Article 6 of the European Convention on Human Rights in Belgian Law

INTRODUCTION

The European Convention on Human Rights has certainly become a significant source of law in Belgium; the time is past when Mr. Henri Rolin could write, as he did a little more than ten years ago, that the Convention, even though part of the country's law, was unknown to Belgian lawyers. To our knowledge it is referred to in at least seventy Belgian court decisions rendered in recent years.

Although much has been written about the influence of the Convention on the municipal legal systems of the Contracting States in general and on that of Belgium in particular, only a very few
monographs deal specifically with the application and interpretation in Belgian law of the provision most often relied upon before the national courts, *i.e.*, Article 6, which safeguards the right to proper administration of justice. About fifty decisions of national courts— *i.e.*, nearly two thirds of all judgments referring to the Convention—deal with this provision.  


The object of this study therefore is to examine the relationship between Article 6 of the Convention and Belgian municipal law. The first part will be devoted to questions of a general nature, while the second will deal with the application and interpretation in Belgium of the various rules contained in Article 6.

I. General Problems of the Relationship between Article 6 of the Convention and Belgian Municipal Law

A. The direct application of Article 6 in Belgian municipal law

Faced with the question whether Article 6 of the Convention can be applied directly in Belgian municipal law, Belgian courts and legal writers have generally replied in the affirmative. Legal writers in Belgium, following the doctrine of the Court of Justice of the European Communities, tend to consider as directly applicable any rule which is both precise and complete and requires a state either to abstain from acting or to act in a particular manner and which may be relied on by persons within the state’s jurisdiction as a right to which they are individually entitled.

The problem of direct application before Belgian courts of a provision of the Convention has two aspects; one concerns public international law and the other municipal public law.

1. Public international law

The first point to be decided by a court which has to interpret or apply Article 6 of the Convention is whether or not this provision is self-executing. This is a problem of public international law, the answer to which depends on three considerations:

— the intention of the parties to the Convention,
— the purpose of the rules in question, and
— the form in which the rules are expressed.

Belgian courts and legal writers have not been able to accept the theory put forward by the Austrian Constitutional Court in its judgment of June 27, 1960, that Article 6, having regard to the vagueness...
of its terms, "contains only principles constituting a program, which must undoubtedly be put into effect and respected by the legislator, but which do not in themselves constitute an immediately applicable body of law." Sixteen judgments of the Belgian Court of Cassation on appeals based on the violation of Article 6 have found that this Article is directly applicable and implicitly decided that it forms part of Belgian municipal law.

In agreement with Mr. Ganshof van der Meersch, and for the reasons expounded by that distinguished writer, we consider that Article 6, as indeed most of the rule-making provisions of the Convention, are self-executing.

Firstly, the wording of Article 1 of the Convention provides an indication of the intention of the Contracting States: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." The original draft contained the expression "undertake to secure." It was at Mr. Rolin's suggestion that the words "shall secure" were substituted. Mr. Rolin supported his amendment as follows: "According to the new text . . . the High Contracting Parties shall not undertake to recognize, they shall recognize—so that once this is ratified by the States, the text, as at present worded, will no longer be the subject of subsequent amendments in our constitutions, or our respective legislatures. It will be incorporated bodily, of its own right, into the legislation of our fifteen States."

Secondly, the purpose of the rules laid down in Article 6 is to establish certain safeguards and acknowledge certain individual rights without the need for ancillary measures of enforcement. According to Mr. Ganshof van der Meersch, a reservation might well be expressed, however, with regard to "the provision in Article 6 which recognizes

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the exclusive jurisdiction of the courts for the adjudication of rights and obligations of a civil nature and over all criminal cases." He notes that "although this is the rule which prevails in the municipal law of the states of Western Europe, it is doubtful whether the provision would be sufficient in its present form to confer jurisdiction on any particular court."

Lastly, Article 6 is drafted with sufficient precision to be applied directly. It is difficult to see why the national courts should not be in a position either to apply it or to compare it with their municipal law.

2. Municipal public law

Are there any reasons of municipal public law which might prevent the direct application of Article 6 of the Convention? There is no rule in Belgian public law which prevents the courts from treating the provisions of the Convention as enforceable in municipal law. Its provisions are binding in Belgium. The treaty containing them has been signed and ratified, has entered into force, has been confirmed by an approving Act and published in the Moniteur Belge (the official Gazette).

The Court of Cassation is of the opinion that Article 6 may only be relied upon by invoking the Belgian Act approving the treaty. In a judgment of February 14, 1963 it decided that a ground for appeal based on a violation of Article 6 was not admissible unless it invoked the Belgian law approving the Convention and alleged that it had been violated. This decision raises the question whether, in the Court's view, the "law" capable of being violated is the Act giving legislative approval to the Convention and not the provision of the Convention laying down the rule. The Court may have simply considered that, for any law to have been violated, it must necessarily be one that is in fact in force, so that the grounds of appeal must contain a reference to the assenting statute, in so far as this is required in order to make the treaty effective.

It is a generally accepted legal principle in Belgium that a treaty which lays down certain rules has "force of law" and that a later...
treaty supersedes a prior law that is in conflict with it. "There is no doubt that in case of conflict between a self-executing provision of the European Convention of Human Rights and an earlier law the former renders the latter ineffective, even if the rules stated in that law are rules of public policy (ordre public) in the domestic legal system. In a judgment of December 20, 1965\(^{18}\) the military appeal court ruled that Article 6(1) of the Convention "cannot modify the rules governing the jurisdiction of the courts, these being rules of public policy." Although the Court of Cassation, in its judgment of June 1, 1966,\(^{19}\) dismissed an appeal against this decision, it refused to adopt the military appeal court's reasoning on this point, preferring instead to follow the submissions of the Advocate General (avocat général), Mr. P. Mahaux,\(^{20}\) who stated, "The reason here given cannot be accepted. The Convention of Human Rights having been ratified by the Act of May 13, 1955, any rules which violate the rights it safeguards must be considered abrogated in so far as they are incompatible with the Convention.

The status of a treaty which conflicts with a later law continues to be a controversial issue. As stated by the European Commission on Human Rights in a decision on a case brought against Belgium, "A series of court decisions have established the principle, with regard to international agreements other than the Convention, that a legislative intention to derogate from a treaty entered into by Belgium and incorporated into its legal system cannot be presumed, so that, when such an intention has been clearly expressed, the court must attempt to find an interpretation reconciling the later law with the earlier treaty."\(^{21}\) According to the traditional rule as expounded by the courts and legal writers, the courts should, when there is a definite conflict between a treaty and a subsequent law, respect the latest expression of the will of the legislature and make the municipal law prevail.\(^{22}\) However, in his inaugural lecture of 1963, on "The conflict between treaties and municipal law," the Attorney General (procureur général) Mr. Hayoit de Termicourt, interpreted this rule as applying only to


\(^{22}\) Cassation 26 November 1925, Pasicrisie 1926, I, 76; Bruxelles, 3 July 1953, J. trib. 1953, p. 518.
non-self-executing treaties. This eminent jurist concluded that nothing in the constitution or legislation forbids the courts, in case of conflict between a treaty and subsequent municipal law, to give precedence to the treaty if it is self-executing. This view was confirmed by the Court of Cassation in its judgment of April 13, 1964, which justified a preference given to municipal law over a treaty by pointing out that the latter was not self-executing. Referring to this holding in his inaugural lecture in 1968 on “International law and revision of the Constitution,” Mr. Ganshof van der Meersch, Attorney General, remarked that the distinction on which it is based was artificial; the reason for giving priority to the rule of international law should be its very nature.

It follows that in case of conflict between Article 6 of the Convention and municipal law, the Belgian courts should always give precedence to the Convention, whether the municipal law is or is not earlier than the Act approving the treaty. Rules of municipal law can never stand in the way of Article 6, whatever their standing.

