Country Report Belgium

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Country Report

Belgium

Laurens van Puyenbroeck

1. General introduction on the Belgian criminal justice system

1.1 Basic tradition

The Belgian criminal justice system is primarily based on the French (Napoleontic) Penal and Criminal Procedure Codes. In 1967 a new Penal Code (PC) was introduced in Belgium. The Criminal Procedure Code (CPC) is still the same as the old Napoleontic Code of 1808. Although it does no longer appear in its pure form, the procedure of many West-European countries, including Belgium, still has many non-adversarial characteristics. In 2002 a proposal for a new CPC was presented by a specially appointed commission. The proposal was approved by the Senate on 1 December 2005 and sent to the Chamber of Representatives where it is still pending. Generally speaking, it could be stated that the proposal does not introduce a radical change compared to the current tradition. It nevertheless incorporates a number of innovating elements which have both been welcomed and criticized[1]: for the first time in Belgian history, a general theory on the nullities in criminal proceedings is incorporated in a law, the admissibility of the action of a civil party is more strictly controlled and the judicial expertise in criminal affairs is given a legal basis. The improved legal position of both suspect/defendant and victim/civil party (e.g. for requesting additional inquiries or for viewing the file) could be seen as one of the red threads throughout the proposal. This would inevitably necessitate the input of more resources and human capacity. The lack of budget for Justice reform is however one of the main (political) challenges in Belgium.

Since 1998 the Belgian criminal justice system has known a number of important reforms. A first reform was achieved by the Franchimont Law of 12 March 1998. The core of this reform concerned the organization of the pre-trial investigation and was aimed at strengthening the position of the suspect and victim and creating a greater transparency (e.g. by introducing possibilities for asking permission to view the file during the investigation or for requesting additional inquiries). A second reform followed after the so-called 'Octopus-consultation'[2]: a new institution was created, the Higher Judicial Council, which intended to 'depolitise' the judicial and prosecuting bodies and to improve the service towards the citizens; the organization of the Prosecutor's Office was changed, *inter alia*, by introducing a federal prosecutor;[3] finally, the police landscape was drastically changed by reforming the various (fragmented) police services into an integrated police service, structured at two levels, a federal level and a local level.[4]

[1] See *inter alia*: P. TRAEST and I. DE TANDT, "Het voorontwerp van wetboek van strafprocesrecht: een kennismaking", *Panopticon* 2004.4, 6-24; F. SCHUERMANS, "Donkere onweerswolken boven het Belgisch strafvorderlijk landschap", *Panopticon* 2005.5, 39-54; Also see the interview with the academic and judicial expert Armand Vandeplas in '*De Juristenkrant*' of 22 November 2006. According to the critics, the proposal contains a number of proposals which make it impossible to work in practice.

[2] Named after the eight political parties that negotiated the Octopus-agreement. On 28 May 1998 the 'Octopus agreement' was approved by both the majority parties as the (democratic) opposition parties. The agreement concerned a major reform of the police force and certain reforms of judicial organization.

[3] Law of 22 December 1998 (Statute Book (S.B) 10 February 1999).

[4] Law of 7 December 1998 (S.B. 5 January 1999).

As will be illustrated further throughout the text, the European Convention on Human Rights and Fundamental freedoms (ECHR) plays an important role in the Belgian judicial system since its provisions are directly applicable before the Belgian courts. Recently, the possibility for reopening a criminal procedure following a judgment of the ECtHR convicting the Belgian state, has been introduced in the law (articles 442bis-442octies CPC)[5]. Especially in the field of criminal procedure legislation, the ECHR has proven a useful mechanism to 'modernise' the outdated criminal procedure by shifting it into a direction which entails more respect for the rights of the defence. The ECHR has therefore become a very important source for the Belgian criminal (procedural) legislation. Belgium has already had several convictions for violations of the rights contained in article 6 ECHR. Especially the right to a prompt trial in criminal proceedings (article 6,1°) has repeatedly been violated.

1.2 Main characteristics and initiation and processing of criminal proceedings

1.2.1 The investigation

The Belgian criminal justice system consists of two main stages. The pre-trial stage (investigation stage) is non-adversarial. Its proceedings are written and secret. The pre-trial investigation is not executed autonomously by the police but is always led by a magistrate, the public prosecutor. In about 10% of the criminal cases, the investigation is led by a specially competent magistrate, the investigating judge (which is at the same time a judge and an examining magistrate). When enforcement orders (such as an arrest warrant, telephone tap or house search) have to be issued, the intervention of the investigating judge is obliged. The public prosecutor is (except under some - legally defined - circumstances) not competent to issue such orders (article 28bis § 3 CPC). The investigating judge then has the *possibility* to take over the lead of the investigation, after which the investigation becomes a 'judicial investigation'. When the investigating judge decides to place a person in pre-trial custody, the investigation *automatically* becomes a judicial investigation (the same applies when the investigating judge is requested to issue a warrant for a house search or searches in certain other private places, a warrant for an observation using technical means, a warrant for a telephone tap or a warrant for granting a witness full anonymity).[6]

The prosecutor-led investigation is entirely non-adversarial: all inquiries are made outside the presence of the suspect and the suspect is not in any way allowed to view the file. The judicial investigation is partially adversarial, especially since the Franchimont Law of 12 March 1998 which allows the formally accused suspects and the civil parties to request access to the file and to request additional inquiries. This legislative change has increased the difference between both types of investigation. The distinction between both types is often criticized because the decision between both forms of investigation is not (enough) determined by objective criteria.

[5] Law of 1 April 2007 (which entered into force on 1 December 2007).

[6] The Prosecutor has the possibility according to article 28septies CPC to request the investigating Judge to order another investigating measure (than these six) for which the judge is exclusively competent without initiating a judicial investigation. After the investigating measure has been executed, the investigating judge decides freely whether he sends the file back to the prosecutor or whether he continues the investigation himself (in that case it becomes a judicial investigation).

In the pre-trial stage, the suspect is not expected to actively participate in the evidence gathering. Using private detectives for tasks which are normally assigned (exclusively) to the police is even forbidden.[7] The outcome of the investigating proceedings is put in writing and is bundled in a 'criminal file' which will serve as the basis for the second (trial) stage.

1.2.2 Initiation of criminal proceedings

The distinction between the two types of pre-trial investigations (the prosecutor-led investigation (which is the standard) on the one hand and the investigation led by an investigating judge on the other hand) is important in terms of the way criminal proceedings are initiated. At the end of a prosecutor-led investigation, the prosecutor decides autonomously what should be done with the results of the investigation and whether the case should be brought before a trial judge with the aim of applying the criminal law. If the prosecutor decides to do so, the case will be brought before a police court or correctional court by means of a 'direct summons'.[8] A direct summons can also be done by a civil party, which automatically brings the case before a trial court (articles 145 and 182 CPC). A direct summons is only possible when there has been no judicial investigation. In the case of a judicial investigation, the pre-trial stage can only be closed by an investigating court, which can refer the defendant to the trial court by a referral order if there are serious indications of guilt regarding a certain offence.

The abovementioned distinction can best be illustrated by two examples. In the first example, a person is suspected of being involved in a minor shoplifting case or a fight with injured people. After detection by the police, the prosecutor will be notified, who can then order additional inquiries. When, according to the prosecutor, the inquiry is completed, the prosecutor will decide whether or not to bring the suspect before a trial judge. The prosecutor also has the possibility to propose a settlement – payment of a sum of money – or to organize a mediation between the offender and the victim, who both have to agree with this (if the offender meets the conditions determined by the prosecutor, the case is terminated). In the second example, a number of people are suspected of supplying hard drugs or of being involved in a human trafficking network. The police who have gathered information on these persons will inform the prosecutor, who will then usually immediately request the investigating judge to issue an enforcement order against these persons (telephone tap, house search, arrest warrant,…). If the investigating judges issues such a warrant, the investigation will become a judicial investigation exclusively led by the investigating judge. When the investigating judge determines that the investigation is complete, he will send the criminal file back to the prosecutor. The prosecutor then has to draft a written requisition where he requests the investigating court to refer the persons, against whom there exist serious indications of being involved in the trafficking, to the correctional court. The investigating court will then decide after having heard the report of the investigating judge, the plea of the prosecutor and the defence.

The most serious offences (*de facto* those where a murder or an attempted murder is involved) will always be investigated by an investigating judge and are brought before a jury (the Assise court). In order for a case to be tried at the Assise court, the investigating court in first instance has to refer the file to the Prosecutor-general (article 133 CPC). The Prosecutor-

[7] Law of 19 July 1991 regulating the profession of private detective (S.B. 2 October 1991).

[8] In some cases, persons can also be called to appear before a police court or correctional court through a 'notification by minutes' (article 216quater CPC) or a notification for immediate appearance (article 216quinqies CPC).

general then has the task of bringing the case before the investigating court in appeal. If the accused is referred by the investigating court in appeal through an indictment, the Prosecutor-general has to make the formal 'act of indictment' in which the nature of the offence, the underlying fact and all possible aggravating or mitigating circumstances are contained.

1.2.3 The trial stage

The trial stage is adversarial. Its proceedings are (mainly) oral and public. The equality of arms is guaranteed to a large extent. Nevertheless, trial proceedings still have considerable non-adversarial characteristics. The trial stage is based mainly on the investigating proceedings of the pre-trial stage (bundled in the criminal file). Before the initial hearing, the trial judge will usually have prepared the case using the criminal file: the judge will then lead the trial on this basis and will determine if certain additional inquiries are necessary. As a result, the information gathered during the pre-trial stage is of crucial importance and will weigh considerably (often exclusively) in the trial stage.

The Belgian criminal procedure respects, *at least in theory*, the immediacy principle: according to article 190 CPC the evidence must be produced at trial:

"The case is tried in public, under penalty of nullity.

When the prosecution is grounded on the articles 372 to 378 of the Penal Code, the court can order that the case is tried with closed doors, if one of the parties requests it, with the aim of protecting its privacy.

The prosecutor, the civil party or its counsel set out the case; the minutes or reports, if there are any, are read out by the court registrar, the witnesses for and against are heard, if there is ground to, and the objections are presented and are decided on; the documents which can serve for conviction or relief are presented to the witnesses and the parties; the defendant is interrogated; the defendant and the civil liable persons or their lawyer present their defence; the prosecutor makes a summary of the case and takes his conclusion; the defendant or the civil liable persons or their lawyer can reply.

The judgment is pronounced immediately or at the latest on the hearing following that on which the debates have been declared closed."

In practice, this principle has little application since the trial stage is often restricted to a verification of the evidence procured during the pre-trial investigation.[9] The proceedings before the trial court starts from and is based on the criminal file, which was drafted in a secret and non-adversarial way.

The Franchimont Law of 12 March 1998 improves this a bit by introducing the possibility for the suspect or civil party to ask for permission to view the file or to ask for additional inquiries (the investigating judge or, if the request is denied and the applicant appeals, the investigating court in appeal decide freely on the substance of the request). Nevertheless, the investigation at trial is still *almost entirely* dependent on the criminal file. The system of "purification of nullities" during the pre-trial stage could strengthen this tendency even more by restricting the debate on the removal of irregular evidence to the pre-trial stage. Only in

[9] B. DE SMET, "Het onmiddellijkheidsbeginsel in het strafproces: een anachronisme of een waarborg voor een kwalitatief goede rechtspleging?", *R.W.* 1996-67, 65-76.

Assise cases the immediacy principle still fully applies in practice (the evidence is presented to the jury and a number of witnesses - selected by the defence and the prosecution - are heard), but even then the criminal file dominates the proceedings, since the President of the court will base himself on the file while leading the trial.

Compared to the judge in a purely adversarial procedure, the Belgian trial judge will be more active during the trial stage than his common law colleague. The judge will usually lead the (trial) investigation him/herself and can order additional inquiries *ex officio*. The defence does not have an absolute right to call and interrogate witnesses: it is the judge who determines the necessity of hearing a witness at trial and who leads the interrogation. Belgium does not know a genuine cross-examination in the Anglo-Saxon meaning. Especially in Assise cases, the President of the court has far-stretching competence: the law gives him the power to do whatever he deems useful for finding the truth (article 268 CPC).

