

## THE PROBLEM OF THE PROCEDURAL RIGHTS OF WAR CRIMINALS AND INTERNATIONAL LAW(\*)

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by

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### A. INTRODUCTORY STATEMENT

One might be tempted to say that there is no need, in international law, to regulate the procedural rights of war criminals, as this subject is not an actual one. The idea of such criminals being put on trial was stimulated by two new crimes which emerged as a result of the atrocities of World War II - crimes against peace and crimes against humanity; in other words, genocide.

However, although unpleasant to recall, one should bear in mind that as threats and acts of genocide are still frequent even at the present time, the trial of individuals or States involved in these acts will in no way be issues out of vogue.

If one considers that acts of murder, torture, brainwashing, racial hatred and war with the use of the most inhuman methods or weapons are being practised today in many regions of our world, - such as South - East Asia, the Middle East, Africa, the Carribeans and even in some parts of Europe - no-one is in a posi-

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tion to claim that court procedures or trials applicable to such crimes or those allegedly responsible therefore (which is the subject of this report) lack actuality.

It is appropriate to mention that neither the structure and competence of the criminal tribunals nor the status of the judges and the prosecuting authorities are the subject of this study. The report deals mainly with the procedural guarantees or the rights of accused war criminals. It is particularly concerned with the question whether an accused war criminal may be accorded the same status as that of a criminal accused of "normal" crimes.

### I. General Sources of International Criminal Procedural Law

To date, neither international law nor the statutes of international organisations recognise an international criminal court. The international Military Tribunals of Nürnberg and Tokyo were multinational tribunals, but not international courts in the strict sense of the word<sup>1</sup>. Universal and regional Conventions provide some penal procedural provisions applicable to war criminals; these Conventions, however, do not establish or provide for an international criminal tribunal. Therefore, it is rather difficult to set out the sources of international law applicable to international criminal procedural law.

Should we consider the principles of international custom applicable to the international criminal procedure, by reference to Article 38 of the *Statute of the International Court of Justice, 1945*<sup>2</sup>, we may state that "international custom" as a source of international procedural law develops in the course of the practice of international courts. As such international criminal tribunals do

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1) Röling, **the law of War and the national jurisdiction since 1945**, in: *RCAD*, 1960, II, 340 f.; Jescheck, H. H., in *Wörterbuch des Völkerrechts*, Bd. III, pp. 781; contrary opinion, Norgaard, C. A., **The position of the individual in international law**, Copenhagen, 1962, pp. 183 ff.

2) Article 38 provides the criteria which shall be applied by the Court. Under paragraph (b), it refers to "international custom, as evidence of a general practice accepted as law".

not so far exist it would be difficult to refer to customary international criminal procedure.

Article 38, paragraph 10, of the *Statute of the International Court of Justice* refers to the generally accepted principles of law, recognised by civilised nations.

For the application of international criminal procedural law, consequently, one may derive the generally accepted principles of law from the existing norms of positive international law, which next to the Hague Conventions of 1907 and the four Geneva Conventions of 1949, may be stated as follows<sup>3</sup> :

1. Charters of the International Military Tribunals of Nürnberg and Tokyo, 8.8.1945.
2. Universal Declaration of Human Rights, 10.12.1948.
3. Charter of the Organisation of American States, Bogota, 30.4.1948.
4. The Convention on the Prevention and Punishment of the Crime of Genocide, 9.12.1948.
5. The European Convention on Human Rights, 4.11.1950.
6. First draft Statute for an International Criminal Court, 5.9.1951 and revised draft Statute for an International Criminal Court, 20.8.1953<sup>4</sup>.
7. Draft Code of Offences against the Peace and Security of Mankind, 28.7.1954.
8. Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955 by the first UN Congress on Prevention of Crime and Treatment of Offenders and approved by ECOSOC in 1957 (Resolution 663 C 'XXIV').

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3) A Convention (Geneva) was signed on 16.11.1937 by 13 States, for the creation of an International Criminal Court. However, it did not enter into force.

4) These draft Statutes have never materialised.

9. International Covenants on Civil and Political Rights, 16.12.1966 and optional Protocol to the International Covenant on Civil and Political Rights, 16.12.1966.
10. UN Convention on the Non-applicability of Statutory Limitations to War Crimes against Humanity, 26.11.1968.

The above-mentioned Conventions and International draft Statutes are directly related to penal jurisdiction. As one can assume that some of the principles of international civil procedure should equally apply to the rules of penal procedure, the provisions of other international courts with civil jurisdiction, e.g. the *Statute of the International Court of Justice* and its *Rules*, might also be applicable to penal jurisdiction.

Other sources of international criminal procedural law may be derived from international treaties providing international tribunals, or other implementary machinery. The *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948, after confirming in its Article 1 that genocide is a crime under international law which should be prevented and punished by the Contracting States, provides under its Article 6 (in fine) that persons shall be tried by a competent tribunal of the State in the territory in which the act was committed or by such an international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. Such a tribunal which should be established in accordance with this Convention, with a further Convention, however, has not yet materialised<sup>5</sup>.

The *Statute of the Court of Justice of the Communities*, particularly the procedure provided under the *European Coal and Steel Community*, might be of special importance in this connection, as it may be considered as being penal (Article 12, paragraph 2 in re : determination of guilt and imposing of penalties and Article 34, paragraph 1). Moreover, Articles 36 paragraph 2, 40 para-

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5) Robert - Louis Perret, *Doctrinal Basis for International Penal Jurisdiction*, in: *Towards a Feasible International Criminal Court*, edited by J. Stone and R. K. Woetzel, Geneva, 1970, p. 152.

graph 1, and 47 paragraphs 3 and 4 are concerned with imposing pecuniary sanctions and payment of compensation<sup>6</sup>.

The European Court of Human Rights, established under the *European Convention on Human Rights*, 1950, might have been considered as an international criminal tribunal, if it had been provided with penal or disciplinary sanctions. Article 50 of this Convention empowers the Court to establish the fact that a certain measure or decision "taken by a legal authority... or a High Contracting Party" violates the Convention. The Court, if necessary, may then decide to afford "just satisfaction to the injured party".

The *International Covenant on Civil and Political Rights*, 1966 and the *Optional Protocol to the Covenant*, 1966, provide for international machinery<sup>7</sup>. The Human Rights Committee established under this Covenant may receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant, provided that both States have recognised the competence of the Committee. The Optional Protocol to the Covenant, which provides for the right of individuals to submit communications might be considered together with the Covenant as making available a procedure which may be applicable to the case of war criminals. At any rate, the rights and freedoms provided for in the Covenant should be applicable even to those accused of war crimes.

The *American Convention on Human Rights*, signed at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969 (not yet in force) provides for an inter-American Court of Human Rights which, in accordance with its Article 63 may rule "that the consequences of the measure or situation that constituted the breach" of a right or freedom guaranteed under the Convention "be remedied and that fair compensation be paid to the injured party". Furthermore, Article 68 goes even further and stipulates that "compensatory da-

6) Cf. Valentine, D. G., *The Court of Justice of the European Coal and Steel Community*, The Hague: Martin Nijhoff, 1955.

