COUNCIL OF EUROPE

EUROPEAN COMMISSION
OF HUMAN RIGHTS

APPLICATIONS
LODGED BY
Franz PATAKI (No. 596/59) and Johann DUNSHIRN (No. 789/60)
AGAINST
AUSTRIA

REPORT
OF THE COMMISSION
(Adopted on 28th March 1963)

STRASBOURG

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GENERAL INTRODUCTION

This Report concerns the Applications which were lodged by MM. Franz Pataki (No. 596/59) and Johann Dunshirn (No. 789/60) against Austria under Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms and which were joined by order of the Commission of Human Rights. The Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and is now transmitted to the Committee of Ministers and to the Respondent Government in accordance with paragraph (2) of that Article. It has not been transmitted to the Applicants.

These cases were ordered by the Commission to be joined and were dealt with by the Commission at the same time as the Applications submitted by Herbert Ofner (No. 524/59) and Alois Hopfinger (No. 617/59), as the Commission decided that the legal issues in all four cases were substantially similar. The Commission's Report in the Ofner and Hopfinger cases was sent to the Committee of Ministers on December 1962.

As regards the present Applications, no friendly settlement between the parties has been achieved by the Commission and the purpose of the Commission in the present Report, as prescribed in paragraphs (1) and (3) of Article 31, is accordingly:

(1) to establish the facts,

(2) to state an opinion as to whether the facts found disclose a breach by the Respondent Government of its obligations under the Convention, and

(3) to make such proposals as it thinks fit.

The Report first sets out a brief background of the two cases (PART I), followed by a history of the proceedings (PART II). These proceedings cover the stage at which the Commission declared the Applications admissible and the subsequent stage at which the Sub-Commission, set up under Article 29 of the Convention, carried out its double function of ascertaining the facts and attempting to seek a friendly settlement between the parties.

PARTS III and IV of the Report contain respectively a concentrated account of the oral and written pleadings submitted by the parties at these two stages and, at the end of PART IV, there is a statement of the Commission's findings of fact and of its opinion

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on the two issues concerned. Part V gives an account of the action taken by the Respondent Government to amend the legislation under review in the two Applications dealt with in the present Report and Part VI sets the proposals of the Commission. The full text of the verbatim record of the oral hearing, together with the documents handed in as exhibits, are held in the archives of the Commission and are available if required.

On 23rd November 1962, during its 38th session held in Paris, the Commission considered the Report of the Sub-Commission. It proceeded to draw up the present Report which it considered during subsequent sessions and adopted during its 41st session in Paris on 28th March 1963. At that session, the following members were present:

MM. S. PETREN, President
C. Th. EUSTATHIADES
P. FABER
Mrs. G. JANSSEN-PEVTSCHIN
MM. M. SØRENSEN
N. ERION
F. ERMACORA
F. CASTBERG
J.E.S. FAWCETT
C. MAGUIRE

PART I

OUTLINE OF THE CASES

APPLICATION No. 596/59 FRANZ PATAKI

1. The following appears to be the outline of the case as it has been presented by the Parties in writing and orally to the European Commission of Human Rights.

The Applicant is an Austrian citizen born in 1920 in Hungary. He had previously been convicted several times on various charges and was released from detention on 9th December 1957.

After his release, the Applicant went to France and Belgium but owing to his criminal record was not able to obtain steady work. He received information in Paris that his mother, who lived in Israel, had recently suffered a stroke and he decided to go to Haifa to visit her. In order to pay for the voyage, he obtained money by committing crimes in various countries. After a month in Israel (the duration of his visa) he returned to Turkey in June 1958 where he was taken ill with meningitis. He states that he committed theft to pay for the hospital bill.

On his return to Austria, the Applicant was indicted by the Austrian authorities on several charges of theft and fraud committed during the period from December 1957 to June 1958. He was convicted on 24th March 1959 by the Regional Criminal Court of Vienna (Landesgericht für Strafsachen), and was sentenced to three years' imprisonment (Schwerer Kerker).

The Applicant states that he wished to call a medical expert during the proceedings to testify as to his health and recent diseases but that the Court rejected his request. However, the Court recognised that there were extenuating circumstances in the case and expressly took them into account when fixing the sentence at three years' imprisonment, the normal penalty for habitual criminals being between five and ten years.

The Applicant states that for this reason he did not appeal from the decision of the Regional Court. The Public Prosecutor, on the other hand, did appeal to the Regional Court of Appeal (Oberlandesgericht) which on 29th April 1959 increased the sentence from 3 to 6 years' imprisonment, setting aside the Lower Court's grounds for its reduction.

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The Applicant alleges that the trial was not held in public, that neither the Applicant himself nor his lawyer was present and that the Court only heard the arguments of the Prosecutor. The judgment of the Court itself indicates that the session was not in public and that only the Public Prosecutor was heard. It also confirms that the Applicant's sentence was increased on the ground that the Court did not accept the existence of any extenuating circumstances.

The Applicant subsequently applied to the District Court (Kreisgericht) of Krems on 16th September 1959 for a reconsideration of his case but this application was rejected on 30th September 1959.

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APPLICATION No. 789/60 JOHANN DUNSHIRN

2. The following appears to be the outline of the case as it has been presented by the Parties in writing and orally to the European Commission of Human Rights.

The Applicant is an Austrian citizen born in 1931.

On 19th February 1960 the Applicant was convicted by the Regional Court (Landesgericht) of Vienna on divers charges of larceny; the Court took into consideration certain extenuating circumstances, including inter alia the fact that the Applicant had made restitution to his victims of 90% of the amount of money which he had stolen from them, and sentenced the Applicant to 14 months' imprisonment with the additional penalty of "sleeping hard" four times a year.

The Applicant accepted this sentence upon his lawyer's advice.

It appears that the Applicant had previous convictions and that shortly before this last conviction he had been released on probation from a labour institution (Arbeitshaus) two years before the expiration of his sentence. This release was subject to the condition that in the event of this Applicant being convicted of a further offence he would have to complete the full

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term in the labour institution. The Regional Court appears to have regarded as an extenuating circumstance the fact that most of the stolen money had been returned to the owners and had taken this into account in fixing his sentence.

The Applicant states that his lawyer made no representation as to the amount of his sentence but that the Public Prosecutor appealed from the decision of the Regional Court of Vienna to the Court of Appeal (Oberlandesgericht) in Vienna. On 13th April 1960, the Court of Appeal, after hearing the Public Prosecutor in camera but without hearing the Applicant or his lawyer, stated that it did not accept the existence of extenuating circumstances and increased the Applicant's sentence from 14 months to 30 months.

The Applicant states that the increase of his sentence has resulted in his having to serve two years in a labour institution and he alleges that the Court of Appeal in effect increased his sentence from 14 months to 54 months.

The Applicant states that no further appeal is available to him either in respect of the original conviction or as to the increase of his sentence.

PART II

HISTORY OF PROCEEDINGS

CHAPTER I - PROCEEDINGS BEFORE THE COMMISSION

A. Application 596/59 FRANZ PATAKI

3. Introduction and Registration

An Application was submitted to the Commission by this Applicant under cover of a letter dated 30th August 1959 and was registered on 12th October 1959 under file No. 596/59 in the general register kept by the Secretariat of the Commission.

4. Contents of the Application

In his letter of introduction and in the application form submitted by him, the Applicant alleged that there had been violations of:

(1) Article 6, paragraph (3) (d) and Article 13 of the Convention in that during the proceedings the Regional Court of Vienna rejected his request for the calling of a medical expert as witness;

(2) Article 6 of the Convention, in that the proceedings before the Regional Court of Appeal were not held in public;

(3) Article 6, paragraphs (1) and (3) (e) of the Convention, in that the Public Prosecutor but not the Applicant or his Counsel was heard when the Court of Appeal of Vienna considered and upheld the Public Prosecutor's Appeal and increased the sentence from three to six years.

5. Report of group of three members

A group of three members (MM. C. Th. Eustathiades, L.J.C. Beaufort and F. Ermacora) considered the Application on 7th March 1960 and decided that its further examination should be adjourned until Mr. Ermacora had presented a note concerning the issues involved.

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A second group of three members (MM. L.J.C. Beaufort, A. Süsterhenn and F. Castberg) considered the Application on 3rd August 1960 in the light of the unofficial note submitted by Mr. Ermacora and submitted a report to the Commission.

6. Partial decision of the Commission on the admissibility of the Application and Communication of the Application to the Respondent Government

On 5th August 1960 the Commission, under the presidency of Professor C.H.M. Waldock,(1) considered the report of the group of three members and decided:

(a) to reject that part of the Application which related to alleged violations of Article 6, paragraph (3) (d), Article 13 and Article 6 (the non-public character of the proceedings at the hearing of the appeal) of the Convention;

(b) to give notice, in accordance with Rule 45, paragraph (3) (b) of the Rules of Procedure, of the Application to the Austrian Government and to invite the Government to submit to the Commission, within a period of four weeks, its observations in writing as to the admissibility of the remainder of the Application which related to the Applicant's allegations that there had been violations of Article 6, paragraph (1) ("fair hearing") and (3) (c), in that only the Public Prosecutor and not the Applicant or his Counsel, was heard when the Court of Appeal (Oberlandesgericht) of Vienna upheld the Public Prosecutor's appeal and increased the Applicant's sentence from three to six years;

(c) to make it clear to the Austrian Government that the decision under (b) did not in any way prejudice the decision which the Commission might ultimately take as to the admissibility of this part of the Application;

(d) to adjourn its examination of this part of the Application until the next plenary session.

The Secretariat accordingly communicated the Commission's decision on 8th September 1960 to Mr. Hans Reichmann, the Austrian Permanent Representative at the Council of Europe, and invited the Respondent Government to submit its observations before 8th October 1960.

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(1) Now Sir Humphrey Waldock.

On 3rd October 1960, the Respondent Government submitted its observations in writing and, on the instructions of the President of the Commission, these observations were sent on 7th October 1960 to the Applicant who was invited to submit his reply before 7th November 1960.

The Applicant submitted his reply on 4th November 1960.

7. Further Report of group of three members

On 1st December 1960 the Application was again examined by a group of three members (Mr. P. Faber, Mrs. G. Janssen-Pevtschin and Mr. F. Castberg) who submitted a report to the Commission.

8. Final decision by the Commission on the admissibility of the Application

On 19th December 1960, during its 25th session, the Commission, after having deliberated, declared part of the Application admissible and the text of its decision was communicated to the Parties on 14th April 1961.

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B. Application 789/60 JOHANN DUNSHIRN

9. Introduction and Registration

An Application was submitted to the Commission by this Applicant under cover of a letter dated 1st July 1960. It was registered on 12th July 1960 under file No. 789/60 in the general register kept by the Secretariat of the Commission.

10. Contents of the Application

In his letter of introduction and in the application form submitted by him, the Applicant alleged that there had been a violation of Article 6, in that neither the Applicant nor his lawyer was allowed to be present during the proceedings before the Regional Court of Appeal and that only the arguments of the Public Prosecutor were heard.

11. Report of group of three members

A group of three members (Mr. Faber, Mrs. Janssen-Pevtschin and Mr. Castberg) considered the Application on 1st December 1960 and submitted a report to the Commission.

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12. Communication of the Application to the Respondent Government

On 19th December 1960 the Commission, under the presidency of Professor C.H.M. Waldock(1), considered the report of the group of three members and decided:

(a) to give notice in accordance with Rule 45, paragraph (3) (b) of the Rules of Procedure, of this Application to the Austrian Government;

(b) to suggest to the Respondent Government, in view of the fact that the allegations made by this Applicant were similar to those made by Mr. Pataki in Application No. 596/59 which was declared admissible on the same date, that the observations submitted by the Government in the latter Application be considered applicable to the present Application;

(c) to declare this Application admissible during its plenary session in March 1961, if the suggestion made under (b) was accepted by the Respondent Government;

(d) to adjourn its decision on the admissibility of this Application until its plenary session in March 1961.

On 3rd January 1961 the Secretariat communicated this suggestion to Mr. Hans Reichmann, the Austrian Permanent Representative at the Council of Europe. On 20th February 1961 the Respondent Government submitted its reply in which it accepted the suggestion made by the Commission and, on the same date, it submitted a statement (Stellungname) containing legal arguments and a correction of the facts as presented by the Applicant.

13. Decision by the Commission

On 15th March 1961 the Commission, after having deliberated, declared the Application admissible and the text of this decision was communicated to the Parties on 14th April 1961.

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(1) Now Sir Humphrey Waldock.

CHAPTER II

PROCEEDINGS BEFORE THE SUB-COMMISSION

I. Appointment of the Sub-Commission

14. These Applications of Pataki and Dunshirn were declared admissible by decisions of the European Commission taken on 19th December 1960 and 15th March 1961 respectively, and the Commission, on the latter date, ordered the joinder of the two cases in pursuance of Rule 39 of its Rules of Procedure.