In our opinion there is only one exception to the primacy of the Convention; it arises where a rule of municipal law which conflicts with Article 6 is more favorable to the individual. In this case, under Article 60 of the Convention, precedence should be given to the rule of municipal law.

B. The Power of the Belgian Courts to Apply Article 6 of the Convention on Their Own Motion

As far as we are aware there has been no judgment regarding the question whether the courts can or should apply Article 6 of the Convention on their own motion. As is clear from the rulings of the Court of Cassation's decision of 26 November 1925 is limited to the effects of non-self-executing treaties, J. trib., 1963, pp. 481-486. This interpretation is disputed by some legal writers. See P. De Visscher, “Droit et jurisprudence belges en matière d'inexécution des conventions internationales,” Revue belge de droit international, 1965-I, p. 129; id., “Les positions actuelles de la doctrine et de la jurisprudence belges à l'égard du conflit entre le traité et la loi,” in Recueil d'études de droit international en hommage à Paul Guggenheim (Geneva, 1968) p. 610; J.A. Salmon et E. Suy, La primauté du droit international sur le droit interne (Bruxelles-Louvain, 1965) p. 21, note 33; M. Waelbroeck, “Le juge belge devant le droit international et le droit communautaire,” Revue belge de droit international, 1965, p. 356; C. Cambier, M. Waelbroeck, J.V. Louis and H.A. Desmedt, “Mécanismes juridiques assurant la mise en œuvre de la législation communautaire par les autorités législatives ou exécutives nationales,” Rapport belge, 3e colloque de la F.I.D.E., Paris 1965, particularly pp. 61-64.


23 Pascrie 1964, I, 851.
mission of Human Rights, the rules laid down in the Convention are situated midway between national and international public policy; i.e., they are rules of European public policy. "European public policy," writes Mr. Ganshof van der Meersch, comprises "the essential interests of the European community (collectivité Européenne) as it exists today or will exist tomorrow after the accession of new members."

It does not follow however, that the question must necessarily receive an affirmative answer in all States which are parties to the Convention. We agree with Mr. Ganshof van der Meersch that the reply will depend on the municipal law of each of these States. If the legislation in force in a particular State allows a court to invoke a ground of decision on its own motion, the court—and the Attorney General's Office, in some cases—must do so if the ground invoked refers to a violation of the Convention. It follows that, in so far as they are entitled to consider arguments on their own motion, the Belgian courts are bound to apply the provisions of Article 6 if these provide for a more vigorous protection of the individual than is afforded by the rules of municipal law.

C. NEW BELGIAN LAW SOLVES THE PROBLEM OF THE Drittewirkung (EFFECTS ON THIRD PERSONS) OF ARTICLE 6 OF THE CONVENTION

Thus far Belgian commentators have not devoted much attention to the question whether a particular provision of the Convention may be binding not only on the Contracting States but also on individuals within their jurisdiction. We consider that the question should be answered in the affirmative, for the reasons put forward for the first time by Mr. Eissen in 1960.

The Belgian courts are adopting the same view. Since the end of 1967 the Brussels civil court has rendered some ten judgments in cases between private persons in which the decision was based, inter alia,

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28 Commission, 11 January 1961, Yearbook IV, p. 116 et seq., in particular pp. 138-142. The decision states, "Whereas it follows that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe."


30 W.J. Ganshof van der Meersch, op. cit. at pp. 371-375.

31 But see Mertens, "Le droit à l'octroi d'un recours effectif devant l'autorité compétente dans les conventions internationales relatives à la protection des droits de l'homme," Revue belge de droit international, 1968, p. 465.

on Article 6 of the Convention. According to these judgments the rights safeguarded by Article 6 of the Convention are binding on both physical and artificial persons. In several of the judgments the court relied on Article 6(1) as a ground for partial rejection of claims by limited companies which had brought proceedings against defaulting debtors.

II. THE APPLICATION AND INTERPRETATION IN BELGIUM OF THE VARIOUS RULES LAID DOWN IN ARTICLE 6

Article 6 of the Convention sets out various procedural rules intended to secure the proper administration of justice. Some of these apply in both criminal and civil cases, others in criminal cases alone.

A. Rules for the determination of civil rights and obligations and criminal charges

Article 6(1) reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties may so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

1. Scope of the rules. (a) Principles

The wording of Article 6(1) shows that it applies only to proceedings relating to the determination of civil rights and obligations or of criminal charges. The question whether a right or obligation at issue in proceedings is a civil one within the meaning of Article 6 of the Con-


vention cannot be decided from the purely formal point of view of
the procedure laid down by municipal law for settling the dispute in
question. The answer depends solely on the subject and purpose of the
claim, and this implies reference to criteria based on substantive law.\(^{25}\)

In our opinion, the words “the determination of . . . civil rights
and obligations” must be understood in a broad sense, with “civil”
denoting matters not covered by the word “criminal.” This theory,
which we think can be reconciled with the literal meaning of the
words, is the one which, in our opinion, conforms best with the his-
torical facts, in relation to which the words assume their full signif-
ance.\(^{26}\) It is also in our opinion the interpretation which best
protects the rights and interests of the individual. According to
Mr. Ganshof van der Meersch, too, “the safeguards in Article 6(1),
which concern the rights of the defense, should be considered as of gen-
eral effect and thus apply both to the ordinary courts and to the ad-
ministrative courts.”\(^{27}\)

The main difficulty raised by this theory in Belgian law is that in
principle hearings before the administrative courts are not required to
be public except where expressly provided for by law. To solve this
difficulty, Mr. Ganshof van der Meersch suggests that Article 6(1)
should be interpreted to mean that the case must be heard in public
at least at final instance.\(^{28}\) This theory has been criticized by Mr. Mast,
who puts forward various arguments against a broad interpretation of
the concept of “civil rights and obligations.” In his opinion the sole
substantive criterion which can be adopted with confidence is to
treat only disputes between private persons as relating to civil rights
and obligations, thus excluding from the reach of Article 6(1) dis-
putes between individuals and governmental agencies.\(^{29}\)

The European Commission of Human Rights has not adopted the
broad interpretation of “civil rights and obligations.” According to its
decisions the safeguards laid down by Article 6 of the Convention do
not apply in proceedings for the determination of: (a) political rights

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\(^{25}\) Commission, 8 March 1962, Collection of Decisions Vol. 8, p. 80, No. 808, Year-
No. 1013.

\(^{26}\) See, on this point, Th. Buergenthal, “Comparative study of certain due process
requirements of the European human rights Convention,” Buffalo Law Review, 1966,
No. 1, pp. 18-54, particularly at pp. 44-50; Newman, “Natural Justice, Due process and
the New International Covenants of Human Rights”, Public Law, 1967, pp. 274-313;
H. Schäffer, “Der Zivilrechtsbegriff der Menschenrechtskonvention,” Österreichische

\(^{27}\) W.J. Ganshof van der Meersch, Organisations europèennes, vol. I, p. 271.


\(^{29}\) “Artikel 6 lid 1 van de Europese conventie voor de rechten van de mens en het
strafrecht van de verdragsstaten,” Report presented to the Congress on European Crimi-
nal Law held in Brussels from 7-9 November 1968.
and obligations—e.g., the right to appointment to a post as a public servant, or (b) disciplinary charges.

In view of these decisions it seems to us that the procedural safeguards laid down in Article 6 do not apply to the ordinary courts in Belgium except when they are hearing disputes relating to civil rights and obligations or proceedings for the determination of a criminal charge. They do not normally apply to bodies other than the ordinary courts, since under Article 93 of the Belgian constitution, such courts may not deal with civil rights and obligations. An exception would, however, have to be made if the legislature were to confer on some body other than an ordinary court jurisdiction in matters which by substantive-law criteria would be defined as civil rights and obligations.