7) Articles 41 et seq of the Covenant; Article 1 et seq of the Protocol.

mages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State". Should this Convention one day be ratified, these Articles, together with Article 8 concerning the "right to a fair trial", will need to be thoroughly examined to see whether they would mean the imposing of penal sanctions or fines on the parties involved. In any event, they go further than Article 50 of the *European Convention on Human Rights*, 1950 mentioned above.

## II. The Procedural Rights Of War Criminals - Principles embodied in the Human Rights Conventions and other International Instruments

Since World War II, the trial and punishment of war criminals has been a special problem. Following the war, two new types of crime - (a) crime against peace; and (b) crime against humanity - have been defined and elaborated by the *Nürnberg Charter* and the *Genocide Convention*. Furthermore, the *Geneva Conventions* of 1949 introduced the concept of "grave breaches" of the laws and customs of war.

Article 2 of the *draft Code of Offences against the Peace and Security of Mankind* contained a long list of acts and offences which it considered as crimes committed under international law against the peace and security of mankind (paragraphs 11 and 12). These Conventions confirmed that the above-mentioned acts were considered as crimes under international law, which should be prosecuted and punished.

Parallel with this development of the suppression and punishment of war crimes in international law, possibly by international tribunals<sup>8</sup>, has grown the idea of the protection of human rights and the recognition of a guarantee thereto without any discrimination whatsoever. General principles to this effect were set out

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8) Cf. Röling, p. 346 "The newness is not the notion of crime or its newness, but rather the newness of the competence to try it. In a new way, international community assumed this competence"

in the *United Nations Charter*, the *Universal Declaration of Human Rights*, the *Geneva Conventions of 1948*, the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*. One of the consequences of these instruments was the establishment of certain standards safeguarding the rights of the individual, including war criminals. In the procedural field, the individual - owing to the provisions of non-discrimination in the application of the above-mentioned conventions - even when he was alleged to have, or suspected of having committed a war crime - was invested with the right to be tried by a proper judge and according to a fair procedure. Furthermore, international law advocated the principle of prohibiting the torture or ill-treatment of prisoners<sup>9</sup> for reasons of interrogation pending or during trial.

The UN General Assembly Resolution 170 (II) of 31 October 1947 also recommended member States "to continue with unabated energy to carry out their responsibilities as regards the surrender and trial of war criminals" and then re-stated that humanitarian principles concerning detention, prosecution and fair trial, should also apply to war criminals and that they should be tried by the "principles of justice, law and evidence".

In this context, reference can be made to the *Standard Minimum Rules for the Treatment of Prisoners*, which were originally drawn up by the International Penal and Penitentiary Commission in 1933 and of which a revised text was adopted in 1955 by the *First UN Congress on the Prevention of Crime and the Treatment of Offenders*. These Rules were subsequently approved by the ECOSOC in its Resolution 663 C (XXIV) of 31 July 1957. The Standard Minimum Rules have been subject to a further examination at the *Fourth UN Congress on the Prevention of Crime and the Treatment of Offenders*, held in Kyoto, Japan, from 17-26

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9) Cf. Article 5 of the Universal Declaration of Human Rights; Articles 7 and 10 of the International Covenant on Civil and Political Rights; Article 3 of the four Geneva Conventions 1949 and the Geneva Conventions Act 1957; Article 3 of the European Convention on Human Rights.

August 1970, in the light of some recent developments which took place in the correctional field.

The procedural rights and guarantees of the accused as set forth in the proposed *draft Statute for an International Criminal Court*, include the following : to be presumed innocent, to be present at all stages of the proceedings, to conduct one's own defence or to be defended by a counsel of one's own choice, to have the proceedings and evidence translated into a language the accused understands, to adduce oral and other evidence and to interrogate any witnesses, to refuse to speak and to have such refusal deemed irrelevant to guilt, to public hearings, and to the avoidance of double jeopardy (Articles 35-53)<sup>10</sup>.

As these draft Statutes have never materialised, in the following paragraphs, we shall try to seek these rights from the relevant provisions of the *International Covenant on Civil and Political Rights*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *Geneva Conventions III and IV of 1949*, taking account of some other important Conventions and resolutions adopted at the UN or European level in this context.

#### **Detention pending trial**

The first issue that we are concerned with is the fundamental principles to be applied with regard to the arrest and detention pending investigation or trial of persons suspected or accused of war crimes. The draft Statutes above-mentioned set forth no directives as to action concerning the arrest of a prisoner.

Article 103 of the aforementioned Geneva Convention III, 1949 lays down rules governing detention pending trial<sup>11</sup>. It furthermore states that :

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10) Cf. Report of the UN Committee on International Criminal Jurisdiction on its session held from 1 - 31 August 1951 (Doc. A/2136, New York, 1952; for the revised text by the '1963 Committee', report of the 1953 Committee, General Assembly, Off. Records, 9th session (1954), Supplement No. 12. Doc. A/2645).



"Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty".

Articles 99 and 87 provide that prisoners of war detained pending trial shall not be committed to penitentiary establishments, that the places of detention shall conform to specified sanitary requirements and that the detainees shall be allowed to exercise, receive medical attention, have permission to read and the right to free correspondence. Furthermore, Article 99 of the Convention forbids all "moral or physical coercion... in order to induce" a prisoner of war to admit he is guilty of the the act of which he is accused, and Article 87 prohibits "any form of torture and cruelty".

The question which arises in this context is whether these safeguards, relating to the rights of prisoners of war detained pending trial, can also apply to prisoners against humanity. Article 85 of the Convention provides as follows :

"Prisoners of war, prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention. It appears that prisoners accused or suspected of war crimes may benefit of the status accorded to prisoners of war".

This argumentation has also been affirmed by the Commentary on the Convention published by the International Committee of the Red Cross<sup>12</sup>.

Article 9 of the *International Covenant on Civil and Political Rights* and Article 5 of the *European Convention on Human Rights* both state in some detail the principles which protect the right of everyone to liberty and security of person.

11) *UN Treaty Series*, Vol. 75, 1950, p. 212.

12) *The Geneva Convention of 1949, Commentary*, edited by J. S. Pictet. Vol. III, pp. 413 - 416, International Committee of the Red Cross, Geneva, 1958. Cf. UN Doc. E/CN. 4/983, 13 January 1969, pp. 34 - 35.

Both Conventions define the rights of arrested persons, each laying down the following safeguards which apply to any arrest or detention and one which is peculiar to arrest or detention on a criminal charge<sup>13</sup>.

*Paragraph 2 of Article 9 of the UN Covenant* stipulates that a person arrested "shall be informed, *at the time of his arrest*, of the reasons for his arrest", whereas paragraph 2 of Article 5 of the European Convention requires only that the arrested "be informed *promptly*". The latter text adds that this information be given "in a language which he understands", a provision which is not to be found in the Covenant text but is clearly implied<sup>14</sup>. Both texts provide that an arrested person be promptly informed "of any charge(s) against him".

