In this connection, it may be worth recalling the words of Judge Learned Hand in a case that had similar political overtones.<sup>122</sup> Noting that "state secrets" which will imperil "national security" may be privileged against disclosure, he emphasized that "it is, however, one thing to allow the privileged person to suppress the evidence, and, *toto coelo*, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses."<sup>123</sup> The latter would be a violation of the defendant's constitutional rights.

Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.<sup>124</sup>

One can only hope that those charged with the application of the Convention will heed these words which, appropriately enough, were uttered during the McCarthy era.

### (e) *The right to free services of an interpreter*

The final provision of Article 6(3) stipulates in subparagraph (e) that a person charged with a criminal offense is entitled "to have the free assistance of an interpreter if he cannot understand or speak the language used in court." The Convention Institutions have not as yet been called upon to interpret this provision. While it is self-explanatory, one would not suppose that a person who has a sufficient understanding and command of the language in which the judicial proceedings are conducted to effectively defend himself could invoke this provision merely to gratify his ethnic or nationalistic convictions.<sup>125</sup> In those countries where a defendant, if convicted, may be required to reimburse the state for the expenses it incurred in prosecuting him, this provision can be effectively invoked to prevent the authorities from charging him for the services rendered by an interpreter. Thus, a lower German court in a 1962 decision sustained the motion of an American defendant to have this item struck from the costs assessed against him.<sup>126</sup> In its view, that part of the German law under which the defen-

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122. *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950).

123. *Id.* at 638.

124. *Ibid.*

125. See, in this connection, App. No. 808/60, 5 Yearbook 108 (1962).

126. Judgment of Amtsgericht/Bremerhaven, 18 October 1962, 16 N.J.W. 827 (1963) (Ger. Fed. Rep.).

dant is required to reimburse the state for translating expenses had been superseded by the provisions of Article 6(3) (e) of the Convention.<sup>127</sup>

### III. DUE PROCESS OF LAW IN NON-CRIMINAL CASES

In the preceding pages we have considered the battery of rights that Article 6 guarantees to a person charged with a criminal offense. This provision of the Convention does not, however, apply only to criminal proceedings as such. It also provides, in Article 6(1), that "in the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Besides, the requirement that "judgment shall be pronounced publicly" applies here to the same extent that it does in criminal cases. But beyond stating these general principles, Article 6 does not attempt to articulate any specific minimum rights that must be accorded to litigants in non-criminal cases.<sup>128</sup> While the full scope of Article 6 as it bears on this topic has not as yet been fully explored by those charged with the interpretation and application of the Convention, some basic notions have in the meantime emerged.

The case law can probably be analyzed most effectively by recognizing that Article 6(1) may, broadly speaking, apply to two types of disputes. That is to say, its guarantees could be relevant in disputes between an individual and some public authority, as well as in litigation between private individuals. Since the duties and role of the state will be quite different in these two types of cases, we will examine them separately.

#### A. *Litigation Between Private Parties and Public Authorities*

The most difficult problem that the application of Article 6 poses in non-criminal cases arises when one attempts to ascertain to what types of proceedings, beyond those involving controversies between private parties, it applies. This question presents itself largely because in many countries to which the Convention applies, disputes relating to "public law"—including all litigation between an individual and state agencies—are determined by administrative tribunals and similar bodies. Ordinary courts only have jurisdiction over so-called "private or civil law" matters.<sup>129</sup> In these countries the concept of "civil rights" is often thought of in terms of this institutional dichotomization between public and private law with the result that Article 6(1) may there be deemed to apply

127. *But see* Judgment of Oberster Gerichtshof, 22 January 1960, 2 Zeitschrift für Rechtsvergleichung 170 (1961) (Austria) (with the interesting comparative note by Lieb-scher), where the fact that an indictment in the German language was served on a Belgian defendant, although he indicated that he could not read German, was held not to be a reversible error because he failed to file a formal objection thereto and because at the trial he was assigned an interpreter.

128. For a valuable study devoted to American and Continental civil procedure and evidence, see Lenhoff, *The Law of Evidence: A Comparative Study Based Essentially on Austrian and New York Law*, 3 Am. J. Comp. L. 313 (1954).