As these two cases showed, in respect of the legal issues raised, a substantial similarity with Applications Nos. 524/59 (Ofner) and 617/59 (Hopfinger) which had also been joined by the Commission's decision of 15th March 1961, the Commission, on the same date, decided that all four cases should be dealt with together. It also decided that the two Sub-Commissions to be set up under Articles 28 and 29 of the Convention should be constituted by a single drawing of lots in order that their composition should be identical.

On 14th April 1961, on the President's instructions, these decisions were communicated to the Respondent Government and to the Applicants and in accordance with Rule 16 of the Rules of Procedure, a time-limit of four weeks was laid down within which the Parties should state whether or not they wished to avail themselves of the right, as set out in Article 29, paragraph (2) of the Convention, of appointing a person of their choice as a member of the Sub-Commission. The President further invited the four Applicants to state whether or not they could agree upon the name of the member to be appointed by them.

The Respondent Government, in a letter from its Permament Representative at the Council of Europe dated 20th February 1961, had already appointed Mr. F. Ermacora as the member of its choice and at the same time it notified the Commission that Mr. Hans Reichmann, the Permanent Representative at the Council of Europe, was to act as its Agent in the presence cases.

On 1st May 1961, the Applicant, Franz Pataki, appointed Mr. A. Süsterhenn as the member of his choice but, on 28th May 1961, he withdrew this appointment and appointed the President of the Commission, Sir Humphrey Waldock, in his place.

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This information was put before the Commission during its 29th session, from 29th May to 2nd June 1961, and the President considered that, in view of the difficulties experienced in other cases in which he had been appointed, it would be preferable for him not to accept nomination by this Applicant. On 6th June 1961 the Applicant was informed of this decision and a time-limit of two weeks was given to him to communicate to the Commission an alternative appointment.

On 15th June 1961 the Applicant re-appointed Mr. Süsterhenn but on 22nd June 1961 he informed the Commission that, upon the advice of his lawyer, Dr. Hans Gürtler, he wished to withdraw this appointment and to waive his right to appoint a member of his choice.

The second Applicant, Johann Dunshirn, on 9th May 1961, also appointed the President as the member of his choice but, having been informed on 6th June 1961 of the President's decision not to accept nomination, he informed the Commission in a letter of 13th June 1961 that he intended to waive his right to nominate a member.

The President of the European Commission, in accordance with Article 29 of the Convention and Rules 15 and 18 of the Rules of Procedure, carried out on 1st July 1961 the drawing by lot of the remaining six members, and the substitute members, of the Sub-Commissions.

The resulting composition of the Sub-Commissions, as communicated to the Parties on 1st July 1961, was as follows:

Members

Mr. F. Ermacora - appointed by the Respondent Government

Mr. M. Maguire
Mr. G. Sperduti
Mr. F. Castberg
Father L.J.C. Beaufort
Mr. F. Skarphedinsson
Mr. M. Sørensen

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Substitutes

Mr. N. Erim
Mr. C. Th. Eustathiades
Sir Humphrey Waldock
Mr. S. Petren
Mr. A. Süsterhenn
Mr. P. Faber
Mrs.G. Janssen-Pevtschin.

In pursuance of Rule 20, paragraph (1) of the Rules of Procedure, Father Beaufort assumed the duties of President of the Sub-Commissions.

II. Sessions and Meetings

15. The Sub-Commission held the following sessions and meetings:

(a) 28th and 29th November 1961
(b) 12th January 1962
(c) 22nd and 23rd February 1962
(d) 9th and 10th May 1962
(e) 18th July 1962
(f) 2nd October 1962

The oral hearing of the Parties took place on 12th January 1962.

At these meetings, Mr. Sørensen acted as President, Father Beaufort being unable to attend and the Sub-Commission was composed as follows:

Mr. M. Sørensen - President
Mr. F. Ermacora - appointed by the Respondent Government
Mr. F. Castberg
Mr. G. Sperduti
Mr. M. Maguire (1)
Mr. N. Erim - substitute member replacing Father L.J.C. Beaufort
Mr. P. Faber - substitute member replacing Mr. F. Skarphedinsson.

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(1) Mr. Maguire was because of illness unable to attend the meeting on 18th July 1962 and was replaced by Father L.J.C. Beaufort. Mr. Maguire died on 24th September and was replaced at the meeting of 2nd October by Mr. Süsterhenn.

III. Examination of the Applications with representatives of the Parties

16. In its letter of 3rd January 1961, by which it had informed the Austrian Permanent Representative at the Council of Europe that the Application of Pataki had been declared admissible, the Commission also raised the question of the legal representation of the Applicant. On 20th February the Respondent Government informed the Commission that it was willing to pay the fees of a lawyer to represent the Applicant jointly with the other Applicants, Herbert Ofner, Alois Hopfinger and Johann Dunshirn, and that such lawyer should either be chosen by them or appointed by the Minister of Justice.

On 9th May 1961 the Applicant, Johann Dunshirn, appointed Dr. Hans Gürtler as his lawyer and on 9th June 1961 Dr. Gürtler notified the Secretariat that the Applicant, Franz Pataki, had also agreed to be represented by him.

17. The President of the European Commission, in a letter of 1st July 1961, invited the Applicant's Counsel to submit within a period of four weeks a Memorial on the merits of the case.

This Memorial was filed with the Secretariat on 31st July 1961 and, on 10th August 1961, the President of the Sub-Commission instructed the Secretariat to send the Applicants' Memorial to the Respondent Government and to invite it to submit within a period of six weeks, namely before 24th September 1961, its Counter-Memorial. This time-limit was later extended, at the request of the Respondent Government, until 21st October 1961.

On 20th October 1961 the Counter-Memorial of the Respondent Government reached the Secretariat.

The Sub-Commission in its meeting of 28th and 29th November 1961, after deliberating, took a decision which was communicated to the Parties on 30th November 1961 and in which it invited the representatives of the Parties to appear before it at an oral hearing on 12th January 1962 to make certain further explanations.

18. The oral hearing took place on 12th January 1962.

The Parties were represented as follows:

For the Applicants

Mr. Hans Gürtler, Barrister-at-Law, Vienna.

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For the Respondent Government

Mr. Hans Reichmann, Permanent Representative of the Respondent Government to the Council of Europe and Agent of the Government
Mr. Liebscher, Attorney-General's Office, Vienna
Mr. Willibald Pahr, Constitutional Section, Federal Chancellery, Vienna

19. After the oral hearing, the Sub-Commission invited the Parties to state whether they wished to avail themselves of the assistance of the Sub-Commission, in accordance with Article 28, paragraph (b) of the Convention, in order to attempt to reach a friendly settlement. After negotiations it was decided that no friendly settlement could be reached.

IV. Adoption of the Report

20. (a) The Sub-Commission adopted its report to the Commission on 2nd October 1962.

(b) The Commission, having deliberated during its 30th, 39th and 40th sessions, adopted its report on 28th March 1963.

PART III

ON THE ADMISSIBILITY

A. APPLICATION No. 596/59 FRANZ PATAKI

21. Points at issue

In his letter of introduction and in the application form submitted by him, the Applicant alleged violations of the Convention as stated above in Part II, paragraph 4. The Commission, accordingly, was called upon to decide whether or not the following allegations were admissible:

(1) As to Article 6, paragraph (3)(d) and Article 13 of the Convention, in that during the proceedings the Regional Court of Vienna rejected his request for the calling of a medical expert as witness;

(2) As to Article 6 of the Convention, in that the proceedings before the Regional Court of Appeal were not held in public;

(3) As to Article 6, paragraphs (1) and (3)(e) of the Convention, in that only the Chief Public Prosecutor, and not the Applicant or his Counsel, was heard when the Court of Appeal of Vienna considered and upheld the Public Prosecutor's appeal and increased the sentence from three to six years.

22. The Submissions of the Parties on the question of admissibility

(a) As regards the alleged violation of Article 6, paragraph (3)(d) and Article 13 of the Convention

The Respondent Government was not invited to submit any comments on this part of the Application which was rejected by the Commission prior to the communication of the Application to the Government under Rule 45, paragraph (3) of the Rules of Procedure.

The Applicant alleged that, during the proceedings before the Regional Court of Vienna, he had been denied the right to call a medical expert who could testify as to his illness which he had given as the reason for the various crimes committed by him in France and in Turkey.(1)

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(1) The Applicant's letter of 7th October 1959, page 3.

(b) As regards the alleged violation of Article 6 of the Convention (non-public character of the proceedings at the hearing of the appeal)

The Respondent Government was not invited to make any submission as to this part of the Application which was rejected by the Commission prior to the communication of the Application to the Government under Rule 45, paragraph (3) of the Rules of Procedure.

The Applicant alleged that the Convention had been violated in that the proceedings before the Regional Court of Appeal of Vienna were held in a closed session(1).

(c) As regards the alleged violation of Article 6, paragraphs (1) and (3)(c) of the Convention

The Respondent Government in its written pleadings raised an objection to the admissibility of the Application on the ground that the Application was manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention.

The Respondent Government contested the allegation that the proceedings before the Regional Court of Appeal infringed the rights guaranteed in Article 6 of the Convention; it submitted that, when the Public Prosecutor appeals against the sentence of a court of first instance, notice of appeal must, under Section 294 (2) of the Austrian Code of Criminal Procedure, be communicated to the convicted person together with the information that he may submit a reply within a period of 14 days. The Court of Appeal thus takes cognisance of the convicted person's objections to the Public Prosecutor's appeal and the two parties are then on an equal footing; the defendant enjoys furthermore an advantage over the Public Prosecutor in that, unlike the latter, he is not required to be objective. The Government also submitted that the representatives of the prosecution are not simply prosecutors but are required to adopt an objective attitude and to give equal consideration to any circumstances which are both in favour of or against the accused.(2)

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(1) The Applicant's letter of 7th October 1959, pages 4-5.

(2) The Respondent Government's observations of 3rd October 1960 pages 1-2. The arguments set forth in this part of the Report are a brief summary only of the contentions and a full statement of the submissions will be found in Part IV, paragraph 31.

The Applicant alleged that the requirements of Article 6 had not been complied with, in that when the Regional Court of Appeal heard the appeal neither he nor his lawyer was allowed to be present although the Public Prosecutor was heard. He was thus denied the possibility of defending himself before a tribunal which subsequently rejected the existence of extenuating circumstances which had been considered relevant to the case by the court of first instance. The court of first instance had based its judgment partly on a personal impression of the responsibility of the accused and had granted a mitigation of sentence on the ground of extenuating circumstances. This impression and the personal behaviour of the accused constituted the decisive elements in the deliberations at which his sentence was determined. The right of the convicted person to submit a reply within 14 days to the Attorney-General's appeal is not in any way equivalent to the effect of the presence in court of the accused or his lawyer and does not enable the court to form its impression of the accused. The Public Prosecutor could not be objective in his presentation of the arguments before the Regional Court of Appeal as the aim of an appeal lodged by the Public Prosecutor is an attempt to secure from the Court of Appeal an aggravation of the sentence.(1)

23. The decision on the admissibility of the Application

As stated in paragraph 13, the Commission on 19th December 1960, declared part of the Application admissible. The text of the decision was as follows:

HAVING REGARD to the Application lodged on 30th August 1959 by Franz PATAKI against Austria and registered on 12th October 1959 under file No. 596/59.

HAVING REGARD to the Declaration made in accordance with Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms on 3rd September 1958, whereby the Government of Austria recognised for a period

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(1) The Applicant's letter of 7th October 1959, pages 4-6, and his reply of 4th November 1960, pages 1-4. The arguments set forth in this part of the Report are a brief summary only of the contentions and a full statement will be found in Part IV, paragraph 31.

of three years the competence of the European Commission of Human Rights to receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention.

HAVING DELIBERATED,

THE FACTS

Whereas the facts of the case may be summarised as follows:

The Applicant is an Austrian citizen born in 1920 in Hungary. He had previously been convicted several times on various charges and was released from detention on 9th December 1957.

After his release, the Applicant went to France and Belgium but owing to his criminal record was not able to obtain steady work. He received information in Paris that his mother, who lived in Israel, had recently suffered a stroke and he decided to go to Haifa to visit her. In order to pay for the voyage, he obtained money by committing crimes in various countries. After a month in Israel (the duration of his visa) he returned to Turkey in June 1958 where he was taken ill with meningitis. He states that he committed theft to pay for the hospital bill.

On his return to Austria, the Applicant was indicted by the Austrian authorities on several charges of theft and fraud committed during the period from December 1957 to June 1958. He was convicted on 24th March 1959 by the Regional Criminal Court of Vienna (Landsgericht für Strafsachen), and was sentenced to three years' imprisonment (schwerer Kerker).