Paragraph 3 of Article 9 of the UN Covenant relates to persons "arrested or detained on a criminal charge". The corresponding provision in the European Convention is Article 5, paragraph 3, which refers in this respect to Article 5, paragraph 1, sub-paragraph (c) of the European Convention. The field of application of the UN Covenant seems to be more limited than that of the Convention since Article 5, paragraph 3 of the European Convention applies not only to persons "arrested or detained on a criminal charge" but also to anyone arrested or detained "on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

The persons referred to in Article 9, paragraph 3, of the UN Covenant and Article 5, paragraph 3, of the European Convention in accordance with both provisions :

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- 13) For a comparison between the relevant provisions of the texts of the Covenant and the European Convention on Human Rights, cf. document entitled "Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights" - Report of the Committee of Experts on Human Rights to the Committee of Ministers, Strasbourg, September 1970 (H (70) 7).
  - 14) See travaux préparatoires. UN doc. A/C. 3/L. 687.

- (a) must be brought promptly before a judge or other officer authorised by law to exercise judicial power, and
- (b) are entitled to trial within a reasonable time or to release pending trial.

The Covenant text prescribes that "it shall not be the general rule that persons awaiting trial shall be detained in custody". The text of the European Convention does not state this principle. However, according to the judgment of the European Court of Human Rights in the "Neumeister" case, the Court indicated that it adhered to this principle<sup>15</sup>.

Both the European Convention and the UN Covenant authorise release pending trial conditioned by guarantees to appear for trial. But the UN Covenant in addition provides for such release subject to "guarantees to appear... at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgment". In this connection, it must be noted that the European Court in the "Neumeister" case has stated that "the guarantee provided for... is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing"<sup>16</sup>.

While, under Article 9 (4) of the UN Covenant, a detained person is entitled to take proceedings before a court which shall

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- 15) In the opinion of the Court the provision of Article 5, paragraph 3 of the European Convention "cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release even subject to guarantees". The Court considered, moreover, that "the reasonableness of the time spent by an accused person in detention up to the beginning of the trial, must be assessed in relation to the very fact of his detention" and that "the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable". Moreover, there should exist a "genuine requirement of public interest justifying a departure from the rule of respect for individual liberty". (European Court of Human Rights, "Neumeister" case. (Judgment of 27 June 1968, page 37, paragraphs 4 and 5).
  - 16) European Court of Human Rights, "Neumeister" case. Judgment of 27 June 1968, page 40, paragraph 14.

decide "without delay" on the lawfulness of his detention, this decision is to be taken "speedily" according to the corresponding Article 5 (4) of the European Convention.

Moreover, both Article 9, paragraph 5, of the UN Covenant and the corresponding Article 5 (5) of the European Convention provide a right to compensation to be invoked in a case of arrest or detention which is unlawful. According to the European Convention such a claim for arrest or detention should be made on a "contravention of the provisions of Article 5".

Both instruments permit deprivation of liberty of a person (arrest and detention) under certain circumstances. Article 9 of the UN Covenant provides that "no-one shall be subjected to arbitrary arrest or detention" (second sentence) and that no deprivation of liberty may take place "except on such grounds and in accordance with such procedures as are established by law". The European Convention, on the other hand, enumerates specifically six conditions whereby a person may be arrested or detained.

The European Convention also requires that, in each case stipulated in it, detention or arrest shall be "lawful" which appears to show that the existence of one of the cases laid down in the Convention is not sufficient, it also being necessary that all the rules stipulated by law should have been observed in the case in question. Furthermore, the Convention, like the Covenant, provides that a "procedure prescribed by law" must be applied in the enumerated cases permitting a detention or arrest.

Article 10 of the International Covenant on Civil and Political Rights, which has no express counterpart in the European Convention on Human Rights, lays down further principles safeguarding the liberty and security of the individual. This article requires that detained persons should be "treated with humanity and with respect for the inherent dignity of the human person". It may be considered that this Article covers some of the same principles as are set forth in Article 3<sup>17</sup> of the European Convention on Human

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17) Article 3 of the European Convention on Human Rights provides as follows :

"no - one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Rights. Nevertheless when the Travaux Préparatoires of Article 10 are taken into account, it appears to have been construed for laying down different standards<sup>18</sup>.

The above-mentioned international rules indicated on a comparative basis the grounds on which an arrest and a detention pending trial might be ordered in general terms. However, the question as to whether these rules could be applicable to the specific situation of persons accused of war crimes or crimes against humanity remains unreplied.

There is no doubt that prosecution of war crimes may present unusual difficulties in carrying out investigations as well as conducting the proceedings in order to clarify fully the facts at issue and to pronounce judgment after properly assessing the degree of participation and the question of guilt.

Nevertheless, a fair administration of justice requires that the basic principles of human rights should be applied to all persons without exception.

This principle is reflected in Article 14 of the European Convention on Human Rights which lays down that :

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground..."

The counterpart of this Article is found in Article 2 of the International Covenant on Civil and Political Rights which states that :

"The rights recognised in the present Covenant" shall be ensured "without distinction of any kind..."

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18) Cf. UN Doc. A/4045, para. 69 - 86 (79). The general feeling was that the words "treated with humanity" implied that a person held in custody is entitled to; (a) Respect for his moral dignity, (b) Respect for his physical dignity, (c) Material conditions befitting his moral and physical dignity, (d) Treatment befitting his physical and moral dignity, (e) Sympathy, (f) Kindness.

Furthermore, common Article 3, paragraph 1, of the four Geneva Conventions prohibit "any adverse distinction based on... or any other similar criteria". This Article furthermore prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

This view was also supported by the principle affirmed by the UN General Assembly Resolution 177 (II) of 21 November 1947 that :

"any person charged with a crime under international law has the right to a fair trial on the facts and law".

The question whether special measures should be applied in case of detention and conducting of proceedings concerning the prosecution of war crimes and crimes against humanity, could be best replied by reference to the jurisprudence of the European Commission and Court of Human Rights in connection with the application of Article 5, paragraph 3, and Article 6 of the European Convention on Human Rights which lays down the principle of a "fair trial".

The European Commission of Human Rights on several occasions dealt with applications of applicants alleging the unlawful length of their detentions pending trial, accused of war crimes<sup>19</sup>.

The most outstanding of these cases is the "Jentsch case". On 19 December 1967, the European Commission of Human

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19) Application No. 920/6 - XV, Federal Republic of Germany Collection of Decisions, Vol. 8, pp. 46 - 49; Application No. 1270/61, Ilse Koch v. Federal Republic of Germany Yearbook of the Convention, Vol. V, pp. 126 ff. Application No. 3376/67 - W. R. Rosenbaum v. Federal Republic of Germany, Collection, of Decisions, Vol. 29, pp. 31 - 50; and particularly the "Jentsch case", Application No. 2604/65, Jentsch v. Federal Republic of Germany, Report of the European Commission of Human Rights of 6 October 1970, Yearbook of the European Convention on Human Rights, Vol. XI, pp. 180 - 228.