Since the Belgian courts lack the power to decide whether a law is constitutional, would they have to assume, given Article 93 of the constitution, that the dispute related to political rights and obligations and therefore the procedural safeguards set forth in Article 6 of the Convention did not apply? We do not think so. Although it cannot judge the constitutionality of a law, a Belgian court can and sometimes must decide, even on its own motion, whether or not a law is in accordance with the Convention. In interpreting and applying the words “civil rights and obligations” in Article 6 of the Convention, the court should refer only to criteria based on substantive law, not to organizational or formal criteria. We consider therefore that, following the doctrine of the Commission, the fundamental procedural guarantees found in Article 6 can be applied in Belgium before courts other than the ordinary courts in all cases where the legislature confers on such courts jurisdiction to deal with disputes relating to rights and obligations which, from the point of view of substantive law, would be considered as civil ones.

This theory, which we adopt only as a supplementary argument, has been criticized in two respects. Firstly, it does not adequately deal with the case of countries where only the ordinary courts deal with disputes relating to “civil” rights; secondly, it would lead to uncertainty in other countries, owing to the vagueness of the criterion proposed.

Besides, it appears that, according to the European Commission of Human Rights, Article 6(1) does not give an individual the right to have civil rights and obligations or a criminal charge decided by a...
court. Pursuant to this interpretation, the purpose of Article 6(1) is not to guarantee access to the courts in certain matters but to ensure the observance of fundamental procedural safeguards when the matters in question come before a competent tribunal.

The Belgian Conseil d'État appears recently to have adopted a similar view. One case concerned an appeal for annulment of a decision by a medical supervisory authority (in fact, the National Institute for Medical and Disability Insurance). The appellant argued in particular that the contested decision violated Article 97 of the Belgian constitution and Article 6 of the European Convention on Human Rights in so far as it confirmed a decision by the Institute's Council. In support of his argument he alleged that the proceedings before the Council were not held in public; that this body, being responsible both for instituting the prosecution and for rendering the decision, was neither impartial nor independent; and that the Council's decision had not been pronounced in public. In its judgment of June 24, 1966 the Conseil d'État rejected this argument. It found that the Council had acted as the governing body of the Institute (Articles 34 and 44 of the Act of February 14, 1961) and not as an administrative tribunal, and that "neither Article 97 of the constitution nor Article 6 of the Convention . . . applies to the administrative decisions of that body." On December 16, 1966 the Conseil d'État rendered a further judgment along the same lines.

(b) The Applicability of Article 6(1) before Disciplinary Tribunals

The European Commission of Human Rights has decided that the rules in Article 6(1) do not apply to disciplinary proceedings. But when called upon to decide this very question, the Belgian Court of Cassation merely stated in its judgment of March 15, 1965, in the case of Verplaetse against the Attorney General of Ghent, that "Article 6
of the Convention was not violated by the holding that no appeal was possible against the decision of the Disciplinary Council of the Bar Association dismissing an application by the appellant to have his name restored to the rolls. ¹⁹ Though it can scarcely be deduced from this judgment that the Court of Cassation had tacitly diverged from the doctrine of the European Commission of Human Rights, a judgment of the Brussels Civil Court dated September 14, 1967, states firmly that the rules contained in Article 6 of the Convention do apply to proceedings before disciplinary tribunals. ⁴⁹ However, there is nothing in the reasoning of this judgment to show what considerations prompted the court to adopt a principle different from that followed by the Commission.

(c) The Applicability of Article 6(1) to Action by the Police

Can the procedural rules in Article 6 of the Convention apply to action by the police, or at least have an indirect effect on such action? Three recent decisions of the Brussels Correctional Court implicitly assumed that the fair trial rule in Article 6(1) required the police to act fairly in examining suspects and therefore to refrain from any form of fraud or trickery in their questioning. Two of these judgments were reversed on appeal.

A judgment of January 30, 1967, ⁵⁰ based partly on Article 6(1), discharged the accused, who was suspected of theft, on the ground that her confession had been obtained by fraud, the police having untruthfully led her to believe that a 100 Franc note found in her clothing was on the list of the stolen notes. This judgment was reversed by the Brussels Court of Appeal, nevertheless it convicted the accused in its judgment of March 28, 1967, without, however, referring to the Convention and relying exclusively on her interrogation at the trial. ⁵¹

Another judgment, rendered by the Brussels Correctional Court on October 2, 1967, ⁵² relied on Article 6(1) to dismiss a larceny charge because a police officer had tricked the defendant into making a confession by giving him a false account of a statement by one of the witnesses. This decision was also set aside by the Brussels Court of Appeal, which, in its judgment of January 12, 1968, ⁵³ decided that Article 6(1) applied only to court proceedings and not to an examination by a police officer.

The same judgment considered the question whether Article 6(3) which provides, inter alia that a person “charged with a criminal offence” must be informed in detail of the nature and cause of the

⁵² ColDec. 1969, p. 76.
⁵³ Unpublished.
accusation against him, did not apply to the instant case. The court’s answer reads as follows:

Whereas it is doubtful whether this provision applies to a police enquiry because it normally precedes and gives rise to a formal indictment (inbeschuldigingstelling) or the formation of a charge (inbetichtingstelling), which is the time when the defendant should be informed in detail of the facts with which he is charged (tenlastlegging) and be given the possibility of preparing his defence;

Whereas, even if this provision were applicable in the present case, there is nothing to show that it has been violated. . ."

A third judgment of the Brussels Correctional Court, rendered on September 16, 1969, relied again on Article 6 to declare null and void proceedings against two persons accused of aggravated theft on the grounds that the evidence submitted to the court, including a fairly extensive confession, had been obtained only by means of a ruse in which—so it seemed to the court—police officers had participated. The judgment states:

Whereas the court cannot concede that the end justifies the means, [and cannot therefore] base its decision on a prosecution vitiated by a ruse which, with regard to some of the persons who were involved in it, might be considered as a form of participation in the offence of receiving [stolen goods] . . .

Whereas to decide otherwise would prevent the court from ensuring that the accused persons receive the fair trial to which they are entitled. . .

An appeal against this judgment is pending.

Related to the foregoing problem is the question of how to deal with cases in which police officers have a pecuniary interest in the outcome of a prosecution for which they gathered the necessary evidence.

Article 23 of the Forestry Code provides that the proceeds of fines for forest offences are to be distributed annually, after deduction of all prosecution costs and bad debts, by way of gratuities to all foresters and forest guards who have given satisfactory service. In its judgment of October 23, 1967, the Court of Cassation decided that it could not be deduced from this provision that every conviction in which a court imposed a fine based on the evidence contained in a report by a forest guard necessarily involved a violation of Article 6(1).

55 Pasicrisie 1968, I, 256.
The Applicability of Article 6(1) in Preliminary Judicial Enquiries

In Belgian law the investigating judge is authorized to carry out investigations and examinations of witnesses but it is not his function to assess the results of his investigations. This is a matter for the investigating courts (the Chambers of the Court of First Instance meeting in chambers and the Indictments Chamber of the Court of Appeal), whose principal task is to weigh up the information obtained by the investigating judge, to determine the legal character of the facts involved in the charge and, if the evidence is sufficient, to put the case before the competent criminal court.

One of the most difficult problems relating to the interaction between the Convention and Belgian criminal procedure concerns the question whether the procedural rules in Article 6(1) apply to the preliminary investigation of offenses. In its decision of December 18, 1963, the European Commission of Human Rights indicated that in principle Article 6(1) did not apply to the Belgian courts engaged in such investigations. This decision was predicated on the holding that Article 6(1) applies only to courts which have to determine either civil rights and obligations or a criminal charge and that, as the Commission rightly observes, the orders and decisions of the investigating courts are not determinations relating to the merits of the criminal charges brought against accused persons. It is true that when the criminal charge gives rise also to a claim for civil damages, “civil rights and obligations” are thereby brought before the investigating courts. But even in this case these courts are not required to determine such rights or obligations.66

But does the principle that Article 6(1) is inapplicable to the Belgian investigating courts hold good when they are asked to confirm a Belgian arrest warrant or to approve the execution of a foreign arrest warrant? Under Article 6(1) the person concerned is entitled to a fair hearing. However, the Convention does not define what a fair hearing entails. From the decisions of the European Commission of Human Rights it appears that in criminal cases the concept includes “equality of arms,” that is to say procedural equality between the accused and the prosecution.67 It must accordingly be asked whether the court proceedings provided for in Article 5(4) to determine the legality of a

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person's detention have to conform to the requirements of a fair hearing within the meaning of Article 6(1)?

