COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF BORGERS v. BELGIUM

(Application no. 12005/86)

JUDGMENT

STRASBOURG

30 October 1991

In the case of Borgers v. Belgium*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court** and composed of the following judges:

Mr J. CREMONA, *President*,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr F. BIGI,
Mr M. STORME, *ad hoc judge*,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 22 March and 25 September 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

---

* The case is numbered 39/1990/230/296. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and then by the Belgian Government ("the Government") on 11 July and 26 September 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 12005/86) against the Kingdom of Belgium lodged with the Commission under Article 25 (art. 25) by a Belgian national, Mr André Borgers, on 5 December 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 (art. 6) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 August 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr F. Matscher, Mr B. Walsh, Mr C. Russo, Mr N. Valticos, Mr A.N. Loizou and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

On 18 July 1990 Mr De Meyer had stated that he wished to withdraw from the case pursuant to Rule 24 para. 2, because it raised the same issues as those which had arisen at the time in the Delcourt case, in which he had acted as Agent and Counsel for the Government (judgment of 17 January 1970, Series A no. 11, p. 5, para. 7). On 21 September the Permanent Representative of Belgium to the Council of Europe informed the Registrar that Professor M. Storme had been appointed to sit as ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's representative on the need for a written procedure (Rule 37 para. 1). In accordance with the orders made in consequence, the Registrar received the Government's memorial on 17 December 1990 and that of the applicant on 13 January 1991.

In a letter of 14 January the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 23 January 1991 the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 51).

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 12 October 1990 that the oral proceedings should open on 19 March 1991 (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J. LATHOUWERS, legal officer,
Ministry of Justice, *Agent*,
Mr P. VAN OMMESLAGHE, avocat,
Mr P. GÉRARD, avocat, *Counsel*;

- for the Commission

Mr S. TRECHSEL, *Delegate*;

- for the applicant

Mr J. GILLARDIN, avocat, *Counsel*.

The Court heard addresses by Mr Van Ommeslaghe, Mr Trechsel and Mr Gillardin, as well as their replies to its questions.

8. At the final deliberations Mr Cremona, the Vice-President of the Court, replaced Mr Ryssdal as President, the latter being unable to take part in the further consideration of the case (Rule 9).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr André Borgers, a Belgian national residing at Lummen (Belgium), is a lawyer who currently practises at the Hasselt Bar.

10. On 8 November 1981 he was elected provincial counsellor and thereupon tendered his resignation from the post of substitute district judge (juge de paix suppléant) which he had held since 12 April 1976, but which under the Judicial Code was incompatible with his new elected office.

11. On 16 June 1981 he had appeared before the Antwerp Court of Appeal charged with forgery and using forged documents, the latter court having jurisdiction by virtue of the privileges which he enjoyed in this respect as a judicial officer. On 19 May 1982 it imposed on him a

suspended sentence of six months' imprisonment and fined him 40,000 Belgian francs.

12. The applicant appealed to the Court of Cassation on points of law. He argued that in its judgment convicting him the Court of Appeal had failed to give an adequate statement of its reasons and to attach sufficient weight to the records of the investigating judge's examinations; he contended further that the judgment had been delivered following a violation of the rights of the defence. In accordance with usual practice, the procureur général's department of the Antwerp Court of Appeal did not submit a memorial in reply.

13. On 20 March 1984 the Court of Cassation allowed the appeal and quashed the contested decision on the ground that an adequate statement of the reasons on which it was based had not been given. Previously, at the hearing, it had heard the report of the judge rapporteur, Mr d'Haenens, and the concurring submissions (conclusions) of Mr Tillekaerts, the avocat général (a member of the procureur général's department). The latter had also attended the deliberations in accordance with Article 1109 of the Judicial Code (see paragraph 17 below).

14. The Ghent Court of Appeal, to which the case had been remitted, convicted the applicant on 14 November 1984 and imposed on him identical sanctions to those resulting from the earlier decision (see paragraph 11 above). Mr Borgers again appealed to the Court of Cassation; he complained inter alia that the judgment in question had failed to state sufficient reasons and had misinterpreted the provisions of criminal law concerning forged documents and statutory limitation.

15. His appeal was dismissed on 18 June 1985, following a hearing at which the Court heard the report of the judge rapporteur, Mr d'Haenens, and the concurring submissions of Mr Tillekaerts, the avocat général, who had again participated in the deliberations (see paragraph 17 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The "procureur général"'s department at the Belgian Court of Cassation

16. According to Article 141 of the Judicial Code:

> "The procureur général at the Court of Cassation shall not act as prosecuting authority except where he has instituted proceedings in which the decision on the merits falls to the Court of Cassation."

This provision replaced Article 37 of the Prince Sovereign's Decree of 15 March 1815, which was in issue in the Delcourt case (already cited, see paragraph 3 above) and which was worded as follows:

"Even in criminal proceedings, the procureur général at the court cannot be regarded as a party; his role is only to make submissions (conclusions), except where he has himself appealed. In the latter event, he shall put the prosecution case (réquisitoire) in pleadings which, filed with the registry, shall be forwarded without further formalities to the rapporteur appointed by the First President and then distributed with the report to the members of the procureur général's department."

It is true that where the Court of Cassation hears a case on its merits, the procureur général's department assumes the role of a party, but these instances are quite rare. They include the trial of ministers (Article 90 of the Constitution), civil proceedings brought against a judge in his official capacity (la prise à partie) (Article 613, 2°, and Articles 1140 to 1147 of the Judicial Code) and disciplinary proceedings against certain judicial officers (Articles 409, 410 and 615 of the same Code).

Apart from these exceptional circumstances, the procureur général's department at the Court of Cassation carries out, with full independence, the duties of adviser to the Court. In this capacity, it is by no means unusual for it to express the opinion that the court should dismiss an appeal lodged by the prosecuting authorities of the lower court or should allow an appeal by an accused; indeed it may even raise an argument against the conviction or sentence of its own motion.

17. On the procedure to be followed in the Court of Cassation, whether for civil or criminal proceedings, the Judicial Code provides as follows:

Article 1107

"After the report has been read out, submissions are taken from the lawyers present at the hearing. Their pleadings shall relate exclusively to the issues of law raised in the grounds for appeal or to the pleas in bar put forward against the appeal.

The procureur général's department shall then make its submissions, whereafter no further documents shall be accepted."

Article 1109

"The procureur général or a member of his department shall be entitled to attend the deliberations unless the appeal on a point of law has been lodged by the procureur général's department itself; he shall not be entitled to vote in the deliberations."

The procureur général's department may file an appeal on a point of law either "in the interests of the law" (Articles 1089 and 1090 of the Judicial Code and Article 442 of the Code of Criminal Procedure) or following a complaint by the Minister of Justice (Article 1088 of the Judicial Code and Article 441 of the Code of Criminal Procedure).

The rule which, in such cases, requires the exclusion from the Court's deliberations of the procureur général or his representative already applied under the Prince Sovereign's Decree of 15 March 1815 (see paragraph 16 above), but it was not expressly laid down therein (see the transcript of the

hearing of 30 September 1969 in the Delcourt case, Series B, no. 9, p. 215). It merely provided, in Article 39:

> "In cassation proceedings the procureur général or a member of his department shall have the right to be present, without voting, when the court retires to consider its decision."

B. Disciplinary rules governing the judiciary

1. The judicial officials of the "ministère public"

18. Under Article 400 of the Judicial Code the disciplinary hierarchy applying to the officials of the ministère public is as follows:

> "The Minister of Justice shall exercise supervisory authority over all the officials of the ministère public, the procureur général at the Court of Cassation over his counterparts at the Courts of Appeal and the latter over public prosecutors and their departments in their courts and the lower courts as well as over State counsel in the Industrial Appeals Tribunals, the crown prosecutors and the State counsel in the industrial tribunals and their substitutes."

The above provision replaced section 154 of the Judiciary (Organisation) Act of 1869, referred to in the Delcourt judgment (cited above, Series A no. 11, p. 16, para. 30).

Article 414 of the Judicial Code states as follows:

> "The procureur général at the Court of Appeal may impose on the subordinate officials of the ministère public the sanctions of a warning, a reprimand or a reprimand with suspension of salary.
>
> The procureur général at the Court of Cassation shall have the same powers in regard to persons holding the office of avocat général at that court and those holding the office of procureur général at the Courts of Appeal.
>
> The Minister of Justice may likewise warn and reprimand all the officials of the ministère public or recommend to the King their suspension or their revocation."

2. Judges

19. On the question of disciplinary proceedings against judges and the role in this matter of the procureur général at the Court of Cassation, the following provisions of the Judicial Code may be cited:

Article 409

> "Only the Court of Cassation may hear disciplinary proceedings to remove a judge from office."

Article 413

"Substitute judges" - such as Mr Borgers from 1976 to 1981 (see paragraph 10 above) - "are, in that capacity, subject to the same disciplinary authorities as full judges."

Article 418

"[...] disciplinary proceedings [...] against judges [...] shall be instituted by the competent authority of its own motion; if their object is the issue of a warning, they shall be instituted by the authority empowered to order such a measure; in other cases, they shall be instituted by the first president of the competent court. Disciplinary proceedings may always be instituted at the instance of officers of the ministère public."

PROCEEDINGS BEFORE THE COMMISSION

20. In his application of 5 December 1985 to the Commission (no. 12005/86), Mr Borgers relied inter alia on Article 6 para. 1 (art. 6-1) of the Convention. He complained that an avocat général at the Court of Cassation had attended the deliberations of that court; in his view, this had infringed his right to a fair trial and violated the principle of the equality of arms. He subsequently criticised, in addition, the fact that he had not been able to reply to that official's submissions or address the court last at the hearing on 18 June 1985 (see paragraph 15 above).