129. See Schlesinger, *Comparative Law* 240-48 (2d ed. 1959); Deak & Rheinstein, *The Machinery of Law Administration in France and Germany*, 75 U. Pa. L. Rev. 846 (1936).

only to cases triable by ordinary courts and not administrative tribunals. It must accordingly be asked to what extent such a narrow interpretation is consistent with the language of this provision and the function it is designed to perform.

In addressing ourselves to this question<sup>130</sup> it should initially be noted that the institutional dichotomization between public and private law is by no means uniform among the states that subscribe to it. Considerable variation in the jurisdiction of ordinary and administrative tribunals exists in these countries.<sup>131</sup> As a result, matters which are in one state triable by administrative tribunals as "public" law might in another be characterized as "civil" or "private" in nature, and vice versa. It would therefore appear that the interpretation of this provision, if the Convention is to establish a common minimum standard of legality, cannot and should not depend upon the legal classification ascribed to a case by national legislation.<sup>132</sup> Whether or not a given dispute calls for a "determination" involving a person's "civil rights and obligations" must accordingly be decided by looking to some other criteria. Since the Convention does not tell us what it means by "in the determination of his civil rights and obligations," and since the *travaux préparatoires* on this subject are inconclusive, at least two possible solutions present themselves. The first would consist of an attempt by means of historical research and comparative study to evolve a definition of "civil rights and obligations" that is conceptually recognized in most of the member states. Article 6(1) would then be applicable only to those types of controversies in which such rights and obligations are at stake.<sup>133</sup>

Another and possibly more satisfactory solution would take its cue from the fact that Article 6 applies to judicial proceedings. It would, however, characterize a proceeding as "judicial" in nature pursuant to a substantive test. That is to say, it would seek to ascertain whether the decision-making body, whatever its formal designation or title, was in a particular case called upon to perform judicial functions, *i.e.*, to adjudicate between conflicting legal claims or asserted rights. Consistent with this approach, it would follow that whenever an administrative body is empowered to render a final determination on a question of law or fact bearing on the existence or non-existence of a right claimed by or an obligation asserted against an individual, the proceedings would be characterized as "judicial" and would have to be conducted in accordance with the provisions of Article 6(1). This view of Article 6(1) is based on two assumptions. The first

130. See, in this connection, the very valuable analysis by Velu, *Le Problème de l'Application aux Juridictions Administratives, des Règles de la Convention Européenne des Droits de l'Homme Relatives à la Publicité des Audiences et des Jugements*, 38 *Revue de Droit International et de Droit Comparé* 129 (1961).

131. Schwelb, *On the Operation of the European Convention on Human Rights*, 18 *Int'l Organization* 558, 575 (1964).

132. See Schäffer, *Der Zivilrechtsbegriff der Menschenrechtskonvention*, 20 *Österreichische Juristen-Zeitung* 511, 512 (1965).

133. See Schwelb, *supra* note 131, at 575, who seems to adopt this approach. See also, Schäffer, *supra* note 132, at 512, who leans towards it.

is that when Article 6(1) employs the phrase "in the determination of his civil rights and obligations," it does so merely to distinguish judicial proceedings involving "criminal charges" from those where other legal claims or rights are in issue. In other words, the assumption here is that the term "civil" is used as an antonym of "criminal."<sup>134</sup> The second proposition, partially flowing from the first, is that Article 6(1) is not really concerned with the substantive meaning of "civil rights" because, apart from those rights which the Convention guarantees, domestic law decides what constitutes a "right" or an "obligation." The sole concern of Article 6(1) is with the *process* by which legal controversies not involving criminal charges are "judicially" determined. That is to say, Article 6(1) applies only to the manner in which domestic tribunals pass upon the existence or non-existence of a "right" or "obligation."