Belgium does not know a guilty plea system or expedited proceedings as in common law countries. Even if the defendant pleads guilty, the court still has the duty to review, *ex officio*, the regularity of the evidence, the possible prescription of the prosecution and, in case of a confession, whether the fact confessed is indeed punishable by law.[10]

1.3 Significant data

The gathering and analysing of data on the criminal justice system in Belgium is, when compared to some other European countries, not well developed. Although there is data on the total number of new cases (and pending cases) before the police and correctional courts in a specific year, there is no way to calculate the proportion of those arrested who are then proceeded against. There is at present no linking between, for example, the data of the trial courts and those of the investigating judges. This makes it impossible to assess the evolution of a case (from arrest to referral and trial). In order to assess the functioning of the criminal justice system in a qualitative way, improvements in this field are a fundamental requirement.

Prison overcrowding is one of the most prominent problems in the Belgian criminal justice system.[11] On 1 September 2006, for example, there was an occupancy level of 117.9%. The Belgian imprisonment rate in March 2007 was 95 per 100,000 citizens[12] (which puts it in the middle compared to the European countries). This rate has risen gradually over the last 15 years (from 71 in 1992 to 81 in 1998 and 88 in 2004). A remarkably high percentage of the prison population consists of foreigners (41.6% on 1 September 2006).[13] One of the causes

[10] Recently the support for the introduction of such simplified proceedings has increased. The Antwerp Public Prosecution Office, together with the Antwerp bar, have been thinking and consulting quite some time on a 'plea bargaining' procedure. It concerns a simplified procedure for suspects who confess the facts, in exchange for which – with their consent – the trial stage would be limited to a debate on the sentence. Informal negotiations on the sentence would then be possible. Although this initiative has gained much support among practicians, it is also criticized, especially among politicians (who do not see a legal framework for negotiating with criminals).

[11] See *inter alia*: K. BEYENS, S. SNACKEN and C. ELIAERTS, *Barstende muren. Overbevolkte gevangenissen: omvang, oorzaken en mogelijke oplossingen*, Kluwer, Antwerpen, Gouda Quint, Arnhem, 1993, 326p. T. DAEMS, "Strafuitvoeringsrechtbanken, overbevolkte gevangenissen & compatibele slachtoffers, *Panopticon* 2007.3, 41-57.

[12] Based on an estimated national population of 10.59 million at the beginning of March 2007.

[13] See http://www.prisonstudies.org ("world prison brief").

for the prison overcrowding is the high number of pre-trial detainees (44.3% on 1 March 2007).

Despite various efforts, the grade of recidivism has remained relatively unchanged (around 42%), while for some offences such as drug-related crimes it amounts to anxiously high proportions (according to some sources even up to 80%).

1.4 Legal aid system

The Law of 23 November 1998 has reorganized the legal assistance, which is now divided into first-line and second-line legal aid.[14] Besides the first- and second-line legal aid, a third category of legal aid has to be distinguished: those persons who cannot afford the *costs* involved in (criminal) proceedings (e.g. for taking copy of the criminal file), can submit a request for 'free legal aid'.

The first-line legal aid falls under the competence of the Commission for Legal Aid and aims to provide a first advice to citizens seeking justice. These citizens can go the 'house of justice' where they are helped by lawyers. When a detailed legal advice is required or when a legal procedure is unavoidable, the citizens are referred to the Legal Aid Bureaux (LAB) which are competent for the second-line legal aid.[15] Every lawyer-trainee is obliged to cooperate with these bureaux during their traineeship (three years). Since 1 September 1997, lawyers who are listed on the roll of lawyers (tableau) can continue to cooperate with the bureau if they are registered.
Data on legal aid at national level is only available for second-line legal aid. This data is general (both for civil and criminal cases). It has been calculated that criminal affairs count for nearly 25% of all cases where (second-line) legal aid is sought. The data show a significant increase in the annual budget for (second-line) legal aid: from 18,790,329.18 euro in 1998-99 to 36,129,000 euro in 2003-04 and 52,641,000 in 2006-07 (or an increase of 13.03% compared to 1998-99).

The decision regarding entitlement to free or subsidised legal advice is made by the local LAB. The procedure is regulated in the Judicial Code (articles 508/7-508/12). A lawyer is only appointed if, following a brief conversation with the person, the case is not manifestly unfounded and the conditions for granting the aid are complied with. When legal aid is refused, the applicant can appeal against this decision before the labour court, within a month after notification of the decision. When legal aid is granted, the applicant receives a document with the name and address of the appointed lawyer, the category under which the appointment is made (fully or partially free of costs) and also a brief outline of the rights and duties of the applicant and, in case of legal aid partially free of costs, the amount that should be paid to the lawyer. The appointed lawyer is informed in writing (or in case of extreme urgency by telephone).

[14] The legal framework consists of the articles 508/1 to 508/23 of the Judicial Code.

[15] The legal basis for these bureaux is article 508/7 Judicial Code which states that in order to provide assistance to indigents, the council of the local bar organizes such a bureau. Each lawyer has a deontological obligation to inform poor persons that they are entitled to legal aid (fully or partially free of charge) and to refer this person to the LAB or, if the lawyer is registered on the roll of lawyers, to take the necessary steps for getting appointed under second-line legal assistance.

The accordance of free or subsidised legal advice is subject to both a means test and a merits test (which does not differ according to the stage of the proceedings). There are two categories: according to article 508/13 JC, legal aid can be granted fully or partially free of costs for (1) those who lack the financial resources (means test) or (2) those who are 'regarded' as lacking the financial resources (merits test).

Citizens who apply for legal aid on the basis of insufficient financial resources have to prove their (net) income and their exceptional debts (which are effectively discharged on a monthly basis). The application has to be accompanied by an official document indicating the family composition. The specific income criteria are determined by Royal Decree.[16]

The second category involves a limited number of circumstances in which citizens can automatically receive free legal aid. These circumstances are determined by Royal Decree[17] and include persons who receive social assistance, persons who have a disabled child, persons who rent a social house, minors, certain foreigners (for procedures related to their status), persons in custody or mentally disabled persons.

The specific performances that are covered by (second-line) legal aid are defined in a list (defined by Ministerial Decree). Every performance is linked to a number of points (each point representing a certain sum). With regard to criminal proceedings, this includes almost every possible procedure. The list of performances which are remunerated is added in the *Annex* to this report. The list does not differentiate the reimbursement according to the nature of the case or its complexity (e.g. the same points are awarded for preparing and pleading a small theft case as for a complex fiscal fraud case). There are no restrictions on the amount of work that can be done/will be paid for. In principle, every performance will be paid for, except for some performances not followed by a procedure (consultations in prisons or psychiatric institutions) of which only a limited number are reimbursed.

The average remuneration per case (i.e. amounts paid to lawyers) can be calculated by multiplying the average number of points per case with the average value per point. In 2006-07, the average number of points per case was 15.11 for the Flemish lawyer association (Orde van Vlaamse Balies) and 16.53 for the French and German speaking lawyer association (Ordre des Barreaux Francophone et Germanophone). The average value per point for the judicial year 2006-07 was 24.28 euro (this value has been steady over the past three years). This gives an average remuneration per case of 367 euro (OVB) and 401 euro (OBFG).

2. Fair trial rights in Belgium

2.1 Compliance with the European Convention on Human Rights

2.1.1. The right to information

[16] Royal Decree of 18 December 2003. The income criteria are changed annually, taking account of the evolution of the consumer price index. As of 1 September 2008 the criteria are: (1) for being entitled to fully free legal aid a monthly net income of 865 euro for single persons; a monthly net (family) income of 1,112 euro for single persons who live together with a dependent person or for the cohabitant with his spouse or any other person with whom a natural family is formed; (2) for being entitled to partially free legal aid a monthly net income between 865 and 1,112 euro; a monthly net (family) income between 1,112 and 1,357 euro for single persons who live together with a dependent person or for the cohabitant with his spouse or any other person with whom a natural family is formed.

[17] Royal Decree of 18 December 2003.

2.1.1.1. The right to be informed of the nature and cause of the accusation

Legal recognition and procedural protection

Suspects

Interrogations of suspects in the pre-trial stage (whether it concerns a prosecutor-led investigation or a judicial investigation) are done by the police. Only when an investigating judge considers to put a person in pre-trial custody, is he personally obliged to interrogate the suspect regarding the facts which form the basis of the accusation and for which an arrest warrant can be issued, unless the suspect is a fugitive or is hiding (article 16 §2 of the Law of 20 July 1990).[18]

The interrogation of persons - irrespective of the capacity in which they are interrogated - is subject to the minimum requirements contained in article 47bis CPC (according to article 70bis CPC these minimum requirements also apply in judicial investigations). If the person is interrogated in the capacity of a suspect (the police is not obliged to say this), *he/she does not have to be informed of the nature and cause of the accusation*. The right contained in article 6.3.a ECHR is not deemed applicable by the Belgian Cassation court to interrogations conducted by the police during a criminal investigation.[19]

An important remark in this respect is article 123 of the proposal for a new CPC which stipulates that *"each person who has been interrogated several times during the last year about the same fact by the prosecutor or the police, can ask the Public Prosecutor's Office by means of a petition if he is suspected of having committed an offence punishable with a sentence of one year imprisonment or more"*. According to the current text of the proposal, the prosecutor should then reply in writing within two months following the petition. If the answer is affirmative, the prosecutor should then indicate the nature of the offence. If there is no answer within two months, the person concerned has the right to ask permission to view the file or to request additional inquiries.

Since the Franchimont Law of 12 March 1998, the Belgian CPC contains an important exception to the aforementioned principle: when, in the course of a judicial investigation, the investigating judge considers that there exist '*serious indications of guilt'* against a person (article 61bis, 1° CPC), the investigating judge is obliged to inform that person of the nature and cause of the accusation.[20] This formal act of accusation is called the 'inverdenkingstelling'. This aim of this obligation is to avoid that suspects are not aware that they are the subject of a judicial investigation until the moment they are invited to the hearing before the investigating court which can refer them to the trial court. The CPC does not stipulate, however, that the obligation *immediately* arises from the moment that there exist serious indications of guilt. The necessities of the investigation (e.g. a planned house search or telephone tap) can require that the person concerned is *temporarily* not informed. If however

[18] Article 145 of the proposal for a new CPC foresees that the investigating judge should interrogate each suspect personally; a violation of this obligation would lead to the nullity of the investigation. The implementation of such an obligation in practice would require a substantial increase of the number of investigating judges.

[19] Cass. 14 December 1999, *Arr. Cass*. 1999, nr. 678.

[20] The obligation exists for each fact for which there are serious indications of guilt. This is mainly a theoretical principle. In practice few investigating judges will inform a person that the investigation has uncovered serious indications of guilt regarding another (new) fact. This will usually be covered by the notification at the end of the investigation at which point the person will be informed of any new fact he/she is officially accused.

the subject is left unknowing without this being necessary for the investigation, the right of defence can be violated. The freedom of the investigating judge to determine the moment at which he informs the person is thus not absolute).[21] Article 61bis CPC does not stipulate any sanction if the investigating judge does not formally accuse a person against whom there exist serious indications of guilt. The absence or irregularity of the accusation as such does not lead to the nullity of the procedure. Only when the investigating judge has (flagrantly) meant to violate the rights of the defendant (e.g. by denying him the legally foreseen rights without this being necessary for the investigation), the absence or irregularity will be sanctioned.[22]

According to article 61bis, 2° CPC *"each person who is the target of prosecution in the framework of a judicial investigation has the same rights as the person who is formally accused"*. This means that a person who is targeted in a request by the prosecutor for a judicial investigation or in a complaint of a civil party before the investigating judge (which automatically initiates a judicial investigation), is no longer treated as a mere suspect. This person will have the same rights as those who have been officially accused by the investigating judge. This legal provision aims to avoid that the investigating judge would postpone the official notification to deny that person the right to ask permission for viewing the file or to the right to request additional inquiries. This principle is sometimes referred to as the '*implicit or virtual accusation'*.

The virtual accusation can follow, for example, from an investigating measure from which it could appear that there are serious indications of guilt and that the subject is possibly targeted by a judicial investigation (telephone tap, house search,…). This is however not necessarily the case: these measures can also be ordered with the aim of gathering evidence regarding a third party. In those circumstances, the secrecy of the investigation on the one hand does not allow to give explanation to the subject of the investigative measure. On the other hand, this person cannot be formally accused because he is at that point not (yet) a target of the investigation.