21. On 12 April 1989 the Commission declared these complaints admissible, while finding the remainder of the application inadmissible. In its report of 17 May 1990 (Article 31 of the Convention) (art. 31), it expressed the opinion, by fourteen votes to one, that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of its opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment*.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 214-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 para. 1 (art. 6-1)

22. Mr Borgers alleged a violation of Article 6 para. 1 (art.6-1), according to which:

> "In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ..."

He complained in the first place that, at the hearing on 18 June 1985 in the Court of Cassation (see paragraph 15 above), he had been unable to reply to the submissions of the avocat général or to address the court last; secondly, he objected to the fact that the avocat général had participated in the deliberations which took place immediately after the hearing. He argued that as, in accordance with Articles 400 and 414 of the Judicial Code (see paragraph 18 above), the ministère public formed a single unit for institutional and disciplinary purposes, the official in question could indeed have been seen as his opponent. That official's presence at the deliberations had served only to aggravate the breach of the principle of equality of arms which had already occurred at the stage of argument.

The Commission shared this opinion in substance and invited the Court to reconsider the view taken in its judgment in the Delcourt case of 17 January 1970 (paragraph 3 above).

23. According to the Government, on the other hand, the procureur général's department at the Court of Cassation could not be considered equivalent to the prosecutor's offices of the lower courts. As it did not act as prosecuting authority, save in exceptional cases (see paragraph 16 above), it was in their view neither party to the proceedings nor the opponent of anyone. Its sole task was to advise the Court and thereby help to ensure that its case-law was consistent: at the hearing, by making submissions; at the deliberations, by assisting in the drafting of the judgment. Its total impartiality was derived in particular from the independence which it enjoyed vis-à-vis the Minister of Justice and the lack of any hierarchical link between the procureur général of the Court of Cassation and the officials of the ministère public in the lower courts. Recent statistics confirmed moreover that, as had been the case in the past, the submissions of the procureur général's department were frequently in favour of the convicted person (see the above-mentioned Delcourt judgment, Series A no. 11, pp. 18-19, para. 34). In short, the Government contended that the disputed proceedings had not given rise to a breach of the applicant's right to a fair trial before an impartial court or infringed the principle of equality of arms.

24. The Court notes in the first place that the findings in the Delcourt judgment on the question of the independence and impartiality of the Court

of Cassation and its procureur général's department remain entirely valid (Series A no. 11, pp. 17-19, paras. 32-38). It is true that the Judicial Code has entered into force since then, but it substantially confirmed the existing rules in this field, through provisions whose wording was moreover examined at the hearing on 29 September 1969 (Series B no. 9, pp. 170 et seq.). Having regard to the grounds set out in that judgment, the Court does not perceive any breach of the Convention requirements on this issue.

It is, however, necessary to consider whether the proceedings before the Court of Cassation also respected the rights of the defence and the principle of the equality of arms, which are features of the wider concept of a fair trial (see, among other authorities, the Ekbatani judgment of 26 May 1988, Series A no. 134, p. 14, para. 30). This has undergone a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice (see, among other authorities, mutatis mutandis, the following judgments: Piersack v. Belgium of 1 October 1982, Series A no. 53, pp. 14-15, para. 30; Campbell and Fell v. the United Kingdom of 28 June 1984, Series A no. 80, pp. 39-40, para. 18; Sramek v. Austria of 22 October 1984, Series A no. 84, p. 20, para. 42; De Cubber v. Belgium of 26 October 1984, Series A no. 86, p. 14, para. 26; Bönisch v. Austria of 6 May 1985, Series A no. 92, p. 15, para. 32; Belilos v. Switzerland of 29 April 1988, Series A no. 132, p. 30, para. 67; Hauschildt v. Denmark of 24 May 1989, Series A no. 154, p. 21, para. 48; Langborger v. Sweden of 22 June 1989, Series A no. 155, p. 16, para. 32; Demicoli v. Malta of 27 August 1991, Series A no. 210, p. 18, para. 40; Brandstetter v. Austria of 28 August 1991, Series A no. 211, p. 21, para. 44).

25. In this connection too the Government stressed that, both in criminal and civil proceedings, the procureur général's department at the Court of Cassation was in no way a party to the proceedings before that court - save in exceptional cases which were not material in this instance -, with the result that it could not be regarded as an opponent; its role was confined to giving the Court an impartial and independent opinion on the legal issues raised and, in criminal proceedings, to drawing attention, even of its own motion, to any point of law having regard to which the contested decision should be quashed.

26. No one questions the objectivity with which the procureur général's department at the Court of Cassation discharges its functions. This is shown by the consensus which has existed in Belgium in relation to it since its inception and by its approval by Parliament on various occasions.

Nevertheless the opinion of the procureur général's department cannot be regarded as neutral from the point of view of the parties to the cassation proceedings. By recommending that an accused's appeal be allowed or dismissed, the official of the procureur général's department becomes objectively speaking his ally or his opponent. In the latter event, Article 6

para. 1 (art. 6-1) requires that the rights of the defence and the principle of equality of arms be respected.

27. In the present case the hearing on 18 June 1985 before the Court of Cassation concluded with the avocat général's submissions to the effect that Mr Borger's appeal should not be allowed (see paragraph 15 above). At no time could the latter reply to those submissions: before hearing them, he was unaware of their contents because they had not been communicated to him in advance; thereafter he was prevented from doing so by statute. Article 1107 of the Judicial Code prohibits even the lodging of written notes following the intervention of the member of the procureur général's department (see paragraph 17 above).

The Court cannot see the justification for such restrictions on the rights of the defence. Once the avocat général had made submissions unfavourable to the applicant, the latter had a clear interest in being able to submit his observations on them before argument was closed. The fact that the Court of Cassation's jurisdiction is confined to questions of law makes no difference in this respect.

28. Further and above all, the inequality was increased even more by the avocat général's participation, in an advisory capacity, in the Court's deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is however hard to see how such assistance can remain limited to stylistic considerations, which are in any case often indissociable from substantive matters, if it is in addition intended, as the Government also affirmed, to contribute towards maintaining the consistency of the case-law. Even if such assistance was so limited in the present case, it could reasonably be thought that the deliberations afforded the avocat général an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed.

29. In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6 para. 1 (art. 6-1).

II. THE APPLICATION OF ARTICLE 50 (art. 50)

30. Under Article 50 (art. 50) of the Convention,

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

A. Damage

31. Initially Mr Borgers claimed an overall amount of 1,000,000 Belgian francs as compensation for the non-pecuniary damage deriving from the professional and family difficulties which had resulted from the failure of his appeal. At the hearing before the Court, he apparently changed his position to that of the Commission. In the latter's view, there could be no speculation as to what would have been the outcome of these proceedings had no violation occurred. The Government too stressed the lack of causal connection between the breach and the alleged damage.

The Court shares the Commission's view that the finding of a violation of Article 6 para. 1 (art. 6-1) constitutes in itself sufficient just satisfaction in this respect.

B. Cost and expenses

32. The applicant also claimed a sum of 113,250 Belgian francs for the expenses and fees, which he itemised, of the lawyer who represented him before the Court. Neither the Commission nor the Government formulated observations on this question.

In the Court's opinion, the amount claimed is consistent with the criteria laid down in its case-law. Mr Borgers should therefore be awarded the entire amount.

FOR THESE REASONS, THE COURT

1. Holds by eighteen votes to four that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention;

2. Holds by twenty votes to two that Belgium is to pay the applicant, within three months, 113,250 (one hundred and thirteen thousand two hundred and fifty) Belgian francs in respect of costs and expenses;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 October 1991.

John CREMONA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- dissenting opinion of Mr Cremona;

- dissenting opinion of Mr Thór Vilhjálmsson;

- concurring opinion of Mr Pinheiro Farinha and Mr Morenilla;

- dissenting opinion of Mr Martens;

- dissenting opinion of Mr Storme.

J. C.
M.-A. E.

DISSENTING OPINION OF JUDGE CREMONA

With respect, I am unable to agree with the present judgment.

First of all, one must not be unduly impressed by the admittedly unusual character of the Belgian system which, one must nevertheless accept, rests on a broad consensus and has worked well for over a century and a half to the extent that the Belgian Parliament has on more than one occasion confirmed it. One may of course have different views as to its necessity or perhaps even wisdom, but it is not for the Court to go into that matter and tell the respondent State what system to adopt. What is essential is that there should be no incompatibility with the Convention and I am satisfied that there is none in the instant case.

In this system the procureur général at the Court of Cassation (which court deals only with the law) is in effect, as was stated in Delcourt (paragraph 34), an adjunct and adviser of that court, who with total objectivity (accepted also in the present judgment) gives the court the benefit of his opinion on the law with a view to ensuring the uniformity of judicial precedent, and discharges a function of a quasi-judicial nature.

As such, the said procureur général (which term is here used to include members of his department, notably the avocat général) does not expect, nor on the other hand can he be expected, to be hailed as an ally when, as so often happens in practice, he expresses a legal opinion which accords with the line taken by the accused, and be dismissed as a foe when he does not, because in actual fact - and this is the reality of the situation examined by the Court in Delcourt - at no time is he either one or the other. Appearances cannot, chameleon-like, change in respect of the same individual according to his interest in a case, because if the majority view is correct, the same individual may in one case consider the procureur général at the Court of Cassation as an ally and in another case as a foe. And if there are two separate questions of law involved in a single appeal, he may even do so in one and the same case. The same applies also if there are two successive appeals to the Court of Cassation on two separate issues in the same case. This is in fact what actually happened in the present case, where the legal opinion of the very same avocat général was in favour of the applicant’s first appeal, which was in fact upheld, and against his second appeal, which was rejected. Obviously, the applicant was quite happy with one and, no less obviously, unhappy with the other. Surely a practising barrister and former judge, himself assisted by another barrister and quite familiar with the system, would be the last person to labour under false impressions in this regard.