To illustrate the application of this criterion, let us assume that *A*, an alien in state *B*, is served with a valid expulsion order. Under the laws of *B* the ministry of justice may temporarily rescind expulsion orders as a matter of unfettered administrative grace. Petitions for a stay of such orders are heard in a private session by the appropriate government official. *A*'s petition is denied following such a conference. *A* does not have a cause of action under Article 6(1), because the ministry did not in this case adjudicate any disputed questions of law or fact. In other words, since the ministry did not have to exercise judicial functions in passing on *A*'s claim, it need not abide by those standards of fairness that are deemed fundamental to judicial proceedings. It should be noted, however, that if *A* had here challenged the legality of his expulsion order, he would have been entitled to the hearing envisaged by Article 6(1), even if under the applicable domestic law such matters are decided by an administrative tribunal or board rather than a court. This result follows from the fact that here the issue to be decided—whether the governmental power was exercised in accordance with law—calls for the exercise of judicial functions upon which the rights or obligations of the individual depend.

On at least one occasion, the Commission has recognized the validity of the contention that the applicability of Article 6(1) does not depend upon the legal classification ascribed to the case by national legislation. Here the Commission characterized a defamation action, which under the governing Austrian law was criminal in nature, as a proceeding involving the applicant's civil rights because he had instituted it to vindicate his reputation.<sup>135</sup> In reaching this conclusion, the Commission emphasized that

the question whether a right or an obligation is of a civil nature within Article 6, paragraph (1) of the Convention does not depend on the particular procedure prescribed by domestic law for its determination

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134. This interpretation finds some support in the French text of Article 6(1), which does not, however, speak of "droits et obligations civils," but of "droits et obligations de caractère civil." "Caractère civil" might here quite readily have been used to distinguish these matters from those involving "accusation en matière pénale." See Velu, *supra* note 130, at 136. Velu however rejects this view of Article 6(1) as being too broad.

135. App. No. 808/60, 5 Yearbook 108 (1962).

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but solely on an appreciation of the claim itself and of the purpose of the complaint. . . .<sup>136</sup>

This test, which looks to the substantive concept of "civil rights," compels a different result than that reached by the Commission in another case.<sup>137</sup> This application was based on a decision by the Danish Ministry of Justice suspending the applicant's visitation rights to her children by a former marriage. The court, which had granted the underlying divorce, had left to administrative authorities the task of working out the appropriate custody arrangements. They awarded custody of the children to the applicant's former husband and accorded the applicant visitation rights. This arrangement was subsequently sustained by the courts in a proceeding instituted by the father. Thereafter the Justice Ministry suspended her visitation rights, presumably in the interest of the children's welfare, without granting the applicant a hearing. She challenged this decision before the Commission relying, *inter alia*, on Article 6 of the Convention. In ruling the application inadmissible, the Commission held that Article 6 applies only "to proceedings before courts of law."<sup>138</sup> Since the decision to suspend the applicant's visitation rights was "an administrative decision, solely within the competence of that Ministry," the Commission concluded that Article 6 was inapplicable. In its view, "the right to have a purely administrative decision based upon proceedings comparable to those prescribed by Article 6 for proceedings in Court is not as such included among the rights and freedoms guaranteed by the Convention."<sup>139</sup>

In thus interpreting Article 6(1), the Commission draws an erroneous conclusion from a valid assumption. The valid assumption is that this provision applies to judicial proceedings. The error lies in the conclusion that the term "proceedings before courts of law" is synonymous with "judicial proceedings." In other words, the Commission either overlooks or rejects the possibility that the concept of "judicial proceedings" includes all those proceedings, however formally designated, in which legal claims or "civil rights" are adjudicated. The danger inherent in this approach lies in the fact that it enables the member states to circumvent the guarantees contained in Article 6(1) by the simple expedient of empowering administrative bodies to perform judicial functions.<sup>140</sup>

The Commission is, however, by no means alone in espousing the position that Article 6 does not apply to administrative proceedings. The few domestic courts that have dealt with this question have generally done so by defining legal proceedings as civil, criminal, or administrative not in terms of their substantive character, but along the public-private law dichotomy adopted in their legal system. Illustrative of this approach is a judgment rendered by a German appellate court, which held that decisions of administrative tribunals did not have

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136. *Id.* at 122.

137. App. No. 1329/62, 5 Yearbook 200 (1962).

138. *Id.* at 208.