It is remarkable to see that, although these persons have the same rights as those who are officially accused, the investigating judge is *not* obliged by law to inform these persons of the fact that they are the subject of a judicial investigation, and, *a fortiori*, to inform them of nature and cause of the accusation (and this regardless of the fact whether the investigating judge does or does not consider that there exist serious indications of guilt). Due to the fact that these targeted persons have the same rights as those officially accused, it has been argued in Parliament and by several authors that the investigating judge should in these case officially inform the concerned person.[23]

The official act of accusation by an investigating judge can be done in different ways. If it is done verbally (following an interrogation by the judge), this will be contained in the official

[21] It should be noted in this respect that every person against whom there exist serious indications of guilt or who has been targeted by a request from the prosecutor or a civil party's complaint, has to appear at the end of the investigation before the investigating court for the arrangement of the procedure (article 127 CPC). This means that, even if the person has been left unknowing during the investigation, a notification of this appearance will be sent. Due to the fact that this notification initiates a new (binding) period during which the file can be viewed and additional inquiries can be requested, the rights of defence can still be respected at that moment.

[22] Cass. 2 October 2002, *R.D.P.* 2003, 125. The fact whether the right of defence has been flagrantly breached, is judged in the light of the whole procedure.

[23] M. ROZIE, "Nieuwe rechten voor de verdachte tijdens het gerechtelijk vooronderzoek", in *Het vernieuwde strafprocesrecht*, Maklu, 1998, 165. R. VERSTRAETEN, *Handboek Strafvordering*, 4de ed., nr. 752.

report of the interrogation. In the other cases, the information will have to be supplied in writing (this can be done by mail or fax). The investigating judge is not obliged to interrogate the person before he makes the official accusation. The act of accusation cannot be delegated to the police or prosecutor. If the suspect is unreachable, the accusation can be done '*in absentia'*.

Defendants
Defendants always have to be informed of the nature and cause of the accusation for which they have to stand trial. The way in which they are informed depends on how the case is brought before the court (see supra, the initiation and processing of proceedings). This is usually done by a direct summons or a referral order.[24]

If the case is instituted before the police court or correctional court by a **direct summons**, the writ of summons will indicate the nature and cause of the accusation. In criminal cases, the writ of summons is governed by the articles 145, 182, 184 en 211 CPC. These articles do not determine in which words the writ should describe the charges and do not contain a nullity provision. According to the Cassation court, a summons can only be declared null if an *essential component* of the writ is missing or if it is proven that the irregularity violates the right of defence.[25] A fundamental requirement in the Cassation court's case-law on the content of the writ is that the charge should describe the underlying fact clear enough to allow the defendant to defend himself.[26] In order to be clear enough, the writ should mention *the place, the date, the offence and its essential factual components* (there is no obligation to specify the article of the PC which was violated). In case of theft for example, this is an indication of the stolen good and the injured person. In case of falsification of documents, this is the document which was falsified and the actual falsification. The indication of the offence does not have to be done in the precise wordings of the law.

Defence lawyers often plead that the charge is not clear enough ('*exceptio obscuri libelli'*), for example by stating that the incriminating period indicated in the summons is too extended to determine the date on which a specific offence has been committed. In practice, it will often be the judge who will make sure that the charge is clarified. The judge may invite the prosecutor or civil party to make a clarification. If the charge is extremely unclear (so that it is impossible to know which is the punishable act) the prosecution will be declared inadmissible.[27]

If, during trial, the qualification of the fact for which the defendant is prosecuted, is altered, the consequence depends on the nature of the new offence. If the nature of the (new) offence is the same (e.g. from normal assault to assault with aggravating circumstances), the judge can sentence the defendant *ex officio* for the new charge after the defendant has been heard on this. If however the nature of the (new) offence is different (e.g. from theft to receiving stolen goods or from misuse of faith to swindling), the defendant has a choice: either to appear

[24] Defendants can also be called to appear before a police court or correctional court by a 'notification by minutes' (article 216quater CPC) or a notification for immediate appearance (article 216quinqies CPC). An exceptional situation is that where a defendant commits an offence in the courtroom (e.g. insulting the judge, the King,…): according to article 181 CPC, the President will immediately make an official report thereof, will hear the defendant and the witnesses and will immediately impose the sentences foreseen by law.
[25] Cass. 12 November 2002, *Arr. Cass*. 2002, 2449.
[26] Cass. 4 February 2003, *Arr. Cass*. 2003, 322; Cass. 12 November 2002, *NjW* 2003, 130.
[27] The violation of the right of defence caused by an irregular writ of summons should be raised '*in limine litis'*, meaning at the start of the trial before any other defence.

voluntarily for the new offence after which the judge can sentence for the new offence without a new summons being necessary; either not to appear voluntarily and to demand the acquittal for the (old) charge, after which the prosecutor will have to summon the defendant for the new charge and thus initiate a new trial.

If the case has involved a judicial investigation, the trial proceedings are initiated by a **referral order** of an investigating court. The procedure before the investigating court (article 127 CPC) is a key moment in the Belgian criminal procedure. At this point, suspects are notified for which offences they can be referred to the trial court. If the formalities of this procedure are not respected (e.g. an irregular notification), every further step in the criminal proceedings will be null. After referral by an investigating court, the defendant is notified by a writ of summons of the date on which the proceedings are initiated. In that case the writ does not initiate the case before the judge, but only counts as a fixation of the date.

2.1.1.2. The right to detailed information (right of access to, or copies of the file) concerning the relevant evidence/material available to the police/prosecutor/examining magistrate

Legal recognition and procedural protection

Suspects

Because of the principally non-adversarial character of the pre-trial stage, suspects do not have the right to view the criminal file during investigation. Although each person has *the right to ask* the prosecutor for permission to view (and take copy of) the file[28], this request is usually denied until the investigation is closed.

The proposal for a new CPC (article 124) foresees the possibility for each person who is suspected of having committed an offence punishable with a sentence of one year imprisonment or higher, to ask the Prosecutor to view the file (the same right exists for the person injured by such an offence). The decision of the Prosecutor regarding this request would not be subject to any appeal.

In the current legislation, there are three important exceptions to the general principal of secrecy.

The first exception regards suspects who have been officially accused by an investigating judge (of the serious indications of guilt regarding an offence). Since the Franchimont Law of 12 March 1998, these suspects have the right to file a request to the investigating judge to view the file (article 61ter CPC). If this request is denied - which, in practice, often occurs - the suspect can appeal against this decision before the investigating court in appeal. Note that a similar right exists for those persons who are the target of prosecution in the framework of a judicial investigation and who have not been officially accused (article 61bis, 2° CPC) as well as for victims who have officially filed a complaint before the investigating judge in the course of a judicial investigation (civil party).

The second exception concerns those suspects who have been placed in pre-trial custody following an arrest warrant. According to articles 21, 22, 22bis and 30 the Law on pre-trial detention of 20 July 1990, these suspects appear before the investigating court of first instance regularly (within five days following the arrest and after that in principle each month). Before any appearance (in first instance or appeal), these suspects have the right to view the criminal file for a limited and legally defined period (in principle one day before the first appearance

[28] Article 96 Royal Decree of 27 April 2007.

and two days before later appearances). If this right is not respected in first instance, this will not lead to the release of the suspect. If the suspect appeals, a right to view the file in preparation of the hearing before the investigating court in appeal will be granted, the decision of the investigating court in first instance will be quashed and the investigating court in appeal will decide itself on the extension of the custody.

The third exception is the situation where a judicial investigation is closed and the investigating court in first instance will decide on the arrangement of the procedure (article 127 and 135 CPC). All suspects who have the status of an accused (those who have been officially informed hereof by the investigating judge or who are the target of prosecution in the framework of a judicial investigation), have the right to view the file before the appearance for at least 15 days (or three days when one of these persons is in pre-trial detention). This is also the first moment in the pre-trial stage at which suspects (and civil parties) have the right to take copy of the file. If this period is not respected for a certain party, that party can appeal after which the investigating court in appeal can declare the procedure null and the case will have to be brought again before the investigating court in first instance according.

It should be kept in mind that the right for a suspect to view the file is always restricted to the opening hours of the Court Registry (8.30h - 12.30h and 13.30h-16.00h).

Comments from criminal justice actors
Although some judges are in favour of an extension of the right of (non-arrested) suspects to access the file in the pre-trial stage (especially in complex cases could this possibly prevent delays at the end of the investigation), this is certainly not a general viewpoint. Investigating judges are usually against any extension of such a right. It is pointed out that at present, many lawyers do not use the possibilities already offered by the law to request permission to view the file.

On the basis of these exceptions, some actors pointed to the fact that there is a discrimination between those suspects against whom there exist serious indications of guilt but who are not arrested and those suspects who are arrested. The first category will not have automatically have the right to access the file but will have to request permission to the investigating judge (or the investigating court in appeal). The latter category will have the opportunity to view the file regularly (at the occasion of the regular appearances before the investigating court which decides on the extension of the arrest warrant).

Moreover, if suspects targeted in a judicial investigation have not officially been accused by the investigating judge and are unknowing of the fact that they are the subject of an investigation, these suspects cannot use the right to request access to the file. They will have to wait until the notification of the date on which the investigating court will decide on the arrangement of the procedure and will then only have (minimum) 15 days (or three days when one of the suspects in the case is in pre-trial custody) to prepare the defence.

Defendants
From the moment on which they are summoned, defendants (and/or their lawyer) have the right to view (or take copy of) the criminal file. The request for a copy of the file implies the payment of a certain amount of money for each copied page, with a maximum of 2,500 euro. Indigent defendants can submit a request for exemption of these costs.

For persons who have to appear before the Assise court, this right exists from the moment of referral (article 297 CPC). An important note in this respect is that each party in an Assise case has a right to a *free* copy of the entire file.

2.1.1.3. Information on rights (letter of rights)

The only legal provision on the information which has to be given to any suspect is article 47bis CPC on the minimum requirements in the course of interrogations of persons (irrespective of their capacity). According to article 47bis *"each interrogated person is told at the start of the interrogation that (a) he can ask that all questions which are asked and all answers that he gives, are noted in the exact wordings; (b) he can ask that a specific inquiry is made or a specific interrogation is done; and (c) his declarations can be used as legal evidence"*.

The Belgian CJS does not know a *letter of rights*. Suspects who are arrested, are not informed explicitly about their procedural rights. They depend entirely on the assistance of a lawyer. There is no obligation for police officers or investigating judges who interrogate suspects to inform them that they have the right to remain silent.

The absence of a letter of rights can work discriminating for those groups who cannot afford a private lawyer. Lawyers appointed under legal aid do not always have a habit of visiting their clients (regularly) in prison or are themselves not always aware of the defence rights their clients have.

<u>*Comments from criminal justice actors*</u>
Although most questioned actors favoured the introduction of a letter of rights, there was no consensus. Some actors suggested instead that article 47bis CPC would be extended (e.g. with an obligation to mention the right to remain silent) and that it should be made clear from the interrogation reports that the suspect has not only been informed of his rights but also effectively understands the content of these rights.

2.1.2. The right of a suspect/defendant to defence

2.1.2.1. The right of a suspect/defendant to defend themselves

<u>Legal recognition and procedural protection</u>
The right of suspects and defendants to defend themselves is guaranteed in the Belgian system. There is no domestic legal provision explicitly stating this nor is there a provision containing an obligation to inform suspects/defendants of this right.

According to article 758, 1° of the Judicial Code, the parties (in a civil procedure) can submit their conclusions and arguments themselves, unless the law prohibits this. This article further stipulates that, in those cases where the law does not require assistance of a lawyer, the judge who determines that a party is incapable to discuss his case with the necessary "*decency"* or with the necessary "*clarity"* due to "*anger or lack of skills*", can deny that party from submitting its conclusions and arguments itself. The Cassation Court has ruled that article 758 Judicial Code is applicable in criminal cases. It does, however, not allow the judge to deny a

defendant the right to submit written conclusions.[29] The judge may (should) solve this by ordering the defendant to seek the assistance of a lawyer.

The right to defend oneself is respected at both the pre-trial and the trial stage. There is no difference between the first instance and appeal stage. The sole exception is the cassation stage, where the parties bring forward their arguments through a (written) memorandum which has to be signed by a lawyer. The right arises from the moment the suspect or defendant appears before an investigating judge or court.