This question has received a clearly affirmative reply in several decisions of the European Commission, including those of July 6, 1964, in Neumeister v. Austria, of December 16, 1964, in Matznetter v. Austria, and of March 29, 1966, in Köpflinger v. Austria. In these cases the applicants alleged that they had not been given a fair hearing within the meaning of Article 6(1) when the legality of their detention was being examined by the Regional Criminal Court because the prosecution was present at the hearings whereas they and their lawyers were not. The Austrian Government argued that Article 6(1) did not apply to the proceedings mentioned in Article 5(4). In each of these cases the Commission considered that "the lack of 'equality of arms' between the Public Prosecutor and the défense during proceedings before the Regional Criminal Court might amount to refusal of the right to a fair hearing within the meaning of Article 6(1)." Since the Commission views the concept of "civil rights and obligations" found in Article 6(1) as an independent principle which cannot be interpreted merely by reference to the law of the state involved the aforementioned cases can be said to indicate that the Commission believes that the right of an accused person to liberty is a civil right within the meaning of the Convention, so that a court dealing with a dispute relating to this right must observe the procedural rules stated in Article 6(1)."
From these decisions it would appear that Article 5(4) should be interpreted as conferring on a detained person the right to challenge an order placing him under arrest at a hearing in which the defense and the prosecution must be placed on an equal footing. In Belgium this interpretation presents a number of problems as far as detention on remand and extradition are concerned.

For one thing, Article 4 of the Detention on Remand Act of April 20, 1874, provides that the arrest warrant shall cease to be effective five days after the preliminary interrogation unless confirmed by the Court of First Instance in chambers. At this stage of the proceedings the court investigations are still considered as being entirely secret, so that neither the accused nor his counsel are permitted to examine the case file. Although it is generally accepted that the case file may not be sent to the prosecution, it is not denied that the prosecution may examine it immediately before the hearing in chambers for the purpose of confirming the warrant within the five-day period. In any case, the prosecution must necessarily have had knowledge of the contents of the file before applying to the investigating judge to deal with the case.

This practice raises the question whether the procedure provided for in Article 4 of the Act of April 20, 1874, secures, as it should, the equality of arms between defense and prosecution required by the combined application of Articles 5(4) and 6(1) of the Convention. The issue of the compatibility of Article 4 of the Act of April 20, 1874 with the European Convention was first submitted to the Court of Cassation in somewhat different terms. This occurred in the Knappen case in which an arrested person alleged that he had not been permitted to examine the file of the investigation before his first appearance before the Court in chambers. In support of his appeal he relied upon Article 6(3)(b) of the Convention, under which everyone charged with a criminal offence is entitled “to have adequate time and facili-

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65 See the inaugural address of the Attorney-General, Mr. de le Court, Belgique judiciaire, 1874, col. 1458 and 1459.


ties for the preparation of his defence." Basing his argument on this provision, he maintained that Article 4 of the Detention on Remand Act violated the Convention in so far as it did not provide an opportunity to examine the file at that stage of the proceedings.

In its judgment of March 25, 1963, the Court of Cassation interpreted Article 6(3)(b) of the Convention as applying exclusively to the rights of the defense during the trial proceedings and not to arrest or detention on remand. A judgment rendered by the same Court on September 23, 1968, relating to a question of detention on remand ruled that Article 6 as a whole was inapplicable to proceedings challenging arrests or remands in custody. In the Court’s opinion, therefore, there is no conflict between Article 6 of the Convention and Article 4 of the Act of April 20, 1874. In recent decisions the Court in chambers and the Indictments Chamber at Brussels have also held

89 See in particular, (a) The prosecutor’s address of 28 October 1967. In support of his application to the Court in chambers for release, the accused had argued that, in violation of Article 6 (1) of the Convention, neither she nor her counsel had been permitted to examine the dossier on the strength of which she was being kept in detention on remand. In its order of 25 October 1967, the Court in chambers simply stated that “under the Belgian Act of 20 April 1874, the investigations are secret and the judge can neither interpret nor violate the law but has merely to apply it.” An appeal having been entered, the Public Prosecutor attached to the Brussels Indictments Chamber made his address on 28 October 1967 and requested the Court to supplement the inadequate reasons given by it in chambers when disposing of the defence put forward by the accused. She—as is stated in the Prosecutor’s address to the Court of Appeal—had not asked the Court in chambers to interpret or violate the Act of 18 April 1874, but to consider whether Article 4 of that Act was compatible with a provision of a later treaty which had been approved by statute. The Prosecutor’s address before the Indictments Chamber contains the words “Whereas Article 6 of the Convention . . . relates to the rights of the defence before the trial court and not to detention on remand . . .”. In its decision of 2 November 1967 the Indictments Chamber was not called on to express an opinion on this question of principle as it had decided that the reasons which had justified the arrest warrant no longer existed.

(b) Judgment of 12 December 1967: On 4 December 1967 the Brussels Court in chambers had rejected submissions similar to those put forward on 25 October 1967, on the ground “that Article 6 of the Convention relates to the rights of the defence before the trial court and not to detention on remand” (Revue de droit pénal et de criminologie, 1967-1968, p. 906). The accused appealed. In his submissions to the Indictments Chamber he relied in particular on the decisions of 6 July and 16 December 1964 rendered by the European Commission of Human Rights on the admissibility of Applications 1936/63 and 2178/64. The appellant argued that in the case of a conflict between judicial precedents established by the Belgian Court of Cassation and by the European Commission of Human Rights, the latter’s decision should naturally prevail because of their higher normative status. In its judgment of 12 December 1967 the Brussels Indictments Chamber decided that the reasoning of the order appealed from was properly based on the ground that Article 6 of the Convention related to the rights of the defence before the trial court and not to detention on remand. The judgment also stated: “Whereas the decisions of the European Commission of Human Rights of 6 July and 16 December 1964 constitute opinions within the meaning of Article 31 of the Convention; whereas it does not follow either from Belgian law or from the Convention itself that these opinions are binding on national courts; whereas the accused is thus not justified in claiming that they must prevail over the judicial precedents of the Court of Cassation . . .”
that Article 6(1) applies only to trial proceedings and not to proceed-
ings concerning detention on remand. This view has in the mean-
time been sustained by the European Court of Human Rights which, in its judgment of June 27, 1968 (Neumeister v. Austria), rejected the Commission’s interpretation. The Court ruled in substance that, apart from the unduly wide interpretation given by the Commission to the concept of civil rights, “it must be observed that remedies relating to detention on remand undoubtedly belong to the realm of crimi-
nal law and that the text of the provision invoked expressly limits the requirements of a fair hearing to the determination . . . of any criminal charge to which notion the remedies in question are obviously unrelated.”

Article 3 of the Belgian Extradition Act of March 15, 1874, which deals with the proceedings for making a foreign warrant enforceable, neither orders nor makes any provision for the appearance of the for-
eigner in question before the Court in chambers. Is this system com-
patible with Article 6(1) of the Convention? In its decision of March 23, 1964 in the Abarca case the Court of Cassation replied in the affirmative. In its opinion, Article 6 of the Convention applies to the rights of the defense during the trial proceedings and not to arrest or detention on remand.

It has also been claimed that the exclusion of the public from pre-
liminary investigations is a violation of Article 6(1) which lays down in principle that there shall be a “public hearing.” Both the Belgian courts and the European Court of Human Rights have refused to accept this argument.