The Applicant states that he wished to call a medical expert during the proceedings to testify as to his health and recent diseases but that the Court rejected his request. However, the Court recognised that there were extenuating circumstances in the case and expressly took them into account when fixing the sentence at three years' imprisonment, the normal penalty for habitual criminals being between five and ten years.

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The Applicant states that for this reason he did not appeal from the decision of the Regional Court. The Public Prosecutor, on the other hand, did appeal to the Regional Court of Appeal which, on 29th April 1959 increased the sentence from 3 to 6 years' imprisonment, setting aside the lower court's grounds for its reduction.

The Applicant alleges that the trial was not held in public, that neither the Applicant himself nor his lawyer was present and that the Court only heard the arguments of the Prosecutor. The judgment of the Court itself indicates that the session was not in public and that only the Public Prosecutor was heard. It also confirms that the Applicant's sentence was increased on the ground that the Court did not accept the existence of any extenuating circumstances.

The Applicant subsequently applied to the District Court (Kreisgericht) of Krems on 16th September 1959 for a reconsideration of his case but this application was rejected on 30th September 1959.

THE ALLEGATIONS OF THE APPLICANT

Whereas, the Applicant alleges violations of:

1. Article 6, paragraph (3)(d) and Article 13 of the Convention in that during the proceedings the Regional Court of Vienna rejected his request for the calling of a medical expert as witness;

2. Article 6 of the Convention in that the proceedings before the Regional Court of Appeal were not held in public;

3. Article 6 of the Convention in that neither the Applicant himself nor his lawyer were allowed to be present during the proceedings before the Regional Court of Appeal and in that only the arguments of the Public Prosecutor were heard.

Whereas the Applicant now claims a new trial on the grounds of the alleged violation of Article 6 as described above.

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THE PROCEEDINGS BEFORE THE COMMISSION

Having regard to the Report dated 3rd August 1960 prepared in conformity with Rule 45, paragraph 1, of the Rules of Procedure of the Commission;

Having regard to the Commission's decision of 5th August 1960, in which:

(a) it rejected that part of the Application which relates to alleged violations of Article 6, paragraph (3)(d), Article 13 and Article 6 (the non-public character of the proceedings at the hearing of the Appeal) of the Convention;

(b) it decided to give notice, in accordance with Rule 45, paragraph (3)(b) of the Rules of Procedure, of the Application to the Government of Austria and to invite the Government to submit to the Commission, within a period of six weeks, its observations in writing as to the admissibility of the remainder of the Application which relates to the Applicant's allegations that Article 6, paragraphs (1) ("fair hearing") and (3)(c) were violated in that the Public Prosecutor but not the Applicant or his Counsel was heard when the Court of Appeal (Oberlandesgericht) of Vienna considered and upheld the Public Prosecutor's appeal and increased the sentence from three to six years;

Whereas the Respondent Government submitted its observations on 3rd October 1960, to which the Applicant replied in a letter of 4th November 1960.

THE LAW

As regards the alleged violations of Articles 6, paragraphs (3)(d) and 13 of the Convention:

Whereas under Article 26 of the Convention on Human Rights and Fundamental Freedoms the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law; and whereas under Austrian law the Applicant had the

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right to appeal to a higher court against the rejection of his request that a medical expert should be called to give evidence during the proceedings before the Regional Court of Vienna but he did not avail himself of this remedy; whereas, moreover, an examination of the case as it has been submitted, including an examination ex officio, does not disclose the existence of any special circumstances which might have absolved the Applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal; whereas it follows that the condition as to the exhaustion of domestic remedies at his disposal laid down in Article 26 has not been complied with by the Applicant; whereas, therefore, this part of the Application must be rejected in accordance with Article 27, paragraph (3), of the Convention;

As regards the alleged violation of Article 6 of the Convention in that the proceedings before the Regional Court of Appeal were not held in public:

Whereas the instrument of ratification deposited by Austria contains the following reservation:

"The provisions of Article 6 of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitutional Law";

Whereas the said Article 90 provides that:

"Hearings of proceedings in civil and criminal cases before the trial court shall be oral and public. Exceptions may be prescribed by law."

Whereas Article 294, paragraph 3, of the Austrian Code of Criminal Procedure does expressly prescribe that the Court of Appeal "takes the decision in a closed session ...";

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whereas, therefore, the Applicant's complaint in regard to the non-public character of the proceedings at the hearing of his appeal falls under the reservation made by the Austrian Government at the time of its ratification of the Convention; whereas it follows that this part of the Application is incompatible with the provisions of the Convention as they apply to the Respondent Government and must be rejected in accordance with Article 27, paragraph (2) of the Convention.

As regards the alleged violations of Article 6, paragraphs (1) and (3) (c) of the Convention:

Whereas Article 6, paragraph (1) of the Convention provides inter alia:

> "In the determination ... of any criminal charge against him everyone is entitled to a fair ... hearing ..."

and whereas Article 6, paragraph (3) (c) provides:

> "Everyone charged with a criminal offence has the following minimum rights: ... to defend himself in person or through legal assistance of his own choosing ..."

Whereas Article 294 of the Austrian Code of Criminal Procedure provides:

"1. The appeal shall be lodged with the Court of first instance within the time-limit specified in Section 284. It shall have staying effect only if it is directed against the type of penalty, or, where the accused is appealing against the severity of the penalty, if he does not himself declare his readiness to begin serving the sentence in the meantime.

2. A copy of the judgment must be served upon the appellant if this has not already been done. The appellant shall have the right to submit in duplicate a memorial stating the grounds for his appeal to the Court within fourteen days after notice of appeal has been given, or if a copy of the judgment has not been served upon him until after the lodging of the appeal, within fourteen days after such service. Either in his memorial, or in the notice of appeal, he must clearly state the circumstances on

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which the appeal is founded, otherwise no consideration can be given to it by the court of second instance. Notice of appeal containing the grounds therefor, or the appellant's memorial lodged within the prescribed time-limit, shall be communicated to the other party with the intimation that he may submit his rejoinder within 14 days.

3. After the rejoinder has been submitted, or after expiry of the prescribed time-limit therefor, all the documents in the case shall be laid before the court of second instance, which, sitting in camera, shall give judgment on the appeal after hearing the Public Prosecutor (Oberstaatsanwalt).

Whereas the Applicant alleges that the requirements of Article 6 of the Convention were not complied with in his case, in that when the Regional Court of Appeal heard the appeal neither he nor his lawyer was present although the Public Prosecutor was heard; that where the accused has had previous convictions, the prosecuting authorities, who go by the strict letter of the law, are a priori prejudiced; that he was denied the possibility of defending himself before a tribunal which rejected the existence of the extenuating circumstances considered relevant by the Court of first instance; that when the court of first instance which bases its judgment partly on its personal impression of the responsibility of the accused grants a mitigation of sentence on the grounds of extenuating circumstances, this impression and the human circumstances involved in the responsibility of the accused constitute the decisive elements in the deliberations at which the sentence is determined; that the submission of a rejoinder to the Attorney-General's appeal within 14 days does not in any way equal the effect of the presence of the accused or his lawyer and does not enable the court to form its impression of the accused; that the Public Prosecutor could not be objective in his presentation of the arguments before the Regional Court of Appeal as the aim of an appeal lodged by the Public Prosecutor is an attempt to secure from the Court of Appeal an aggravation of the sentence; that so far as he is aware no case has yet arisen where the Attorney-General has in any way corrected or withdrawn in the defendant's favour a petition for an aggravation of the sentence; that the present rules of procedure have been severely criticised by the Austrian Law Society and by the Press as being obsolete and in need of a reform.

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Whereas the Respondent Government submits that the proceedings before the Regional Court of Appeal do not infringe the rights guaranteed in Article 6 of the Convention; that when the Public Prosecutor appeals against a sentence rendered by a court of first instance notice of appeal must, under Section 294 (2) of the Austrian Code of Criminal Procedure, be communicated to the convicted person together with the information that he may submit a rejoinder within a period of 14 days; that the Court of Appeal thus takes cognisance of his objections to the Public Prosecutor's appeal and the two parties are then on an equal footing; that the defendant enjoys an advantage over the Public Prosecutor that, unlike the latter, he is not required to be objective; in that the prosecuting organs are not merely prosecutors, but like all other "authorities involved in criminal proceedings," required to adopt an objective attitude, and to give equal consideration to the circumstances militating in favour of or against the accused; that the fact that the Court of Appeal hears the Attorney-General before taking a decision does not mean that the latter is present when the voting takes place, but only that he is given an opportunity to express an opinion; that the Attorney-General in his statement may not, in any way, broaden the grounds of the public prosecutor's appeal or intensify the charge; that the effect of hearing the Attorney-General, who is bound by the rule of objectivity, is rather to give him the opportunity to withdraw any unjustified appeal lodged by a subordinate public prosecutor or to ensure that the law is upheld by entering an appeal for the annulment of erroneous judicial decisions injurious to the accused.

Whereas it is not contested that in the present case the appeal was decided after hearing the arguments of the representative of the Public Prosecutor in the absence both of the accused and his lawyer, in accordance with the procedure laid down in Section 294 (2) of the Austrian Code of Criminal Procedure; whereas therefore the question for determination in the present Application is the conformity or otherwise of this Section of the Code of Criminal Procedure with Article 6 of the Convention and, in particular, paragraphs (1) and (3) (c) thereof;

Whereas it is true that Article 27, paragraph (2), of the Convention requires the Commission to declare inadmissible any application from an individual which it considers to be "manifestly ill-founded"; and whereas the "travaux préparatoires" of the Convention reveal that the introduction of this special

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ground of inadmissibility into Article 27 of the Convention was due to the concern of the Contracting Parties to exclude from the consideration of the Commission applications which do not merit its attention; whereas it follows that at the present stage of the proceedings the task of the Commission is not to determine whether an examination of the case submitted by the Applicant discloses the actual existence of a violation of one of the rights and freedoms guaranteed by the Convention but only to determine whether it excludes any possibility of the existence of such a violation; whereas, moreover, in a long series of previous decisions the Commission has consistently acted on the principle that an application should be declared inadmissible as being manifestly ill-founded only when a preliminary examination of the case does not disclose any appearance of a violation of the Convention; and whereas in Applications Nos. 214/56 (De Becker against Belgium), 332/57 (Lawless against Ireland) and 343/57 (Schouw Nielsen against Denmark) it was on the basis of this principle that the Commission decided not to reject as manifestly ill-founded but to retain for closer examination certain of the complaints contained in those Applications;

Whereas in the present case the Parties have submitted in writing their observations concerning the admissibility of the Applicant's complaint in regard to the procedure followed by the Regional Court of Appeal; whereas, however, a preliminary examination of the information and arguments submitted by the Parties does not enable the Commission to determine here and now whether the facts of this complaint exclude any possibility of a violation of the Convention; whereas, moreover, to carry the preliminary examination of the complaint beyond the point which it has now reached by pursuing the matter further, whether in written or oral proceedings, would necessarily entail going fully into the merits of the case; whereas it follows that the Applicant's complaint in regard to the procedure followed by the Regional Court of Appeal in dealing with the appeal in his case cannot be regarded as manifestly ill-founded within the meaning of Article 27, paragraph 2, of the Convention and cannot be declared inadmissible on that ground;

Whereas no other ground for inadmissibility has been alleged in the pleadings of the Government or found by the Commission ex officio;

For these reasons, and without in any way prejudging the merits of the case the Commission

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Declares admissible and retains that part of the Application which relates to the compatibility of Section 294, paragraph 3, of the Austrian Code of Criminal Procedure and of the procedure followed by the Regional Court of Appeal in the present case with the provisions of Article 6, paragraphs 1 and 3 (c) of the Convention."

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B. APPLICATION No. 789/60 JOHANN DUNSHIRN

24. Point at issue

In his letter of introduction and in the application form submitted by him the Applicant alleged that there had been a violation of the Convention as stated above in Part II, paragraph 10. The Commission, accordingly, had thus to decide whether the following Application was admissible:

- that Article 6 of the Convention had been violated in that neither the Applicant nor his lawyer was allowed to be present during the proceedings before the Court of Appeal of Vienna and in that only the arguments of the Chief Public Prosecutor were heard.