2.1.2.2. The right to legal advice and/or representation

Legal recognition and procedural protection

Legal advice

Each person who is involved in a criminal procedure as a suspect or defendant has the right to legal advice. Article 23, 3° of the Constitution guarantees the right to legal assistance in a general way. The right to legal advice in criminal proceedings arises even before the moment of arrest, namely at the moment on which a person is notified of a possible involvement in criminal proceedings (e.g. an invitation from the police for an interrogation). Each person who appears before a court (investigating and trial courts) has the same right.

There is no legal provision prescribing that persons should explicitly be informed of the right to legal advice.

Article 144 of the proposal for a new CPC contains an obligation for the investigating judge, when he officially accuses a suspect (i.e. informs him/her that there exist serious indications of guilt) to inform this suspect that he/she has the right to choose a lawyer. At present, investigating judges in practice already inform suspects of this right during interrogation (this is mentioned explicitly in the minutes of the interrogation).

If a suspect demands the assistance of lawyer during interrogation, the police or the investigating judge will record this request in the minutes of the interrogation (cf. the right contained in article 47bis CPC for an interrogated person to demand that all questions and answers are written in their precise wordings).

Legal assistance of persons in pre-trial detention

A lawyer can never be restricted from seeing his client in private. Even when the investigating judge does not allow the arrested suspect to have contact with anyone (this can be ordered for maximum three days after the first interrogation and cannot be extended), this does never exclude a lawyer from visiting his client. In practice, however, the exercise of this right is not without any problems. Belgium does not have a formal system that guarantees access to a lawyer 24 hours a day. This means that those who are arrested at night or during the weekend are (temporarily) denied access to legal assistance.

Article 29 § 1 of the Royal Decree of 1 May 1965 on the general regulation of penitentiary institutions stipulates that lawyers can have a private consultation at each hour of the day with those detainees who are not finally sentenced and by whom they are called or to whom they were appointed, but only after their first interrogation (also see article 20 of the Law of 20 July 1990 on pre-trial detention).[30] This means that *it is impossible for a person who is*

[29] Cass. 18 September 1979, *Arr. Cass*. 1979-80, 63.

[30] Y. VAN DEN BERGE, *Uitvoering van vrijheidstraffen en rechtspositie van gedetineerden*, 2e ed., Larcier, 2006, nr. 222.

arrested to consult a lawyer during the arrest period of 24 hours (of which the law does not further regulate the modalities). Moreover - after this first 24 hour period and during the whole detention - *the restrictions on access to prisons should be taken into account*. Mostly, this is restricted to the period between 7.00 a.m. and 9.00 p.m. The law of 12 January 2005 on the penitentiary system and the rights of detained persons stipulates in article 67 (which has not yet entered into force) that the lawyers can visit the detainees *"during the hours of the day which, for each prison, are determined by the King"*).

The effect of the right to legal advice can differ according to the financial resources of the suspect who is placed in pre-trial custody, since those suspects who have to request the appointment of a lawyer under legal aid, will usually have to wait longer to talk to this lawyer than those suspects who can see their (private) lawyer immediately after they arrive in prison.

In principle, the suspect or defendant chooses whether or not he seeks the assistance of a lawyer, whom he can choose freely. Article 16 of the Law of 20 July 1990 on pre-trial detention states that, if a suspect is arrested by the investigating judge and does not have or choose a lawyer, the representative of the local bar is informed. This means that, in practice, every suspect in pre-trial detention has a lawyer at his disposal.

Mandatory assistance

In some proceedings, the assistance of a lawyer is mandatory (e.g. for the Assise court, see article 293 CPC). The former article 28 of the Law on the Protection of Society stipulated that the courts, including the Cassation Court, or the Commissions and the High Commission for the Protection of Society could only decide on *requests for internment* regarding persons who were assisted by a lawyer. If the person did not choose one, the President of the court or Commission would appoint one. Article 118 of the new Law on the internment of persons with a mental disorder contains a similar provision with this difference that the new penitentiary courts have replaced the former Commissions (this article has not yet entered into force).

Exceptions to the right to legal assistance

In some circumstances, assistance by a lawyer is not permitted. There is *no right for a lawyer to be present during interrogation* by the police or an investigating judge.[31] The fact that a representative of the Public Prosecutor's Office can be present at the interrogation, does not in itself lead to a violation of the right of defence or the nullity of the interrogation.[32] Some legal experts have argued that the fact that the presence of a lawyer is not foreseen by law, does not mean that it would be forbidden to allow a lawyer to be present during interrogation.[33] There is one exception to this general rule, namely the summary interrogation according to article 22, 3° of the Law on pre-trial Custody which is not used frequently in practice. This article gives the right to a suspect who is in pre-trial custody (or his lawyer) to request a summary interrogation to the investigating judge within ten days before each appearance before the investigating court in first instance. The lawyer as well as the prosecutor can be present during this summary interrogation.

[31] Cass. 4 December 2002, *Arr. Cass*. 2002, nr. 651.

[32] Cass. 30 March 1988, *Arr. Cass*. 1987-88, nr. 479.

[33] C. VAN DEN WYNGAERT, *Strafrecht, Strafprocesrecht & Internationaal Strafrecht*, 6th edition, Maklu, Antwerpen-Apeldoorn, 2006, p. 915. F. GOOSSENS, "Het E.V.R.M.: een argument pro aanwezigheid van de advocaat bij het politioneel verdachtenverhoor?", *Ad Rem* 2005, 38-51.

The debate on the assistance of lawyer during interrogation is ongoing. In this regard, it is important to note that the proposal for a new CPC foresees such a right: article 86, 5° (on the police interrogation) stipulates that *"on the request of the interrogated person, after his first interrogation, he/she can be assisted by a lawyer during the interrogation. The lawyer assists the interrogated person on the compliance with the rules of interrogation. The interrogation is suspended until the lawyer is present."* Article 147 of the Proposal contains a similar provision for interrogations of suspects by the investigating judge, with the exception of the words "*…after his first interrogation…*" (in practice, the first interrogation of a person will always be done by the police).

Among the questioned actors there was no consensus on this aspect. Most lawyers are (naturally) in favor of such a right: not only could this provide a guarantee against unlawful police behavior, it could also help the investigation (the lawyer could consult with his client at an early stage and could advise him to tell the truth, stressing that denial has no use) Judges are more divided on the issue: some fear that this will hinder the normal course of an interrogation, while others do not seem to object (in that case they suggest to limit the role of the lawyer to a passive observer). Prosecutors are generally against any form of participation of lawyers at interrogations. Some judicial actors stated that the presence of a lawyer during interrogations could prevent the interrogators from putting some 'pressure' on the suspect, while this pressure (if not exceeding what is legally allowed) is often useful in the interests of an investigation.

Most questioned actors agree that, if the assistance of a lawyer would be permitted during interrogation, this would necessitate the extension of the period during which a suspect could be deprived of his liberty (before the issuing of an arrest warrant) from 24 hours to (at least) 48 hours, for evident reasons. Many actors are in favor of such an extension, even without the presence of a lawyer during interrogation. The current 24 hour period is generally accepted as too short to take all the necessary steps in an adequate way (deprivation of liberty; initial interrogation by the police (possibly requiring the use of an interpreter); notification of the prosecutor who then, if an arrest warrant is deemed necessary, has to request the intervention of the investigating judge; possible additional inquiries; the interrogation by the investigating judge and the issuing of the arrest warrant). The 48 hour period would also allow to execute a brief psychological examination of the suspect (in order to assess in this stage whether the suspect is possibly mentally disordered and to allow a better assessment of the danger the suspect poses). Most actors agree that the 48 hour period would possibly lower the number of pre-trial detentions: many cases seem to 'solve themselves' within a few days.

An interesting proposal made by some of the questioned actors was to compensate the fact that lawyers are not present during investigative actions such as interrogations or confrontations by making an audio recording. This would make it much easier to check the regularity of the investigative actions afterwards and would also avoid a lot of discussion before the investigating courts or trial judge on what the client did say and did not say.

<u>Legal assistance of minors and mentally vulnerable persons</u>

When a **juvenile**[34] has committed a fact described as an offence the proceedings consist of two stages.[35] In the first stage the judge can impose a protective measure (meanwhile the judge will order an investigation on the social and educational environment by a welfare officer connected to the juvenile court). Protective measures are, *inter alia*,: community service, an educational programme, house arrest, placement in an (partially or fully closed) institution, etc. The second stage concerns the merits of the case (where the guilt and the necessity of an additional measure will be determined, and where civil parties can make their claim). *In both stages, the assistance of a lawyer is obligated*.

Unless the parents have appointed a lawyer themselves (which is rather exceptional), a lawyer will be appointed and paid for by the state in the (second line) legal aid system (article 52ter and 54bis of the law of 1965). With regard to the legal assistance of minors a bill (of 22 December 1999) on the introduction of specialized lawyers for minors stipulates that *"in each judicial or administrative procedure where a minor is a party or wherein he is involved of during his/her interrogation, the minor is assisted by a specialized lawyer except when he chooses another lawyer"*. This bill has not yet been approved. Recently, the local LAB of the Flemish local bars have begun to draw up a list of lawyers specialized in juvenile assistance (in practice this will be those lawyers who have attended the recently introduced special course on juvenile law which is held annually and is organized by the Flemish lawyer association in cooperation with all Flemish universities).

A special protection in the form of legal assistance is also accorded to **mentally vulnerable persons**. When an offender is found to be mentally disordered, the internment of this offender can be ordered after following a special procedure. The law of 21 April 2007 on the internment of mentally disordered persons has replaced the law of 9 April 1930 on the Protection of Society.[36] According to this new law (which has not yet entered into force) the new penitentiary courts will replace the former Commissions for the Protection of Society and are now competent for controlling the execution of the internment. The former article 28 of the Law on the Protection of Society stipulated that the courts, including the Cassation Court, or the Commissions and the High Commission for the Protection of Society could only decide on requests for internment regarding persons who were assisted by a lawyer. If the person did not choose one, the President of the court or Commission would appoint one. Article 118 of the new Law on the internment of persons with a mental disorder contains a similar provision.[37]

[34] A juvenile is defined by law as a minor (below 18) who has committed a *"fact described as an offence" (*a fact explicitly defined in the Penal Code). This group should be distinguished from those minors in a problematic educational situation (according to article 2, a and 4 of the decree on the Special Youth Assistance this is *"a situation where the physical integrity, the affective, moral, intellectual or social chances for development of minors are threatened, due to special circumstances, relational conflicts or the circumstances in which they live*"). The protective measures determined by law are largely the same for both categories. The distinction between both categories is often vague and, in practice, a considerable number of the latter category (who are often placed in foster families or educational institutions) reappear before the juvenile judge for having committed a fact described as an offence.

[35] See the law of 8 April 1965 on youth protection adjusted by the law of the law of 15 May 2006 and 13 June 2006.

[36] According to article 1 of the Law of 1930, a mentally vulnerable person is someone who, due to a mental illness, is not capable to control his deeds and is a danger for society (this last criterion was developed by the jurisprudence). According to article 8 of the Law of 2007, this is a person who suffers from a mental illness which seriously affects his judgment capability or the control of his deeds.

[37] This seems incompatible however with article 11 § 3 of the same law which states that the persons subject to a request for internment before the investigating courts, *can* be assisted or represented by a lawyer.

Many of the questioned actors (mainly judges) were critical about the performance of lawyers appointed under second-line legal aid in internment procedures (a high number of the mentally disordered persons who are placed in custody after having committed an offence are indigent). The defence of mentally vulnerable offenders by lawyers-trainees is often inadequate. A number of young lawyers seem to handle these cases "too lightly". They hardly ever visit their client before the hearing (this could be explained partially by the fact that, in case of appointment under legal aid, they are usually notified very late) and sometimes do not even appear at the hearing.

Legal assistance of indigent suspects/defendants

The Belgian legal aid system is well developed and guarantees the appointment of a lawyer free of cost for those suspects or defendants who lack the financial means to pay a private lawyer (see supra, p. 6-8).

According to article 184bis CPC, if a person who has to appear before a court and has been found in need of legal aid, asks for the assistance of a *lawyer at least three days before the court hearing*, the President of the court will send the request to the LAB who will then appoint a lawyer (a similar request can be made by a suspect (whether or not arrested) in the course of a judicial investigation). According to article 16 of the Law of 20 July 1990, investigating judges who interrogate a person prior to issuing an arrest warrant, have to inform the suspect of the possibility to choose a lawyer. If no particular lawyer is chosen, the judge will inform the representative of the local lawyer society that a lawyer should be appointed under second-line legal aid.