Rights declared admissible an application lodged by Heinz Jentzsch against the Federal Republic of Germany. The Commission was, in this case, mainly concerned with the applicant's allegation that his detention on remand violated Article 5, paragraph (3) of the Convention, which guarantees to an arrested person, in accordance with paragraph 1 (c), the right to be brought to trial within a reasonable time or to be released pending trial<sup>20</sup>.

Jentzsch was detained in prison in West Berlin and Northrhine-Westphalia since his arrest in May 1961. Under the indictment of 1 December 1965, he was charged with murder in many cases, committed in 1941-42 in the concentration camp of Mauthausen. His trial was opened before the Regional Court of Hagen only on 28 August 1967.

The applicant had also alleged that the whole situation complained of amounted to a violation of Article 6, paragraph (2) of the Convention which provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. He considered that this principle should be taken into account in any decision as to whether a period of detention pending trial is reasonable.

In considering this case, the Commission first of all considered the following two questions which were raised owing to the special nature of the case :

- (1) Whether persons charged with war crimes and crimes against humanity should, for the purposes of the provisions of the Convention, in particular Article 5, paragraph 3, and Article 6, be treated differently from others; and

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20) Cf. *supra* FN (1). For further information concerning the concept "reasonable time" see also H. Golsong, *Die angemessene Dauer der UH in der Rechtsprechung der Europäischen Menschenrechts Konvention*, in: *Aktuelle Probleme des internationalen Strafrechts*, Festschrift f. H. Grützner, 1970, s. 68 ff. Bartsch, H. J., *Dauer der Untersuchungshaft und Europäische Menschenrechtskonvention*, in: *Jus* 1970, S. 445 ff.

- (2) Whether such persons by reasons of the charges brought against them are precluded from invoking the provisions of the Convention<sup>21</sup>.

The Commission's reply to these two issues was as follows :

With regard to query (1) the Commission stated that the case at issue concerned a complaint under Article 5, paragraph (3), and that there is no indication in Article 5 or other provisions of the Convention that war crimes and crimes against humanity should, for the purposes of Article 5, be treated differently from other crimes.

The Commission concluded that the applicant was not removed from the protection of Article 5 of the Convention by reason of the fact that he had been charged with, and convicted of, murders which rank as war crimes and crimes against humanity. Therefore, Article 5, paragraph (3) applied and the particular features of this case could only be considered by the Commission in connection with the question whether the length of the applicant's detention on remand was "reasonable" within the meaning of this provision.

In connection with query (2), the Commission referred to its decision of 8 March 1962, on the admissibility of an application by Ilse Koch against the Federal Republic of Germany<sup>22</sup>. In that decision the Commission, noting that "the applicant is imprisoned in execution of a sentence imposed on her for crimes against the most elementary rights of man" stated that "this circumstance does not however deny her the guarantee of the rights and freedoms defined in the Convention for the Protection of Human Rights and Fundamental Freedoms".

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21) Cf. Article 17 of the Convention which stipulates that :

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

22) Cf. Publications of the European Convention on Human Rights, Series B: Pleadings, Oral Arguments and Documents, 1969, pp. 279 - 280 and 289 - 291.



Another question which arises in this context is whether the unusual length of the trial ("monster trial") should be considered as affecting the length of detention. That means whether, owing to the nature of the trial, i.e. difficulties of investigation, in particular : complexity of the case, voluminous nature of the files to be examined and evidence to be obtained (often hundreds of witnesses!), detention pending trial might be considered as unreasonably long within the meaning of Article 5 (3) of the Convention.

A solution to this might be considered in the light of the "Wemhoff" case where it was discussed at length<sup>23</sup>. The representative of the German Government first posed the question in this connection, whether :

"... when the two authentic texts of Article 5 (3) of the Convention were drawn up, any thought was given to such 'monster trials' requiring a long time from the beginning of the oral hearing until judgment in order that the verdict and sentence shall finally be reached, all procedural remedies to which the prisoner is entitled being taken into consideration?"

In his opinion the interpretation to be obtained from using the French text along<sup>24</sup> - consideration of the beginning of the period of detention pending trial as provided in Article 5 (3) from the *judgment* and not *the beginning of the trial* would certainly

"... in monster trials - such as the very long trials of Nazi mass crimes conducted in the Federal Republic - make it possible for the prisoner so to protract the trial by extensive use of procedural devices that he would in the end be entitled to release from detention, because otherwise the Court

23) Cf. Publications of the European Convention on Human Rights, Series B: Pleadings, Oral Arguments and Documents, 1969, pp. 279 - 280 and 289 - 291.

24) The French text states that the person is entitled to judgment - "droit d'être jugé". The English text states "entitled to trial".

would fear that detention might be considered as unreasonably long within the meaning of Article 5 (3) of the Convention<sup>25</sup>.

The reply by the President of the Commission to this question was as follows :

"We think that it would be a rather dangerous theory to admit that a provision of a Convention which does not allow for any exception could nevertheless be held not to apply in exceptional circumstances. One might even argue that it is really in exceptional circumstances that the Convention has its real importance. We know that other Articles of the Convention provide for restrictions, limitations, exceptions... But Article 5 (3) does not allow for any derogation or exception, except for the amount of flexibility which is involved in the notion of reasonable length of detention. It is therefore around this notion of reasonableness that the whole debate must turn"<sup>26</sup>.

He then made some observations which were mainly concerned with the actual length of time spent in detention, the nature of the crime and the sentence provided for by law and that likely to be given.

His first observation related to the interpretation to be given to two different texts, namely the French and English texts of Article 5 (3). The Commission interpreted this paragraph as follows:

"The question is whether Article 5 (3) envisages the period from the opening of the trial to the date of the passing of judgment. The French text states that the person is entitled to judgment, 'droit d'être jugée'. The English text is 'entitled to trial'...<sup>27</sup>.

The European Court of Human Rights in its judgment of 27 June 1968 supported the opinion expressed by the Commission on this same case and remarked that :

25) Cf. supra 'Wemhoff' case, at p. 280.

26) Cf. supra "Wemhoff" case, at p. 289.

27) Publications of the European Court of Human Rights, "Wemhoff" case, Series B, 1969, p. 291 - 292.

"Thus confronted with two versions of a treaty which are equally authentic but not exactly the same the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible... It is impossible to see why the protection against unduly long detention on remand which Article 5 seeks to ensure for persons suspected of offences should not continue up to delivery of judgment rather than cease at the moment the trial opens"<sup>28</sup>.

With respect to the evaluation of the "reasonableness" of length of detention, the Commission referred to its former constant jurisprudence. It has consistently based its assessment on the *particular circumstances of each given case*, without using as a fixed standard an absolute upper limit of time<sup>29</sup>. The Commission, in evaluating the "reasonableness" of detention, attached particular weight to the actual length of time spent in detention.