25. The submissions of the Parties on the question of admissibility

The Respondent Government submitted that the Application was manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention. It referred to its pleadings submitted in respect of Application No. 596/59 (see above paragraph 22 (c). It further submitted that the Applicant had not appealed against the decision of the Regional Court of Vienna but that, when appeal had been lodged by the Public Prosecutor, he had instructed his Counsel to file a reply in which he simply asked for the appeal to be dismissed and made no attempt to refute the arguments of the Prosecutor. In principle, the hearing of the Prosecutor is in no way prejudicial to the Applicant

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as no facts can be raised other than those known to both Parties, and the Court of Appeal is bound to take into consideration ex officio all the elements of the case, including those which are favourable to the accused. The Prosecutor has no possibility to influence the court and, in the present case, did not enter into details but simply asked that the appeal be upheld. The submission of an appeal was justified as the extenuating circumstances of the case were less significant than the aggravating circumstances(1).

The Applicant submitted that the provisions of the Convention were not complied with in that neither he nor his representative was allowed to be present at the proceedings before the Court of Appeal of Vienna although the Court heard the Public Prosecutor(2).

26. The text of the decision on the admissibility of the Application

As stated in paragraph 13, the Commission, on 15th March 1961, declared the Application to be admissible. The text of the decision was as follows:

HAVING REGARD to the Application lodged on 1st July 1960 by Johann DUNSHIRN against Austria and registered on 12th July 1960 under file No. 789/60,

HAVING REGARD to the Declaration made in accordance with Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms on 3rd September 1958, whereby the Government of Austria recognised for a period of three years the competence of the European Commission of Human Rights to receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention.

HAVING DELIBERATED,

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(1) The Statement of 20th February 1961 pages 1-4. The arguments set forth in this part of the Report are a brief summary only of the contentions and a full statement of the submissions will be found in Part IV, paragraph 31.

(2) The Applicant's letter of 9th September 1960 page 2.

THE FACTS

Whereas the facts of the case may be summarised as follows:

The Applicant is an Austrian citizen born in 1931.

On 19th February 1960 the Applicant was convicted by the Regional Court (Landesgericht) of Vienna on divers charges of larceny; the Court took into consideration certain extenuating circumstances, including inter alia, the fact that the Applicant had made restitution to his victims of 90% of the amount of money which he had stolen from them, and sentenced the Applicant to 14 months' imprisonment with the additional penalty of "sleeping hard" four times a year.

The Applicant accepted this sentence upon his lawyer's advice.

It appears that the Applicant had previous convictions and that shortly before this last conviction he had been released on probation from a labour institution (Arbeitshaus) two years before the expiration of his sentence. This release was subject to the condition that in the event of this Applicant being convicted of a further offence he would have to complete the full term in the labour institution. The Regional Court appears to have regarded as an extenuating circumstance the fact that most of the stolen money had been returned to the owners and had taken this into account in fixing his sentence.

The Applicant states that his lawyer made no representation as to the amount of his sentence but that the Public Prosecutor appealed from the decision of the Regional Court of Vienna to the Court of Appeal (Oberlandesgericht) in Vienna. On 13th April 1960, the Court of Appeal, after hearing the Public Prosecutor in camera but without hearing the Applicant or his lawyer, stated that it did not accept the existence of extenuating circumstances and increased the Applicant's sentence from 14 months to 30 months.

The Applicant states that the increase of his sentence has resulted in his having to serve two years in a labour institution and he alleges that the Court of Appeal in effect increased his sentence from 14 months to 54 months.

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The Applicant states that no further appeal is available to him either in respect of the original conviction or as to the increase of his sentence.

Whereas the Applicant now asks for a reduction of the sentence imposed upon him by the Court of Appeal on the grounds that it was rendered in his absence and without his being heard on the question of its increase.

Whereas the Applicant alleges violations of the Convention.

The Proceedings before the Commission

Having regard to the Report dated 1st December 1960 prepared in conformity with Rule 45, paragraph 1 of the Rules of Procedure of the Commission,

Having regard to the Commission's decision of 19th December 1960 in which it decided:

(a) to give notice in accordance with Rule 45, paragraph (3) (b) of the Rules of Procedure of the Application to the Government of Austria;

(b) to point out to the Respondent Government the similarity of the allegations in the present Application and those made in Application 596/59 which was declared admissible on 19th December 1960, and to suggest that the observations submitted, in respect of Application 596/59, cover the issues of the present Application.

Having regard to the letter of 20th February 1961 from the Respondent Government in which, exceptionally and without prejudice to future cases and solely for reasons of economy of procedure, it raised no objection to the present Application being declared admissible by the Commission in order that the two Applications should be dealt with together.

Having regard to the statement on this point of the Respondent Government as communicated to the Commission in its letter of 20th February;

Having regard also to the observations of 3rd October 1960 submitted by the Government in regard to Application No. 596/59,

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THE LAW

Whereas Article 6, paragraph (1) of the Convention provides inter alia:

> "In the determination ... of any criminal charge against him everyone is entitled to a fair ... hearing ..."

and whereas Article 6, paragraph (3) (c) provides:

> "Everyone charged with a criminal offence has the following minimum rights: ... to defend himself in person or through legal assistance of his own choosing ..."

Whereas Article 294 of the Austrian Code of Criminal Procedure provides:

1. The appeal shall be lodged with the Court of first instance within the time-limit specified in Section 284. It shall having staying effect only if it is directed against the type of penalty, or, where the accused is appealing against the severity of the penalty, if he does not himself declare his readiness to begin serving the sentence in the meantime.

2. A copy of the judgment must be served upon the appellant if this has not already been done. The appellant shall have the right to submit in duplicate a memorial stating the grounds for his appeal to the Court within fourteen days after notice of appeal has been given or, if a copy of the judgment has not been served upon him until after the lodging of the appeal, within fourteen days after such service. Either in his memorial, or in the notice of appeal, he must clearly state the circumstances on which the appeal is founded, otherwise no consideration can be given to it by the Court of second instance. Notice of appeal, containing the grounds therefor, or the appellant's memorial lodged within the prescribed time-limit, shall be communicated to the other party with the intimation that he may submit his rejoinder within 14 days.

3. After the rejoinder has been submitted, or after expiry of the prescribed time-limit therefor, all the documents in the case shall be laid before the Court of second instance which, sitting in camera, shall give judgment on the appeal after hearing the Public Prosecutor (Oberstaatsanwalt).

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Whereas the Applicant alleges that the requirements of Article 6 of the Convention were not complied with in his case in that when the Court of Appeal heard the appeal neither he nor his lawyer was present although the Public Prosecutor was heard;

Whereas the Respondent Government submitted that, in accordance with paragraph 175 of the Austrian Criminal Code of 1945 and paragraph 283 of the Austrian Code of Criminal Procedure, 1960, the appeal by the Prosecution's office against the Applicant's sentence in the Regional Criminal Court (Landesgericht für Strafsachen) of Vienna to the Court of Appeal (Oberlandesgericht) in Vienna was formally in order; that, further, the appeal was justified in substance as the extenuating circumstances mentioned in the judgment of the Regional Court were less significant that the particularly aggravating circumstances constituted by the recidivist character of the offence; that the Applicant, who was represented by Counsel before the Regional Court did not appeal against his sentence but later instructed his Counsel, to whom the Public Prosecutor's appeal had been communicated under paragraph 294 (2) of the Code of Criminal Procedure, to file a counter-memorial (Gegenaüsserung) in which he asked for the appeal to be dismissed but did not attempt to refute the arguments by the Prosecution;

that, in accordance with paragraph 294 (3) of the Code of Criminal Procedure, the decision of the Court of Appeal was taken after the hearing of the Public Prosecutor in camera; that the hearing of the Public Prosecutor can in no way prejudice the accused as no facts can be raised other than those known to the parties from the documents in the case and, further, the Court of Appeal is bound, under paragraph (3) of the Code of Criminal Procedure, to take into consideration ex officio all elements favourable or unfavourable to the accused regardless of whether they have been referred to by either party; that the Chief Public Prosecutor has accordingly no possibility to influence the Court of Appeal and in fact, in the present case, entered into no details but simply asked that the appeal be upheld;

that, as the Respondent Government has observed in regard to the similar Application lodged against it by Franz PATAKI (No. 596/59), the Court of Appeal thus takes cognisance of the accused's objections to the Public Prosecutor's appeal and the two parties are then on an equal footing; that the defendant enjoys an advantage over the Public Prosecutor as, unlike the latter, he is not required to be objective and, moreover, has the chance that unjustified grounds of appeal advanced by

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subordinate public prosecutors may be withdrawn; that he has also the right of making a plea of nullity (Nichtigkeitsbeschwerde); that, in this respect, it is not correct, as was alleged by Pataki, that "there has never yet been a single case in which the Chief Public Prosecutor has withdrawn, in favour of the convicted person, an appeal for a heavier sentence"; that, in fact, at least ten per cent of criminal appeals by public prosecutors are withdrawn by the Chief Public Prosecutor; that, in accordance with paragraph 294 (3) of the Code of Criminal Procedure, the Chief Public Prosecutor at the Court of Appeal is bound to lodge a plea of nullity "in the interest of the law" in regard to any decision which appears to be contrary to the law and which is to the prejudice of the accused; that, if the Court of Appeal finds that there has been such a violation of the law to the prejudice of the accused, it quashes the decision concerned; that if it finds, however, that there has been a violation of the law to the advantage of the convicted person, it records its finding but the decision concerned remains valid; that the action of the Public Prosecutor in criminal appeal proceedings can accordingly never be against the interests of the accused and even may be to his advantage; that in the present case the Court of Appeal, in strict compliance with all the rules of procedure laid down for its observance, upheld the Public Prosecutor's appeal and increased the Applicant's sentence to one of two and a half years' imprisonment with one day of "sleeping hard" every three months; that the grounds stated by the Court of Appeal were that the extenuating circumstances carried little weight while the reversion to crime by the Applicant during a period of probation following his conditional release from a labour institution constituted an aggravating circumstance; that the hearing of the Public Prosecutor in the present case in no way prejudiced the rights of the accused to defend himself within the meaning of Article 6 of the Convention;

Whereas the Commission has also ex officio taken note of the observations of the Respondent Government in the Application (No. 596/59) of Franz PATAKI against the Respondent Government;

Whereas it is true that Article 27, paragraph (2), of the Convention requires the Commission to declare inadmissible any application from an individual which it considers to be "manifestly ill-founded"; and whereas the travaux préparatoires of the Convention reveal that the introduction of this special ground of inadmissibility into Article 27 of the Convention was due to the concern of the Contracting Parties to exclude from the consideration of the Commission

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applications which do not merit its attention; whereas it follows that at the present stage of the proceedings the task of the Commission is not to determine whether an examination of the case submitted by the Applicant discloses the actual existence of a violation of one of the rights and freedoms guaranteed by the Convention but only to determine whether it excludes any possibility of the existence of such a violation; whereas, moreover, in a long series of previous decisions the Commission has consistently acted on the principle that an application should be declared inadmissible as being manifestly ill-founded only when a preliminary examination of the case does not disclose any appearance of a violation of the Convention; and whereas in Applications Nos. 214/56 (De Becker against Belgium), 332/57 (Lawless against Ireland), 343/57 (Schouw Nielsen against Denmark), 524/59 (Ofner against Austria), 596/59 (Pataki against Austria), and 617/59 (Hopfinger against Austria) it was on the basis of this principle that the Commission decided not to reject as manifestly ill-founded but to retain for closer examination certain of the complaints contained in those Applications;

Whereas in the present case a preliminary examination of the information and arguments submitted to the Commission by the Parties does not enable it to determine here and now whether the facts of the complaint that the procedure followed by the Court of Appeal violated the Convention exclude any possibility of such violation; whereas, moreover, to carry the preliminary examination of the complaint beyond the point which it has now reached by pursuing the matter further, whether in written or oral proceedings, would necessarily entail going fully into the merits of the case; whereas it follows that the Applicant's complaint in regard to the procedure followed by the Court of Appeal in dealing with the appeal in his case cannot be regarded as manifestly ill-founded within the meaning of Article 27, paragraph 2 of the Convention, and cannot be declared inadmissible on that ground;

For these reasons, and without in any way prejudging the merits of the case the Commission

Declares admissible and accepts the Application.

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PART IV

ESTABLISHMENT OF THE FACTS AND OPINIONS OF THE COMMISSION

27. Point at issue in the two Applications

In the light of the Commission's decisions of 19th December 1960 and 15th March 1961 on admissibility, as set out in Part III, paragraphs 23 and 26 of this Report, the task of the Sub-Commission was to establish the facts in regard to the following point:

> Whether or not the provisions of Section 294, paragraph 3 of the Austrian Code of Criminal Procedure and the procedure followed by the Regional Court of Appeal, as applied in the present cases, were compatible with Article 6, paragraphs (1) and (3)(c) of the Convention.

The opinion of the Commission is set out at the end of this part of the report.

28. The relevant provisions of Article 6 of the Convention read as follows:

paragraph (1):

> "In the determination ... of any criminal charge against him everyone is entitled to a fair ... hearing ...";

paragraph (3)(c):

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ... to defend himself in person or through legal assistance of his own choosing ..."