I must say at this point that I am not much impressed by the host of judgments cited in paragraph 24 insofar as they are held out as some sort of justification for overruling Delcourt. In actual fact these were cases of alleged lack of impartiality (and/or independence) and the importance

attached in the relative judgments to the question of appearances was in that context. But in the present judgment the Court says that, having regard to the grounds set out in Delcourt, it does not perceive any breach of the Convention requirements on the issue of the impartiality and independence of the Court of Cassation and its procureur général's department. It then passes on to consider the case under the head of equality of arms and rights of the defence (paragraph 24). But here the cited judgments, which as already stated were really concerned with impartiality and independence, do not help or at any rate do not directly do so.

In any event, if those judgments are invoked as precedents for overruling Delcourt in view of the importance attached by them to appearances as part of an evolutionary process in the Court's jurisprudence, it is to be noted that in Delcourt too appearances were clearly given importance. But then the truly important thing is that, looking behind appearances, the Court found in that case that the reality of the situation, in the light especially of the true role of the procureur général at the Court of Cassation, disclosed no breach of the requirements of a "fair trial" under Article 6 (art. 6), and in my view should have done the same also in the present case. After all, surely to look behind appearances at the realities of a given situation is in itself, as a general proposition of both law and common sense, perfectly sound. It is also something which the Court has explicitly done in quite a number of other cases besides Delcourt (see, for instance, the judgments of Deweer, Series A no. 35, p. 23, para. 44; Van Droogenbroeck, Series A no. 50, pp. 20-21, para. 38; Sporrong and Lönnroth, Series A no. 52, pp. 24-25, para. 63). Whether in individual cases it ultimately concluded for or against a violation, and in fact it has done both, is of course beside the point.

Again, the importance attached to the increased sensitivity of the public to the fair administration of justice, also (rather vaguely) referred to in connection with the evolutionary process in the Court's jurisprudence and which surely cannot have exploded in intensity since Delcourt, cannot serve as a ground for overruling that judgment.

In Delcourt, after a very careful examination of the issue from all aspects, including that of appearances, the Court in effect performed an evaluating exercise which should not be disturbed too easily and which to my mind is, as such, still valid.

In conclusion, I do not think that the judgments cited in paragraph 24 are in effect valid precedents for overruling Delcourt, nor do I see any other reason cogent enough to justify overruling a previous judgment of the Court on the basis of which the respondent State has for so many years acted in good faith.

Lastly, as is common practice, I have voted on the compensation payable under Article 50 (art. 50) in view of the majority decision on the merits.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

I have not found it possible to vote with the majority of the Court on the main question in this case, i.e. whether or not there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention.

The issues that have to be considered are set out in paragraph 24 of the judgment. I have nothing to add to what is said in the first sub-paragraph, with which I agree fully.

As to the relevance of the fact that the avocat général stated his opinion in open court and was the last speaker before the Court retired for deliberations behind closed doors, I would like to quote the following from paragraph 29 of the Delcourt judgment:

> "In the present case, the two appeals to the Court of Cassation were both instituted by [the applicant]; under Belgian law, the respondent party was not the procureur général's department at the Court of Cassation but the procureur général's departments at whose behest the lower courts had pronounced the decisions under appeal ... Indeed, the procureur général's departments at the Court of First Instance and the Court of Appeal did not even avail themselves of their right to reply in writing to [the applicant's] memorial and the relevant legislation did not even permit them to appear at the hearing before the Court of Cassation - still less be present at the deliberations."

In paragraph 34 of the Delcourt judgment the Court added:

> "The procureur général's department at the Court of Cassation is, in a word, an adjunct and an adviser of the Court. It discharges a function of a quasi-judicial nature."

I find the facts set out in that case comparable to the facts in the present case and the legal analysis in the Delcourt judgment still valid. The question of equality of arms does not arise in this connection in my opinion, because the avocat général was not engaged in argument with the applicant. His duty was to form an opinion on the legal issues before the Court of Cassation after the applicant had presented his arguments. He then had a duty to make his views public at a particular stage of the proceedings. I am of the opinion that it has not been substantiated that this constituted a failure to respect the rights of the defence and the principle of equality of arms.

The presence of the avocat général at the deliberations of the judges of the Court of Cassation has also to be considered. As I have already stated, I see the avocat général not as an opponent of the applicant but rather as an assistant to the judges. Even if the avocat général were considered to be to some extent bound by his public statement, that would hardly matter. The strong traditions of the judiciary in Belgium and the ability of the judges, deriving from their education and training, provided the necessary effective guarantees of independence and impartiality. I find no violation here of the principle of fair trial.

The third and last question is that of appearances. The functions of the procureur général's department at the Court of Cassation in Belgium are grounded on old and well-known traditions. Assessing all the circumstances, I find it established that the objective impartiality of the Court cannot be challenged.

CONCURRING OPINION OF JUDGES PINHEIRO FARINHA AND MORENILLA

(Translation)

1. We agree with the operative provisions of the judgment, but, to our regret, we cannot accept what the majority says in paragraphs 24 and 28.

2. We reject the affirmation that the findings in the Delcourt judgment on the question of the independence and impartiality of the procureur général's department "remain entirely valid". We believe that, quite to the contrary, the Court ought expressly to have departed from the contents of paragraphs 32-38 of that judgment.

3. As regards the independence of the procureur général's department at the Court of Cassation, we observe that, under Articles 400 and 414 of the Judicial Code, the Minister of Justice is empowered to exercise supervisory authority over all the officials of the ministère public and in particular to impose on them the sanctions of "a warning" or "a reprimand" or "to recommend to the King their suspension or revocation"; we also note the hierarchical structure of the ministère public deriving from the first and second paragraphs of the aforesaid Article 414.

4. It follows that the avocat général who made his final submissions in the cassation proceedings and who participated in the deliberations of the Court remained a member of the ministère public.

5. We have absolutely no doubts as to the integrity of the members of the procureur général's department and their intellectual independence, but we point out that they remain representatives of the prosecutor in criminal cases and therefore - in procedural terms - the accused's opponents.

6. In our opinion, with all due respect to the members of the majority, it is not possible to talk of equality or inequality of arms where there are no opposing parties. In this case there was no equality of arms in view of the "unusual" right (see the Delcourt judgment, pp. 16-17, para. 30 in fine) of the ministère public in Belgium, in accordance with Article 1109 of the Judicial Code (see paragraph 17), to attend the secret deliberations of the Court.

7. The rights of the defence required, as the majority acknowledged at paragraph 27, that "once the avocat général had made submissions unfavourable to the applicant" the latter be accorded the right to submit observations on those submissions before the hearing was closed. This requirement was not satisfied by Article 772 of the Judicial Code, according to which exceptionally the hearing may be reopened, because in the present case no "document" or "new fact" had been discovered. Moreover it seems that Article has as yet never been applied in the Court of Cassation.

DISSENTING OPINION OF JUDGE MARTENS

I. Introduction

1. In its judgment (hereinafter "the judgment") the Court has overruled the Delcourt decision. By its own standards it could do so only if it were persuaded that there were cogent reasons for such a course1. Such reasons were particularly called for since what was at stake was whether the proceedings before the highest court of a member State comply with the requirement of fairness under Article 6 para. 1 (art. 6-1) of the Convention - a delicate question which in the Delcourt judgment had been answered in the affirmative by a unanimous Court. Moreover the Court's overruling of that decision may affect the proceedings before the highest courts in several other member States as well2.

In my opinion there are no such reasons. Moreover, the Court has failed to do what a court that overrules an important judgment should do: it failed to state its reasons for doing so clearly and convincingly.

I will elaborate on these two points and conclude this opinion with some considerations on a more general aspect of this case which also causes me concern.

II. Are Articles 1107 and 1109 of the Belgian Judicial Code compatible with the Convention?

a. Introductory remarks

2.1. Firstly I note, like the Court in paragraph 24 of its judgment, that although the relevant national legislation has been changed since the Delcourt judgment, the changes were not essential, were already known to the Court when it considered its decision in that case, and have been taken into account explicitly3.

2.2. Secondly, it is common ground that the impugned proceedings were in every respect in conformity with Articles 1107 and 1109 of the Belgian Judicial Code. In such a case I persist in thinking that both logic and truthfulness demand that the first step must be to ascertain whether these provisions are compatible with the Convention4.

It is not only required by logic and truthfulness but also out of fairness to Belgium.

The Delcourt judgment is one of those rare judgments where the Court examined the compatibility of national provisions with the Convention: it explicitly defined the object of its examination in this way both at the beginning (see para. 27 in fine) and at the end of its judgment (see para. 37). At the outset therefore Belgium is entitled to expect that a judgment overruling the Delcourt decision does the same.

There is, however, a more compelling reason to be quite explicit on this point. As a result of the judgment Belgium will have to change its legislation and is therefore entitled to expect that the judgment enables it to ascertain whether Articles 1107 and 1109 as such violate Article 6 para. 1 (art. 6-1), or do so only in certain cases. The more so as it was the Commission's thesis (as explained by its Delegate) that these provisions violate the Convention only as far as criminal cases are concerned5. It is true that the Court did not adopt the arguments on which this proposition was based. Nevertheless, in paragraph 26 it has also limited itself to criminal cases. In my opinion Belgium and the other member States which have a particular interest in the outcome of this case should not have been left to guess whether or not the Court's new doctrine is restricted to such cases.

b. The "procureur général"'s functions and the manner in which he performs them

2.3. The first step in examining complaints about national procedure should be "to concentrate on the realities of the situation"6: the Court should not, of course, blindly accept national doctrine, but should itself analyse and assess the procedure. Therefore, the starting point for ascertaining whether Articles 1107 and 1109 are compatible with the requirements of a fair trial within the meaning of paragraph 1 of Article 6 (art. 6-1) should be an examination of the procedural position the procureur général occupies in the proceedings before the Belgian Court of Cassation and of the manner in which he performs his function7. In this examination I have carefully taken into account the critical comments made in this respect about the Delcourt judgment.