“Besides,” continued the Court, “Article 6 (1) does not merely require that the hearing should be fair, but also that it should be public. It is therefore impossible to maintain that the first requirement is applicable to the examination of requests for release without admitting the same to be true of the second. Publicity in such matters is not, however, in the interest of accused persons as it is generally understood.”

71 Païocrisie 1964, 1, 797.
73 Correctionnel Bruxelles (chambre du conseil), 10 August 1968, Revue de droit pénal et de criminologie, 1968-1969, p. 140. The Order states: “Whereas Article 6 of the Convention . . . does not relate to arrest and detention on remand; whereas the right conferred by this Article concerns a person who appears before a court which has to decide on his civil rights or obligations or on a criminal charge against him, which is not the function of the Court in chambers as an investigating tribunal; whereas this Article does not exclude the possibility of exceptions being provided by law where publicity would prejudice the interests of justice.”
74 Judgment of 27 June 1968 (Neumeister v. Austria).
The Applicability of Article 6(1) to the Execution of Judgments

Finally, mention should also be made of the Court of Cassation's decision of October 2, 1967, which held that the rules laid down in Article 6 do not apply to the execution of judgments nor to the various enforcement remedies provided for under municipal law.

2. The Right to a Fair Hearing

The "fair hearing" provision of Article 6 raises, in addition to the questions which were discussed above and which relate to its scope, questions relating to the following subjects:

—the manner of bringing cases before the Correctional Courts [courts with original jurisdiction of minor crimes];
—procedure before the Courts of Appeal;
—procedure before the Assize Court [courts with original jurisdiction of major crimes].

With regard to cases brought before the Correctional Court by direct application on the part of the prosecution the question arises whether, if the prosecution's application seems to it to be incomplete, the court should send the case file back to the prosecution. This question was presented to the Brussels Correctional Court in a case in which the file, submitted to the Court on the prosecution's application charging the defendant with issuing bad checks and with fraud, also contained evidence of forgery. In the opinion of the Court it was impossible to divorce the charges formulated by the prosecution from the evidence of forgery, which, unless reduced to a correctional offence, was punishable as a crime and thus falls under the jurisdiction of the Assize Court.

Accordingly, in its judgment of February 13, 1967, the Court stated that the concept of "fair hearing" enunciated in Article 6(1) of the Convention implied "that the trial court should be in a position to assess the facts before it in the light of all charges which could properly be formulated and that the criminal charges should correspond as much as possible to the facts of the case and the intentions of the various persons involved in it." The judgment continued,

Whereas in the present case the Court cannot itself complete the investigation of the case by hearing the party claiming damages or his agent . . . without confusing the roles of judge and prosecutor in proceedings which might lead to the confession of offences not subject to its jurisdiction. . .

76 Pasicrisie 1968, 1, 160.
78 Decision reprinted in the reporters note by J. Messine, J. trib. 1968, pp. 189-190.
For these reasons the Court decided that, before dealing with the prosecution's direct application and the claim for damages, it would return the file to the prosecution "for such action as might be necessary."

This decision was reversed by a judgment of the Brussels Court of Appeal of November 15, 1967. The Court pointed out that the lower court "could deal only with the facts put before it in the application commencing proceedings; that it has the right and indeed the duty to assess the facts in the light of criminal law and to characterize them accordingly, even if in so doing it finds itself obliged to amend the charges provisionally filed either by the prosecution, another court or a party claiming damages in a direct application... The lower court cannot therefore decide to send the case back to the prosecution on the pretext that the file shows 'evidence of facts' which were not placed before it and which in its opinion should first be investigated by the police or a court and then legally classified before being put before it for trial." In the opinion of the Court of Appeal such a decision "amounts in fact to a denial of justice."

The problem which arose in connection with the proceedings of the Court of Appeal involved the report that is made at the hearing by a member of the bench. Article 209 of the Code of Criminal Procedure provides that such a report be presented to the Court by one of its members to inform it of the facts and the principal documents contained in the case file.

Article 210 provides that after the report has been presented, but before the reporting judge and the other judges state their opinions, the accused, other persons against whom civil damages are claimed, the party claiming damages and the Attorney General shall be heard. This practice raises the question whether the fact that the reporting judge expresses in his report an opinion unfavorable to the accused, either on the question of his guilt or on the defense he adopted prior to appearing before the Court, constitutes a violation of Article 6 of the Convention.

At a hearing of Boeckmans' Case in the Brussels Court of Appeal, the President of the Chamber, in presenting his report in a larceny case, described the defense of the accused as "unbelievable," "scandalous," "untruthful," "disgraceful," and "repulsive." He further told the accused that the Court would have to consider whether the sentence that was imposed by the court of first instance "was sufficient in view of the nature of the defense." In its judgment of March 14, 1962, the

18 J. trib. 1968, p. 189 and note by J. Messine.
Court increased the defendant's principal sentence from two years to thirty months. The accused appealed to the Court of Cassation, alleging the violation of Article 6 of the Convention, Article 210 of the Code of Criminal Procedure, and the rights of the defense (droits de la défense). In its judgment of June 6, 1962, this Court rejected all three counts of the appeal. The reasons advanced by the Court may be summarized as follows:

(a) it did not appear from the documents which the Court was entitled to take into account that the President of the Court of Appeal had in his report prejudged the guilt of the appellant; he had merely expressed an opinion on the defense which the appellant had adopted prior to his appearance in the Court of Appeal;

(b) in Article 210 of the Code of Criminal Procedure the word “opinion” referred only to the opinion which the rapporteur and the other judges were required to express during the deliberations following the hearing;

(c) the rapporteur’s statement was made in the presence of counsel for the defense and before the appellant was heard; the defense was consequently in a position to contradict it.

Having exhausted all available domestic remedies, Boeckmans lodged an application with the European Commission of Human Rights in which he alleged that the Belgian courts (the Brussels Court of Appeal, its President, and the Court of Cassation) had violated Articles 6(1), (2), and (3)(c) of the Convention. He alleged that the President of the 14th Chamber had failed to comply with the requirements of Article 6 in three respects:

(a) his attitude had been neither fair nor impartial (Article 6(1));

(b) he violated the accused’s right to be presumed innocent until proven guilty (Article 6(2));

(c) he had made up his mind before hearing the case, thus making it impossible for the accused to defend himself (Article 6(3)(c)).

Boeckmans further contended that Article 6 had been violated by the Court of Appeal, because it had “endorsed its President’s attitude,” and by the Court of Cassation, because it had rejected the appeal.

In its decision of October 29, 1963, the European Commission of Human Rights declared Boeckmans’ application admissible on the ground “that the problems arising in the case with regard to Article 6 of the Convention were sufficiently complex to justify an examination

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79 Pasicrisie 1962, 1, 1148, J. trib. 1963, p. 313 with note by Mr. Cornil.
of the merits." The case ended on February 17, 1965 with a friendly settlement, the first to be arrived at under Article 28 of the Convention, in which the Belgian government agreed to pay the sum of 65,000 Belgian francs (about $1,300) to Boeckmans as compensation for any injury he might have suffered. The fact that the Belgian Government accepted this settlement suggests that in its opinion the accused's allegations were not totally unfounded. This is a concrete example in which the rules of the Convention provided a litigant with the institutional machinery for a satisfactory solution to a dispute between himself and Belgium on a question of criminal procedure.

Finally, as far as the Assize Court is concerned, the "fair hearing" provision of Article 6(1) has led to difficulties in three areas: the examination of witnesses, the swearing in of expert witnesses, and the argument of defense counsel.

Article 319 of the Code of Criminal Procedure, which deals with the examination of witnesses before the Assize Court provides in part:

After [the witness] has made his statement the accused or his counsel may question him through the président and allege both against him and against his evidence anything that may be of benefit to the defense.

The président may also obtain from the witness and the accused all the explanations he considers necessary for the purpose of ascertaining the truth.

The judges, the attorney general, and members of the jury shall be granted the same facilities on application to the président. The party claiming damages may not put questions either to the witness or to the accused except through the président.