Where suspects or defendants principally have the right to choose their own lawyer, this is not (always) the case for indigent persons. If they are accorded a lawyer under the legal aid system, they cannot choose which lawyer is appointed: the lawyer is appointed from a list (of lawyer-trainees or other lawyers who are registered), unless they choose a lawyer they know under the condition that this lawyer is registered in the legal aid system. Suspects/defendants always have a right to ask for a replacement (e.g. they do not trust the appointed lawyer), although this can be a time-consuming process (the appointed lawyer should first be relieved from the case before a new lawyer can be appointed).

Representation

The legal provisions on representation have fundamentally been changed following the case-law of the ECtHR. In the old system, the defendant who did not appear, could not be represented by a lawyer, except in a few circumstances such as force majeure. If the defendant did not appear personally, he was convicted in absentia, even if the lawyer was present at the hearing. If the defendant did not appear on the hearing in opposition to the default judgment, the opposition was declared inadmissible.

In the Van Geyseghem case[38], the ECtHR ruled that the right to legal advice contained in article 6(3)d ECHR also included the right to representation; this right could not be lost by the single fact that the defendant was absent on the hearing.[39]

[38] Van Geyseghem/Belgium, ECtHR 21 January 1999.

[39] Other convictions on this point include: Goedhardt/Belgium and Stroek/Belgium, ECtHR 20 March 2001; Pronk/Belgium, ECtHR 8 July 2004 and Stift/Belgium, ECtHR 24 February 2005.

Following this judgment, the Belgian legislation was changed: *representation by a lawyer is now principally allowed*, unless the court orders the personal appearance of the defendant (article 152 § 1 and article 185 §§ 1 and 2 CPC). Only at the Assise court, the personal presence of the accused is still required.

According to the current legislation, a defendant who is summoned before a correctional or police court, is thus principally not obliged to appear personally and can be represented by a lawyer (exceptionally, the court can order the personal appearance of a party, without the possibility to appeal against this decision[40]). It can be questioned whether this is an adequate solution. In practice, the absence of the defendant is often not 'appreciated' by judges. Not only can this be regarded as a lack of interest, but the judge will not be able to check the credibility of the defendant through personal contact and through interrogation or to confront him with certain statements made during the investigation. Not in the least, the personal appearance is crucial for the judge to determine an adequate and personalised punishment (some forms of punishment, such as the labour sentence, are not possible if the defendant has not personally agreed at trial).

The right to representation is not absolute. In cases of pre-trial detention, the presence of the suspect at the hearing before the investigating courts is principally required. If however the suspect is unable to appear (e.g. because of a strike which makes it impossible to transport the suspect between prison and court), the investigating court will allow the lawyer to represent his client. If the lawyer (who was duly notified) does not appear or does not request permission to represent his client, the investigating court can decide in absence of the suspect and his lawyer; the same is possible when the suspect refuses to appear. If the investigating court wants to decide on the pre-trial detention, in absence of the suspect who is unable to appear and who is not represented by a lawyer, the decision which continues the detention must determine that the court is unable to move.[41]

2.1.3. Procedural rights

2.1.3.1. The right to release from custody pending trial

Legal recognition and procedural protection

Before 1990 there were no alternatives for the pre-trial custody. The investigating judge only had two options: either to release the suspect or to order the arrest. Since the Law of 20 July 1990 suspects can be released from pre-trial custody under certain conditions in all cases where the pre-trial custody can be ordered or continued: the release from custody pending trial (with or without conditions) can now be ordered by the investigating judge[42], the investigating courts (at the occasion of the regular appearances for continuation of the arrest or at the arrangement of the procedure) and the trial judge[43] (articles 25, 27 and 35 of the Law of 20 July 1990).

[40] Articles 153 §2, 1° and 185 § 2, 1° CPC.

[41] Cass. 7 May 2003, P.03.0607.F.

[42] Since the Law of 31 May 2005 (S.B. 16 June 2005) there is no possibility for appeal against this decision of the investigating judge.

[43] When the investigation is closed (and the person is referred to the trial court) and the defendant is still in custody, the release from custody can be ordered after the submission of a petition to the court where the case is pending (article 27 § 1 of the pre-trial detention law). The same right exists for the defendant who appears free before the trial court but who has been 'immediately arrested' at the moment that the sentence is pronounced (article 27 § 2).

When the release from custody pending trial is ordered, there are three possibilities: (1) the arrest warrant is lifted; (2) the arrest warrant is continued but the suspect is released under conditions; (3) the arrest warrant is continued but the suspect is released after payment of bail (a combination of (2) and (3) are also possible).

In case of a **conditional release**, the conditions under which the release can be ordered are not explicitly defined in the law but are determined by the judge. The judge is however not totally free in this respect: article 35 § 3 of the Law of 20 July 1990 determines that the conditions must relate to one of the circumstances named in article 16 § 1 of the law (risk of absconding, risk of recidivism, risk of misappropriation or risk of collusion)[44]. The conditions are thus aimed to neutralize these risks. The conditions therefore vary according to the specific circumstances of the case and the personal situation of the suspect. They can include, *inter alia*, a prohibition to frequent a certain area or establishment or to contact a certain person (or group of persons), a prohibition to use or abuse alcohol or drugs, an obligation to reside at a specific address, an obligation to find work (and not to lose this due to his/her own fault), an obligation to attend a specific course (for drug addicts or sexual offenders,…), etc. If the conditions oblige the suspect to follow guidance or a treatment, the suspect is expected to choose a competent person or institution. This person or institution is then obliged to report regularly to the judicial body that imposed the condition (article 35 § 6 of the law). The conditions imposed are valid for a period of three months, after which they can be renewed or changed. The suspect can ask for a change in the conditions or can resist against the renewal or change (with the exception of conditional release ordered by the investigating judge: if the judge decides to renew the conditions, there is no possibility to appeal).

The release after payment of **bail** can be ordered in all stages of the criminal proceedings. The Cassation court has ruled that the right contained in article 5.3 ECHR is not an absolute right but that the judge should consider whether the aim of the pre-trial custody can be reached in this way.[45] The judge determines freely the amount of bail. If there is no written conclusion of the defence, the judge is not obliged to motivate the decision on this point.[46] The judge can base the decision on serious suspicions that money or valuables originating from the offence have been placed abroad or are kept in hiding. The money has to be deposited in cash in a closed account of a specific institution, the Deposito- en Consignatiekas. From the moment that the original proof of payment is submitted at the prosecutor's office, the release is ordered. Recently, it has been made possible to deposit the money in cash into the account of the Deposito- en Consignatiekas at each national post office. The right can be exercised regardless of the financial situation of the suspect/defendant. In theory, every person can apply for bail. In determining the amount, the judge/court can take account of the financial situation of the applicant (there are no minima or maxima).
The fact that Belgian legislation explicitly foresees alternatives for the pre-trial detention, implies an obligation for the competent judicial authorities to *consider* these alternatives whenever possible. The fact that deprivation of liberty in the pre-trial stage can only be ordered and extended when '*absolutely necessary*', is the fundamental criterion in considering the lawfulness of the detention. Extremely long periods of pre-trial detention can only be

[44] Unless the maximum sentence of the offence for which the suspect is arrested exceeds 15 years of imprisonment, the arrest warrant can only be issued if there are serious reasons to fear that the suspect who is released would commit new crimes, would abscond, would try to make evidence disappear or would collude with third parties.
[45] Cass. 7 May 2003, P.03.0620.F.
[46] Cass. 12 October 1993, A.C. 1993, nr. 406.

justified in exceptional circumstances. Belgium has already been convicted on this point (article 5 § 3 ECHR) by the ECtHR. In the case of Michel Lelièvre, an accomplice in the 'Dutroux case', the pre-trial detention of seven years, ten months and eight days was deemed excessive. The ECtHR considered that the Belgian courts had never seriously considered the question of alternatives to his detention, although the defence appeared to have put forward proposals in that respect. The Court also considered that the proceedings had not been conducted with "special diligence", noting in particular that almost two years had passed between the transmission of the file and the opening of the trial.[47]

Comments from criminal justice actors

Although the law provides a wide range of alternatives for pre-trial detention, the practical implementation poses many problems. All actors involved (judges, investigating judges, prosecutors and lawyers) regret the lack of institutions which can be used as a basis for guidance or treatment of suspects who are eligible for conditional release. Especially the access to the services for mental health care (for treatment of sexual offenders, drug offenders,...) have a shortage of available places and can therefore not be used *immediately* if a judicial body considers a conditional release. All actors indicate this as an area where intervention by policymakers is urgently needed. The difficulties in implementing alternatives to pre-trial detention are not only caused by organisational (capacity) problems. According to several judges, lawyers also bear a great responsibility in this respect. All too often, lawyers do not seem aware of the various institutions that can be contacted in order to prepare a conditional release. Instead of being offered a viable alternative, judges often have to make suggestions to lawyers how to prepare these alternatives.

The illegal status of many (foreign) suspects makes a conditional release impossible. This is caused by the conflict between the law on the pre-trial detention on the one hand and the Aliens Act on the other hand. The latter makes it impossible that an illegal person would be required by judicial bodies to reside at a particular address within the country (which is one of the conditions automatically included when a conditional release is ordered). Unfortunately, this is a situation which does not seem possible to solve. The only alternative is to release the foreigner under bail, although for a large group of suspects this is not possible because they lack the financial resources to pay (even a very limited) bail. Moreover, many judges are not easily convinced to release illegal suspects under the only condition of bail. As a result, Belgian prisons are to a large extent filled with foreign suspects in pre-trial detention. The most realistic option to counter this is to make use of international criminal law, namely by transferring the criminal proceedings to the countries of origin.

2.1.3.2. The right of defendants to be tried in their presence

Legal recognition and procedural protection

In Belgian criminal proceedings, defendants have *the right* to be tried in their presence. They are however *not obliged* to be present (see supra, 'representation of suspects /defendants). If a defendant or a lawyer representing the defendant do not appear at the court hearing as determined in the summons, the defendant can be tried in absentia (article 149 and 186 CPC).

[47] Lelièvre/Belgium, ECtHR 8 May 2007. Also see Clooth/Belgium, ECtHR 12 December 1991. In the Grisez case, the ECtHR held that there had been no violation of article 5 §3 ECHR: the Court found that, although the medical examinations had caused delays in the proceedings, other steps had been taken in the investigation during that period. Furthermore, the total length of the detention pending trial (two years, three months and nineteen days) did not appear unreasonable in view of the seriousness of the charges and the number of matters requiring investigation (Grisez/Belgium, ECtHR 26 September 2002).

The defendant who was tried in absentia can 'oppose' his conviction (article 151 and 187 CPC).[48]

In principle the Assise court requires the personal appearance of the accused. If however the case has several accused and one of them did not appear at the composition of the jury nor on the first day of the debates, but for the first time after that, this does not prevent the case from being tried against him.[49]

The right to opposition against judgments in absentia is not an internationally guaranteed procedural right. The ECtHR has on the contrary repeatedly underlined the importance of the presence of a defendant at trial (cf. the aforementioned Van Geyseghem judgment). The principle that defendants have the right to remain absent, is therefore criticized: this right (and the right to opposition) is said to be used frequently as an instrument to slow down the proceedings.[50] Although such abuses are possible, it should not be forgotten that in a lot of cases being absent will not be in the advantage of the defendant: practice shows that if the judge has already formed an opinion on the merits of the case, it is not easy to change this in an opposition procedure. Opposition procedures are therefore mainly useful for lowering the sentence (a sentence can never be more severe after opposition[51]).

2.1.3.3. The right to be presumed innocent

Legal recognition and procedural protection

The presumption of innocence is regarded as one of the fundamental characteristics of the modern criminal justice system.[52] It applies from the moment on which a person is suspected and continues to apply until the criminal procedure has been closed by a final conviction.[53] A violation of this principle will however not always lead to the nullity of a procedure. In some cases a violation will be easily remediable[54]; in other cases the remedy will leave damage; in some cases the inadmissibility of the prosecution is the only suitable remedy.[55] The latter will only be the case when the breach of the presumption of innocence has irremediably violated the right of defence, in other words when the later or higher jurisdiction can no longer repair the situation.