2.4. One of the judgment's fiercest critics, Cappelletti, has written8 that the "ambiguity of the role and the status of the ministère public remains a typical feature of this institution". In a way that is true. As it is - to a certain extent - also true that "the ministère public is, and has been throughout a century-long history, an institutional method of assuring that the 'public interest' (...) is adequately represented"9. Neither can there be much doubt that there is a historical connection between this function of the ministère public and those of its representative at the courts of cassation in France, Italy, the Netherlands and Belgium10: the latter functions undoubtedly once originated from (or at least were closely connected with) the task "to insure that the (lower) courts correctly and uniformly apply the law" which in former days was incumbent upon the ministère public11.

One should be careful, however, not to draw over hasty conclusions from these general and historical considerations as to the actual functions of the procureur général at the Belgian Court of Cassation. In particular, it would, in my opinion, be wrong to conclude therefrom that because the procureur général at the Belgian Court of Cassation is a member of the ministère

public his functions are "to represent the public interest". This is the case when he brings an appeal in the interests of the law. But apart from that, it would be erroneous to consider his role as "representing the public interest". This may be illustrated by the fact that his position and the manner in which he performs his functions do not in any way depend on whether the appeal concerns a civil or a criminal case12, or on any other special feature of an appeal instituted by one of the parties to the case13.

His role is - as the Court said in paragraph 34 of its Delcourt judgment - that of an independent and impartial adjunct to and adviser of the Court of Cassation. It was not disputed - and explicitly accepted also in the present judgment (paragraphs 16, 24 and 26) - that to all practical purposes the procureur général offers the same guarantees with respect to independence and impartiality as the judges in the Court of Cassation. In my opinion the term "adjunct" is well chosen14: in a way the procureur général is an "extraordinary member" of the Court of Cassation15.

As to the manner of performing his functions this "extraordinary member" differs in two respects from ordinary members:

(1) he expresses his opinion in open court, before the secret deliberations; he does so after the parties have, at the hearing, declared that they maintain the claims made in the memorials already submitted, or (very exceptionally16) have orally elucidated their submissions; in other words, when he takes the floor, the case has been fully pleaded and all members of the Court have already formed their (at least preliminary) opinion;

(2) subsequently the extraordinary member, like the ordinary members, attends17 the secret deliberations but is not entitled to vote.

2.5 As often in legal debate it may be illuminating to alter the facts slightly. Imagine a legal system where each case before the Court of Cassation is prepared by one of the five judges, the juge rapporteur. Imagine further that under that system and before the deliberations, the juge rapporteur has to state in open court his full opinion, i.e. the conclusions he has come to after having studied the file and having heard the parties. I would think that under such a system it would stand to reason that the juge rapporteur is only in a position to do so after the case has been fully pleaded and that, consequently, the parties will not be allowed to comment upon his speech or, if they are, that he will have "the last word". It would also stand to reason that the juge rapporteur, who presumably has a better knowledge of the file than his brethren, takes part in the deliberations. In such a system these features not only stand to reason but there is in my mind no doubt that they cannot be regarded as incompatible with the requirements of a fair procedure. The public submissions of the juge rapporteur constitute, in this system, the first stage of the process by which the Court forms its judgment (which is arrived at in camera) and I fail to appreciate why fairness demands that the parties, who already have had every opportunity to defend their case, should at that stage be heard again: lites finiri oportet.

Nor can I see any reason why such a juge rapporteur should not take part in the deliberations. By expressing his opinion in open court he has, admittedly, committed himself and therefore has a particular interest in having his view of the law accepted by his colleagues18. While it is true that even Supreme Court judges may have their pride, should we not assume that the juge rapporteur is sufficiently trained to overcome this when he is convinced that the view expressed in camera by his colleagues is the better one? And if not, do not his fellow judges form the majority?

It follows from the analysis of the position of the procureur général and the manner in which he performs his functions as set out in paragraph 2.4 above that there is no decisive difference between his position and that of the imaginary juge rapporteur. Consequently, the conclusions drawn with regard to that judge are equally valid with regard to the procureur général.

In conclusion: I fully share the analysis and the assessment of the Delcourt judgment.

III. The Court's reasoning

a. Introductory remarks

3.1. The reasons given by the Court for coming to a different conclusion may, for present purposes, be divided into two parts.

The second sub-paragraph of paragraph 24 of the judgment contains the Court's "general considerations". There the Court notes that, although the independence and the impartiality of the Court of Cassation and its procureur général's department meet the requirements of the Convention, it remains to be seen whether the same may be said about the proceedings before that court. It suggests that, especially as far as the notion of fair trial is concerned, there has been "a considerable evolution", impliedly since the Delcourt judgment. The Court continues by indicating the characteristics of that evolution, which concerned notably: (a) "the importance attached to appearances" and (b) "the increased sensitivity of the public to the fair administration of justice".

The starting point for the Court's "specific considerations" is paragraph 26 where it then applies this "evolved" notion of fair trial to the proceedings before the Belgian Court of Cassation.

I will first discuss the Court's "general considerations" and then make some remarks on paragraph 26.

b. The increased sensitivity of the public to the fair administration of justice

3.2. The point made by the Court suggests that since the Delcourt judgment there have been "societal changes" in this respect which warrant overruling19. Thus it echoes a similar observation made during the hearing before the Court by counsel for the applicant. Counsel provided no specific

grounds for his suggestion that since the Delcourt judgment there had been an evolution in this respect. Neither does the Court. It merely refers to its case-law (to be discussed in paragraph 3.4); but there one will look in vain for a factual basis for the alleged "increased sensitivity of the public".

Yet, general allegations such as this require a proper basis in fact. While the legal profession in various member States undoubtedly shows an increased awareness of the possibilities offered by the Convention, this should not be confounded with "societal changes" which eventually may entail - and justify - changing the Court's case-law!

For my part, I am not aware of any specific grounds for the Court's thesis.

Admittedly, there were some critical remarks on the Delcourt judgment in commentaries at the time of the decision, but these can hardly serve as an illustration of societal changes since then. There is no evidence whatsoever of recent, serious and widespread national or international criticism of the proceedings before the Belgian Court of Cassation; nor - which, in view of the information provided in note 2, one would have expected if there was really any considerable increase in sensitivity on this point - of proceedings before the French or the Netherlands courts of cassation20.

In conclusion, I must say, with due respect, that I find this ground for overruling wholly unconvincing.

c. The importance attached to appearances

3.3. As regards the second characteristic of the "evolution" perceived by the Court, I note that from the list of judgments given in paragraph 24 one reference is conspicuously lacking: the Delcourt judgment itself. Yet, that judgment is, to the best of my knowledge, the first judgment in which "appearances" made their entry into the Court's case-law. They did so in the wake of the maxim "justice must not only be done; it must be seen to be done" (paragraph 31)21 to which the Court then - albeit somewhat tentatively - referred to for the first time.

All of the decisions referred to in paragraph 24 of the judgment concerned "impartiality"22: nearly all of them the impartiality of judges (or other members of tribunals and boards); two (Bönisch and Brandstetter) the impartiality of a court-appointed expert.

It is my understanding that in this case-law "appearances" stands for: objective, perceivable factors, observed by or at least known to the parties or the public, whilst the repeatedly quoted English maxim serves as a justification for not regarding it as decisive whether the judge - or, as the case may be, the expert - is actually biased. The idea is that when these factors are such that there is a possibility of the judge or the expert being prejudiced, it is immaterial whether he actually is, because any judge in such circumstances should withdraw in the interests of public confidence in the administration of justice. The "principle of equality of arms" on the

other hand requires that any court-appointed expert in such circumstances be considered as a party expert or witness.

3.4. A further point to be made is that, admittedly, since the Delcourt judgment introduced this notion of "appearances" the case-law using that doctrine has become rather extensive. That, however, does not justify suggesting that since then there has been an "evolution". On the contrary, analysis of that case-law shows that the role of and the weight attached to "appearances" are stationary.

In its Delcourt judgment as well as in various later judgments23, the Court stressed that appearances have a certain importance, but are not decisive24, adding that what is decisive is whether, in the Court's view, fears as to impartiality are "objectively justified". The Court has recently reiterated this cautious approach in paragraphs 40 and 41 of its Demicoli judgment and in paragraphs 44 and 61 of its Brandstetter judgment.

This cautious approach implies - as for example the Hauschildt judgment clearly illustrates - that the Court's remarks in paragraph 48 of its de Jong, Baljet and van den Brink judgment of 22 May 1984 are also relevant to this context, viz. that

> "in determining Convention rights one must (...) look beyond the appearances (...) and concentrate on the realities of the situation"25.
>
> In order to judge whether fears as to impartiality are objectively justified, one needs to make a very careful assessment of the objective reality which lies behind appearances. Such assessment will frequently include a weighing of interests since what is at stake is often not only the confidence which the courts must inspire, but also the public interest in having a rational and smoothly operating judicial system26.
>
> There can be little doubt that the latter interest is indeed at the root of the formula: "objectively justified", for it is this public interest that prevents yielding without more ado to any and all of the purely subjective apprehensions of laymen. The formula shows that the Court was - rightly - not prepared to be led in this fashion by "the sensitivity of the public".

Accordingly, in the Hauschildt case (most members of) the minority and the majority agreed that the mere fact that a judge has already been involved in making preliminary decisions cannot be held in itself to justify fears as to his impartiality, even - as the Court stressed in paragraph 49 of its judgment - if "this kind of situation may occasion misgivings on the part of the accused ..., misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified"27. Otherwise, the Court seems to suggest, that kind of subjective "feeling" would all too easily disrupt judicial machinery! A similar approach is to be found in paragraph 44 of the Brandstetter judgment.