139. *Ibid.*

140. Schwelb, *supra* note 131, at 575.

to be pronounced publicly, because Article 6 applied only to civil and criminal courts.<sup>141</sup> This conclusion was based in part at least on the German text of Article 6(1) under which such an interpretation is not unreasonable, but only because the translation is erroneous. The German translation of Article 6(1) which, unlike its French and English text, is not authoritative, speaks in part of "an independent and impartial tribunal established by law, authorized to adjudicate his civil rights and obligations or any criminal charges brought against him."<sup>142</sup> In other words, it justifies the conclusion that Article 6(1) refers only to tribunals having jurisdiction to decide civil and criminal cases, and thus clearly excludes administrative tribunals. This language bears some resemblance to the more ambiguous French wording of Article 6(1).<sup>143</sup> It is, however, totally at variance with the English text, which admits no such drastic or easy interpretation.

The dangerous consequences inherent in this interpretation (or translation) of Article 6 can be demonstrated by looking at a decision rendered by a Bavarian appeals court in 1960. The appellant here contended that the proceedings leading to his detention in an asylum for the mentally ill did not conform to Article 6(1) of the Convention. His appeal was rejected on the ground that they were administrative in nature and thus not governed by Article 6.<sup>144</sup> The court based its decision in part on the erroneous German translation of Article 6(1) as well as on Article 13 of the Convention. In relying on the latter provision, the tribunal emphasized that it merely entitled the victim of a violation of the Convention to "an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." It therefore concluded that since the order detaining an individual in an asylum for the mentally ill was under its law a sovereign or official act, and since Article 13 refers only to "an effective remedy before a national authority" without prescribing that the national authority be a court, it followed that Article 6(1) did not apply to administrative proceedings challenging the sovereign acts here in question. What the court over-

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141. Judgment of Oberverwaltungsgericht [hereinafter cited OVG] of Münster, 25 November 1955, 9 N.J.W. 1374, 1375 (1956) (Ger. Fed. Rep.). See also to the same effect Judgment of OVG/Münster, 24 June 1955, 9 N.J.W. 157 (1956); Judgment of Bundesverwaltungsgericht, 16 September 1957, 11 M.D.R. 697 (1957); Judgment of OLG/Celle, 17 November 1959, 13 N.J.W. 880 (1960). *But see* Judgment of Bundesgerichtshof, 21 April 1959, 12 N.J.W. 1230 (1959), recognizing the danger inherent in this approach.

142. The here relevant German text of Article 6(1) reads as follows:

Jedermann hat Anspruch darauf, dass seine Sache in billiger Weise öffentlich und innerhalb einer angemessenen Frist gehört wird, und zwar von einem unabhängigen und unparteiischen, auf Gesetz beruhenden Gericht, das über zivilrechtliche Ansprüche und Verpflichtungen oder über die Stichhaltigkeit der gegen ihn erhobenen strafrechtlichen Anklage zu entscheiden hat.

This translation of Article 6(1) has been adopted by the Federal Republic of Germany, [1952] Bundesgesetzblatt (pt. II.) No. 14, p. 685, and by Austria, [1958] Bundesgesetzblatt für die Republik Österreich, No. 210, p. 1927.

143. The French text of Article 6(1) provides in part:

Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle.

144. Judgment of Bayerisches Oberstes Landesgericht, 21 September 1960, 14 N.J.W. 270 (1961) (Ger. Fed. Rep.).



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looked is that even persons of unsound mind detained under Article 5(1) (e) are, under Article 5(4), entitled to have the lawfulness of their detention decided by a "court."<sup>145</sup> Thus, notwithstanding the meaning one might ascribe to Article 13, it cannot apply to the instant case, since a person detained or to be detained in an asylum has the right to a judicial proceeding conducted in accordance with the standards prescribed in Article 6(1). This conclusion finds support in recent Commission jurisprudence.<sup>146</sup> It is, furthermore, not inconsistent with its decision that Article 6(1) applies only to proceedings before courts of law, because Article 5(4) expressly accords an individual the right to have the lawfulness of his detention decided by such a *court*.<sup>147</sup>