The presumption of innocence implies that judges (Bench or investigating judges) have to refrain from making statements (in court or in the press) which could amount to a declaration

[48] If the opposition was done regularly, the opposed judgment is no longer existent and the case will be tried again before the same court. The new judgment 'on opposition' will be a judgment in first instance and is subject to appeal. If the opposing defendant does not appear at the court hearing on which his opposition will be treated, the opposition is considered 'not done'. The right to opposition is not absolute. If the defendant or his lawyer do not appear at a later hearing, after he or his lawyer have appeared at the initial hearing, the judgment will not be regarded as a judgment in absence and opposition will not be possible (article 185 §2 CPC).

[49] Cass. 16 June 2004, *Arr. Cass*. 2004, 1094.

[50] C. VAN DEN WYNGAERT, *o.c.*, 1075-1076.

[51] Cass. 3 September 2003, *J.T.* 2003, 883.

[52] F. KUTY, *Justice pénale et procès équitable*, Larcier, 2006, Volume 2, nr. 1589.

[53] Cass. 19 May 1981, *Pas*. 1981, I, 1089.

[54] In some cases the reasons used to motivate a certain decision can disregard the presumption of innocence, for example in the issuing of an arrest warrant by the investigating judge or in the extension of the pre-trial custody by the investigating court: such breaches can be solved by the investigating courts (in first instance or in appeal respectively).

[55] R. VERSTRAETEN and P. TRAEST, "Het recht van verdediging in de onderzoeksfase", *N.C.* 2008.2, 90.

of the suspect's or defendant's guilt. In 2006 Belgium was convicted by the ECtHR in a case where the applicant was suspected of involvement in the disappearance of six members of his family and was charged with murder. Throughout the investigation the applicant denied any involvement and compared his situation to that of Captain Dreyfus. At a hearing before the investigating court, the investigating judge said in his report that rather than comparing himself to Dreyfus, the applicant should have had the serial killers Landru or Dr. Petiot in mind. The comparison was reported in the Belgian press. The applicant was later sentenced to life imprisonment. According to the ECtHR, the comments were unacceptable from an investigating judge. The comments had both encouraged the public to believe the suspect guilty and had prejudged the assessment of the facts by the competent judicial authority.[56]

Especially in a time where criminal law is a popular media product, it is evident that declarations of guilt in the press are very common.[57] The question rises whether such press campaigns could have procedural consequences. Although such a thesis could be motivated by jurisprudence of the ECtHR, the Cassation court has ruled that respecting the presumption of innocence is an obligation for the judges that have to make a judgment on the merits of the accusation and that this is judged by taking account of the proceedings *as a whole*; the circumstance that the presumption of innocence has been disrespected in the public opinion, does not necessarily imply that the trial judge has violated this same principle.[58]

This viewpoint – that certain excesses or even the manifest negation by the press of the presumption innocence do not lead as such to the nullity of criminal proceedings – can be regarded as reasonable. This does not mean however that breaches of the presumption of innocence should not be dealt with.[59] Interim injunction proceedings could in some cases be an efficient instrument to accomplish this.[60]
Belgium has been convicted by the ECtHR for violating article 6 §2 ECHR with regard to the statutory requirement for persons who claimed compensation for unfounded pre-trial detention (the applicant had been placed in pre-trial custody from 29 March 1994 until 21 April 1994 but at the end of the judicial investigation, the case was dismissed). The claim of the applicant was rejected on the ground that he had not provided evidence of his innocence as required by article 28 § 1 b of the Law of 13 March 1973. Such a requirement, which suggested that the applicant was guilty, seemed unreasonable and was found to infringe the presumption of innocence.[61]

<u>Comments from criminal justice actors</u>
The questioned actors agree that, in principle, Belgian trial judges endorse the fundamental presumption of innocence. Nevertheless, it is recognised that the media can put a lot of pressure on a particular judge to decide in the way 'it is expected'. This pressure can sometimes be caused by lawyers themselves, by 'pleading' their case in the press before the trial has even started.

[56] Pandy/Belgium, ECtHR 21 September 2006.
[57] See B. TAEVERNIER, "La présomption d'innocence et la médiatisation de la justice: une cohabitation précaire", *Rev. dr. pén*. 2005, 33.
[58] Cass. 15 December 2004, A.R. nr. 9.04.1198.F.
[59] R. VERSTRAETEN and P. TRAEST, *l.c.*, 91.
[60] See the recent legislative proposal (submitted on 19 December 2007) adjusting article 587 Judicial Code with the aim to protect the presumption of innocence. This proposal intends to introduce the possibility (in the case of a violation of the presumption of innocence) to file an application on the basis of which the judged could demand the cancellation or withdrawal of disrespectful words or images or the publication of a rectifying press release.
[61] Capeau/Belgium, ECtHR 13 January 2005.

2.1.3.4.The right to silence (including the prohibition of self-incrimination)

Verwijderd: ¶

Legal recognition and procedural protection

The right to silence is recognised in Belgium as an aspect of the right of defence.[62] It is said to follow out of article 6.1 ECHR.[63] This means, *inter alia*, that a suspect cannot be interrogated under oath. The suspect determines to which extent he makes use of this right (he can choose to answer some questions and not to answer other questions). Although the right is recognised, there is *no legal obligation* requiring persons to be interrogated by the police (or investigating judge) to be informed of the right to silence.

The right to silence has not been found irreconcilable with the use of a polygraph if the concerned person has agreed to this voluntarily, if no pressure or force was used and if the person can decide to stop at any moment.[64] The person has to consent after being *informed* sufficiently. The same rules apply for those DNA analyses where consent of the person is required (which means, *inter alia*, that the person is informed of the reasons for taking the sample).[65]

An important question is whether the right to silence can be used by a person who is interrogated in the framework of other procedures that could lead to criminal prosecution. The Belgian jurisprudence has repeatedly stated that when cooperation with the government can imply that a person would be forced to confess certain criminally relevant facts, this person can already use his right to silence in the non-penal procedure (e.g. civil, fiscal and social cases). This does not seem to prohibit that the concerned person could no longer be interrogated.[66] If the investigating (non-judicial) authority would however be aware of a possible interference with a pending or planned prosecution, an explicit information regarding the right to silence seems an essential prerequisite.[67]

2.1.3.5. The right to reasoned decisions

Legal recognition and procedural protection

According to article 149 of the Constitution, judgments should be reasoned. Various legal provisions specify the obligation to make a reasoned judgment concerning the guilt and the sentence. The Cassation court has repeatedly ruled that the obligation of a reasoned judgment also implies that the judge should answer the defence that was brought forward in written conclusions.[68] The essential criterion applied by the Cassation court is that *the judgment should meet the specific requirements of the applicable legal provisions*: if this is complied with, there can be no reason to quash the judgment on the basis of (violation of) article 149 of the Constitution. The judge should investigate and answer *the plea in law* of the parties and

[62] Cass. 13 January 1999, Arr. Cass. 1999; F. KUTY, "L'étendue du droit au silence en procédure pénale", *rev. dr. pén*. 2000, 309.
[63] Cass. 11 March 1992, *Arr. Cass*. 1991-92, 657.
[64] Cass. 15 February 2006, *R.W*. 2006-07, 1039; S. VANDROMME, "Cassatie niet afkerig van leugendetector", *Juristenkrant* of 7 June 2006 (nr. 131).
[65] Cass. 31 January 2001, *Arr. Cass*. 2001, nr. 61.
[66] R. VERSTRAETEN and P. TRAEST, *l.c.*, 99.
[67] Cass. 16 February 1996, *Arr. Cass*. 1996, nr. 82.
[68] F. TULKENS, "L'évolution des droits de la défense depuis un siècle", in H. BOSLY, G. DEMANET, J. MESSINNE and B. MICHEL, *Cent ans de publication de droit pénal et de criminologie*, Bruxelles, La Charte, 2007, 204.

not the arguments which support this plea.[69] Whether a certain defence is a plea in law or (only) an argument depends on the circumstances of the particular case.

2.1.3.6.The right to appeal

Legal recognition and procedural protection
The right to appeal is guaranteed in the Belgian CPC. Each party principally has the right to appeal but only concerning their own interests. This means, *inter alia*, that the public prosecutor can only appeal in regard of the criminal prosecution and not in regard of the civil claim[70]; that the defendant who was acquitted cannot appeal; and that the civil party can only appeal in regard of its claim. In principle, all judicial decisions are subject to appeal (provisional judgements as well as final judgments; judgments after trial as well as judgments in absentia). There are some exceptions however such as judgments of the Assise court and decisions of the penitentiary courts.

The right of appeal of suspects in the pre-trial stage is restricted in two ways. Firstly, the right to appeal of suspects against the decision of the investigating court which refers them to the trial court is subject to certain conditions: appeal is only possible if there are grounds of *non-admissibility or prescription of the prosecution* or in case of *irregularities, negligence or nullities with regard to an investigative deed, the gathering of evidence or the referral decision itself*. In the latter case, the appeal is only admissible if these arguments have been submitted in writing before the investigating court in first instance (article 135 § 2 CPC). Secondly, if referral of the suspect to the trial court is combined with the continuation of his pre-trial detention, the suspect cannot appeal against the part of referral decision where his arrest was continued. On the contrary, if the suspect is referred and his release is ordered, this part of the decision is subject to appeal by the prosecutor (article 26 §§ 3 and 4 of the Law of 20 July 1990 on the pre-trial detention).

The appeal cannot harm the party-appellant. This principle however only applies when that party was the only appellant. If the public prosecutor appeals, then the sentence can become more severe. In that case there is an important exception to the principle that judgments should be made with an absolute majority: the judges can only decide to a harsher sentence by unanimity (article 211bis CPC). The unanimity requirement generally applies to all cases where the defendant's position on appeal is changed in an adverse way (e.g. a conviction after acquittal; an additional sentence is given (such as confiscation); imprisonment instead of internment; an effective sentence instead of a suspended sentence;...).

2.1.4. Rights relating to effective defence

2.1.4.1. Rights to investigate the case

Legal recognition and procedural protection
Suspects
The pre-trial investigation is principally non-adversarial: the investigation is secret and the suspect is not allowed to be present during inquiries such as line-ups, searches, interrogation of witnesses, etc. This principle is said to be compensated by the fact that the prosecutor or investigating judge are obliged to investigate the case by gathering all useful elements *à*

[69] Cass. 18 December 2007.
[70] Cass. 23 May 2001, *J.T.* 2001, 716.

charge and *à décharge* (for the investigating judge this is explicitly stated in article 56 § 1 CPC).

The only way in which suspects can *participate* in the investigation is indirectly, by requesting that additional inquiries are made. Even then, this right is not absolute. It depends first of all on the type of the investigation.

If the investigation is prosecutor-led, there is no possibility to submit formal requests for additional inquiries. Only informal requests are possible. In the case of an judicial investigation, there is a formal possibility for all suspects targeted by the investigation - whether or not they are officially accused (see article 61bis CPC) - to demand that certain additional inquiries be made (article 61quinqies CPC). The right is subject to certain (formal) conditions and the investigating judge can refuse the request if he does not deem the inquiry necessary to reveal the truth or if he deems the inquiry prejudicial to the investigation at that particular moment.[71] This right to request additional inquiries exists until the moment of arrangement of the procedure by the investigating court. If the court decides that the investigation is not complete, the file is sent back to the investigating judge who is then ordered to carry out certain additional inquiries.

The proposal for a new CPC intends to narrow the difference between both types of investigation on the point of requesting additional inquiries. Article 125 introduces the formal possibility for a suspect (*"anyone who is suspected of having committed an offence which is punishable with a sentence of one year imprisonment or higher"*) to request the prosecutor to make an additional inquiry.[72]

Article 130 of the Proposal extends the arrangement of the procedure to all prosecutor-led investigations: each suspect would have the possibility to ask for additional inquiries at this stage. It needs no explanation that this could seriously slow down the treatment of such cases (every suspect in every case - even a mere shop theft - confronted with an imminent direct summons, would be able to ask for additional inquiries).

An important question related to the non-adversarial character of the pre-trial stage, is whether this is compatible with the aims of a judicial expertise carried out during this stage. According to the recent jurisprudence of the Cassation court, the judicial expertise ordered in the pre-trial investigation remains in principle non-adversarial. This does however not prevent the investigating judge to order the expert to hear the parties or to give the parties the opportunity to contest the preliminary expert report.[73] This jurisprudence does not seem compatible with the most recent view of the ECtHR which appears to plead for an accusatorial expertise, especially when the expertise is related to the appraisal of the prosecution.