In conclusion I must say, again with due respect, that I find as also wholly unconvincing the suggestion that the "evolution" of the Court's case-

law as to the importance to be attached to "appearances" warrants overruling the Delcourt decision.

d. The "specific" part of the Court's reasoning: paragraphs 26 et seq.

3.5. Before going into the "specific part" of the Court's reasoning I would like to stress that in my opinion the above analysis of the Court's case-law on "appearances" shows that the formula "objectively justified" in principle implies two tests: the first is whether the circumstances are such that (not only a layman, but also) the Court cannot exclude the possibility that the judge (or the expert) is prejudiced; and the second is whether, nevertheless, in the particular case in which this arises other public interests are to be deemed more important than the confidence the courts should inspire.

3.6. In the light of paragraph 24 of the judgment one would expect that, in answering the question whether the proceedings before the Belgian Court of Cassation meet the requirements implied in the notion of a fair trial the Court would have applied these two tests. But when one looks at paragraph 26 (which obviously constitutes the pivot of this part of the Court's reasoning) one cannot help noting that the term "appearances" is conspicuously lacking. That is all the more noticeable as the Commission had based its finding that an accused is entitled to regard an avocat général who submits that the appeal be dismissed as his opponent (mainly if not wholly) on "appearances": see paragraph 54 of its report.

3.7. Although the term may be lacking, the wording of paragraph 26, and especially that of the second sub-paragraph, seems nevertheless to suggest that the finding is based on the concept of "appearances" (which, as a matter of fact, crops up in paragraph 28): "from the point of view" of the accused the opinion of the avocat général cannot be regarded as "neutral" and, accordingly, by recommending that the appeal of the accused be dismissed the avocat général becomes "objectively speaking" his opponent (with the consequence that the rights of the defence and the principle of equality of arms apply).

The Court was evidently at pains to suggest that it did not just rely on (understandable) "misgivings" which an adverse conclusion of the avocat général "may occasion on the part of the accused", but that it had "weighed" those "misgivings" and had found them "objectively justified". The words "objectively speaking" are, presumably, especially chosen to convey that impression because of their resemblance with the expression "objectively justified" discussed above (see paragraph 3.4). Thus these words seek to suggest that not only a layman, but also the Court itself, cannot but conclude that an avocat général who submits that the accused's appeal be dismissed is to be regarded as the accused's opponent. That conclusion would, however, be wholly incomprehensible. Firstly, because Article 141 of the Judicial Code (see paragraph 16 of the judgment) makes it clear that officials of the

procureur général's office cannot be considered a party to the appeal in the ordinary sense of that notion. Secondly and more importantly, because under the case-law as it stands (see paragraph 3.5 above) this conclusion would imply that the court is saying that in view of the opinion of the avocat général it cannot exclude the possibility that he is prejudiced. That, however, would be clearly incompatible with the Court's finding that these officials meet the requirements of judicial independence and impartiality and discharge their functions with objectivity (see paragraphs 22 and 26 of the judgment).

I cannot, therefore, but infer from the fact that the Court only suggests that it has come to this conclusion and refrains from giving any argument whatsoever that as a matter of fact there is no more than a pretense of objectivity and that in substance the Court, without more ado, has made decisive the subjective perception of legal reality by a layman. The reference to the "sensitivity of the public" in paragraph 24 shows that the Court was well aware of what it was doing.

3.8. It cannot be said that the Court thus merely applies the case-law referred to in paragraph 24 and discussed above. Nor that the Court only further develops the principles already laid down in that case-law. Not at all. This is something quite different, something quite new and something quite dangerous.

A layman's perceptions of procedural institutions and practices are, of course, not immaterial per se, but at the risk of jeopardising legal certainty they can only be held to be decisive under very special circumstances and conditions.

This can be illustrated by the same process as used above if we imagine a case where the submissions of a court-appointed expert are decisive for the chances of acquittal of the accused. There too the accused will probably consider the expert, when his report is unfavourable, to be his opponent. But under the case- law of the Court as it stood before the judgment in this case this layman's perception does not suffice to hold that under the principle of equality of arms any person the defence might wish to call, in whatever capacity, in order to refute the views professed by the expert should be examined under the same conditions as the expert! Under the Court's case-law as it stood the principle of equality of arms only comes into play in such a case if the special circumstances of the case are such as to give rise to fears on the part of the accused as to the expert's lack of objectivity and if the Court finds those fears "objectively justified" (in the sense I have indicated above in paragraph 3.4)!

3.9. As I have explained in paragraph 3.4, under the Court's case-law as it stood, even the layman's perception that under the circumstances there is a possibility or even a probability of the judge or the expert being prejudiced is never decisive. That perception should be "weighed" and, in addition, weighed against other interests. The same considerations that have

inspired that case-law demand that the layman's perception according to which a perfectly neutral adjunct to and adviser of the Court of Cassation, when advising with due objectivity that the accused's appeal be dismissed, has become his opponent, be treated likewise.

In paragraph 3.8 I have already explained why I cannot but conclude that in this case the Court failed to give the proper weight to the perceptions of the accused. In this context I note that there is no trace of a further weighing of interests. Yet, in my opinion, there were some further, relevant factors to be taken into account. I confine myself to two.

Firstly, there is the fact that before the Belgian Court of Cassation the accused, as a rule, is assisted by a (specialised) lawyer, who is of course well aware of the real situation and who will undoubtedly be able to disabuse those rare clients28 who labour under the idea that the avocat général has become their opponent because he has submitted that their appeal be dismissed.

Secondly, there is the public interest in having a rational and smoothly operating judicial system. The best judge of the question whether such an interest is involved is, undoubtedly, the Belgian legislator who, as the Court mentions in passing (paragraph 26 in pr.), has "on various occasions" in recent times showed that in his opinion Articles 1107 and 1109 indeed serve such an interest29.

3.10. These considerations vindicate my remarks in paragraph 1 above, namely, that the Court has failed to state its reasons for overruling the Delcourt decision clearly and convincingly.

IV. Self-restraint where national procedural provisions are at stake?

4.1. The foregoing considerations amply explain my vote. There is, however, one more general aspect of this case that, although rather delicate, merits a separate discussion.

In my view, it is quite something for an international court to hold that the very proceedings (in criminal cases) before the highest court in one of the member States are "unfair" or (to put it less bluntly) are in violation of the requirements of a fair trial under Article 6 para. 1 (art. 6-1). The Court's judgment, however, does not reveal that the Court even contemplated whether this particular aspect of the case should have led to some form of self-restraint. There is, however, room for some comment.

4.2. My starting point is that on the one hand the Convention does not aim at uniform law but lays down directives and standards, which, as such, imply a certain freedom for member States. On the other hand, the Preamble to the Convention seems to invite the Court to develop common standards. These contradictory features create a certain internal tension which requires

that the Court to act with prudence and to take care not to interfere without a convincing justification.

4.3. A further ground for circumspection is that the Court's decisions may have far-reaching consequences30 for other national legal systems than that of the respondent State, consequences of which the Court is not always aware and which, at any rate, it often cannot adequately appreciate.

4.4. Lastly there is the concept of "fair trial" itself which calls for careful handling.

To begin with the concept is vague and "open-ended". It needs "filling in". This gradually occurs as case-law develops more specific rules. The Court, however, has a tendency always to rule in concreto, taking into account the specific features of the case at hand. Thus elaborating the vague notion of "fair trial" is not without risks: the rules that emerge from such a case-law develop a momentum of their own and a tendency to engender specific new rules. These new rules may overstrain a concept which, after all, refers to very basic principles of procedure.

As long as it has not elaborated a more comprehensive analytical view of the notion of "fair trial" the Court should be aware of these risks.

4.5 The need for caution in this area is all the greater since the Court is confronted in a double sense with various procedural systems: its members have been schooled in different procedural traditions and those of the respondent State permeate the issues under Article 6 para. 1 (art. 6-1). It may be that those who are completely unfamiliar with a particular procedural institution will be more readily inclined to find it incompatible with the requirements of "fair trial" than those who form part of the same tradition. There is a risk that the former will be more inclined to view as a question of fair trial - i.e. as a question concerning basic principles - issues which in the latter's view concern merely questions of procedural expediency (about which procedural law specialists may differ) yet which fall outside the province of "fair trial".

4.6. These risks, and especially the last, call for greater prudence because the finding that a national procedure violates the requirements of "fair trial" is a harsh one. That is, of course, why it should be persuasive and based on grounds that also convince those who are familiar with the procedural traditions of the respondent State. This is imperative for the Court's credibility and the acceptability of its decision in the States concerned.

This brings me to my concluding remark. I am familiar both with the appeal on points of law system and with the institution of the procureur général at a Court of Cassation. In my opinion the Belgian - and to a lesser degree the French variant of this system - is unfortunate. Since it only secures the benefits31 it implies when the procureur général and the Court of Cassation keep their distance from each other: this confers a greater freedom on both - the procureur général to propose new solutions and, if he thinks fit, to criticise the case-law - the Court to disagree. However, these

are considerations of procedural expediency. I cannot help feeling that it is disproportionate to hold that the Belgian variant violates the very basic principles of fair procedure referred to in Article 6 para. 1 (art. 6-1) of the Convention.

NOTES

1 See paragraph 35 of its judgment in the Cossey case, judgment of 27 September 1990, Series A no. 184.

2 In its memorial in the Delcourt case (Series B no. 9, p. 134) the Commission had said that the outcome of the case was "bound to affect the conduct of subsequent proceedings before the Court of Cassation in Belgium, and even in other States which have a similar procedure." (the italics are mine). See in the same sense the remarks of the Commission's President at the Court's hearing: Series B, p. 157.