The conclusion to be derived from these interpretations given by the organs of the European Convention on Human Rights is that even in "monster trials" concerning war criminals the accused should be protected from unduly long detention pending trial and that this period should continue up to the delivery of the judgment.

Coming back to the "Jentzsch" case, our case at issue, it should be recalled that the applicant was detained seven years, 177 days

28) Publications of the European Court of Human Rights, "Wemhoff" case, Series A, 1968, The Law, pp. 22 (23).

29) Cf. various decisions of the European Commission of Human Rights listed in Appendix XI of its report on the "Wemhoff" case, Application No. 2122/64; Cf. publications of the European Court of Human Rights, Series B, "Wemhoff" case 1969, pp. 184 ff. In its decision in the *Matznetter v. Austria* 2178/64, Yearbook VII, p. 331 and Application 2516/65, Collection of Decisions, Vol. 20, pp. 28, 35, the Commission stated, "after referring to the decisions regarding Applications Nos. 1602/62, 1936/63 and 2122/64 and to the general principle that the question whether length of detention is reasonable should not be decided in abstracto but in the light of the circumstances of each case". See also Application No. 2077/63, Yearbook, of the European Convention on Human Rights, Vol. 7, pp. 268, 276 and 278.

on remand. Similarly, in the "Rosenbaum" case<sup>30</sup>, the applicant was detained 6 years, 11 months on remand. In both these cases, the Commission did not find a violation of Article 5 (3) by its mere length. It stated that :

"...the principle that whether length of detention on remand conforms with Article 5, para. (3), is 'not to be decided in abstracto but to be considered in the light of the particular circumstances of each case' *would not apply in such exceptional cases*"<sup>31</sup>.

However, taking account of the judgment of the European Court of Human Rights in the "Wemhoff" case that Article 5 (3) may be violated if proceedings continue for a considerably long period<sup>32</sup> and in full concurrence with the dissenting opinions expressed by the members of the Commission of Human Rights - MM. Fawcett, Ermacora and Welter<sup>33</sup>, the decision of the European Commission of Human Rights - treating the time spent by Jentzsch and Rosenbaum in detention on remand as reasonable<sup>34</sup> - is open to criticism in both of these cases.

30) Application No. 3376/67, Collection of Decisions, Vol. 29, pp. 31 - 49. This case deals with the applicant's - also a war criminal - allegation of the violation of Article 5 (3) of the European Convention.

31) "Jentzsch" case, Application No. 2604/65, Strasbourg, 1971, p. 15.

32) Publication of the European Court of Human Rights, Series A : "Wemhoff" case 1968, 'The Law', para. 16.

33) 'The drafters of the Convention might well have made some limited exception to Articles 5 or 6 for the prosecution of crimes committed during the Second World War.' However, as this was not the case "the applicant must therefore be accorded the same measure of liberty under the Convention as any other suspected person". And "to treat seven years and 177 days of detention on remand as a 'reasonable time' is in our opinion not only to empty that expression of all meaning but to weaken, and even destroy, an important Convention from safeguard of personal liberty". Jentzsch case, Application No. 2604/65, 1971, p. 16.

34) "Jentzsch" case, p. 65, para. 174.

### Presumption of innocence

Moreover, in the light of the Commission's observation concerning the determination of the relation between the penalty and the length of detention in the "Wemhoff" case, consideration should be given to the principle of *presumption* of innocence as provided by Article 6 (2) of the Convention<sup>35</sup>.

In this context, one is inclined to enquire how far the Commission's consideration in the "Jentzsch" case<sup>36</sup> - that in view of the probably danger of flight by the applicant the grounds adopted by the respondent Government for the applicant's unusual continued detention were relevant "under Article 5 (3) of the Convention" - is reconcilable with the Commission's above observation.

To conclude, the aim of Article 5, paragraph 3, is that detention pending trial must be strictly justified both as to its grounds and its length.

Another safeguard, aimed to provide a remedy "in law" for a detained person, is provided *in paragraph 4 of Article 5*, of the European Convention on Human Rights, and is apparently aimed to protect him from unjustified detention<sup>37</sup>.

In the "Wemhoff" case, the Commission made its view clear, that even in "monster trials" as is the case of the "Nazi mass crimes", there is no reason to interpret the provision of Article 5, paragraph 3, at the disadvantage of the accused, as there is no specific limitation set out in the application of this paragraph.

35) "If the length of detention should approach too closely to the sentence to be expected in case of conviction, the principle of presumption of innocence would not be fully observed." - Publications of the European Court of Human Rights, Series A: Judgments and Decisions, "Wemhoff" case, Judgment of 27 June 1968, Strasbourg, 1968, p. 15.

36) "Jentzsch" case, Application No. 2604/65, Council of Europe, 1971, p. 59 and 60.

37) Under Article 5, para. 4 of the Convention:

"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".

Consequently, the notion of "reasonableness" of the length of detention should have a flexible application, even when these are particular circumstances to be considered.

An argument to justify the departure by the Commission from its thus expressed opinion as well as from the rule of respect for individual liberty in the "Jentzsch" case could have been the existence of "a genuine requirement of public interest"<sup>39</sup>. However in the "Wemhoff" case, the Court stated on this point that :

"It cannot be doubted that, even when an accused person is reasonably detained during these various periods *for reasons of the public interest*, there may be a violation of Article 5 (3) if, *for whatever cause*, the proceedings continue for a considerable length of time"<sup>39</sup>.

This may raise the question how these proceedings should be conducted. The Commission in one case found that "this provision does not give any indication as to the manner in which such proceedings" should be conducted<sup>40</sup>. In the "Vagrancy" cases, it affirmed, nevertheless, that "administrative proceedings could never satisfy the Article's requirements. The minimum guarantee required by Article 5 (4) is that proceedings should be judicial".

In the Commission's view :

"...the ratio legis of Article 5 (4) is to enable everyone who is deprived of his liberty to have decided, at any time, by a court, whether the conditions prescribed by law for detention are still fulfilled"<sup>41</sup>.

One may conclude that the function of a court, requires the conducting of a fair hearing and observance of the rules of natural justice.

38) Cf. "Neumeister" case, Publications of the European Court of Human Rights, Series A. Judgment of 27.6.1968, p. 37, paras. 4 and 5.

39) Publications of the European Court of Human Rights, Series A : "Wemhoff" case, 1968, The Law, para. 16.

40) Applications 1802/63 : Recueil (1963) iii.

41) Publications of the European Court of Human Rights, Series B : "Vagrancy" cases, 1971, pp. 211 and 213.

### Fair trial

Article 6 of the European Convention on Human Rights lays down the *fundamental procedural guarantees* applicable to cases involving the determination, inter alia, of a criminal charge.

Article 6 (1) requires that everyone should have the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

There are two issues which have importance here :

- (a) a fair and public hearing within a reasonable time;  
and
- (b) by an independent and impartial tribunal established by law.