[71] The judge's decision is subject to appeal by the prosecutor and the applicant within 15 days following the decision. A new request is only possible after a period of three months since the last decision on the same subject.

[72] The injured person would have the same right. The Prosecutor would have the possibility to refuse the request if he would not deem the inquiry necessary to reveal the truth or if he would deem the inquiry prejudicial to the investigation at that particular moment. No appeal would be possible against the Prosecutor's decision. A new request would only be possible after a period of three months since the last decision on the same subject.

[73] Cass. 7 May 2002, *Pas.* 2002, 1106.

It should be noted that the proposal for a new CPC sets forth the principle of an accusatorial judicial expertise, during the trial as well as the pre-trial phase.[74]

Defendants
In the trial stage, the entire criminal file (holding the results of the investigation) is presented to the court. Defendants (as well as the civil parties) have the right to ask additional inquiries to the prosecutor (after the pre-trial stage has been closed but before the court hearing) or to the court itself. The prosecutor decides freely to carry out the request, without possibility for appeal. The same goes for the trial court: it decides freely whether it orders the prosecutor to execute the additional inquiry. The Cassation court has ruled that article 6.3.d ECHR nor the general principle of respect for the rights of the defense deprive the judge of the freedom to decide on the relevance of a request for additional inquiries.[75]

An interesting example of the freedom of courts on this point is the 'Van Ingen' case before the ECtHR. Following the opening of an investigation in the United States in relation to international drug trafficking, the applicant was charged in Belgium and was sentenced in June 2002 by the Antwerp Court of Appeal to seven years imprisonment. The applicant complained of the refusal of the Court of Appeal to reopen the proceedings to give the prosecution the opportunity to adduce new evidence transmitted by the American authorities in May 2002. He alleged that that circumstance had prevented him from presenting his case effectively. The ECtHR considered that the applicant had not indicated how the new evidence could have assisted in changing the verdict against him by the Belgian courts if it had been adduced in the proceedings before them. If further noted that the prosecution did not appear to have relied on the evidence contained in the documents. In conclusion, it considered that the proceedings had observed the adversarial principle and equality of arms.[76]

The defence always has the possibility to gather evidence (*à décharge*) at their own initiative which can be submitted at trial (and is then added to the file). The defence has the right to consult and use the reports of (unilaterally appointed) experts (e.g. psychiatrists) but the evidential value of these reports is naturally lower than those of judicial experts. When the court orders a counter-expertise on request of the defence, the report of that expertise will count as a judicial expertise.

A (defence) lawyer is not allowed to interview prospective witnesses. A lawyer is not allowed to embark on an investigation him/herself. This is primarily a deontological issue

Comments from criminal justice actors
Some questioned lawyers were critical about the fact that the investigating judge is seen as the best guarantee for an investigation à charge and à décharge (which is meant to compensate the fact that the defence is principally not obliged to be present during investigative actions). In practice, a number of investigating judges appear to focus (sometimes almost exclusively) on the à charge aspect of the inquiry and are often reluctant to consider investigating à décharge, even when proposals in this respect are made by the defence.

A number of questioned judges pointed out that, although the judge is free to decide on requests for additional inquiries, the Belgian criminal justice system foresees many

[74] E. DE BOCK, "De maxi Franchimont. De wettelijke regeling van het deskundigenonderzoek in het voorontwerp van het nieuw wetboek van Strafprocesrecht", *Jura Falc*. 2005-06, 429-470.
[75] Cass. 16 June 2004, *Arr. Cass*. 2004, 1094.
[76] Van Ingen/Belgium, ECtHR 13 May 2008.

possibilities for the defence to make such a request and to appeal against the rejection by the judge. In the pre-trial stage a Franchimont request for additional inquiries can be made every three months, with the possibility to appeal. Secondly, when the investigation is closed and the parties are notified of the date on which the procedure will be arranged, each party again has the right to make a request, with the possibility to appeal. Finally, when there is an admissible appeal against a referral decision, a request can be made to the investigating court in appeal. Requests can later be repeated for the trial judge. If the trial judge (in first instance) rejects the request, this will either be done by means of a provisional judgment or in the final judgment. In both cases, appeal is possible.

2.1.4.2. The right to adequate time and facilities for preparation of defence

Legal recognition and procedural protection

Suspects

In the pre-trial stage, the defence is offered time to prepare the case in two ways. Firstly, if the person is in pre-trial custody, the defence is notified at least two days before the appearance before the investigating court (one day in case of the first appearance) that the criminal file can be consulted (article 21 and 22 of the pre-trial detention law). Secondly, when the judicial investigation is closed, the defence is notified at least fifteen days before the appearance before the investigating court which will decide on the arrangement of the proceedings. This period is reduced to three days if one of the persons involved is in pre-trial custody (article 127 CPC).

Defendants

In the trial stage a period of ten days has to be left between the notification (by a summons) and the first appearance before the police court or trial court (articles 146 and 184 CPC). The non-compliance with this period is sanctioned by the nullity of the conviction *in absentia* of the defendant. If the case has been tried after all parties have been heard, the non-compliance with these periods only leads to the nullity of the conviction if the rights of defence have been violated.[77] In urgent matters, this period can be reduced '*op cedel'* (a court order). Article 184 stipulates that the period can be reduced if the defendant or one of the defendants is in custody, without being shorter than three days. The period of notification before the Assise court is two months, unless the parties explicitly waive this right.

Two important remarks should be made in this respect. Firstly, when the case is brought before the trial court after referral by an investigating court, there is no indication in the law whether the ten-days period has to be counted from the referral order or from the day on which the summons is served (which in such cases only counts as a fixation of date). Secondly, when a suspect who is referred by an investigating court is kept in custody pending trial, the law does not foresee a maximum period within which the case has to be brought before the trial court by summoning the defendant. This means that such a person can be kept waiting in prison for weeks (even months) without knowing when the case will be tried or without the possibility to view the file (this right only exists from the moment that the date of the initial court hearing is fixed). In such cases, the defence can submit a petition for conditional release to the trial court.

With regard to the delay/adjournment of a hearing on request of the defence, there is *no specific legal provision* regulating this. The judge decides freely if the suspect/defendant and

[77] Cass. 15 December 2004, *J.T.* 2004, 4.

his lawyer have had enough time and facilities to prepare the case.[78] This depends on the circumstances of the case such as the size of the file, the nature and complexity of the case and the legal questions at hand. The argument of the defence that it wants to have the same amount of time to prepare as the prosecutor has had, is not a relevant criterion.[79] A change of lawyer can be a reason to adjourn the hearing if this has truly not left enough time to prepare the defense.[80]

Comments from criminal justice actors

An overwhelming majority of the questioned actors agree that the lack of facilities offered to the defence to prepare the case in the *pre-trial stage* is an obstacle for effective defence of suspects. On each occasion where the defence has access to the case file in the course of an investigation (the regular appearances before the investigating courts in case of arrested suspects or when the investigating judge has allowed access to the file following a Franchimont petition in case of non-arrested suspects) there is no possibility to take copy of the file. This possibility is only offered for the first time at the end of the investigation (in the 15 or 3 day period before the arrangement of the procedure). This means that in all other cases where the defence has access to the file in the pre-trial stage, the content of the file has to be copied in writing by the lawyers at the court registry (some registries allow the use of dictaphones[81]).

Taking account of the fact that there is only a limited amount of time available and of the fact that cases are increasingly extensive, this system is absolutely inefficient. The fact that lawyers are obliged to gather at the registry in order to take notes in stressing circumstances (see the closing of the registry at 4 pm or the annoying sound made by lawyers using their dictaphones) has been rightly described by some actors as "prehistoric". Taking into account the current technical possibilities, it would not require great investments or manpower to deliver digital copies of files to lawyers. At the least, the right to a copy of the file should be ensured from the first moment the lawyer has access to the file in the pre-trial stage. Compared to these options, the current situation is nothing more than a pointless waste of time. The comment of some judicial actors that the complaints of lawyers regarding lack of time are largely inspired by their own agenda, cannot be seen as a convincing argument. The interests involved in cases of pre-trial detention should make lawyers give these cases priority and should require their full engagement. This does however not imply that these lawyers would be prevented from demanding the best facilities.

A final remark in this respect that was made by many of the questioned actors concerns the disorganized composition of judicial files in criminal cases. At present, there is no obligation for investigating judges to organise the case file in a uniform way. As a result, the differences between investigating judges are enormous. In a number of cases, the file is so badly organised that it becomes practically impossible to access properly (a common example is the part of the file where the results of telephone taps are collected: in the current situation, it is impossible to select the elements à charge and à décharge, without investing a disproportionate amount of time). If this fact is combined with the limited time that lawyers (but also prosecutors and judges) usually have for preparing the case, it becomes clear that

[78] Cass. 14 September 2004, *Pas*. 2004, 1332.
[79] Cass. 15 December 2004, *J.T.* 2004, 4.
[80] Cass. 9 February 2005, *Pas*. 2005, 329.
[81] Which requires that the lawyer's secretary later has to type this out which is completely resource-inefficient.

this situation is hardly compatible with the right of defence. This problem could be easily solved by introducing a (obligated) standard in organising the judicial file.

2.1.4.3. The right to secure the attendance of witnesses, and to examine or to have examined witnesses, favourable to the defendant on the same conditions as those against them

Legal recognition and procedural protection

Although the trial stage in the Belgian criminal procedure is (theoretically) said to be adversarial (the defence, prosecution and civil parties discuss the evidence in an adversarial way), the trial proceedings have some clearly non-adversarial characteristics. One of these is the active role of the trial judge whose mission consists of discovering the truth (rather than passively judging the presented evidence). To accomplish this mission, the court should use whatever means it has to investigate the case while respecting the defendant's fair trial rights.[82]

This active role, and consequently the non-adversarial character of the proceedings, is strongly present in the *hearing of witnesses* at trial. The judge decides *freely* on the necessity and opportunity of hearing witnesses (à charge and à décharge), who have been interrogated in the pre-trial investigation, again at trial.[83] This very broad competence is not deemed incompatible with the ECHR.[84] The Assise court is an exception to this general rule: the defence and the prosecutor have an equal right to call witnesses.

With regard to (new) witnesses, who have not been interrogated in the pre-trial investigation, the same rules apply. In principle the criminal file should contain all evidence including statements of witnesses. Especially when there has been a judicial investigation, the defence should submit any request to hear witnesses at this stage (through formal requests to the investigating judge). When the defence has 'found' a new witness after the pre-trial stage has been closed, the discretion of the trial judge to allow this witness to be heard is absolute. The defense has the right to call witnesses (any person can be summoned as a witness), but the court decides freely whether or not to hear the witness.

Although the court is free in its decision, it is obliged to indicate the reasons why a request for hearing witnesses is denied. Not motivating this decision can lead to a violation of article 6 ECHR.[85]

[82] Belgium has already been convicted by the ECtHR in a case where a court of appeal, which convicted a defendant (after an acquittal in first instance) for deprivation of the fortune of a civil party, failed to arrange a confrontation between the civil party and the defendant on three of the five charges (Bricmont/Belgium, ECtHR 7 July 1989).

[83] Cass. 3 October 2000, *Arr. Cass*. 2000, 1470.

[84] See Pisano/Italy, ECtHR 27 July 2000.

[85] In 1992 Belgium was convicted in a case where the examination of witnesses had been rejected by the court of appeal. The applicant had originally been acquitted after several witnesses had been heard. When the appellate court substituted a conviction, it had no new evidence. It based its decision entirely on the documents in the case file. Moreover, the court of appeal had given no reasons for its rejection, which was merely implicit, of the submissions requesting it to call four witnesses. The silence of the Court of Appeal's judgment on this point was not considered consistent with the concept of a fair trial. This was all the more the case as the Court of Appeal had increased the sentence which had been passed by the court below (Vidal/Belgium, ECtHR 22 April 1992).

The active role of the Belgian trial judge is also illustrated in the *examination of witnesses* heard at trial. The defense has the right to (cross-)examine witnesses at trial. This examination is, however, firmly controlled by the presiding judge. This means that the judge usually asks the questions suggested by the parties, although in practice the judge sometimes allows direct examination of witnesses by the parties.