29. Section 294 of the Austrian Code of Criminal Procedure (as promulgated on 24th July 1945), states as follows:

> "1. The appeal shall be lodged with the court of first instance within the time-limit specified in Section 284. It shall have staying effect only if it is directed against the type of penalty or, where the accused is appealing against the severity of the penalty, if he does not himself declare his readiness to begin serving the sentence in the meantime.

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2. A copy of the judgment must be served upon the appellant if this has not already been done. The appellant shall have the right to submit in duplicate a Memorial stating the grounds for his appeal to the Court within fourteen days after notice of appeal has been given or, if a copy of the judgment has not been served upon him until after the lodging of the appeal, within fourteen days after such service. Either in his memorial, or in the notice of appeal, he must clearly state the circumstances on which the appeal is founded, otherwise no consideration can be given to it by the Court of second instance. Notice of appeal, containing the grounds therefor, or the appellant's memorial lodged within the prescribed time-limit, shall be communicated to the other party with the intimation that he may submit his rejoinder within fourteen days.

3. After the rejoinder has been submitted, or after expiry of the prescribed time-limit therefor, all the documents in the case shall be laid before the Court of second instance which, sitting in camera, shall give judgment on the appeal after hearing the Chief Public Prosecutor (Oberstaatsanwalt)."

30. As mentioned in Part III, paragraphs 23 and 26, the Commission, in its decisions of 19th December 1960 and 15th March 1961, found that the Applications of Pataki and Dunshirn respectively could not be regarded as manifestly ill-founded in so far as they concerned alleged violations of Article 6, paragraphs (1) and (3)(c) of the Convention.

31. Summary of submissions of the Parties to the Commission (at the stage of admissibility)

A. Application No. 596/59, FRANZ PATAKI (1)

The Respondent Government, in its observations of 3rd October 1960 submitted:

(a) that the proceedings before the Regional Court of Appeal did not infringe the rights guaranteed in Article 6 of the Convention; when the Public Prosecutor appeals against a sentence rendered by a court of first instance, notice of appeal must,

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(1) cf. Part III, paragraph 22.

under Section 294 (2) of the Austrian Code of Criminal Procedure, be communicated to the convicted person together with the information that he may submit a reply within a period of fourteen days. The Court of Appeal thus takes cognisance of any objections made by him to the Public Prosecutor's appeal and the two Parties are then on an equal footing;

(b) that the representatives of the prosecution are not simply prosecutors but, like all other "authorities involved in criminal proceedings", are required to adopt an objective attitude and to give equal consideration to circumstances which are in favour of or against the accused. The fact that the Court of Appeal hears the Chief Public Prosecutor before taking a decision does not mean that the latter is present when the voting takes place, but only that he is given an opportunity to express an opinion. The Chief Public Prosecutor in his statement may not in any way extend the grounds of the Public Prosecutor's appeal or increase the nature of the charge. The effect of hearing the Chief Public Prosecutor is to give him the opportunity to withdraw any unjustified appeal lodged by a subordinate Public Prosecutor or to appeal for the annulment of an erroneous judicial decision of which a convicted person might have been the victim.

The Applicant, in his reply of 4th November 1960, submitted:

(a) that the requirements of Article 6 of the Convention were not complied with in his case, in that, when the Regional Court of Appeal heard the appeal, neither he nor his lawyer was present although the Chief Public Prosecutor was heard. Where the convicted person has had previous convictions, the prosecuting authorities, who observe the strict letter of the law, are a priori prejudiced. He was denied the possibility of defending himself before a tribunal which, in fact, rejected the existence of the extenuating circumstances considered relevant by the court of first instance. When the court of first instance, which bases its judgment partly on its personal impression of the responsibility of the accused, mitigates a sentence

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on the grounds of extenuating circumstances, this impression and the human circumstances involved in the responsibility of the accused constitute the decisive elements in the deliberations at which the sentence is determined;

(b) that, when proposing the initial judgment, the President of the Court in his oral statement said that, in view of the personal impression it had gained from the accused, the Court was convinced that in committing the offences in question his object had been to see his aged mother again after nineteen years;

(c) that the submission of a reply to the Public Prosecutor's appeal within fourteen days does not in any way equal the effect of the presence of the convicted person or his lawyer and does not enable the Court to form its impression of the convicted person. The Chief Public Prosecutor could not be objective in his presentation of the arguments before the Regional Court of Appeal as the aim of an appeal lodged by the Public Prosecutor is to secure from the Court of Appeal an increase of sentence. In the absence of the convicted person, who is deprived of any possibility of defending himself in the Court of Appeal, and after a hearing of the Attorney-General alone, the decision reached is bound to be unfavourable to the defendant. Every legally constituted State in the free and democratic world, excepting Austria, applies the principle of Roman law known as "Audiatur et altera pars";

(d) that, so far as the Applicant was aware, no case has yet arisen where the Chief Public Prosecutor has in any way corrected or withdrawn in the defendant's favour a petition for an increase of sentence.

B. Application No. 789/60 JOHANN DUNSHIRN(1)

As mentioned in Part II, paragraph 12, the Commission did not invite the Parties to submit observations on the question of admissibility.

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(1) cf. Part III, paragraph 25.

The Respondent Government, however, filed a written statement of 20th February 1961 in which it referred to its pleadings in Application 596/59 (Franz Pataki) and, in addition to the arguments set forth in its observations of 3rd October 1960, submitted:

(a) that, in accordance with paragraph 175 of the Austrian Criminal Code of 1945 and paragraph 283 of the Austrian Code of Criminal Procedure 1960, the appeal by the Public Prosecutor's office against the Applicant's sentence in the Regional Court of Vienna to the Court of Appeal in Vienna was formally correct. The appeal was justified in substance as the extenuating circumstances mentioned in the judgment of the Regional Court were less significant than the particularly aggravating circumstances constituted by the recidivist character of the offence;

(b) that the Applicant, who was represented by Counsel before the Regional Court, did not appeal against his sentence but later instructed his Counsel, to whom the Public Prosecutor's appeal had been communicated under paragraph 294 (2) of the Code of Criminal Procedure, to file a counter-memorial in which he asked for the appeal to be dismissed but did not attempt to refute the arguments of the Prosecution;

(c) that, in accordance with paragraph 294 (3) of the Code of Criminal Procedure, the decision of the Court of Appeal was taken after the hearing of the Public Prosecutor in camera; the hearing of the Public Prosecutor can in no way prejudice the accused as no facts can be raised other than those known to the parties from the documents in the case and, further, the Court of Appeal is bound, under paragraph 294 (3) of the Code of Criminal Procedure, to take into consideration ex officio all elements favourable or unfavourable to the accused regardless of whether they have been referred to by either party. The Chief Public Prosecutor has accordingly no possibility to influence the Court of Appeal and in fact, in the present case, entered into no details but simply asked that the appeal be upheld;

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(d) that the Applicant had also the right of making a plea of nullity (Nichtigkeitsbeschwerde) and that, in this respect, it is not correct, as was alleged by Pataki, that "there has never yet been a single case in which the Chief Public Prosecutor has withdrawn, in favour of the convicted person, an appeal for a heavier sentence"; in fact, at least ten per cent of criminal appeals by public prosecutors are withdrawn by the Chief Public Prosecutor;

(e) that, in accordance with paragraph 294 (3) of the Code of Criminal Procedure, the Chief Public Prosecutor at the Court of Appeal is bound to lodge a plea of nullity 'in the interest of the law' in regard to any decision which appears to be contrary to the law and which is to the prejudice of the accused. If the Court of Appeal finds that there has been such a violation of the law to the prejudice of the accused, it quashes the decision concerned. If it finds, however, that there has been a violation of the law to the advantage of the convicted person, it records its finding but the decision concerned remains valid;

(f) that, in the present case, the Court of Appeal, in strict compliance with the rules of procedure, upheld the Public Prosecutor's appeal and increased the Applicant's sentence to two and a half years' imprisonment with one day of "sleeping hard" every three months. The grounds stated by the Court of Appeal were that the extenuating circumstances carried little weight, while the reversion to crime by the Applicant during a period of probation following his conditional release from a labour institution constituted an aggravating circumstance.

The Applicant, in his letter of introduction of 1st July 1960, submitted that the requirements of Article 6 of the Convention were not complied with in his case.

32. Summary of submissions of the Parties to the Sub-Commission

During the establishment of the facts by the Sub-Commission, the written submissions of the Parties were contained in an exchange of written pleadings and the oral submissions were made at the hearing before the Sub-Commission on 12th January 1962.

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Memorial by the Applicants

The Applicants' Counsel, in his memorial of 27th July 1961, recapitulated the arguments put forth by the Applicants (see above, paragraph 31) and repeated the submission made by them that the proceedings before the Court of Appeal violated Article 6, paragraphs (1) and (3)(c) of the Convention. He stated, in particular, that the Chief Public Prosecutor was present at the time when the Court voted on the case. The Austrian Minister of Justice had recognised the need for a reform by stating on the Austrian Barristers' Day in 1960 as follows:

> "The principle of treatment on equal footing between the governmental Body of Public Prosecution and the defence in criminal proceedings will be accorded full account. At non-public consultations of the Court at which the State Attorney is present, the defence in the future will also always be present if the legislative body gives its agreement. Similarly, on principle, it should no longer happen that appeals can be decided across the table concerning the fate of the defendant during proceedings of a legal measure without the Court of Appeals having been confronted with the defendant."(1)

Counter-Memorial by the Respondent Government

The Respondent Government, in its Counter-Memorial of 20th October 1961, submitted that there had been no violation of Article 6 of the Convention.

The Government made the following submission:

(a) that the right of every person, as laid down in Article 6, paragraph (1) of the Convention "to a fair and public hearing within a reasonable time", does not mean that an accused person must make a personal and oral appearance before the court at every stage of the proceedings. In Austria this right is granted, in principle, only in respect of proceedings in courts of first instance. Here, Austrian law goes even

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(1) Memorial, pages 5-15.

further than the Convention, since a conviction in contumaciam, namely, in the absence of the accused during the principal proceedings, is always excluded in the case of serious offences. However, when the case comes before the Court of Appeal, the facts have already been established in the Court of first instance and no new facts can be submitted by either the accused or the prosecution. The proceedings simply comprise a judicial examination of legal and procedural questions and a fair hearing does not require a personal appearance by the convicted person but only an examination of his written objections to the verdict. The Government considered this view to be confirmed by the fact that this procedure is common to most European judicial systems and also by the fact that the French text of Article 6, paragraph 1 does not refer to a personal hearing but merely says "que sa cause soit entendue équitablement";

(b) that the resolution adopted in 1959 by the International Congress of Jurists in New Delhi concerning the right to defence stated that, in order to be able adequately to prepare his defence, an accused person:

"1. Should at all times be entitled to the assistance of a legal adviser of his own choice and to have freedom of communication with him.

2. Should be given notice of the charge with sufficient particularity.

3. Should have a right to produce witnesses in his defence and to be present when this evidence is taken.

4. Should, at least in serious cases, be informed in sufficient time before the trial of the nature of the evidence to be called for by the prosecution.

5. Should be entitled to be present when any evidence for the prosecution is given and to have the witnesses for the prosecution cross-examined."

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This declaration clearly referred to proceedings in courts of first instance while, in respect of appeal proceedings, the resolution stated as follows:

> "Every conviction and sentence and every refusal of bail should be challengeable before at least one higher court. It is essential that there should be adequate remedies for the breach of any of the rights referred to above. The nature of those remedies must necessarily depend on the nature of the particular right infringed and the system of law which exists in the country concerned. The different systems of law provide different ways of controlling the activities of the police and of the prosecuting and enquiring authorities."