Under Article 5(4) of the Convention, a person "who is deprived of his liberty by arrest or detention" has, as we have just seen, the right to institute "proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." Beyond the Commission's conclusion that the proceeding it envisages is subject to the "fair trial" provisions of Article 6(1) and the "equality of arms" principle inherent in it, the full scope

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145. Convention, Art. 5 provides:

(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) 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 authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

146. See App. No. 1936/63, *Neumeister v. Austria* (Admissibility), 14 Collection 38 (1965); App. No. 2178/64, *Matznetter v. Austria* (Admissibility), 15 Collection 40 (1965). Both cases were ruled admissible over the Austrian Government's contention that Article 6(1) did not apply to proceedings under Article 5(4), since under Austrian law they were neither civil nor criminal in nature.

147. See App. No. 858/60, 4 Yearbook 224, 236 (1961).

of this habeas corpus type action is still largely unexplored.<sup>148</sup> Thus it is not as yet clear what specific rights must be accorded to a person challenging the legality of his arrest or detention. One of the many questions that will have to be answered in this connection was recently considered by a national court. The case had to do with the right of a person, against whom a warrant of arrest had been issued, to obtain access to the findings of the investigating magistrate prior to the hearing. This was denied on the ground that the appellant had not as yet been charged with a criminal offense within the meaning of Article 6(3). Not being an accused, he could accordingly not claim that to deny him the possibility of inspecting his dossier deprived him of adequate facilities to prepare his defense.<sup>149</sup>

It is, of course, true that the rights guaranteed in Article 6(3) are expressly granted only to individuals charged with a criminal offense. There may well be cases, however, where a person might be unable to meaningfully assert the illegality of his detention under Article 5(4), unless he can inspect his case file, obtain the assistance of a lawyer or the examination of witnesses. Given such facts, the "fair hearing" requirements of Article 6(1) may entitle him to validly claim these rights. It is submitted that under Article 6(1), anyone challenging the deprivation of his liberty in a habeas corpus proceeding of the type envisaged in Article 5(4), must be accorded all those rights without which, in his particular case, the hearing to determine the lawfulness of his detention cannot really be meaningful.

### B. *Litigation Between Private Parties*

Probably the most far-reaching interpretation of the duties which Article 6 imposes upon the member states in ensuring fairness in litigation between private parties can be found in a Commission decision rendered in 1959.<sup>150</sup> The applicant, a Polish national residing in Germany, sought in Swedish courts to obtain visitation rights to his infant child living with his divorced wife in Sweden. His request for permission to enter Sweden to participate in the proceedings was denied. In passing on the admissibility of this application, the Commission first noted that the Convention did not necessarily require that the member states enable an individual to participate in person in every action to which he is a party. The Commission recognized, however, that in cases where the personality and moral character of the litigants are in issue, a fair trial within the meaning of Article 6(1) may imply the duty to accord to both litigants the opportunity to be present especially when, as in the instant action, one

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148. App. No. 1936/63, *Neumeister v. Austria (Admissibility)*, 14 Collection 38, 51-53 (1965); App. No. 2178/64, *Matznetter v. Austria (Admissibility)*, Collection 40, 48-49 (1965).

149. Judgment of Cour de Cassation, 25 March 1963, [1963] *Pasicrisie Belge* 808, 809 (Belgium). See also Judgment of Cour de Cassation, 22 July 1960, [1960] *Pasicrisie Belge* 1263 (Belgium).

150. App. No. 434/58, 2 Yearbook 354 (1958-59).

of them was allowed to appear.<sup>151</sup> In such circumstances, it did not matter that general international law left states free to control the admission of aliens and that the foreigner's right to enter the territory of a member state was not as such guaranteed by the Convention. In the Commission's view, these considerations could not detract from the fact that a member state must be understood to have agreed "to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it has accepted under that Convention."<sup>152</sup> Since Sweden subsequently granted the applicant an entry visa, the Commission did not have to decide whether its initial denial violated his rights under Article 6(1).<sup>153</sup> That it might well have reached this conclusion is, however, apparent from its opinion, which extends the "equality of arms" principle to litigation between private individuals and imposes upon the member states the affirmative duty to ensure it.