The notion of "fair trial" in a criminal case is not defined by Article 6. In its decision in the "Nielsen" case<sup>42</sup>, the Commission expressed the view that the specific rights enumerated under paragraphs (3) and (2) should certainly all be respected so that a hearing may conform to the general standards of a fair hearing. Nevertheless, even when these minimum standards laid down in these paragraphs are conformed to "It is on the basis of an evaluation of the trial as a whole that the answer must be given to the question whether or not there has been a fair trial".

Another element of a "fair hearing" is the principle of "equality of arms" which means that each party to the proceedings before a tribunal, first<sup>43</sup> or second<sup>44</sup> degree, must be given a full opportunity to present his case, on facts and in law as well as to reply to the comments of the respondent party.

42) "Nielsen" case, Application No. 343/57, Yearbook of the European Convention on Human Rights, Vol. II, pp. 548 - 550.

43) Applications Nos. 524/59 (Ofner) and 617/59 (Hopfinger); v. Austria; Yearbook of the European Convention on Human Rights, Vol. 3, pp. 332 ff. and 370 ff; Yearbook Vol. 6 pp. 680 ff (Report of the Commission); 780 ff. (Resolution of the Committee of Ministers).

44) "Pataki" and "Dunshirn" v. Austria, Applications Nos. 596/41 and 789/60. Yearbook, Vol. III, pp. 356 ff and Yearbook Vol. V, pp. 186 ff.

Personal appearance in criminal proceedings is a further requirement of a "fair hearing". The presence of the accused at the trial is of importance not only in enabling a just and equitable verdict to be arrived at, but also in regard to the finding of the facts, particularly concerning the individual personality of the accused. In proceeding in absentia, the old principle *audi et altram partem* cannot be applied, or if so, then only to a very limited extent.

In this context, there is also the problem of the international validity of criminal sentences and the recognition of sentences rendered in absentia. And it is certain that the practical value of rules on enforcement of foreign judgments will be impaired if they cannot be applicable to judgment rendered in absentia.

A fair administration of justice requires also that a foreign judgment taken in absentia should, if possible, be given the same effect as a national judgment. That is, a person should not be brought to trial twice for the same offence.

In order to find a solution to this problem, and particularly to facilitate international collaboration in criminal matters for the enforcement in one State of a criminal judgment rendered in another, the European Convention on the International Validity of Criminal Judgments was drawn up within the Council of Europe by a committee of governmental experts. It was opened for signature on 28 May 1970. The Convention introduces a system of "opposition" which aimed to guarantee to persons sentenced that a judgment in absentia will not be enforced without his being afforded an opportunity to obtain retrial<sup>45</sup>.

The Convention regulates also (Part III, Section 1) the international application of the principle of *ne bis in idem*.

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45) Cf. Explanatory Report of the European Convention on the International Validity of Criminal Judgments, Council of Europe, Strasbourg, 1970; also, Publication of the European Committee on Crime Problems; Aspects of the International Validity of Criminal Judgments, Council of Europe, Strasbourg, 1968, Cf. below, p. 37, point 4.



Article 6 (1) of the Convention, similar to Article 5 (3) provides that a public and fair hearing should be conducted within a *reasonable time*. The Commission stated that "a reasonable time" under these two different provisions should be understood differently. In connection with the "Wemhoff" case, the Commission expressed its opinion that :

"...the question whether the time was "reasonable" for the purposes of Article 5 (3) or of Article 6 (1) must be judged differently in the two cases as the former, being intended to safeguard the physical freedom of the individual, requires stricter application than the latter, the object of which is to protect the individual against abnormally long judicial proceedings, irrespective of the question of the actual detention"<sup>46</sup>.

A very important rule set out by this paragraph concerns the "tribunal established by law".

This requirement prohibits the establishment of extraordinary courts by executive orders of even extraordinary legislation<sup>47</sup>. The establishment of such tribunals violates the principle of a fair trial. In this context reference is made to Article 101 of German Basic Law, 1949.

The conclusion to be drawn from this provision is that war criminals should under no circumstances be tried by extraordinary tribunals established under extraordinary legislation often passed under the influence of a post-war revenge and punishment climate.

Consequently in the light of this provision as well as the decision of the European Commission on Human Rights stated below on the Second "Greek" Case, two queries arise as to the : (a) clarification of the States of the Nürnberg and Tokyo International Military Tribunals - no doubt established as extraordinary tri-

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46) Publications of the European Court of Human Rights, Series A : "Wemhoff" case, 1968, p. 17 "Final" Decision of the European Commission on the admissibility.

47) Cf. Application No. 4448/70 by the Governments of Denmark, Norway and Sweden against the Government of Greece.

bunals after the Second World War; and (b) the compatibility of the standards of procedure laid down by the Charter of these Tribunals with the requirements in particular of Article 6 of the European Convention on Human Rights.

In the second "Greek" case<sup>48</sup> the Applicant Governments alleged inter alia violations of :

"...the right to a fair trial by an independent and impartial tribunal established by law. They complain that the defendants were not tried by an ordinary court but by an extraordinary court martial under extraordinary legislation..."

With regard to this allegation, the Commission, with reference to its findings under Article 6 in the first "Greek Case" stated that :

"whereas, in that case, the Commission, referring to the functioning of the extraordinary courts martial in Greece and to the special legislation creating them observed that these courts were not independent and that political offenders were treated on an arbitrary basis (Report of 5 November 1969, vol. I, Part 1, page 177); whereas in the same case, the Commission also considered the position of the defence in trials before these courts and found that it had been prevented by the respondent Government from fully establishing the facts (*ibidem* page 178, para. 327);

whereas the Committee of Ministers of the Council of Europe, when dealing with the first "Greek" Case in its Resolution DH (70) 1 of 15 April 1970, on the basis of the Commission's Report, agreed with the Commission's opinion as to Article 6 of the Convention and referred to certain proposals which had been made by the Commission in accordance with Article 31, paragraph (3), of the Convention, when it transmitted its Report to the Committee; whereas in that part of the proposals which was published by the Committee of Ministers as an appendix to the above Resolution, the Commission stated inter alia :

48) Cf. *supra*, FN 2.

"The jurisdiction of courts martial should be limited to charges against members of the Armed Forces and charges against civilians of offences against the security of the Armed Forces, whereas the ordinary criminal tribunals should alone be competent to try other criminal charges against civilians, including all charges of offences against public order or national security. Proceedings before courts martial, as well as before ordinary criminal tribunals, should be in accordance with Article 6 of the Convention which implies that the rights of defence shall be strictly observed".

Therefore, the Commission found that :

"...the present allegations under Article 6 of the Convention, together with the documentary evidence submitted, again raise the question of the special legislation in force in Greece in the field of the administration of justice".

Article 6 (2) of the Convention, like Article 14 (2) of the Covenant, states the rule that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The rule that an accused person must be presumed innocent, even when charged with severe offences, is fundamental. A definition of its meaning has been given in a decision of the European Commission of Human Rights. This principle requires :

"...firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt"<sup>49</sup>.

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49) Cf. Application No. 788/60 (Austria v. Italy), Report of 31 March 1963, Yearbook of the European Convention on Human Rights, Vol. VI, pp. 782 - 784.