Pursuant to this provision the accused and his counsel cannot question witnesses except "through the président," whereas the attorney general may obtain directly from the witnesses, on application to the président, "all the explanations he considers necessary for the purpose of ascertaining the truth." In its judgment of October 9, 1967, the Court of Cassation had to decide whether this rule created an inequality between the prosecution and the accused which was incompatible with the right to a fair hearing provided for in Article 6(1) of the Convention. The Court held that Article 319 of the Code did not violate the Convention because it was "a provision that deals with the powers of the président to control and direct the hearing; it does not prejudice the fairness of the hearing nor does it hamper the exercise of the rights

82 Pasicrisie, 1968, I, 189.
of the defense which is assured the right to have the witness examined on all points of interest for the defense.” The Court noted further that “far from upsetting the equality between the accused and the prosecution to the detriment of the former, Article 319 strengthens the position of the defense by giving the accused not only the right to have the witness examined but also to allege both against him and against his evidence anything that might be useful to the defense.”

In a case which was decided a few years ago by the Assize Court, the expert witness who was called by the defense was heard without being given the opportunity to take the oath that is specially designed for expert witnesses, whereas the expert witness who was appointed by the investigating judge took this oath before testifying. In his appeal against the judgment of the Assize Court, the accused alleged inter alia, that this practice violated the equality-of-arms principle implicit in Article 6(1) of the Convention. In its judgment of October 9, 1967, the Court of Cassation rejected this ground of appeal with the remark that “specialists, whether called by the defense or the prosecution, are not expert witnesses within the meaning of the Code of Criminal Procedure; only persons commissioned as expert witnesses by the Court before whom they testify have this status.”

In another case the president of the Assize Court interrupted defense counsel’s argument to forbid him to criticize the manner in which the investigation had been conducted. In his appeal the accused argued that this prohibition amounted to a violation of the equality-of-arms principle since it created the impression that the president had expressed an opinion regarding the thoroughness of the investigations and that he had sided with the prosecution. In its judgment of October 9, 1967, the Court of Cassation rejected this argument on the ground that it rested “on allegations which were not supported by the evidence which the Court could properly take into account.”

3. The Right to a Public Hearing

The Belgian Constitution draws a distinction between the right to a public hearing and to the public pronouncement of judgments. Article 96 stipulates that “hearings in the courts and tribunals are open to the public unless public access is prejudicial to public order or morals.” Article 97 provides that “every judgment . . . is pronounced in open court.” There are no exceptions to this rule.

A somewhat different system is provided for in Article 6(1) of the Convention. First, the Convention does not distinguish clearly between public hearings and the public pronouncement of judgments. Secondly, in addition to cases involving a danger to public order or morals,
Article 6(1) recognizes three other exceptions to the rule requiring a public trial. It provides that a private hearing may be ordered: (a) when required in the interests of juveniles; (b) when required for the protection of the private life of the parties; and (c) "to the extent strictly necessary in the opinion of the court in special circumstances where public access would prejudice the interests of justice."

To what extent may Belgian courts order hearings in camera in cases not contemplated by the Constitution but provided for in the Convention? In answering this question, it should be noted that Article 60 of the Convention specifies that "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or any other agreement to which it is a Party." It follows that the provisions of Article 6(1) which relate to public hearings and the public pronouncement of judgments may not be interpreted in Belgium to deprive individuals of the rights conferred on them by Articles 96 and 97 of the Constitution.

The difficulty in applying this principle arises from the fact that some of the limitations which Article 6(1) of the Convention imposes on the right to a public trial are specifically designed to provide additional protection for the litigants. This question was considered by the Court of Cassation in its judgment of October 2, 1967, which took the position that it was for the trial court to decide whether the conditions laid down in Article 6(1) for ordering trials to be held in camera had been satisfied. Earlier, in a judgment dated March 17, 1966, the Brussels Correctional Court indicated that a case could be tried in camera if this was necessary for the protection of the private lives of the parties. The judgment states:

Whereas this exception goes beyond what is laid down in the Constitution, it is nevertheless not in opposition to the national law since the right to a public trial remains the governing rule; the exception merely provides additional protection in the sole interests of the individual concerned;

Whereas the litigant in question thus has two parallel safeguards at his disposal; whereas it is for him to decide whether it is in his interest to waive the constitutional safeguard in favor of the safe-

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86. J. trib. 1966, p. 413. An appeal was entered, but the Brussels Court of Appeal's judgment does not deal with the problem here referred to. In his address on "The Development of the Court in Chambers in Belgian Criminal Legislation," the Attorney-General, M. de le Court, states: "This raises the question whether the judgment of 17 March 1966 is compatible with present constitutional provisions," J. trib. 1967, p. 518 and note 70.
guard introduced into our law by the Act of May 13, 1955 [ratifying the Convention]. . . .

In another judgment of January 27, 1965, the Brussels Correctional Court ordered the proceedings in a case involving the illegal sale of drugs to be held in camera. In entering this order the Court relied on an exception provided for only in the Convention, and not intended to protect the interests of the litigant, which permits the exclusion of the press and public “to the extent strictly necessary, in the opinion of the court, in special circumstances where public access would prejudice the interests of justice.” The Correctional Court based its decision on the consideration that “public disclosure of the evidence would necessarily have the effect of making the names of pain-killing narcotics generally known; such publicity would jeopardize the interests of justice in that it might encourage the use of habit-forming drugs.” The prosecution opposed the order on the ground that it reduced the “deterrent effect of criminal prosecutions.” The Court did not accept this argument; stating that “the requisite deterrent effect can be achieved by the publication of the sentence.”

4. The Right to Have One’s Case Heard by an Independent and Impartial Tribunal Established by Law

Under Belgian law, the victim of a criminal offence which is subject to military jurisdiction does not have the right to intervene in the military court proceedings. Does this rule violate Article 6(1) of the Convention? In a judgment of June 1, 1966, the Court of Cassation answered this in the negative. It found that the denial of this right did not deprive an individual of his right under Article 6(1) to a “fair hearing within a reasonable time by an independent and impartial tribunal,” because he was free to file an action for damages in a civil court whose independence and impartiality conformed to the requirements of the Convention and was a more appropriate forum for the adjudication of civil claims. The Court emphasized, moreover, that under Article 6(1) the safeguards provided in criminal proceedings applied only to the person “against” whom a “criminal charge” was brought, whereas the determination of those civil liberties to which the criminal offense might also give rise was governed by other provisions of Article 6.

87 Col.Dec. 1969, p. 44.
88 Pauci.rie 1966, I, 1243; Revue de droit pénal et de criminologie, 1966-1967, p. 100; J. trib. 1966, p. 739. Compare, cour militaire 20 December 1965, Revue de droit pénal et de criminologie, 1966-1967, p. 89, J. trib. 1966, p. 169. The case in question related to a member of the constabulary who had taken direct proceedings against two officers of the constabulary to the Military Appeal Court. A heavy disciplinary punishment had been imposed on him and he had been cashiered for his trade union activities in the constabulary. He complained that his superior officers had violated the law on freedom of association.
The Brussels Civil Court has rendered eight judgments since the end of 1967, in which it interpreted the right to a fair hearing by "an independent and impartial tribunal" as barring the imposition of pecuniary sanctions against an individual because he exercised his right to have a claim against him adjudicated by a court. In the first of these cases the plaintiff sued to obtain payment of a sum of money representing the balance of a debt that the defendant had guaranteed and in addition plaintiff's counsel fees as provided for in the guarantee. The Court allowed the claim on the guarantee but held, at the same time, that the clause requiring the guarantor to pay plaintiff's counsel fees as well as the costs of the proceedings was contrary to public policy. The court's judgment of November 23, 1967, reads in part as follows:

Whereas Article 8 of the Belgian Constitution and Article 6 of the Convention . . . guarantee that no person shall be removed against his will from the jurisdiction of the judge to whom the law assigns him and that everyone is entitled to have his civil rights and obligations determined by a court established by law;

Whereas a person who properly exercises his right to defend himself in a court may not be subjected to any kind of pecuniary sanction, since it would be contrary to public policy to place the defendant in a position that might compel him to renounce his fundamental and natural right to defend himself freely and without constraints; whereas any clause which would impair a person's right to defend himself is contrary to public policy . . .