(c) that documents 9 Bs 722/59 (PATAKI) and 12 Bs 211/60 (DUNSHIRN) of the Vienna Court of Appeal merely state that the Office of the Chief Public Prosecutor proposed that the appeal lodged by the Office of the Public Prosecutor should be accepted without submitting any arguments or adding anything to the application made by the Office of the Public Prosecutor. It is not now possible to ascertain what the Chief Public Prosecutor said at the non-public hearings of 29th April 1959 or of 15th April 1960. It is neither possible to ascertain the exact statement made by the Judge Rapporteur or to separate it from the deliberations and records of voting or to ascertain the statement of the Chief Public Prosecutor on the content of the written statement. The deliberations at such a hearing follow a written motion by the Judge Rapporteur which is prepared by him independently of the parties to the case and solely on the basis of a study of the case-file;

(d) that, in the DUNSHIRN case, it may be seen from Doc. 12 Bs 211/60 of the Vienna Court of Appeal that the increase in the sentence was decided upon independently of the written or oral statements of the Chief Public Prosecutor. The last page of that document (top-right corner) contains the following remark by the President of the Appeal Senate: "Dunshirn - relapse after conditional release!" Thus, even before the Office

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of the Public Prosecutor could take up any definite position in the matter, the President of the Court of Appeal informed the Rapporteur that, in his opinion, the appeal lodged by the Office of the Public Prosecutor was justified. Hence, it was the aggravating circumstances raised by the President of the Court of Appeal that served as a ground for justifying the increase in the sentence imposed on DUNSHIRN;

(e) that the Applicant's contention is equally incorrect that "throughout the whole proceedings in the Court of Appeal neither the accused nor his counsel obtained an oral or written hearing";

(f) that the principle of a fair hearing was fully observed by taking into consideration the written statement of both parties. As the judgment on the appeal shows, the sentence was in both cases increased on the basis of the grounds put forward in the petition of appeal by the Office of the Public Prosecutor, as the Court of Appeal shared the view that the application of the provisions allowing for a mitigation of sentence was inappropriate in the cases under review. The views expressed by the Chief Public Prosecutor did not play a decisive part in the Court's decision to increase the sentence;

(g) that the Government agreed with the Applicants' Counsel that when determing, and also when increasing, a sentence, the personal impression made by the accused is of decisive importance. This is also the view of the overwhelming majority of Austrian judges, public prosecutors and jurisprudence. Modern policy in criminal matters is that in judging an offence, the offender is more important than the offence. It is regrettable that the Code attaches scant importance to the re-examination of the nature of a sentence and also that, above all, it is not possible for the courts, which are concerned with appeals only, to form a definite impression of the accused and examine in his presence the psychological reasons for his acts. The European Commission, however, cannot take up this question which, in order to avoid publicity, the Austrian Government has reserved for itself. The fact must not be overlooked that in certain circumstances public appeal proceedings may entail certain disadvantages for the accused. The courts of appeal are usually at a

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great distance from the place of residence of the appellant who in many cases, because of the time factor or on financial grounds, does not wish to go to the trouble of personally appearing before the court of appeal, since in any case the question of his guilt no longer arises and, as a rule, he is unable to make any new submission in connection with his case. Hence, this whole question should also be considered from the point of view of whether the non-participation of the accused in public oral proceedings would not entail greater disadvantages for him than appeal proceedings in camera, where account is taken of the written statements submitted by both parties;

(h) that the role of the Public Prosecutor is not that of the Attorney-General who performs the impartial task of ensuring the observance of the law. The Office of the Chief Public Prosecutor is the prosecuting authority and, in accordance with the principle of decentralisation, could reserve for itself any criminal case coming within its province and initiate proceedings accordingly. However, the meaning of Article 294, paragraph 3, of the Code is that the Chief Public Prosecutor, in accordance with the higher prerogatives granted him, himself determines whether the appeal of the Public Prosecutor should be maintained and whether the sentence rendered by the ordinary (first) court was adequate or too lenient. The Chief Public Prosecutor, as the prosecuting official in the Court of Appeal, has to adopt a definite position on all these questions. It is a principle of Austrian legal tradition that, whenever the Public Prosecutor is heard by a court in the absence of the accused, he shall adopt a restrained attitude. Thus, in many cases the interests of the accused are better served by the comments of the Chief Public Prosecutor, which cover all considerations, than by his own statements which the court already knows to be biased in his own favour.

The Government referred also to the relevant arguments in the pleadings of the same date in Applications 524/59 OFNER and 617/59 HOFFINGER.(1)

33. Oral hearing

At the oral hearing before the Sub-Commission on 12th January 1962 the Parties made submissions as follows:

(1) Countor-Memorial, pages 2-6. ./.

Counsel for the Applicant stated that the equality of the Parties had been maintained until the oral hearing. It was established that the Chief Public Prosecutor was present. Although it could not be ascertained whether or not he had played an active part at the hearing, it was obvious that he was there in order to be heard on the appeal lodged by the Public Prosecutor. In his written appeal in the Pataki case, the Public Prosecutor had requested that the sentence should be increased and that the exceptional right to mitigation of sentence should not be accepted. The Applicant had, however, submitted a rejoinder setting out the human aspects of the case which, together with a personal impression of the accused, had guided the court of first instance in fixing the sentence. The rejoinder was passed over in silence in the decision of the Court of Appeal, whereas the arguments of the Public Prosecutor were set out in detail. It was a clear violation of the Convention that, in the proceedings before the Appeal Court, the Chief Public Prosecutor had the opportunity on two occasions of giving his views on the appeal lodged by the Public Prosecutor and of supporting it, whereas the defence was in general ignored.

In the Dunshirn case it was likewise established beyond doubt that the Chief Public Prosecutor was present throughout the entire session and during the deliberations.(1)

The Respondent Government submitted that the appeal lodged by the Public Prosecutor in the Pataki case had been examined by the President of the Chamber of the Court of Appeal and that he transmitted the file to the Chief Public Prosecutor's Office for "suggestions and views" only to ascertain whether the latter supported the appeal (if not, the decision of the lower court remained valid). The Judge-Rapporteur arrived at the conclusion that the grounds for mitigation relied upon by the lower court did not exist. During the hearing on 29th April 1959 he made an oral report to that effect and proposed an increase of sentence from three to six years. The Chief Public Prosecutor did not express any opinion on the matter; he was present, but played no active part. He was heard only in writing in the same way as the defence.

He further submitted that the same observations applied to the Dunshirn case and pointed out that the sentence as increased was still only half the minimum penalty provided for by law(2).

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(1) Verbatim Record, pages 65-66 and 67-68
(2) Verbatim Record, pages 63-63, 66-67, 68-69.

Findings and Opinion of the Commission

A. The facts

34. In accordance with Article 28 of the Convention, the Sub-Commission undertook an examination of the cases with a view to ascertaining the facts. In the course of the written and oral proceedings, the parties made certain statements and the Austrian Government placed the complete files of the cases at the disposal of the Sub-Commission for the purpose of establishing the facts.

35. On the basis of this examination, the findings of the Sub-Commission were as follows:

1. Application No. 596/59 Franz Pataki

The Applicant is an Austrian citizen who was born in 1920 in Hungary and is an interpreter by profession.

During the war he was interned in the concentration camp of Buchenwald as a habitual criminal and, prior to the facts set out below, he had several convictions on various criminal charges. On 9th December 1957 the Applicant was released on probation from the Labour Institution (Arbeitshaus) of Suben.

He states that after his release he went to France and Belgium, that he was accepted as an interpreter for the universal exhibition (EXPO) in Brussels for the Summer of 1958 but that owing to his criminal record he was notified that he could no longer be employed. He states further that he was not able to obtain any other regular employment. In Paris the Applicant received information that his mother, who lived in Israel, had recently suffered a stroke at the age of almost 80 and he consequently decided to go to Haifa to visit her, in particular, as he had not seen her since 1939. He states that, in order to pay for the voyage, he obtained money by committing various crimes. After a month in Israel (the duration of his visa) he returned to Turkey in 1958 where he was taken ill with meningitis and he further states that he committed theft to pay for the hospital bill.

In January 1958, the Vienna police received information from a French national that the Applicant had defrauded her of various objects, and, on 3rd February 1958, the District Court of Steyr decided to open a preliminary examination against the Applicant under Articles 197 and 200 of the Austrian Criminal Code. On 6th February 1958 the District Court issued an arrest

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order against the Applicant and in the following months the police received information from persons living in Switzerland, Germany, Austria and Turkey that they had been victims of various criminal acts for which the Applicant was responsible. On 24th October 1958 the Regional Court of Vienna, which has competence to deal with crimes committed by Austrian citizens abroad, renewed the arrest order against the Applicant and charged him with offences under Articles 171 and 173 (theft), 197, 200, 208 and 8 (fraud and attempted fraud) of the Austrian Criminal Code. The Applicant had, however, on 14th October 1958 been arrested by the Swiss police in Zurich and charged with frauds committed in Switzerland and in Greece against persons of Swiss nationality. On 3rd December 1958, the Public Prosecutor of Zurich drew up the indictment and, on 17th December 1958, the Applicant was convicted by the Court of Zurich and, at the request of the Public Prosecutor, sentenced to three months' imprisonment.

On 14th January 1958, having served this sentence in a Swiss prison, the Applicant was handed over to the Austrian police at Feldkirch and, on 17th February 1959, the Applicant was indicted by the Public Prosecutor of Vienna on seven charges of theft and fraud committed in the period from December 1957 to June 1958. Dr. Danemark was appointed lawyer for the defence.

On 24th March 1959 the Applicant was convicted by the Regional Court of Vienna and sentenced to three years' imprisonment.

The Applicant alleges that he asked to be allowed to call a medical expert during the proceedings to testify as to his recent illnesses but that the Court rejected his request. The Court recognised, however, that there were extenuating circumstances in the case and expressly took them into account when imposing a sentence of three years' imprisonment, the normal penalty for habitual criminals being between five and ten years.

According to the Proces-Verbal of the proceedings before the Court, the Applicant, upon his lawyer's advice, accepted this sentence whereas the Public Prosecutor announced that he intended to appeal and, in fact, two days later formally lodged an appeal with the Regional Court. On 3rd April 1959 the Public Prosecutor stated the grounds of his appeal in a document submitted to that Court and communicated to the Applicant. The Public Prosecutor asked the Court of Appeal (Oberlandesgericht) to increase the sentence so as to bring it within the limits provided for in the Criminal Code (5 to 10 years' imprisonment).

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He submitted that the courts could only reduce sentences below the minimum term in "very important and persuasive conditions" which did not exist in the Applicant's case. On 13th April 1959, as provided for in Article 294 (2) of the Code of Criminal Procedure, the Applicant's lawyer filed a counter-memorial (Gegenäusserung) with the Regional Court in which he submitted to the Court of Appeal that the Prosecutor's appeal should be rejected and, in particular, he stressed the extenuating circumstances taken into consideration by the Regional Court.

The case-file was transmitted on 23rd April 1959 from the Regional Court to the Court of Appeal and, on the following day, 24th April 1959, the case-file and a mimeographed document were sent to the Chief Public Prosecutor (Oberstaatsanwalt) "for information and opinion". On 27th April 1959 the Chief Public Prosecutor returned the case-file to the Court of Appeal with an endorsement on the mimeographed document to the effect that he requested that the appeal should be accepted for the reasons stated by the Public Prosecutor in his document of 3rd April 1959.

The Applicant's case was heard by the Court of Appeal in a non-public session on 29th April 1959. The Chief Public Prosecutor was present and addressed the Court. Neither the Applicant himself nor his lawyer was allowed to be present and the Court only heard the arguments of the Chief Public Prosecutor. The Court of Appeal rejected the existence of extenuating circumstances and increased the Applicant's sentence to 6 years' imprisonment.

This decision was communicated to the Regional Court on 4th June 1959 and, on 23rd June 1959, the Applicant received a copy.

The Applicant states that in 1958 he was released on probation but that his probation was later cancelled and that he has now to serve three years and seven months of a previous sentence by which he was committed to a labour institution. This sentence was ordered to run as from the end of his previous sentence of six years.

The Applicant subsequently applied to the District Court (Kreisgericht) of Krems on 16th September 1959 for a reconsideration of his case but this application was rejected on 30th September 1959.

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2. Application No. 789/60 Johann Dunshirn

The Applicant is an Austrian citizen who was born in 1931.

On 3rd September 1959 the Applicant was arrested in Vienna on suspicion of having committed theft. An investigation by the police was opened on 5th September 1959 and lasted until 17th December 1959 on which date the Applicant, together with six other persons, was charged with violations of Articles 171 (theft), 173 (theft of objects of a value higher than 1,500 Austrian schillings), 174 (theft of dangerous nature and conspiracy to commit theft) and 176 (aggravting circumstances) of the Criminal Code, Article 7 of the State Protection Act (Staatsschutzgesetz) and Article 26 of the Fire Arms Act (Waffengesetz). The offences mentioned in the indictment were alleged to have been committed on 17th, 24th and 28th August 1959 and the objects were assessed at approximately 7,000 Austrian schillings.

On 19th February 1960 the Applicant was convicted by the Regional Court (Landesgericht) of Vienna on all these charges except the charge under Article 7 of the State Protection Act. The Court considered that there were extenuating circumstances, in particular, the fact that the Applicant had made restitution to his victims of part of the money which he had stolen from them, and sentenced him to 14 months' imprisonment with the additional penalty of "sleeping hard" four times a year. The Applicant states that upon his lawyer's advice he accepted this sentence.