In paragraph 30 of its judgment in that case the Court noted, however, that "on this last point" (i.e. that the procureur général withdraws with the judges to attend the deliberations held in the privacy of chambers) Belgian legislation:

> "does not seem to have any equivalent today in other member States of the Council of Europe, at least in criminal cases".

This statement suggests that the outcome of the case only concerned Belgium; it was, however - as has already been pointed out by Nadelmann, AJIL 66 (1972), pp. 509-510 and 516 et seq. - not entirely correct. See also: M. Cappelletti and J.A. Jolowicz, Public Interest Parties and the Active Role of the Judge in Civil Litigation (Milano, 1975), p. 31 and note 54.

Under French practice - as recently described by Boré in both La cassation en matière civile (Cc) (1980) and La cassation en matière pénale (Cp) (1985) - the procureur général also attends the deliberations. It is true that we are told that he does not participate in them (Boré, Cc, no. 2844, and Boré, Cp, no. 871) but that makes no difference as far as appearances are concerned. Moreover, in civil cases it is customary for the president of the chamber to discuss each case on the list at a conference in his office between himself, the oldest member of the chamber and the avocat général (Boré, Cc, no. 2835; see also no. 2831). In criminal cases the file, the report and the draft judgment prepared by the judge-rapporteur is sent to the procureur général before the public hearing (Boré, Cp. no. 846).

It should be noted that as to this last point the practice in Belgium seems to be the same as in France: see J. Matthijs, Openbaar Ministerie (1983), para. 263; see also the Delcourt case, loc. cit., Series B no. 9, p. 214; see for civil cases, paragraph 5 of the Kaufmann decision of the Commission referred to in note 5 below.

In Italy, while Article 537 of the Code of Criminal Procedure does not provide for such participation, under Article 194 of the Codice di procedura civile the pubblico ministero at the Court of cassation participated in the deliberations in civil cases, but was not allowed to vote; see M. Cappelletti and J.M. Perillo, Civil Procedure in Italy (1965), p. 281. See further, Nadelmann, op.cit., p. 520 on the history of Article 194 and on a judgment of the Italian Court of Cassation of 4 October 1969, preventing an attack on this provision before the Constitutional Court. See for criticism of the latter judgment (and of the Delcourt judgment): M. Cappelletti and D. Tallon, Fundamental Guarantees of the Parties in Civil Litigation (1973), pp. 551 et seq. In a judgment of 14 January 1974, the Constitutional Court held Article 380 to be unconstitutional (see: M. Chiavario, Riv. Dir. Int. 57 (1974), p. 480, note 91, and M. Cappelletti and J.A. Jolowicz, op.cit., p. 31, note 54).

In the Netherlands the procureur général's participation in the Supreme Court's proceedings ends with his conclusion which he presents without any previous consultation with the judges and without knowing their opinion; he does not attend deliberations; in other respects his position is, however, similar to that of his Belgian counterpart; at the hearings he speaks last (Article 328 of the Code of Civil Procedure and Article 440 of the Code of Criminal Procedure), though in civil cases the parties are allowed to submit "simple notes" drawing attention to "evident errors with regard to which there can reasonably be no discussion" (HR 30 October 1987, NJ 1987, p. 153). During the last century the impossibility for the parties to reply to the procureur général's submissions was often criticised (see, for example, the leader in Weekblad van het regt no. 238 (30 November 1841) and Mr. J. de Wal, Het regt van't laatste woord in cassatie (1869), but when the present Code of Criminal Procedure was enacted (1921) Article 440 was justified explicitly by pointing out the special position of the procureur général at the Supreme Court. This explanation was severely criticised by the leading handbook of those days (see A.J. Blok and L.CH. Besier, Het Nederlandsche Strafproces (1925) II, pp. 445 et seq., who used arguments in very much the same way as the majority in the present judgment), but that criticism has not been repeated by later writers.

It was, however, raised in application no. 3692/68, but rejected by the Commission in its decision of 5 February 1979 (Yearbook XIII (1970), pp. 516 et seq.), which relied on the Court's Delcourt judgment.

The purpose of giving the above data is: (a) to show that the Belgian system was not as "unusual" as was suggested by the Court in paragraph 30 of its Delcourt judgment and by the Commission in paragraph 53 of its report in the present case and (b) to indicate that overruling that judgment may have consequences for the proceedings before the courts of cassation of France and The Netherlands.

3 See the aforementioned Delcourt judgment, pp. 10-12, 16-17, 19, paras. 19, 30 and 36 respectively.

4 See paragraph 7 of my dissenting opinion in the Brogan case, Series A no. 145-B, p. 50. If this first question is answered in the affirmative - as I think it should be in the present case - the reviewer's task is finished. I will therefore not follow the Court's example and do not propose to examine the applicant's case in particular.

5 The Delegate therefore maintained that the Commission's opinion in the present case was compatible with that in its decision of 9 December 1986 on the application of J. and R. Kaufmann v. Belgium (application no. 10938/84, DR 50, pp. 98 et seq.) where the Commission still followed the Delcourt judgment.

6 See paragraph 3.4 below.

7 See also paragraph 3.4 below; the Court followed this method inter alia in paragraph 31 of the aforementioned Bönisch judgment of 6 May 1985 and in paragraph 42 of its above-mentioned judgment in the Brandstetter case.

8 See M. Cappelletti and J.A. Jolowicz, op.cit., (note 2), p. 34.

9 Ibid., p. 20.

10 Mr R. Hayoit de Termicourt, in his "Propos sur le Ministère Public" held on 15 September 1935 at a formal session of the Brussel's Court of Appeal, rightly underlines, however, that in order to understand the position of the ministère public in Belgium one should also take into account local historical traditions which often differ from those in France. In our present context it is interesting to note that the learned procureur général tells us on page 9 of his address that in those provinces which now constitute Belgium the predecessors of the actual ministère public were generally the same time a member of the court in whose jurisdiction they exercised their other functions!

11 M. Cappelletti and J.A. Jolowicz, op.cit., p. 30.

12 In paragraph 33 of its Delcourt judgment the Court noted that in civil matters the procureur général exercises functions "close to" those which he exercises in criminal matters; in my opinion in both types of cases he exercises, as far as the present examination is concerned, identical functions.

13 Article 1109 explicitly makes an exception for those cases where the appeal has been lodged by the procureur général's department; accordingly what we are talking about are only appeals instituted by one of the parties; this should be borne in mind throughout.

14 I disagree on this point with J. Velu who in his study on the Delcourt judgment (see note 21) qualified the term as "not very fortunate" (pp. 61-62) without, however, giving reasons for this criticism. See also, J.E. Krings, Le rôle du ministère public dans le procès civil (Rapports belges au IXe Congrès international de droit comparé, Téhéran 1974), p. 142, who said that the Court's description according to which the procureur général "discharges a function of a quasi-judicial nature" depicts exactely the

situation obtaining at the Belgian Court of Cassation. See also, M. Cappelletti and J.A. Jolowicz, op.cit. (note 3), p. 31, note 54, who also agree with this characterisation of the Court.

15 There is a difference between the judges and the procureur général as to the procedures followed for their appointment; there may be a difference also as to the groups from which they are recruited; members of the Court of Cassation are traditionally recruited amongst judges (of the Courts of Appeal) only: see J. Rutsaert and A. Meeus in P. Bellet, A. Tunc and A. Touffait, la Cour judiciaire suprême (1978), p. 254.

16 See J. Rutsaert and A. Meeus, op.cit. (note 22), p. 263; there one also finds further data about the proceedings before the Belgian Supreme Court in both civil and criminal cases.

17 Both Article 39 of the Decree of 1815 and Article 1109 of the Judicial Code give the right "d'assister à la délibération"; accordingly, J. Velu, op.cit., p. 20, note 21, insists that in this context one should use that term.

18 This was the main point made by Nadelmann (see note 2) an echo of which is to be found in paragraph 29 of the Court's judgment.

19 See again paragraph 35 of the Cossey judgment (note 1).

20 Like there was, for example, in the Kostovski case, see paragraphs 33 and 34 of the Court's judgment in that case (judgment of 20 November 1989, Series A no. 166).

21 The Court said that, if one refers to that dictum, doubts may arise "about the satisfactory nature of the system in dispute". Several writers have been scandalised that the Court should have allowed itself this censure of a system which it had found compatible with the Convention. See, for example, Chr. Daubie, Annales de droit (Louvain) (1974), p. 56; J. Velu, L'affaire Delcourt (1972), p. 63. In my opinion these writers have failed to understand the weighing-method adopted in the Delcourt judgment.

22 I am note unaware that some of these decisions speak about "independence" rather than of "impartiality". I think, however, that whoever takes the trouble of carefully comparing the wording in the series of cases cited in paragraph 42 of the Huber judgment will agree that today the Court is inclined to treat as an issue of impartiality what formerly it classified as a question of independence; but the approach and the criteria used remain the same. I therefore feel entitled to speak of impartiality alone.

23 For example, Piersack, para. 39; Sramek, para. 42; De Cubber, para. 26.

24 The italics are mine. In this context I note that, according to Lord Denning, The Discipline of the Law (1979), p. 86, the maxim is a dictum of Lord Hewart CJ and its correct text is:

> "It is not merely of some importance, but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Is it by accident that in its Delcourt judgment the Court, presided over by the British judge Sir Humphrey Waldock, chose to use a much milder form of the maxim and has continued to use that form instead of the original one?

25 Series A, no. 77, p. 23, para. 48.

26 The German Bundesverfassungsgericht habitually refers to "the requirement of maintaining an administration of justice which is able to function effectively" ("Postulat der Aufrechthaltung einer funktionsfähigen, wirksamen Rechtspflege"): see, BVerfGE 38, 115-118, where it derives this requirement from the rule of law and the idea of justice implied therein: justice can only be brought about when the administration of justice is able to function effectively.