Finally, in a judgment of November 13, 1968, the Brussels Civil Court decided that an undertaking not to institute any future action or proceeding concerning a previous contract which both parties considered to have been executed was contrary to the provisions of the Convention because no one may renounce his right to be heard by his ordinary judges.

B. Rules on the Rights of Accused Persons

1. Presumption of innocence

Article 6(2) provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." We have already mentioned, in discussing the right to a fair hearing, the


Court of Cassation's judgment of June 6, 1962, in the Boeckmans case.\footnote{Pas judges 1962, I, 1148; J. trib. 1963, p. 313, with note by Mr. Cornil. See supra note 28.}

That case, it will be recalled, also raised a very interesting question of interpretation relating to an accused person's right to be presumed innocent.

2. Right to be informed of the nature and cause of the accusation

Under Article 6(3) "everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

It has already been noted that the Brussels Court of Appeal, in its judgment of January 12, 1968,\footnote{Unpublished. See supra note 17.} expressed the view that

it is doubtful whether this provision applies to a police enquiry because it normally precedes and gives rise to a formal indictment (inbeschuldigingstelling) or the formulation of a charge (in-betichtingstelling), which is the time when the defendant should be informed in detail of the facts with which he is charged (tenlastenlegging) and be given the possibility of preparing his defence.

Orders or judgments referring or remitting cases to a correctional court present a problem more or less similar to the one that has been discussed above in connection with proceedings instituted on the direct application of the prosecution, except that the issue is raised not under Article 6(1) of the Convention but under Article 6(3)(a). Thus the Brussels Correctional Court had to render a decision on the following facts: The Chamber of the Court had ordered an accused person committed for trial on charges of misappropriation and forgery. In drawing up the charges the Chamber had referred, by way of example, only to one forgery, whereas it appeared from the case dossier before the Court that the accused, when interrogated by the investigating judge, had confessed to another forgery which was not expressly mentioned by the Chamber in the order committing her to be tried. In its judgment of February 1, 1967,\footnote{Col. Dec. 1969, p. 67.} the Court stated that "the phrase 'for example' in the description of the charge ... is incomplete ... because everyone charged with a criminal offence is entitled to be informed in detail of the nature and cause of the accusation against him (Article 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms)." The Court consequently returned the case file to the prosecution. As there was no appeal
from this decision it has become final. The doctrine it expounds must, however, be treated with particular caution because of the contrary view that the Court of Appeal advanced in its previously mentioned judgment of November 15, 1967.  

3. Right to have Adequate Time and Facilities for the Preparation of One’s Defense

Article 6(3)(b) provides that a person charged with a criminal offence is entitled to “have adequate time and facilities for the preparation of his defense.” It will be recalled that in its judgment of March 25, 1963, in the *Knappen* case the Court of Cassation decided that Article 6(3)(b) referred exclusively to the rights of the defense before the trial court and not to the accused person’s arrest or detention on remand. This interpretation was followed by the Court of Cassation in its judgment of March 23, 1964, in the *Abarca* case, which held that Article 6(3)(b) did not apply to extradition proceedings.

In earlier extradition cases the Court had implied that Article 6(3)(b) was applicable to such proceedings. Thus, in the *Zaouche*, *Abdi*, and *Ouakli* cases the Court had to decide whether the failure of the prosecution to deposit the case dossier with the registry of the Court of Appeal for inspection by the defense violated that provision. Here the Indictments Chamber had ordered the execution of an arrest warrant issued by a foreign authority for the purpose of extradition after finding that the foreigner in question, who alleged in his submissions that the dossier had not been placed at his disposal, had refused an offer for an adjournment before the end of the hearing in order to enable him to complete his defense. Taking these considerations into account the Court of Cassation ruled that the Chamber’s decision did not violate Article 6(3)(b). Similarly, in its judgment of May 29, 1961, in the *Talbi* case the Court of Cassation considered the question whether the fact that an accused had not been given advance notice of an order by the Court of Appeal reopening the proceedings could be reconciled with Article 6(3)(b). The Court answered the question in the affirmative, having found that the reopening of the hearing had been ordered *ex officio* in the presence of the accused, that the submissions filed by the prosecution had previously been served on

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94 See supra note 27.
96 See supra note 22.
97 Pasicrisie 1964, I, 797, see supra note 23.
98 Pasicrisie 1960, I, 1263.
99 As note 2 in the *Pasicrisie* states, “the Court expressed the view by implication that the requirement of making the file available to the foreigner and his counsel at the registry of the Court of Appeal is stipulated in order to ensure the rights of the defence, and may be waived by the person concerned.”
100 Pasicrisie 1961, I, 1037.
his counsel after the hearing had again been closed, and that the accused permitted a decision to be rendered on the merits of the case without requesting a continuance of the hearing to be allowed adequate time to prepare his defense.

It happens quite often that accused persons rely on Articles 6(3)(b) and (c) of the Convention to obtain an adjournment when their counsel is unable to appear. In addressing itself to such a motion, the Brussels Correctional Court in a judgment of January 4, 1966, decided that the right of the accused to legal assistance of his own choosing had to be balanced against the requirements of criminal prosecution, particularly in cases such as failure to support one's family, where the offence giving rise to the prosecution infringed the rights and interests of another person and where the resultant punishment can be expected to remedy the injury which, after all, is the foremost aim of all criminal proceedings.

Note should also be taken of a very interesting case which was decided by the Brussels Civil Court on September 14, 1967. Here the Court ruled that disciplinary regulations of an association violated Article 6(3)(b) of the Convention because they provided that a member against whom disciplinary action was taken could not examine his dossier until the case had been heard at first instance and that, in the event of an appeal, he could only see his dossier on the day preceding the hearing and then only to the extent authorized by the appellate committee representing the association.

4. Right to be Assisted by Defense Counsel

Article 6(3)(c) provides that a person charged with a criminal offence is entitled to “defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” This provision was invoked before the Brussels Correctional Court by an accused who, having opted for proceedings in Dutch, engaged a French-speaking lawyer to defend her who stated that he was incapable of addressing the Court in Dutch. Relying on Article 6(3)(c), the defendant requested the Court to authorize her counsel to address it in French. In its judgment of January 26, 1967, the Court set out at considerable length its reason for rejecting this application. It emphasized that a person appearing before a Belgian criminal court was entitled to legal assistance of his own choosing, provided counsel in question spoke the language in which the proceedings were conducted. The Belgian legislature was entitled to impose this limita-

tion on the right to counsel because of the principle, which was essential for the protection of the rights of the defense, that any person appearing before the courts was entitled to be heard and to be defended in the national language in which he had chosen the proceedings to be conducted. Such a limitation, far from infringing the rights of the accused, assured their protection.

5. Right to Obtain the Attendance and Examination of Defense Witnesses under the Same Conditions as Prosecution Witnesses

Article 6(3)(d) gives a person charged with a criminal offense the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” This provision was applied by the Louvain Criminal Court in its judgment of October 2, 1967. In this case the prosecution refused to summon a witness who declared during the preliminary investigation that he had seen nothing; the accused, relying on Article 6(3)(d), insisted on his being called. The Court held that it was bound to reopen the hearing in order to allow the accused to avail himself of the right accorded him under this provision.

In applying Article 6(3)(d) Belgian courts have encountered two problems, one relating to the calling of defense witnesses and the other to their examination.