As a result, while it is accepted that the minimum rights guaranteed in Article 6(3) apply as such only to criminal proceedings,<sup>154</sup> a denial of similar rights in civil cases may under certain circumstances violate Article 6(1). Thus, to refuse a party in a civil case the opportunity of introducing certain evidence might amount to a denial of a "fair hearing."<sup>155</sup> This might be equally true, if a person is not allowed to be represented by counsel in certain civil proceedings<sup>156</sup> and conceivably, if counsel is not assigned in some special cases, for example, where only an attorney may argue before special courts and the litigant is indigent.<sup>157</sup>

Finally, it should be noted that in applying Article 6(1) the Commission has held that the adjudication of civil claims by arbitration under a procedure departing from that which is consistent with proper judicial practice was not *ipso facto* a violation of the Convention.<sup>158</sup> But a waiver of judicial adjudication in favor of arbitration would, in the Commission's view, be incompatible with the rights guaranteed in the Convention if not given voluntarily.<sup>159</sup> This would no doubt also be true if the conduct of the arbitrator was incompatible with the spirit of Article 6(1). Such would presumably be the case if the arbitrator, for example, acted in a manner which raised serious doubts about his impartiality. In this connection one might ask, parenthetically, whether a member state by delegating judicial powers to an international institution would violate the Convention, if in proceedings before that body the individual is not accorded the rights assured him under Article 6. It is not inconceivable that the Convention

151. *Id.* at 370.

152. *Id.* at 372.

153. See App. No. 911/60, 4 Yearbook 198, 206 (1961).

154. See, e.g., App. No. 265/57, 1 Yearbook 192 (1955-57).

155. See App. No. 852/60, 4 Yearbook 346, 354 (1961); App. No. 1092/61, 5 Yearbook 210, 212 (1962).

156. See App. No. 1013/61, 5 Yearbook 158, 164-166 (1962).

157. See App. No. 727/60, 3 Yearbook 302, 308-310 (1960).

158. App. No. 1197/61, 5 Yearbook 88 (1962).

159. *Id.* at 96.

Institutions will have to face this question sooner or later, considering the proliferation of supranational organizations.<sup>160</sup> Accordingly, it should be pointed out that the Commission has on at least one occasion indicated that a state, in concluding an international agreement, is "bound not to disable itself from giving effect to the rights and freedoms which it had guaranteed by entering into the European Convention."<sup>161</sup> This dictum calls to mind the words of Mr. Justice Black in *Reid v. Covert*<sup>162</sup> to which it bears a striking resemblance. Speaking for the Court, Justice Black stated:

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI [of the Constitution] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.<sup>163</sup>

Of course, the Convention is not the United States Constitution. But time and enlightened judicial activism might well make it an instrument of similar importance on the regional international level to which it applies.

#### IV. CONCLUSION

The case law relating to procedural due process under the European Convention of Human Rights is, as we have seen, still largely in an embryonic stage. The judicial institutions expounding it are proceeding with extreme caution. In part this is due to the fact that the Convention is a novel international experiment. Its success in large measure depends upon the continued willingness of the member states to participate in it. The Convention Institutions, judging by their judicial pronouncements, are quite reluctant to proceed too rapidly in applying it for fear of being branded irresponsible or insensitive to the needs of law enforcement agencies, to the role of national courts and to the traditions of domestic legal institutions. This attitude is well illustrated by the Commission's refusal to extend the "fair hearing" provisions of Article 6 to administrative proceedings. Since the public-private law dichotomy is a concept deeply rooted in quite a number of member states, the Commission is no doubt hesitant about taking a position that many governments might at this stage find unacceptable. Similar considerations probably also account for the unimaginative formalism that characterizes some other Commission decisions. I am thinking particularly of those cases in which the formal stage of a domestic criminal proceeding is accepted as the criterion for granting or denying rights accorded to persons

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160. In this connection, see *Degreef v. Commission of the European Economic Community*, Case No. 80/63, Court of Justice of the European Communities, Judgment of July 1, 1964, 10 *Sammlung der Rechtsprechung des Gerichtshofes* 837, 868-70 (1964). Here the Court of Justice set aside an EEC Commission decision dismissing a Community employee, because the Commission had not accorded him a proper hearing. A contrary holding would have raised the question discussed in the text.