Article 6 (3) of the European Convention on Human Rights states the rights of a person - as minimum guarantees - charges with a criminal offence<sup>50</sup>. The non-exhaustive nature of the enumeration given in Article 6 (2) and (3) of the Convention has been stressed by the European Commission of Human Rights in several of its decisions<sup>51</sup>.

These rights secure to the person charged :

1. The right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him - Article 6 (3) (a),<sup>52</sup>;
2. The right to adequate time and facilities for the preparation of his defence - Article 6 (3) (b),<sup>53</sup>;
3. The right to be tried without undue delay<sup>54</sup> or within a reasonable time - Article 6 (1);
4. The right to defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be given it (Article 6 (3) (c))<sup>56</sup> in any case where the interests of justice so require<sup>57</sup>.

50) A counterpart of this text, though fuller, is provided in Article 14 (3) of the Covenant text.

51) Cf. in particular its reports of 15 May 1961 on Application No 343/57 (Nielsen) paragraph 52 (Yearbook Vol. IV, p. 548), of 23 November 1962 on Applications Nos. 524/59 (Ofner) and 617/59 (Hopfinger), paragraph 46 (Yearbook, Vol. VI, p. 696) and of 28 March 1963 on Applications Nos. 595/59 (Pataki) and 789/60 (Dunshirn), paragraph 36 (Yearbook, Vol. VI, p. 730).

52) Article 14 (3) (a) of the Covenant.

53) Article 14 (3) (b) of the Covenant.

54) Article 14 (3) (c) of the Covenant.

55) Article 14 (3) (d) of the Covenant.

56) Cf. Application No. 646/59, Yearbook, of the European Convention on Human Rights, Vol. III, p. 272 ff.

57) According to the European Commission of Human Rights Article 6 (3) (c) of the Convention does not deprive States of the power to regulate the appearance of lawyers before their various courts (decision of 6 March 1962 on Application No. 722/60, Yearbook, Vol. V, p. 104).

5. The right to examine the witness against him, or have them examined, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him - Article 6 (3) (d),<sup>58</sup>,
6. The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court, Article 6 (3) (e),<sup>59</sup>;

The International Covenant on Civil and Political Rights adds certain rights explicitly mentioned in the Convention;

1. The accused person's right to communicate with counsel of his own choosing from the time of the "preparation of of his defence" onwards - Article 14 (3) (b);
2. His right to be tried in his presence - Article 14 (3) (d);
3. His right to be informed, if he does not have legal assistance, that he is entitled to such assistance - Article 14 (3) (d);
4. His right not to be compelled to testify against himself or to confess guilt - Article 14 (3) (d).

These rights may reasonably be thought to form part of the general *requirements of a fair trial*. The European Commission of Human Rights has already given some guidance on this point, especially with regard to the accused's presence at his trial; it has ruled that a case has not received a fair hearing if, during appeal proceedings the accused was not entitled to be present or

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58) Article 14 (3) (e) of the Covenant; According to the European Commission of Human Rights this is one aspect of the principle of treatment of the prosecution and the defence on an equal footing (see in particular its decisions of 19 December 1960 on Application No. 617/59, Yearbook, Vol. III, p. 370, of 11 January 1961 on Application No. 788/60, Yearbook, Vol. IV, p. 116, and of 19 December 1961 on Application No. 1134/61, Yearbook, Vol. IV, p. 378)

59) Article 14 (3) (f) of the Covenant.

represented at a private hearing in which the prosecution took part<sup>60</sup>.

Moreover, Article 14 (6) of the Covenant provides that "when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or a newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

The application of this provision, which has no equivalent in the Convention, constitutes an important safeguard for victims of miscarriages of justice. Nevertheless, as national systems of law vary widely, with respect to this provision, the provision they make for implementation of this principle set out in the Covenant text might not have the results desired.

Article 14 (7) of the Covenant text stipulates that "no-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

The European Convention on Human Rights contains no equivalent or similar provision; the Commission has already expressed its opinion that neither Article 6 nor any other Article of the Convention "guarantees either expressly or by implication the principle of 'non bis in idem'"<sup>61</sup>.

Furthermore, Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights both prohibit the retroactivity of the criminal law.

In addition, Article 16 of the Charter of the Nürnberg International Military Tribunal, *though an exceptional tribunal*, laid

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60) Cf. Commission's report of 28 March 1963 on Applications Nos 596/59 (Pataki) and 789/60 (Dunshirn), paragraph 36 'Yearbook Vol. VI, p. 730).

61) Decision of 27 March 1963 on Application 1519/62, Yearbook IV, p. 346.

down standards of procedure applicable to the cases of war criminals tried by that tribunal<sup>62</sup>.

In pursuance of these standards concerning safeguards for the defence, provision was made, in accordance with Article 24, for example, for the right of the defendant and his counsel to present witnesses, to question any witness and to address the court, and also for the right of any defendant to make a statement to the Tribunal before judgment was delivered.

Other articles of the Tribunal's charter stressed the need to prevent procedural delay including rules of evidence and avoid technicalities that might paralyse the Tribunal. (Articles 18 and 19).

Furthermore, Article 26 provided that the judgment of the Tribunal as to the guilt or innocence of any defendant had to give the reasons on which it was based; the decision was final and not subject to review.

The Geneva Convention 1949 (Treatment of Prisoners of War) guarantees that prisoners of war will get a proper trial even if charged with war crimes. Furthermore, it specifies under its Article 99 that :

"No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel".

Article 102 states that a "prisoner of war can be validly sentenced only if the sentence has been pronounced by the same

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62) In this context, cf. the question posed above on p. 27.

courts according to the same procedure as in the case of members of the armed forces of the Detaining Power and if, furthermore, the provisions of the present Charter have been observed.

Lastly, Article 106 provides that every prisoner of war "shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him with a view to the quashing or revising of the sentence or the re-opening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so".

All the Geneva Conventions of 12 August 1949, including the Convention relative to the Protection of Civilian Persons in Time of War, contain an identical clause setting out the obligation of States Parties to punish persons committing grave breaches of the Conventions. This clause specifies that "in all circumstances", the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the *Convention relative to the Treatment of prisoners of war, 1949*".

### **Compensation**

The last point to be dealt with in this report concerns the question of compensation to be paid to the victims of a damage allegedly sustained by the applicant concerned under the European Convention on Human Rights.

Article 50 of the European Convention on Human Rights provides that:

"If the court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."



The issue of damages to be paid to war criminals in the case of their being victims of a violation of the European Convention on Human Rights at first sight may not appear to be quite appropriate. However, as the European Commission of Human Rights had already stated in the "Jentzsch" case that Article 5 para. 3 does apply to the exceptional trial of war criminals, there should be no valid reason why Article 5 para. 5 or Article 50 of the Convention should not equally apply to war criminals.

A recent case, the "Ringeisen" case, in which the European Court of Human Rights was called upon to decide on the question of compensation to be paid to the applicant, throws light on the application of this Article.