On 10th September 1954, the Applicant had been convicted on similar charges by the Regional Court of Vienna and sentenced to 18 months' imprisonment and subsequently to be bound over for a period of three years under the threat of a suspended sentence of detention in a labour institution. On 12th November 1956 and on 16th April 1957 he was, however, again convicted and sentenced to one year's imprisonment and six months' imprisonment respectively. He was subsequently committed to a labour institution from which he was released on probation on 4th June 1959, namely two years before the expiration of his sentence. His release on that occasion was subject to the condition that, in the event of his being convicted for any further offence, he would have to serve the full term of his sentence in a labour institution.

On 22nd February 1960, the Public Prosecutor announced that he would appeal against the sentence of 19th February 1960 and, on 3rd March 1960, he stated the grounds of his appeal in a document submitted to the Regional Court and communicated to the

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Applicant. The Public Prosecutor asked the Court of Appeal (Oberlandesgericht) to increase the sentence as being too lenient. He denied the existence of extenuating circumstances and pointed out that the crimes were committed only two months after the Applicant's release. On 16th March 1960 the Applicant's lawyer filed a counter-memorial (Gegenäusserung) with the Regional Court in which he submitted to the Court of Appeal that the Prosecutor's appeal should be rejected and, in particular, he stressed the extenuating circumstances taken into consideration by the Regional Court. He further pointed out that, after serving his sentence of 14 months' imprisonment, the Applicant would then be committed for a period of two years to the labour institution from which he had been released in June 1959.

The case-file was transmitted on 4th April 1960 from the Regional Court to the Court of Appeal, and on the following day, 5th April 1960, the case-file and a mimeographed document were sent to the Chief Public Prosecutor (Oberstaatsanwalt) "for information and opinion". Two days later, on 7th April 1960, the case-file was returned to the Court of Appeal with an endorsement on the mimeographed document to the effect that the Chief Public Prosecutor requested that the appeal should be accepted for the reasons stated by the Public Prosecutor in his document of 3rd March 1960.

On 13th April 1960 the Applicant's case was heard by the Court of Appeal in a non-public session and the Court's decision was endorsed to the effect that the Chief Public Prosecutor was present and addressed the Court. Neither the Applicant nor his lawyer was present and the Court only heard the arguments of the Chief Public Prosecutor. The Court of Appeal rejected the existence of extenuating circumstances and increased the Applicant's sentence to two and a half years' imprisonment.

This decision was communicated to the Regional Court on 15th April 1960 and, on 25th April 1960, the Applicant himself received a copy.

It is pointed out by the Applicant that the increase in his sentence has resulted in his having to serve two years in a labour institution and that the Court of Appeal has thus in effect increased his sentence from 14 months to 54 months.

The Applicant states that no further appeal is available to him either in respect of the original conviction or as to the increase of his sentence.

The Applicant's term of imprisonment expired on 3rd March 1962 and an application for pardon in respect of the subsequent committal to a labour institution appears to have been rejected in November 1961.

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B. The Law

36. Although the facts of the present cases differ essentially from the facts of the Ofner and Hopfinger cases, the legal principles involved are the same in the two groups of cases. In the report adopted by the Commission on 23rd November 1962 concerning the Ofner and Hopfinger cases, the legal problem was defined in the following terms, which the Commission reproduces as relevant also to the present cases:

"The legal problem at issue relates to the right of defence which the Convention guarantees to anyone charged with a criminal offence. The Applicants have invoked Article 6, paragraph (3), subparagraph (c), according to which the right to defend himself is one of the minimum rights which every accused shall enjoy, and also the more general provision of Article 6, paragraph (1) which guarantees the right to a fair trial.

Concerning this principle of a fair trial, and its relation to the minimum rights laid down in paragraph (3) of the Article, the Commission has expressed the following opinion in a previous case:

'Article 6 of the Convention does not define the notion of a 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 five 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'. (Report of 15th March 1961 in case 343/57, paragraph 52, Nielsen v. Denmark).

In the present cases the problem is whether the notion of a 'fair trial' embodies any right relating to the defence beyond and above the minimum rights laid down in paragraph (3). The Commission is of the opinion that what is generally called 'the equality of arms', that is the procedural equality of the accused with the public prosecutor, is an inherent element of a 'fair trial'. Whether such equality has its legal basis in paragraph (3) depends upon the interpretation of subparagraphs (b) ('to have adequate time and facilities for the preparation of his defence') and (c) ('to defend himself in person or through legal assistance'). The Commission need not express a definite opinion on this question, since in any case it is beyond doubt that the wider and general provision of a fair trial, contained in paragraph (1) of Article 6, embodies the notion 'equality of arms'."

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In the present cases, the problem is whether the presence of the Public Prosecutor, without the presence of the accused or his counsel, at the session of the Court of Appeal when the case was heard and decided in conformity with Section 294, paragraph (3), of the Code of Criminal Procedure, constituted an inequality in the representation of the parties, which is incompatible with the provisions of the Convention.

It is not possible to establish with certainty whether the Public Prosecutor has taken an active part in the deliberations of the Court. No records of the deliberations were kept. Even on the assumption, however, that the Public Prosecutor did not play an active role at this stage of the proceedings, the very fact that he was present and thereby had an opportunity of influencing the members of the Court, without the accused or his counsel having any similar opportunity or any possibility of contesting any statements made by the Prosecutor, constitutes an inequality which, in the opinion of the Commission, is incompatible with the notion of a fair trial.

The Commission therefore reaches the conclusion that the proceedings conducted in the present cases on the basis of section 294, paragraph (3), of the Code of Criminal Procedure, as it was then worded, were not in conformity with the Convention.

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PART V

REVISION OF THE AUSTRIAN LEGISLATION DURING THE EXAMINATION OF THE CASES BY THE COMMISSION

37. Following negotiations between representatives of the Austrian Government and the President of the Sub-Commission with a view to reaching a friendly settlement within the meaning of Article 28 of the Convention, the Minister of Justice on 26th June 1962 submitted a Bill to the Austrian Parliament for the modification of certain sections of the Code of Criminal Procedure. The purpose of the Bill was to establish the principle of equality of representation in proceedings before the Court of Appeal, The text of the Law as enacted is reproduced at Annex A to the present report.

The explanatory observations which accompany the text of the proposed new rules refer to the cases pending before the European Commission. They also state that the proposed detailed amendments to the existing Code of Criminal Procedure are based on the principle that proceedings in appeal cases no longer shall be a unilateral, non-public procedure on the basis of documents, but a bilateral procedure taking place in a public session.

Article II of the Bill contained certain transitory provisions according to which inter alia, where the European Commission had declared an application admissible or where appeal proceedings had taken place in non-public session within a period of six months preceding the coming into force of the new law, appeal proceedings already concluded could be resumed according to the new rules at the request of the applicant, being the convicted person, or his legal representative.

On 20th July 1962 the Sub-Commission was informed, however, that Article II had not been adopted by the Austrian Parliament. Certain members of the Parliament had apparently taken the position that a provision of such an extraordinary character which introduced a certain retroactive effect, albeit in favour of the accused, required more careful consideration than could be given to it at this late stage of the parliamentary session. Consequently, only Article I of the Bill, containing the new rules applicable to future cases, was adopted, and this Article came into force as at 1st September 1962.

Article II of the Bill was adopted in a modified form by Parliament on 28th March 1963.(1)

By the adoption of this Law, a new remedy has been made available to the applicants, and they are now entitled to have their cases re-examined by the Austrian tribunals under a procedure which will not give rise to the objections which the Commission has expressed concerning the previous proceedings.

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(1) The Act was promulgated on 5th April 1963.
(Note by the Secretariat)

PART VI

PROPOSALS OF THE COMMISSION

28. In these circumstances the Commission wishes to avail itself of its right under Article 31, paragraph (3) of the Convention and to propose that the Committee of Ministers, take note of this report, express its appreciation of the legislative measures adopted in Austria with a view to giving full effect to the Convention of Human Rights, and decide that no further action should be taken in the present cases.

ANNEX A

Federal Law of 18th July 1962 amending and supplementing the 1960 Code of Criminal Procedure

(Amending Law, 1962)

The National Council has decided as follows:

Article 1

The 1960 Code of Criminal Procedure, BG Bl, No. 98 shall be amended and supplemented as follows:

1. Paragraph 41 (2) to read as follows:

"(2). If, owing to certain circumstances known to the Court, an accused person is unable to pay his own defence costs the Court shall, at his request, provide him with legal aid in connection with any specific appeal lodged by him against his indictment in respect of both the main proceedings as well as a public proceedings relating to such an appeal. If such legal aid is provided for the main proceedings or for the entering of a plea of nullity or the lodging of an appeal, then such legal aid shall also cover the appeal proceedings. If, however, the Court sitting where the public proceedings in respect of an appeal are to take place is not held in the district of the court where the main proceedings took place, legal aid for the accused at the said sitting shall be provided by another Counsel, if possible one of the barristers residing at the place where the sitting is to be held."

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2. Paragraph 286 (4) to read as follows:

"(4). If the criminal offence with which the accused is charged in the indictment or in the judgment of the Court of First Instance, is punishable by more than five years' imprisonment or subject to an even more severe penalty, then, if the said accused has no Counsel to represent him and has not been provided with legal aid, the authorities shall appoint a counsel to represent him at the Court sitting who shall be one of the barristers residing at the place where the Supreme Court has its seat."

3. Paragraph 294 (2) and (3) shall be replaced by the following provisions:

"(2). The appellant shall, if this has not been done already, be supplied with a copy of the judgment. The appellant has the right, within fourteen days after lodging his appeal, or, if he was not supplied with a copy of the judgment until after lodging the appeal, within fourteen days after receiving the copy, to forward to the Court in duplicate a statement of his grounds of appeal. He must, either in this statement or when lodging his appeal, clearly specify the points in the judgment of which he complains, failing which the Court of Appeal will not take his appeal into consideration. The appeal containing the grounds in question or the statement made within the stipulated time-limit shall be forwarded to the opposing party with the comment that the latter party may make its counter-statement within fourteen days.

(3). After the submission of this counter-statement or after the expiration of the stipulated time-limit, all relevant files and records shall be submitted to the Court of Appeal which shall deliberate on the appeal at a non-public sitting only if the Rapporteur or the Chief Public Prosecutor request the dismissal of the appeal on one of the grounds set forth in the following paragraph.

(4). The Court of Appeal may dismiss the appeal at a non-public sitting if the said appeal has been lodged too late or has been entered by a person who is not entitled to appeal or whose right of appeal does not correspond to the right claimed or who has renounced his right of appeal. Furthermore, if the appellant has, neither in his appeal nor in his statement, clearly specified the points in the judgment of which he wishes to complain, the appeal shall not be taken into consideration.

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(5). If no decision on the appeal is taken at the non-public sitting, the President of the Court shall order a public hearing. The fixing of the date and organisation of these public proceedings shall be subject to the provisions of paragraphs 286 and 287, it being understood that an accused who is not under arrest must always be summoned to appear and that an accused under arrest may also be required to appear. If the appeal against the judgment is based on claims under private law, then the individual concerned also must be summoned to appear."

4. Paragraph 296 to read as follows:

"Paragraph 296 (1). If in addition to the appeal a decision is also to be taken on a plea of nullity, entered by one or other of the parties, the relevant files and records submitted to the Supreme Court shall include those concerning the appeal. In such a case, the Supreme Court shall also take a decision on the appeal.

(2). The Supreme Court shall deliberate on the appeal at a non-public sitting only if the Rapporteur or the Attorney-General have requested the dismissal of the appeal on one of the grounds mentioned in paragraph 294 (4) and if no decision has to be taken on the plea of nullity at a public court sitting called for this purpose.

(3). In all other cases, the Supreme Court shall take a decision on the appeal either at the public court sitting called upon to deal with the plea of nullity or, where the plea of nullity has already been decided upon at the non-public sitting, at a public court sitting devoted to the appeal. The fixing of the date and organisation of the sitting shall be subject to the provisions of paragraphs 286 and 287, it being understood that an accused who is not under arrest must always be summoned to appear and that an accused under arrest may also be required to appear. If the appeal against the judgment is based on claims under private law, then the individual concerned also must be summoned to appear."

5. Paragraph 467 (5) to be replaced by the following:

"(5). The appeal or appeal statement shall be submitted or taken down in duplicate. A copy shall be forwarded to the opposing party with the comment that the latter may submit his counter-statement within fourteen days. After submission of his counter-statement or the expiration of the stipulated time-limit all the relevant files and records shall be submitted to the Court of First Instance.

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6. Paragraph 469 to read as follows:

"Paragraph 469. The Court shall deliberate on the appeal at a non-public sitting only if the Rapporteur or the Public Prosecutor propose one of the decisions mentioned in paragraph 470."

7. Paragraph 471 to read as follows:

"Paragraph 471 (1). If no decision is taken on the appeal at the non-public sitting, the President shall order a public hearing of the appeal and summon the plaintiff, the defendant and the witnesses and experts who are likely to be needed for cross-examination.