27 See, for further examples of such assessments: paragraph 30 sub (b) of the Piersack judgment; paragraph 81 in fine of the Campbell and Fell judgment.

28 "those rare clients": it should not be forgotten that, as the Government have alleged without being contradicted, the accused, as a rule, does not attend the hearings before the Court of Cassation.

29 What is mainly at stake is the interest of the procureur général in being able to function as an adviser of the Court when the Court deliberates in chambers. It cannot be excluded that this interest is also served by the differences of recruitment: one could suppose that these differences would sometimes result in a different professional background and thus in a different approach to cases and as such in a specific and valuable contribution to the Court’s work by the procureur général’s office.

30 Consequences which may effect the organisation of the judicial system and thereby create considerable budgetary burdens for the member States involved.

31 I am firmly convinced of these benefits. So firmly that I repeat what I said elsewhere, viz. that the European Court of Human Rights should have the benefit of a procureur général’s office too!

DISSENTING OPINION OF JUDGE STORME

(Translation)

1. Although I believe whole-heartedly that the rights of the defence and the principle of "Waffengleichheit" (equality of arms) should be scrupulously respected, I have found it impossible to agree with the majority decision of the Court for a number of reasons.

I would even venture to add, in so far as this personal style - which has come from the English judges - is accepted in the European Court of Human Rights, that a professional career of more than fourty years at the bar has taught me that it is the public prosecutor's department (ministère public) which is the lawyer's principal adversary.

The problem nevertheless resides in the fact, and this is the "heart of the matter", that the public prosecutor's department, on the one hand, and the procureur général's department at the Court of Cassation, on the other, are two completely different bodies. The Belgian legislature ought, as indeed it tried unsuccessfully to do, to have used terminology which was formally distinct and at the same time adapted to the essentially different functions of the public prosecutor's departments in the lower courts and of the procureur général's department at the Court of Cassation.

The principal reason for my dissenting opinion lies in the fact that the detailed and comprehensive analysis which I have conducted of the case has not enabled me to understand why the Borgers case should be decided differently from the Delcourt case: the complaints are identical; the legislation and judicial practice in Belgium are the same; the facts of the case are the same. The two cases are however completely different in one respect, and I shall return to this in considering the case from the point of view of appearances, namely as regards the identity of the applicants: on the one hand, Mr Delcourt, a Belgian national, appearing before the Court of Cassation without a lawyer; on the other, Mr Borgers, a lawyer, a substitute judge, assisted before the Court of Cassation by Mr L. De Gryse, the current President of the Bar Council of the Court of Cassation, who lodged two appeals in the Court of Cassation, and who relied on Article 6 para. 1 (art. 6-1) of the Convention only after the second proceedings, in which his appeal was dismissed!

I. Note on the general principles concerning the role and the task of the "procureur général"'s department at the Belgian Court of Cassation

2. These general principles were excellently and extremely thoroughly explained at the hearing in the Delcourt case (Eur. Court H. R., Series B no. 9, 1969-1970, pp. 156-247). It is not in dispute that these fundamental

principles have undergone no substantive alteration since the introduction in Belgium of the new Judicial Code (1967-1970) (Delcourt judgment, pp. 10-12, para. 19; see the present judgment, in particular paragraph 24).

It is accordingly sufficient to set out certain essential features by way of summary.

3. The Court of Cassation does not "judge", in other words does not decide on the parties' claims; it only "reviews" the decision of the lower court, which has ruled on the merits of the case. It is that decision which is submitted to the Court of Cassation, whose task is to consider whether the court in question applied or interpreted correctly the substantive law, the procedural law or the formal general principles of law.

Neither the Court of Cassation, nor a fortiori its procureur général's department, inquire into the parties' rights; they confine themselves to analysing the appealed decision. This is equally true in criminal proceedings, as the procureur général at the Court of Cassation does not act as prosecuting authority (Article 141 of the Judicial Code). Even a public prosecutor of the lower courts who has lodged an appeal, or against whom an appeal has been lodged, never submits an additional memorial or a memorial in reply in the Court of Cassation (paragraph 12 of the present judgment).

4. In any event, the procureur général's department at the Court of Cassation cannot be regarded as a party (Delcourt judgment, para. 29), but rather as onpartijdig adviseur (= impartial adviser: Mr Faurès, pleadings in the Delcourt case, Eur. Court H. R., Series B no. 9, 1969-1970, p. 223) - the term "adviser to the Court" employed in this judgment (paragraph 16 of the present judgment; cf. Delcourt judgment, para. 34: "an adjunct and an adviser of the court") may give rise to confusion. For my part I prefer the designation "amicus curiae".

The procureur général at the Court of Cassation is in fact rather the guarantor of the consistency of the court's case-law. The procureur général's department forms a single and permanent unit, which meets regularly and is thus in a position to draw the court's attention to the possibilities of divergencies between the different chambers and sections (Dutch-speaking - francophone), and to the risks involved in adopting different reasoning for the same solution. The procureur général fulfills perfectly the role of maintaining the coherence of the Belgian case-law, in particular in a country in which cultural, political, socio-economic, ideological or linguistic differences could affect the national and uniform nature of the legislation.

5. On the question of procedure, whether civil or criminal, it is necessary to recall the principles laid down in the Belgian Judicial Code.

The Belgian Judicial Code of 1967 provides in Article 2 thereof as follows: "The rules set out in this Code shall apply to all proceedings, except such as are governed by statutory provisions which have not been

expressly repealed or by principles of law whose application is not compatible with that of the provisions of this Code."

This means that the Articles of this Judicial Code are in principal applicable to all proceedings (civil, criminal, administrative ...).

Article 772 of the Judicial Code is worded as follows: "If, during the deliberations, a document or a new and important fact is discovered by one of the parties in the proceedings, the party in question may, for so long as the judgment has not been delivered, request that the hearing be reopened."

This Article applies to cassation proceedings, not only pursuant to the above-mentioned Article 2, but also by virtue of Article 1042 of the Judicial Code, according to which: "In so far as no derogation is laid down in the provisions of this Book, the rules concerning first-instance procedure are applicable to appeal proceedings." The "rules concerning first-instance procedure" are Articles 700-1041, in other words Book II of the Judicial Code, entitled First-instance procedure, and include Article 772.

The second paragraph of Article 1107 of the Judicial Code lays down a rule of a practical nature ("... no further documents shall be accepted ...") which in no way excludes the application of the aforementioned Article 772.

It is therefore indisputable that any new fact makes it possible for any party to request the reopening of the hearing, even in cassation proceedings, in accordance with the above-mentioned Articles 2 and 772 of the Judicial Code.

It is clear at this point that the applicant's complaint that he had been unable to reply to the avocat général's opinion (see paragraph 27 of the present judgment) is totally unfounded. Pursuant to Article 772 of the Judicial Code, Mr Borgers could have sought the court's leave to submit a reply to the opinion.

6. I do not consider it necessary to examine the Belgian rules governing disciplinary proceedings for judges, since the present case does not involve disciplinary proceedings, but proceedings of a purely criminal law nature.

However, I would draw attention to the fact that institutional and disciplinary unity of the ministère public, to which this judgment alludes (paragraphs 22-26 of the present judgment), does not exist. It is only for disciplinary purposes that it forms a single unit. Accordingly, to hold that the official of the procureur général's department (see paragraph 26 of the present judgment) could become objectively speaking the opponent of the accused (paragraph 26), seems to me to disregard the general principles of criminal procedure in the Court of Cassation.

II. Violation of Article 6 para. 1 (art. 6-1)

A. Requirements of the rights of the defence and the principle of the equality of arms

7. The majority of the Court refers to the principles of the rights of the defence and of the equality of arms, features of the wider concept of a fair trial. In this connection it cites among other authorities the Ekbatani judgment, but seems to forget that the Delcourt judgment had already mentioned this wider concept of a fair trial (see paragraph 28 of the Delcourt judgment).

In the present case too the Court's approach is no different from that adopted in the Delcourt case.

8. The starting-point of the Court's reasoning concerns the opinion of the procureur général's department.

This opinion cannot be neutral from the point of view of the parties (paragraph 26 of the present judgment) and yet it is, since this opinion of the procureur général's department concerns only the application and/or interpretation of the (substantive or procedural) law by the court whose decision has been submitted for review by the Court of Cassation.

The procureur général's department at the Court of Cassation - which is in fact not a prosecuting authority in the true sense - can in no way become the ally or the opponent of the accused (see, however, paragraph 26 of the present judgment).

Ultimately the procureur général is only the amicus curiae, the objective adviser of the Court of Cassation. Let us not forget moreover that the European Court's Rules of Court recognise by implication the institution of amicus curiae (Rule 37 para. 2).

By giving an opinion, the procureur général at the Belgian Court of Cassation cannot become an opponent. What is important is that this opinion should be ojective and impartial, as has always been the case; this was stressed by the European Court of Human Rights in the Delcourt judgment (paras. 32-38) and also at various places in the present judgment (paragraphs 24, 26 and 28).

The European Court's decision is, in my view, based on an erroneous interpretation of the notion of an opinion. Does an expert who expresses an opinion unfavourable to one party become the latter's objective opponent? What is to be thought of judicial systems - like the Belgian one - in which the courts are composed of lay judges who are appointed after proposal by trade unions and management organisations on the basis of their qualifications and who decide, rather than merely expressing an opinion.

Finally I consider that it is contradictory to say, on the one hand, that no one calls in question the impartiality and independence of the procureur

général's department (paragraph 24 of the present judgment) and, on the other, to decide that he is objectively speaking the opponent of the accused (paragraph 26 of the present judgment).