The case referred to the Court on 24 July 1970 by the European Commission of Human Rights was concerned, *inter alia* with the long duration of detention on remand.

"By judgment of 16 July 1971 the Court ... held that there had been a breach of Article 5 para. 3, of the Convention in that the detention of 'Ringeisen' had been continued longer than a reasonable time (points 5 and 6 of the operative part of the judgment and paragraphs 100 to 109 of the reasoning). The Court further reserved *for the applicant the right, should the occasion arise, to apply for just satisfaction on this issue (point 7 of the operative part of the judgment).*

On 27 September 1971, the Principal Delegate of the Commission, making reference to point 7 of the operative part of the judgment, transmitted to the Registrar a letter dated 18 August 1971 in which the applicant asked the Commission 'to apply to the ... Court ... on (his) behalf and to have a decision taken in accordance with Article 50 of the Convention...'.<sup>63</sup>

The applicant requested that the Court should award him full reparation "for material and non-material damage allegedly

63) "Ringeisen" case, Judgment (Question of the application of Article 50 of the Convention, Strasbourg, 1972, p. 1).

suffered by reason of the excessive length of his detention on remand".

By a judgment delivered at Strasbourg on 22 June 1972, the European Court of Human Rights afforded to the applicant, Ringisen, for detention on remand for longer than a "reasonable time.. a compensation in the sum of 20,000 German marks (DM) to be paid by the Republic of Austria<sup>64</sup>.

### **III. Other European Conventions which might be applicable to the procedural rights of war criminals**

Other European Conventions, drawn up within the Council of Europe, in the field of crime problems and which might be applicable to the subject at issue, include the following:

1. European Convention on Extradition, signed at Paris, on 13 December 1957, entered into force on 18 May 1960.
2. European Convention on Mutual Assistance in Criminal Matters, signed at Strasbourg on 20 April 1959, entered into force on 12 June 1962 (principles which inter alia, enable the States to inter-communicate relevant information and evidence).
3. European Convention on the Supervision of Conditionally sentenced or Conditionally sentenced or Conditionally released Offenders, signed at Strasbourg on 30 November 1964; (Principles which inter alia enable the State of residence under certain conditions to enforce judgments pronounced in the State of the offence and to take the measures necessary for the social rehabilitation of persons convicted in another State).
4. European Convention on the International Validity of Criminal Judgments, signed at Strasbourg on 28 May 1970. (Principles which enable, inter alia, the States to assimilate a foreign judgement to a judgement emanating from the

64) The enforcement of any order made by the Court is the responsibility of the Committee of Ministers under Article 54 of the Convention.

Courts of another Contracting State. It is particularly applied in three different respects, namely to :

- the enforcement of the sentence;
- the *ne bis in idem* effect;
- the taking into consideration of foreign judgments.

5. Draft Convention on the Non-Applicability of Statutory Limitations as applicable to crimes against humanity and war crimes<sup>65</sup>. This Convention was elaborated by a Sub-Committee No. XV set up by the European Committee on Crime Problems (ECCP). The Preamble of the Convention explains its motives for its elaboration as follows:

"The member States of the Council of Europe signatory hereto,

Considering the necessity to safeguard human dignity in time of war and in time of peace,

Considering that crimes against humanity and the most serious violations of the laws and customs of war constitute a serious infraction of human dignity,

Concerned in consequence to ensure that the punishment of those crimes is not prevented by statutory limitations whether in relation to prosecution or to the enforcement of the punishment,

Considering the essential interest in promoting a common criminal policy in this field, the purpose of the Council of Europe being to achieve a greater unity between its members."

The draft Convention has been approved by the ECCP which has now submitted it to the Committee of Ministers for its consideration.

65) Cf. Recommendation 415 (1965) of the Consultative Assembly of the Council of Europe "on Statutory Limitations as Applicable to Crimes against Humanity" and Recommendation 549 (1969) of the Consultative Assembly of the Council of Europe on the same subject.

6. *The Standard Minimum Rules for the Treatment of Prisoners*

In 1968, the Council of Europe decided to set up a working party to re-examine the standard minimum rules for the treatment of prisoners, adopted in 1955 by the first Congress of the United Nations on the prevention of crime and the treatment of offenders, to adapt the present text to the needs of contemporary crime policy and to further its effective European application,

The terms of reference of the Sub-Committee set up by the European Committee on Crime Problems (ECCP) were:

- to carry out a complete review of the implementation in a European context of the standard minimum rules and to adapt them to the needs of modern crime policies;
- to draft a recommendation laying down a revised version of the standard minimum rules as these should be applied in the member States.

The Sub-Committee submitted its revised text of the standard minimum rules, elaborated during the eight sessions it held, to the ECCP for its approval, together with a summary of the discussions of the Sub-Committee on the amended articles. The ECCP furthermore drafted a resolution to which was appended the revised text of the Standard Minimum Rules for the Treatment of Prisoners which it has now submitted to the Committee of Ministers for approval.

#### B. CONCLUSIONARY STATEMENTS

There have been long discussions and debates on the feasibility of establishing an international criminal court, with universal ju-

risdiction<sup>66</sup>. Nevertheless it is true that until all nations of the world can create a climate of mutual understanding and solidarity in which war can be eliminated, and until the present strong feelings of sovereignty are relaxed, the coming into being of such a tribunal cannot be postulated.

This, however, should not mean that the existing rules and judicial practice applicable to the prosecution of war criminals—which have inevitably developed with post-war experiences—cannot be codified.

At present, apart from the Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949, there exists a positive international law, the provisions of which concern the procedural guarantees applicable to the trials of war criminals. The standards of procedure embodied in these various instruments might be assembled in order to apply to the prosecution of war criminals.

An enumeration of these Conventions would include in particular the Covenant on Civil and Political Rights and its Optional Protocol, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Prevention and Punishment of Genocide, the European Convention on Human Rights, and the American Convention on Human Rights.

These Conventions not only supplement each other, but also fill in the gaps existing in the Hague and the Geneva Conventions. The relevant provisions of these Conventions should apply to all individuals within the territory of a State Party and subject to its jurisdiction without distinction.

For there is surely a clear conclusion to be drawn from the Post-War Tribunal procedures namely that there is a tendency to inequality before the law, that is to say, it only the victor who

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66) For the work carried out in this respect under the auspices of the United Nations and "pros" as well as "cons" on the subject, cf. Stone, J. Range of Crimes for a Feasible International Jurisdiction, in: *Towards a Feasible International Criminal Court*, edited by J. Stone and R. K. Woetzel, Geneva, 1970, p. 315 ff.

tries and his liability for the same or similar crimes is never questioned.

It is to be hoped that a codification of the nature mentioned above would aim not only at the ensurance of the principle of equality, according to which every criminal — notwithstanding the heaviness and type of the crime committed — should be tried but that it would also consider the developments and alterations of the laws of war<sup>67</sup>.

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67) Cf. Röling, *cit.*, *supra*, p. 2 FN. 1, p. 396.