161. App. No. 655/59, 3 *Yearbook* 280, 286 (1960).

162. 354 U.S. 1 (1957).

163. *Id.* at 17.

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“charged with a criminal offense.” Recourse to formalism is a simple expedient for avoiding difficult questions and the Commission may not be quite ready to face too many of them at this time.

In the long run, however, its initial caution may actually further the cause of European human rights. Even though the member states only recognize the right of the Commission to hear private complaints for a limited period of years at a time, it is not unreasonable to assume that the longer the Commission performs its functions, the more difficult politically it will be for individual governments to withhold renewal of their periodic acceptance of its jurisdiction. With time, adverse governmental reactions will therefore justify less cause for alarm and permit correspondingly greater judicial creativity.

The caution of the Convention Institutions is of course attributable also to the fact that the task assigned to them compels it. It is therefore probably unrealistic to assume that the Human Rights Court, if more cases were referred to it, would immediately forge ahead with great boldness. In the heterogeneous legal setting to which the Convention applies, the Convention Institutions can only slowly gather the requisite experience to evolve a judicial philosophy that will do justice to the spirit of the Convention and the legal systems subject to it. By the same token, domestic courts and the legal profession in the member states must be given more time to recognize the potential scope of the Convention. Here it should be noted that the more enlightened judicial imagination national judges bring to the task of applying and interpreting the Convention, the easier it will be for such international institutions as the Commission and the Court to display similar traits.

In assessing the case law discussed in this paper, it must be emphasized that there is a great difference between self-imposed judicial restraint and judicial formalism or rigidity. The former often increases confidence in the tribunal's wisdom, the latter breeds injustice. Since the Convention applies to fifteen different countries, the principles it enunciates will become largely meaningless if domestic legal terminology or classification are accepted as criteria determining its application. A common standard of legality governing these divergent legal systems can only be achieved by recognizing that labels rarely if ever bear any but the most superficial relation to the institutions and facts to which they attach. In short, they often camouflage reality. This the Commission has recognized in its application of the “equality of arms” principle and in holding that the Convention does not exhaustively define the notion of a “fair hearing.” It has, however, on many occasions barricaded itself behind a wall of formalistic pronouncements that offer no guidance to domestic courts. As a matter of fact, it would be most surprising if it did not encourage these tribunals to adopt or continue to pursue similar attitudes in interpreting the Convention. Once such a judicial *modus operandi* gains acceptance, it will be very difficult to break its confining grip.

In this paper we have on a number of occasions criticized the manner in

which the Commission has applied Article 6. In its defense three points should be emphasized. The first is that by and large trial attorneys in the member states have not as yet fully recognized the legal relevance of the Convention. As a result, a large number of cases either do not reach the Convention Institutions at all or, if they do, their procedural posture precludes adjudication on the merits. Available domestic remedies are often not exhausted, time limits are ignored and rights waived through ignorance of the substantive provisions of the Convention. The second point is closely related to the first. Simply stated it is that most cases are poorly presented to the Commission. The Commission, not being a permanent body, meets only as its case load requires. Its members, in addition to serving on this body, carry on their regular professional careers throughout the year. It can therefore be reasonably assumed that poorly briefed applications will quite often lead to poor decisions. The need for imaginative marshalling of the facts and for comparative research in criminal and civil procedure is indispensable to the effective application of Article 6. As far as I have been able to ascertain, counsel seldom provide the Commission with this type of needed assistance. Finally, it must not be forgotten that it took the United States Supreme Court a very, very long time indeed to transform the Constitution into a meaningful instrument for the protection of civil liberties. The Convention has been in force slightly over a decade. To expect the Convention Institutions to accomplish any drastic reforms in the administration of justice in Europe in this short span of years would be to disregard our own painfully slow progress. Viewed in the light of the American experience, the Commission's assertion of power to define the notion of a "fair hearing" is an extremely important development bearing on the application of Article 6. It justifies considerable optimism regarding the future of the Convention because, potentially at least, it is capable of serving as the legal basis for the achievement of results comparable to those brought about by the Supreme Court under the due process clause of the fourteenth amendment.