In the correctional and police courts, witnesses are called either by summons or by notice to appear. In theory, witnesses may be summoned by a bailiff, a member of the local police or the national police force. In practice, the public prosecutor (Procureur du Roi) sends them a notice to appear; defense witnesses are either brought to the hearing by the accused or notified to appear by the public prosecutor. Frequently the defense requests the prosecution to summon the defense witnesses as well as the prosecution witnesses, and very often the prosecution agrees to do so. Before the Convention came into force in Belgium, it was generally assumed that the prosecution was under no legal obligation to comply with such a request. Thereafter, the question arose whether Article 6(3)(d) of the Convention could be read to compel the prosecution to assist the defense, either by notice to appear or, by summons if necessary, to obtain the attendance of defense witnesses.

Two judgments of the Brussels Correctional Court, one dated October 30, 1962, and the other March 13, 1965, have answered this question in the negative. In reaching this decision the Court

noted that under Belgian law, if the parties concerned wished to have witnesses heard at a criminal trial, it was for them to take the initiative. Thus the prosecution and the party claiming damages called the prosecution witnesses either by summons or by notice to appear; similarly, the accused “will have his witnesses heard” if he has “brought any or had any summoned” (Code of Criminal Procedure, Article 153). Far from depriving the accused of the right to obtain the attendance and examination of the defense witnesses, Belgian law provides him will all facilities necessary to place him on an equal footing with the prosecution and the party claiming damages.

Prior to the entry into force of the Convention, the established rule in Belgium was that in correctional and police court cases the question whether a particular witness was to be heard was left to the discretion of the Court. Have the courts now lost this discretion because Article 6(3)(d) of the Convention gives the accused the right to obtain the "examination" of witnesses on his behalf under the same conditions as witnesses against him? In its judgments of October 24, 1960,107 and July 20, 1962,108 in the De Greef case and the Belaid and Mercx case, the Court of Cassation ruled that Article 6(3)(d) did not deprive the trial court of its freedom to determine, in general, what additional evidence it needed to decide the case nor, in particular, whether any further prosecution or defense witnesses should be heard for this purpose. In the opinion of the Court, the equality between the prosecution and the defense is not affected by the refusal of the trial judge to hear witnesses named by the defense since he has the power to refuse a similar application by the prosecution. The Conseil d'État gave a judgment on similar lines on May 28, 1965.109

This doctrine is completely in accord with the view that the European Commission of Human Rights has expressed on this subject. Relying on the travaux préparatoires of the Convention,110 the Commission has on several occasions ruled that Article 6(3)(d) is intended to place the accused on a footing of equality with the prosecution and the persons claiming damages, but that it does not give him the right

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107 Pasicrisie 1961, 1, 207.
108 Pasicrisie 1962, 1, 1238.
109 Pasicrisie 1966, IV, 16, Arrêts et avis du Conseil d'État 1965, p. 550, Recueil de la jurisprudence du droit administratif et du Conseil d'État 1965, p. 127. The Conseil d'État had before it an appeal for annulment of the King's refusal to allow a Minister to be heard as a witness. The judgment states: "Since an application to the King under the Decree of 4 May 1812 for authorization for a Minister to be heard as a witness before the Court is necessarily bound up with the court's decision on whether the witness should be heard, an appeal seeking the annulment of the refusal to grant such authorization is inadmissible for lack of a legally justified interest whether the Court considers that it is not necessary to hear the witness in order to decide the case."
to summon witnesses without any restrictions. In the Commission's opinion the competent judicial authorities of a Contracting State are free, provided they comply with the principle of equality mentioned above, to satisfy themselves that the examination of a defense witness is likely to assist in the discovery of the truth and, if this is not the case, not to summon the witness. This does not mean, however, that the national courts may exercise this power arbitrarily; the organs established by the Convention retain the right to determine for themselves whether in exercising it, the national authorities have abused this power.\footnote{See in particular, Commission, 5 August 1960, Application No. 753/60, Yearbook III, p. 310; Commission, 19 December 1960, Application No. 617/59, Yearbook III; p. 370 (at p. 390); Commission, 19 December 1961, Application No. 1134/61, Yearbook IV, p. 382, Collection of Decisions, Vol. 7, p. 120; Commission, 15 February, 1965, Application No. 1753/63, Collection of Decisions, Vol. 17, p. 20 (at pp. 28-29); Commission, 3 April 1967, Application No. 2383/64, Collection of Decisions, Vol. 23, p. 26 (at p. 30); Commission, 1 June 1967, Application No. 2291/64, Collection of Decisions, Vol. 24, p. 20 (at p. 34).}

6. Right to Free Assistance by an Interpreter

Under Article 6(3)(e) everyone charged with a criminal offence has the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court.” As far as interpreters' fees are concerned, Belgian municipal legislation makes a distinction based on whether or not they were incurred with regard to a language officially in use in Belgium.\footnote{Thus, for example, in the case in which the Court of Cassation gave its judgment of 24 October 1960 Pas. 1961, I, 207), the European Commission of Human Rights, in its decision of 19 December 1961, considered that the trial court had in no way abused its discretion in the matter. It said, “Whereas in refusing to hear the police officer A the sole reason was that the latter's evidence would have had no bearing on the charges against X but only on subsequent facts, in other words such evidence would have been irrelevant and would not have constituted evidence for the defence, in the sense of Article 6 (3) (d) of the Convention.” Application No. 1134/61, Yearbook IV, p. 382; Collection of Decisions, vol. 7, p. 120 (at p. 122).} Costs arising out of the use of such a language must in all cases be borne by the state, whereas if the language is not officially in use in Belgium the losing party must pay the resulting fees.

The Convention thus goes further than Belgian law in protecting persons “charged with a criminal offence” who require the assistance of an interpreter. For unlike Belgian law, which favors persons who need assistance with a language officially in use in Belgium, \textit{i.e.}, with French, Dutch, or German, the Convention makes no distinction with regard to any particular language. It must therefore be conceded that the entry into force of the Convention compels Belgium to provide the

\footnote{Article 12 of the Revision of Criminal Costs Act of 1 June 1849; Articles 93, 96 and 97, 98 of the Royal Decree of 28 December 1950 embodying General Regulations on Criminal Costs.}
assistance of interpreters free of charge to all individuals charged with criminal offences. The cost assessments made by the Brussels Correctional Court in three judgments rendered on May 4, 11 and 19, 1965, are based on this reasoning. Moreover, in its judgement of October 7, 1968, the Court of Cassation set aside a judgment of a Court of Appeal in so far as it dealt with appeal costs in criminal proceedings because it failed to specify whether the costs which the convicted person had been ordered to pay included interpreters' fees. The Court of Cassation emphasized in this connection, that it followed from Article 6(3)(e) of the Convention, from Article 31 of the Use of Languages Act of June 15, 1935, and from Item 93-3 of the cost scale applicable to criminal cases that interpreters' fees may not be assessed against a convicted person.

The Belgian courts tend to interpret Article 6(3)(e) liberally, in favor of accused persons, and insist that individuals be accorded the assistance of an interpreter not only during the trial but also at all steps of the preliminary proceedings whenever this should be necessary for the effective defense of the accused. This attitude is reflected in the decision of the Legal Aid Office of the Brussels Court dated August 10, 1968, which concluded that it followed from Article 6(3)(e) of the Convention that “every person charged with a criminal offence is entitled to an effective defense, which necessarily includes the ability to communicate with his counsel in a language he understands, through an interpreter if required.” In this case, after finding that there was reason to believe that the applicant, who only spoke Arabic, was not in a position to pay for an interpreter and that the case was urgent and might be prejudiced by delay, the Office appointed a French/Arabic interpreter to accompany the applicant's counsel to the prison or any other place of detention.

**CONCLUSION**

Article 6 of the Convention appears thus far to have had a relatively limited effect on Belgian law. We have seen, however, that some of its provisions, particularly Articles 6(1), 6(3)(a), and 6(3)(e), have either influenced or determined the outcome in a number of cases involving disputed questions of criminal or civil procedure. While it cannot therefore be denied that the procedural safeguards provided for by Article 6 are gradually taking root in Belgium, it must be admitted that the Belgian legal system is showing prudent deliberation in accepting this development.