9. The requirements of the rights of the defence and of the principle of the equality of arms are said not to have been complied with in the examination of the Borgers case in the Court of Cassation. This violation of Article 6 para. 1 (art. 6-1) is said to stem from two features of the cassation proceedings: the submissions (conclusions) of the procureur général's department and the latter's participation in the deliberations.

1. The submissions

I would recall that in accordance with the general principle laid down in Article 772 of the Judicial Code (no. 5 above), the accused was entitled to request a right of reply through the reopening of the hearing.

In addition, if the procureur général's department were to communicate his opinion in advance, this would ultimately lead to a debate between its representative and the accused. Paradoxically the procureur général would then really become the accused's opponent.

Finally, it is not a case in this instance of a restriction on the rights of the defence. The procureur général's submissions (conclusions) are genuinely a conclusion: they sum up and conclude the judicial hearing.

2. Participation in the deliberations

It should be noted that the presence of a member of the procureur général's department in the deliberations is a tradition going back nearly two centuries, which cannot harm the accused, because the procureur général's department does not make prosecution submissions, as the prosecuting authority, but expresses his views or gives a legal opinion.

In the exceptional cases in which he does make prosecution submissions, he does not attend the deliberations (Article 1109 of the Judicial Code).

It therefore appears incoherent, and even contradictory, to find, as the judgment does, that the procureur général gives his assistance with total objectivity (paragraph 28), but that the appearance ("it could reasonably be thought that") is sufficient to find a violation of Article 6 para. 1 (art. 6-1).

The justification for attending the deliberations, given by Mr procureur général Hayoit de Termicourt in the course of the debate on the draft Judicial Code in the Belgian Senate, confirmed moreover in the Delcourt judgment, remains valid: "The role of the [procureur général] at the deliberations is not to provoke a decision rejecting an appeal, where the Court intends to allow it, or conversely. His presence is primarily concerned with the motivation of the decision. The terms of the Court's decisions must be carefully chosen. Most decisions contain statements of a rule, the field of application of which extends beyond the particular case under consideration.

The function of the [procureur général] during the deliberations is, therefore, to draw the Court's attention to the possible consequences, in other fields, of the way in which the rule is worded in the text of the proposed decision, or to the interpretational difficulties to which it might give rise, or again, to any discrepancy between this wording and the wording of other decisions stating the same rule.

On the other hand, the [procureur général's department] is particularly well-qualified to lend assistance in this regard, during the deliberations, to the members of the Chamber examining an appeal, since all members of the Department appear before both Chambers of the Court. These considerations seem all the more worthy of attention because the draft Judicial Code provides for the creation, within the Court, of a third Chamber, which will increase the difficulty of maintaining uniformity in the Court's judicial practice." (Eur. Court H. R., Series B no. 9, Delcourt case, p. 123.)

As in the Delcourt judgment, I venture to suggest that it is necessary to look beyond appearances (paragraphs 30 and 31 in fine of the Delcourt judgment).

Thus we come to the question of appearances, which in all probability played, if not a decisive role, at least a predominant one in the evolution of the decision of the European Court of Human Rights in the Borgers case.

B. Appearances

10. It is clear that the majority of the Court reached its decision under the influence of the growing importance of the theory of appearances (see paragraphs 24 and 29 of the present judgment). However, careful study of the judgments cited (see paragraph 24 of the present judgment) leads to the inescapable conclusion that reliance upon appearances must be objectively justified and that the appearance is a contextual notion, in other words it varies according to the circumstances of the case (see the Hauschildt judgment of 24 May 1989, paras. 48 in fine and 49 in fine).

In the present case recourse to appearances is not justified, since the Court stresses repeatedly the impartiality, independence and objectivity of the procureur général's department (paragraphs 24, 26 and 28 of the judgment). One may thus repeat what was stressed in the Hauschildt judgment cited above: "what is decisive is whether this fear can be held objectively justified" (see the Hauschildt judgment, para. 48 in fine).

The circumstances of the case and more specifically the identity of the applicant, already referred to above (see no. 1 of this opinion), cannot justify a finding that the applicant could rely on appearances.

11. However, I believe it is much more important to go further into the notion of appearances in (judicial) law. G. Cornu's Vocabulaire juridique (Paris, 1987) states as follows: "Theory of appearance: judicial theory

according to which mere appearance is sufficient to produce effects in respect of a third party who, on the basis of a legitimate mistake, was unaware of the true situation (for example contracts concluded by an apparent agent bind the person whom he appeared to be representing). Apparent act: ostensible and deceitful act, also referred to as sham act, which its perpetrators carry out solely (for example fictitious sale) to conceal the true act which they have carried out (gift), known as the secret, concealed or unseen act" (pp. 55-56).

The theory of appearances in substantive law serves to sanction a party which attributes qualities to certain things when he knows or should know that they do not have them. Accordingly, in judicial law, appearance means that a judge is portrayed as impartial, whereas in fact he is not at all so.

In the present case the European Court seeks to apply the theory of appearances the other way round. It attributes apparent defects to a judicial system when it knows very well, and expressly states, that such defects do not really exist. A more thorough analysis of the true situation leads on the contrary to the conclusion that the legal situation in which the observer believed does not exist.

The erroneous application of the theory of appearances brings to mind the extreme application of the "adversarial system" in the majority of the common law countries. According to this theory to allow the judge to direct the argument, to order an enquiry, an expert opinion or the communication of documents would mean that he would have "to drop the mantle of judge and assume the robe of an advocate" (Lord Denning in James v. National Coal Board [1957], 2 QB 55, 63-64).

Taking such an approach to procedure as a starting point it could indeed be maintained that all the judges of continental Europe are partial and dependent because they play an increasingly activist role in the conduct of the trial.

Under such an approach, what is to be thought of the Lord Chancellor, who belongs at the same time to the judicial, legislative and executive authority? Who would dare claim that when he sits as the presiding judge of a Court, appearances cast doubt on his impartiality and his independence?

Provided that the fundamental principles of a fair trial are protected, the historical and sometimes unusual traditions of each judicial system fall outside the scope of the review of the European Court of Human Rights.

The Delcourt judgment (para. 31) looked beyond the appearances. The present judgment, on the other hand, goes no further than appearance. I conclude that in this case there has been no infringement of a right to a fair trial.

III. Overruling of the case-law

12. Should the majority decision of the Court be accepted, it would be inconceivable to find by this judgment that the Belgian State is retrospectively in violation of the Convention, in other words ex tunc. The Belgian State could legitimately have believed that the way in which the function of procureur général at the Court of Cassation has been discharged not only since 1815 (the Prince Sovereign's Decree), but also and in particular since the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms, was in conformity with that Convention, and above all since the Delcourt judgment.

This judgment of 17 January 1970 stated expressly as follows:

> "So far as concerns the application of that system in the present case (i.e. the presence of a member of the procureur général's department at the deliberations) the Court finds that there are no grounds for holding that the procureur général's department at the Court of Cassation failed to observe ..., at the hearing or at the deliberations, the duty to be impartial and independent which is inherent in its functions" (paragraphs 35 and 38 of the Delcourt judgment).

And later in the same judgment:

> "Article 6 (art. 6) of the Convention does not require, even by implication, that an accused should have the possibility of replying to the purely legal submissions of an independent official attached to the highest court in Belgium as its assistant and adviser" (paragraph 41 of the Delcourt judgment).

Just as each citizen can, in a State governed by the rule of law, legitimately expect that the existing legal system will not be modified rectroactively, States are for their part entitled to rely on the same legitimate expectations.

Often a radical modification of the case-law interpreting a legal rule has been accompanied by a "prospective overruling", which was excellently explained in a judgment of the Illinois Supreme Court: "We feel justice will be served by holding that ... the rule herein established shall apply only to cases arising out of future occurrences" (Molitor case, cited by R. Joliet, Le droit institutionnnel des communautés européennes, Liège, 1981, p. 214; see also similarly: the judgments of Defrenne II (8 April 1976), Gravier (13 February 1985) and Blairot (2 April 1988) of the Court of Justice of the European Communities; see also and in particular the Marckx judgment of the European Court of Human Rights).

This necessity for a "prospective overruling" is all the more evident as the Belgian State has for some time applied Article 6 (art. 6) of the Convention in the light of the case-law of the European Court of Human Rights. The fundamental right of a State to the respect for legitimate expectations generated by the Court itself would be seriously infringed by a finding of a violation ex tunc.

13. The instant overruling of the European Court's case-law is all the more disturbing because it is based not only on the importance attached to appearances but also in response to "[an] increased sensitivity of the public to the fair administration of justice" (see paragraph 24 in fine of the present judgment). This new notion introduced by the Borgers judgment has no link with the previous case-law and contains a reference to "the increased sensitivity of the public" which is in my view extremely dangerous.

In a case like this one, where the procedural rules criticised by the Court were approved by the Belgian Parliament on three different occasions (see paragraph 26 of the present judgment), it is not for this Court to seek to replace a national legislature by invoking the sensitivity of the public.

IV. Even if restricted to criminal proceedings the finding of a violation affects the organisation of the courts

14. In view of the exceptional role which the procureur général's department at the Court of Cassation fulfills regarding the consistency and the development of Belgian case-law, the violation found by the Court can concern only criminal proceedings and not civil proceedings. The opinion of the procureur général's department in civil proceedings (and clearly also social security, commercial, tax proceedings, etc.) can in no way violate the right of the defence or the principle of the equality of arms in the context of adversarial proceedings in which two - or indeed more - parties are opposed.

I remain convinced that the Court's ruling that there has been a violation is not only unfounded, but also misguided because it goes to the very essence of the organisation of the courts in Belgium, particularly in the Belgian Court of Cassation, and this has never been the objective of the European Convention on Human Rights.