(2). According to the distance of the defendant's domicile from the seat of the Court of Appeal, he must be given at least three days in which to prepare his defence.

(3). If the accused is under arrest, the Court may order his appearance.

(4). In the notice of summons to both the defendant and the plaintiff, it shall be stated that even if they do not appear, the appeal will be dealt with in accordance with the law in the light of the contents of the statement and the counter-statement relating to the appeal.

(5). If the appeal requires a decision on claims under private law, the individual party concerned shall be summoned and notified as mentioned in the preceding paragraph. Otherwise, he shall be informed by the Court that he is at liberty to appear.

(6). If the individual plaintiff or party concerned has appointed a counsel to represent it, the summons shall be sent to the latter."

8. Delete paragraph 488 (1).

9. Delete paragraph 489 (1 /2 and 7/).

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Article II

Entry into force and enforcement clause

The present Federal Law shall enter into force on the first day of the month following the date of its publication. Responsibility for enforcing this law shall rest with the Federal Ministry of Justice.

Schärf
(sign)

Gorbach
(sign)

Broda
(sign)

ANNEX B

REGIERUNGSVORLAGE

Federal Act of 26th March 1963 on the reopening of appeal proceedings in criminal cases - 18/63

(promulgated on 5th April 1963)

The National Assembly decides as follows:

1.(1) In respect of an appeal against a sentence lodged in accordance with the law, new proceedings may be instituted at the request of the person sentenced or of his legal representative within the meaning of the provisions of the 1960 Code of Criminal Procedure as amended by the Criminal Proceedings Amendment Act of 1962 (BGBl. No. 229) when, at the time of lodging the said request, the European Commission of Human Rights has already accepted in accordance with Article 28 of the Human Rights Convention (BGBl. No. 210, 1958) a petition against appeal proceedings in an Austrian court conducted under the law previously in force.

(2) The application for the reopening of appeal proceedings shall be inadmissible, even in the circumstances set out in Article 1 above, when:

1. the Court of Appeal has heard an appeal by the prosecution only and that appeal has failed;

2. the European Commission of Human Rights in its report pursuant to Article 31 of the Human Rights Convention has already ruled that the appeal proceedings did not constitute a violation of the Human Rights Convention;

3. a reduction of the legally imposed sentence is impossible in law.

2.(1) The application for the reopening of proceedings shall be lodged, in writing or verbally, within six months of the entry into force of this Federal Act, with the court which tried the case in the first instance or verbally with the Governor of the prison or head of the institution where the person concerned in detained.

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(2) When the application is not lodged with the court of first instance, the record of the verbal application shall be remitted to that court forthwith. The latter shall then submit to the court of appeal (Article 3), without unnecessary delay, any application transmitted to or lodged with it, together with the documents in the case.

3.(1) The court which rendered the decision on the appeal shall be competent to render a decision on the application referred to in Article 1.

(2) All judges who took part in the previous appeal proceedings shall be excluded from the reopened proceedings (Article 69 of the 1962 Code of Criminal Procedure).

4.(1) Inadmissible and belated applications shall be dismissed at sittings in camera.

(2) All other applications shall be dealt with at public court sittings (Articles 294 (5), 296 (3), and 471 of the 1960 Code of Criminal Procedure as amended by the 1962 Criminal Procedure Amendment Act, BGBl. No. 229). If the Court of Appeal deems it desirable to impose a milder sentence than that pronounced at the previous proceedings, it shall amend the sentence accordingly. In all other cases, it shall rule that no grounds exist for altering the previous appeal decision.

(3) When the Court of Appeal reduces the sentence in favour of one of a group of accused on grounds that would apply equally to his accomplices, it shall ex officio act as though such accomplices likewise had lodged an appeal admissible in accordance with Articles 1 and 2.

5. When the Court of Appeal reduces a sentence that is still running to such an extent that no time remains to be served, it shall ensure that execution is suspended without delay. If the Court of Appeal reduces a sentence that is still running to an extent such that the conditional release of the prisoner can be envisaged, the Court of Appeal shall transmit the documents in the case to the Court competent to render a decision in the matter of conditional release.

6. The new appeal decision shall take effect from the day on which the previous judgment acquired force of law. The new sentence shall be regarded as having been completed at the latest on the day on which a portion of the original sentence equivalent to the new one has been served.

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7. The costs of the reopened appeal proceedings, except for the fees of the appellant's counsel and of other representatives of the parties (Article 381, para. 1, line 4 of the 1960 Code of Criminal Procedure), shall be borne by the State irrespective of the outcome of the case.

8. The implementation of this Act shall be entrusted to the Federal Ministry of Justice.

REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF JUSTICE

JMZ1. 18.170-9b/63

EXPLANATORY NOTES

on the draft Bill on the reopening of appeals in criminal cases

General

When Austria ratified the Convention for the Protection of Human Rights and Fundamental Freedoms in 1958, it availed itself at the same time of the possibility of recognising the right of individual appeal. This means that individuals, non-government bodies and groups of persons are entitled to apply to the European Commission of Human Rights claiming that Austria has infringed their rights as safeguarded by the Convention. Many applications have since been submitted by persons convicted in Austrian courts. Most of them have been rejected by the Commission after a preliminary investigation. Four were accepted, however, and all other similar applications - sixteen at the time, to which others have since been added - were left pending, awaiting the decision on the first four.

Of the four first-mentioned applications, two, concerning appeal procedure before the Supreme Court (Oberster Gerichtshof) in connection with decisions on pleas of nullity under Article 285 c, para. 1 of the Code of Criminal Procedure, were rejected by the Commission which, in its report to the Committee of Ministers, found that Austria had committed no breach of the Convention on Human Rights. The two other similar cases will follow the same course.

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The situation as regards the application relating to appeal procedure in the Courts of Appeal of the Länder (Oberlandesgerichte) and possibly also as regards those relating to appeal procedure in the Supreme Court in connection with decisions on pleas of nullity under Article 285, para. 2 of the Code of Criminal Procedure, is quite different. In the case of the former, it was becoming increasingly clear as time went on that the Commission of Human Rights might decide against Austria that the terms of the Convention on Human Rights were being infringed. At present there is no doubt at all that the decision will go against Austria and it is still possible that the applications relating to procedure in the Supreme Court may have a similarly unfavourable outcome.

The Commission's formal decision in both groups of cases is to be expected shortly. It has been deferred until now only pending the results of Austrian efforts to settle the matter by legislation.

In fact, at the present time there is only one way of preventing an unfavourable decision by the Commission of Human Rights, namely the passing of a law authorising the reopening of all appeal proceedings that took place before the amendment of Austrian appeal procedure on 1st September 1962 and on which doubt has been cast by the fact that the Commission of Human Rights has "accepted" applications in respect of them in accordance with Article 28 of the Convention on Human Rights.

The Government suggested this way of settling the matter at the time of the 1962 Criminal Procedure Amendment Act, but as the solution proposed then would have called for the reopening of a very large number of appeal cases, the transitional measures were omitted in response to the objections of the Legal Committee. The subsequent efforts on the part of the Ministry of Justice to find an administrative means of removing the appellants' cause for complaint, chiefly by the granting of pardons, produced positive results in a small number of cases only, because no action could be taken except in accordance with existing legislation.

The failure of the attempt to remove the appellants' cause for complaint by administrative means brings the question of legislating to introduce transitional measures once again to the fore. However, the provisions of the present draft differ essentially from those of the relevent Article II of the Government's Criminal Procedure Amendment Bill of 1962, inasmuch as that text contained a provision which would have

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authorised the reopening of numerous cases which have become res judicata, whereas the new draft affects only those cases still pending before the Commission of Human Rights, which in any event will not amount to more than 40. The legal provisions to which the Commission of Human Rights objected were amended on 1st September 1962 by the Criminal Procedure Amendment Act (BGBl. No. 229), so that no new applications can be submitted on those grounds and, in addition, since that date, the six-months' time-limit allowed by the Commission for the submission of applications has almost elapsed. Any person who considered himself unjustly treated under the former procedure had to apply to the Commission of Human Rights within six months and, since the last cases conducted in accordance with that procedure were heard in August 1962, any applications would have to be submitted by the corresponding date in February 1963. By the beginning of February, in addition to the applications already mentioned, another 23 had been received and that figure might increase slightly by the end of the month.

II.

Notes on individual clauses of the Bill

1. The reopening of appeal proceedings which have already become res judicata is not to be authorised in every case but only when the person convicted or his legal representative so requests. Other requirements justifying reopening are that the Commission of Human Rights shall already have accepted an application relating to an earlier hearing of a legally admissible appeal and shall not yet have ruled that no breach of the Convention has been committed, that, moreover, an appeal shall not have been lodged by the prosecution only and have been unsuccessful, and, lastly, that it shall be legally possible to reduce the sentence because the Court has not imposed the mildest form of penalty or the mildest sentence prescribed by law or has imposed an optional accessory penalty.

An application for the reopening of appeal proceedings may be lodged by the person concerned or his legal representative, but not by the prosecution. This provision in no way prevents the appellant from being represented by counsel (Article 39 of the Code of Criminal Procedure).

2. A time-limit of six months is prescribed for lodging the application. On the one hand it may be supposed that this time is adequate for the lodging of applications and on the other hand, it is important, for the protection of the judicial system, that the period during which court decisions having force of law can be modified should not be too long.

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The intention is to facilitate the lodging of applications by allowing them to be recorded verbatim, not only by the Court but also at the penal institution where the prisoner is serving his sentence. The Bill does not require applications to comply with any special conditions as to form, such as bearing the signature of the appellant, etc.

2. Para. (2): This paragraph seeks to ensure that the Court of Appeal is in a position to reopen the appeal proceedings without delay.

3. For reasons of convenience, the court competent to render a decision on the application lodged in accordance with Article 1 is the court that heard the original appeal.

4. The Court of Appeal shall then decide whether the application lodged is admissible and has been lodged in due time, and applications which are inadmissible or out of time shall be rejected at a sitting in camera. When an application is admissible and has been lodged in due time, the Court of Appeal has to decide, at a public hearing to be arranged and conducted in accordance with the amended appeal procedure, whether, on the basis of the previous appeal, a reduction of the sentence is called for. If so, the Court of Appeal must allow the appellant's earlier appeal, or allow it to a greater extent than in the previous judgment, or else it must disallow the earlier appeal by the prosecution or allow it to a lesser extent than on the previous occasion.

In all other cases, that is to say even if it considers that a severer sentence is called for, the Court of Appeal must rule that there is no cause to modify the previous judgment.

In accordance with the provisions of Articles 295, para. 1 and 477, para. 1 of the Code of Criminal Procedure, Article 4 (3) of the Bill provides that in the case of a group of accused, all shall be treated with equal justice, so that no unjustified discrepancies can arise out of the fact that one has lodged an application under Articles 1 and 2 whereas another has not.

5. This clause seeks to ensure that in the event of a reduction of the sentence the prisoner shall be discharged or released conditionally, as circumstances demand, without delay.

6. From the point of view of the law on the enforcement of sentences, the two important factors are the date on which the judgment acquires force of law and the date on which the sentence is to be regarded as fully executed, since they

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determine the period of enforcement. Since, in a sense, the judgment acquires force of law only through the judgment rendered in the reopened proceedings, the convicted person must be treated as though the new judgment had been pronounced on the previous occasion. Furthermore, t has to be specified that it is the new sentence which determines the date on which execution comes to an end. The express exclusion from the reopened appeal proceedings of judges who took part in the original appeal proceedings is in conformity with Article 69 of the Code of Criminal Procedure on the exclusion of judges.

7. The costs of the reopened proceedings - except for the fees of the representatives of the parties - are always to be borne by the State, even when an application has been rejected under Articles 1 and 2. It is of course conceivable that applications may be lodged wilfully by persons who know that they must fail, and that the refund of the costs entailed by the application would be called for, but it is important to avoid any appearance of discouraging the lodging of applications by the prospect of the costs that might be entailed.

8. This clause designates the Ministry of Justice as the authority competent to implement the Act.

III.

Financial implications

The appeal proceedings that will have to be reopened because of applications relating to them now pending before the European Commission of Human Rights can have only negligible financial repercussions since, for the small number of cases to be heard, which, besides, will all be concluded within quite a short time, no extra staff can be appointed and no additional administrative expenditure will be necessary.

Article 7 may be mentioned in this connection. It means only that the Court will not call the appellants to pay the costs of the reopened proceedings, but it does not mean that the State will pay the parties' own costs. Such a provision would be contrary to the principles of Austrian criminal procedure. Nor does the Convention on Human Rights provide that a State against whom an application is lodged with the Commission of Human Rights shall refund the costs.