A specific regulation exists regarding anonymous witnesses. Under clearly defined conditions the investigating judge can decide to hide (certain elements of) the identity of certain witnesses (articles 75bis and 86bis CPC). During the pre-trial stage, certain possibilities exist for the parties to interrogate the witness in the presence and under control of the investigating judge (article 86ter CPC, also see article 235ter § 2 CPC). A similar right exists during the trial stage: on request of the defence, the court can decide to interrogate the witness (while preserving his/her partial or full anonymity) and to allow the defence to ask certain questions to this witness.

2.1.4.4. The right to free interpretation of documents and translation

Right to interpretation

Legal recognition and procedural protection

According to the Law of 15 June 1935 on the use of the language in judicial affairs, each suspect who does not understand the language in which the investigation is carried out, has the right to ask that the criminal proceedings are continued in another of the three languages officially recognized in Belgium (Dutch, French and German).

When the suspect does not speak any of the three Belgian languages or does not request that the proceedings are continued in another of the three official languages, the law guarantees the right to an interpreter. Both the Law of 15 June 1935 on the use of the language in judicial affairs and article 47bis of the CPC foresee several possibilities when the interrogated person wishes to express himself in a language different from the procedural language. According to articles 47bis and 70bis CPC (minimum rules with regard to interrogation of persons, regardless of their capacity), a sworn interpreter is used to assist a suspect who wishes to use a language different from the procedural language. Another option is to note the suspect's declarations in his/her own language. This last option is only possible when the police/investigating judge sufficiently speak the language chosen by the suspect. A final option is to request the suspect to write his declaration himself.

An interesting question in respect of the increased internationalization of crime concerns the situation where it is impossible to find an interpreter for the language chosen by the suspect who has been deprived of his liberty within the period of 24 hours from the moment of deprivation of liberty. Should this suspect then be released from custody? It has been suggested to interrogate the person in another language which he understands and for which an interpreter is available. This does however not work in all circumstances (e.g. when the suspect only speaks one language or when the suspect is not able to communicate and does not have any papers so the police cannot know which language he speaks). It has been accepted by the jurisprudence that in those situations where, despite all possible efforts, it is impossible to find an interpreter within the 24 hour period, it is possible to issue an arrest warrant, because it concerns a matter of force majeure. It should then be clear from the file that all possible efforts were made to find an interpreter. This solution is seen as contrary to

the Law on the pre-trial custody by some authors.[86] In any case, the investigating judge would be obliged to continue his search for an interpreter to allow the interrogation of the suspect as soon as possible.

If the suspect has already been interrogated with the assistance of an interpreter regarding the facts that have led to his arrest, the Cassation court has ruled that is it not required that a translation of the arrest warrant is attached to the warrant which is served to the suspect.[87]

At the Assise court, the President is obliged according to article 332 CPC to appoint an interpreter *ex officio* when the accused, the civil party, the witnesses or one of them do not speak the same language or the same 'idiom' (dialect).[88] For the normal trial courts, there is no legal provision similar to article 332 CPC. This does not mean that a judge does not have to ensure the possible assistance of an interpreter, in particular when a party is not assisted by a lawyer. In any case, parties have to ensure their own defence rights: they cannot invoke for the first time before the Cassation court that an interpreter should have been appointed.[89]

The law does not prescribe a sanction if the right to an interpreter is not respected. This could however lead to a nullity of the prosecution or conviction if this leads to a violation of the defence rights.

Many questioned actors pointed to the fact that, in cases of legal aid, suspects in pre-trial detention have the right to free assistance of an interpreter for a period of three hours. This does not seem sufficient in case of complex files or when interpretation is required in certain 'exotic' languages (of which the lawyer does not even have a basic knowledge).

In the current legislation, there is no specific regulation for persons acting as interpreter or translator in judicial proceedings. There is no official statute for sworn interpreters or translators. In practice, interpreters and translators who are used in criminal proceedings are appointed by the prosecutor's office from a list. To be included on this list, the interpreter has to prove his/her blank criminal record and has to submit degrees/diplomas. If the interpreter is accepted by the prosecutor, he/she will take an oath before the Justice of the Peace. If an interpreter is not competent, the suspect/defendant can complain about this but only in extreme circumstances will a replacement immediately be appointed. If there is substantial proof that an interpreter does not live up to the expectations, the prosecutor's office will no longer appoint the interpreter.

The total lack of any selection and quality criteria, education, deontological code, control and complaint procedure, clearly indicates the need for a legislative intervention.

In 2006, a legislative proposal was presented that would install a legal framework for appointing interpreters and translators in judicial (including criminal) proceedings. This proposal foresees in the introduction of a new chapter in the Law of 15 June 1935 on the use of languages in judicial proceedings and would also alter the CPC. The proposal contains the conditions for appointing sworn interpreters and translators. A national register of sworn translators and interpreters would be established which would contain those persons that

[86] S. VANDROMME, "De wegens taalperikelen onmogelijke ondervraging door de onderzoeksrechter bij de aflevering van een aanhoudingsbevel" (note to Cass. 5 August 2003), *T. Strafr*. 2004, 75.
[87] Cass. 2 December 1987, *A.C.* 1987-88, nr. 205.
[88] Cass. 25 January 2006, *Pas.* 2006, 221.
[89] Cass. 28 January 2004, Arr. Cass. 2004, 141.

succeed in a selection test. If no special objections would exist, the candidates would take an oath before the Court of Appeal and would be included in the register by the Minister of Justice. The register could be consulted by anyone. All judicial authorities would be free to use these registered persons. The proposal is still pending.

In the Antwerp Court of First Instance a specific service 'Sworn Interpreters and Translators' is in place since 1 January 2008. The mission of this service covers four aspects: managing the list of sworn interpreters and translators; organizing their selection, education and appointment; guaranteeing the quality and integrity; and acting as ombudsman. Moreover, a cooperation between magistrates, prosecutors, lawyers, police and the Lessius College in Antwerp has elaborated a test project for a better training of judicial interpreters and translators.

Right to translation of documents

The Cassation court has ruled that article 6.3.a ECHR does not require to join a translation with the summons. The fact that defendants have been informed in such a way that they are able to ensure their defence is sufficient.[90] The information regarding the accusation can, if necessary, be provided with the assistance of an interpreter at the court hearing according to article 31 of the Law of 15 June 1935 on the use of the language in judicial affairs. The judge decides freely whether the defendant has sufficient knowledge of the procedural language and whether he wants to proceed with the case without the use of an interpreter.[91] In practice, most judges will want an interpreter to be present, because this enables them to interrogate the defendant more efficiently.

The translation of documents is a very sensitive issue in Belgium. Depending on the court's location, the trial will be held in Dutch, French or German. Article 22 of the Law of 15 June 1935 on the use of the language in judicial affairs foresees that every suspect who only understands Dutch and German or one of these languages can demand that a Dutch or German translation of the interrogation reports, witnesses' or injured parties' statements and expert reports that are drawn up in French are joined in the criminal file. The same evidently goes, *mutatis mutandis*, for those who only speak French and/or German or those who only speak French and/or Dutch.[92] In a recent judgment, the Cassation court has made a very narrow interpretation of this article: a Lebanese citizen who also spoke French had asked for a French translation of the file. The courts of first and second instance had rejected this and the Cassation court did not quash these judgments. The Cassation court used the remarkable argument that article 22, according to its explicit wordings, was applicable to all suspects who *only* (read 'exclusively') understand Dutch, French or German and not those who speak another than one of these three languages and also only understand Dutch, French or German. According to this interpretation, article 22 would only be useful for unilingual Belgians.[93] In the same ruling, the Cassation court remarked that the fact that a suspect who speaks a foreign language cannot demand a translation on the basis of article 22, does not diminish the need to respect his right of defence: depending on the circumstances, the judge can use the right of defence to order the translation of documents into another Belgian national language.

The Law on the use of the language in judicial proceedings is very strict (this is understandable taking into account the Belgian context). According to article 40 of the Law

[90] Cass. 17 October 1972, *Arr. Cass*. 1973, 173.
[91] Cass. 2 January 1996, *Arr. Cass*. 1996, 6.
[92] Cass. 1 December 1982, Arr. Cass. 1982-83, nr. 233.
[93] Cass. 18 December 2007.

its rules are prescribed with the sanction of nullity. However, each non-purely preparatory judgment after trial, covers the nullity of the writ of summons and the other procedural acts that have preceded that judgment. Often, defendants try to call upon a too strict interpretation of the Law. The Cassation court has clearly ruled that the circumstance that the summons mentions the place of birth and the residence of the defendant in the language of this place rather than in the procedural language, does not lead to the nullity of the summons.[94] In another judgment, the Cassation court has decided that the sole circumstance that documents that were drawn up in the framework of a foreign prosecution, have afterwards been joined to the criminal file (of a Belgian prosecution) does not imply that the defendant has not been informed without delay of the nature and cause of the accusation against him.[95]

2.2. Professional culture and obligations

2.2.1. Introductory remarks

There is a lack of studies in Belgium on the role played by the various actors within the criminal justice system and the perception of and among these actors. This is to be regretted, since this aspect forms an important part of the general situation in a country regarding compliance with fair trial rights. Defence rights may well be recognized by law, their application in practice is determined to a large extent by the actions of the specific actors dealing with them every day and the underlying relationships between these actors. This interaction together with the opinions of the various actors within the criminal justice system can be referred to as the '*professional culture'* within a particular system.

In what follows, the professional culture in the Belgian criminal justice system will slightly be touched upon. This part of the report does not pretend to give a definitive account nor does it present a total picture. Moreover, none of the viewpoints expressed can be regarded as representative for a particular professional group. Nevertheless, the text (which is largely the result of interviews with and the practical experience of criminal justice actors such as prosecutors, judges, criminal defence lawyers, interpreters, etc.) offers valuable insights in some of the main areas of concern in this field. Not in any way is a specific actor targeted or blamed for one of the defaults within the system which are described. The insights provided can merely serve as a basis for kicking off the work that might (should) be done in the future.

2.2.2. Interference of criminal defence lawyers with their ability to act in the best interests of their clients

Criminal defence lawyer can be seen as the 'first guardian' of fair trial rights in practice.

Although the police, investigating judges, courts and prosecutors should respect defence rights 'spontaneously', practice shows that, possibly due to the complexity of (some) criminal proceedings, the pressure to bring suspects to justice as soon as possible and the increasing workload, fair trial rights are at constant risk of being neglected and violated. Within this difficult context, criminal defence lawyers have to serve as the *ultimate watchdog* of fair trial rights, which puts them in a very specific position.

The task of criminal defence lawyers is far from easy. Their autonomous position is a crucial element in accomplishing the task to act in the best interests of their clients. This autonomy

[94] Cass. 12 April 2005, *Pas.* 2005, 850.
[95] Cass. 24 September 2002, *Arr. Cass*. 2002, 1934.

also brings with it some difficulties. In defending their clients, lawyers often have to 'disturb' the normal course of criminal proceedings: the submission of extensive written conclusions on procedural discussions which can lead to enormous delays, adopting a critical attitude towards the prosecution and sometimes even towards the judge, questioning the quality of the work done by police and investigating judges,…

All this naturally serves a just cause if it is done in a well-considered manner and from a sincere concern to preserve the fair trial rights of clients. In some cases, however, fair trial rights are 'misused' by criminal defence lawyers with the sole purpose of strengthening the defence of their client by transforming the case into a 'procedural mess' (in these particular cases, the clients are often prosecuted for serious offences and risk severe sentences).

Although abuses can never be ruled out and although judges are usually capable of distinguishing needless procedural 'attacks' from well-founded procedural arguments, this trend – for which only a small (but persistent) number of lawyers can be held responsible and which is often badly covered in the media – seems to have led in the last years to a more *rigid* interaction between criminal defence lawyers in general and other criminal justice actors.

This evolution is not only marked by an increased vigilance of judges towards procedural arguments as such, but also appears to have led to a more critical attitude of judges towards the lawyers invoking these arguments. If this alertness stimulates the correct application of fair trial rights, this can only be welcomed. If however this trend goes hand in hand with an increasing aversion of criminal defence lawyers – and their '*procedural nonsense'* – this might entail great risks for the overall compliance with fair trial rights. This negative climate (mainly caused by the arguable attitude of some lawyers) could affect the *mutual respect* between criminal defence lawyers and judges, while this respect is crucial for a proper functioning of defence rights in daily practice.

The problems criminal defence lawyers encounter in defending their clients are not only caused by the 'bad performance' of some lawyers. Sometimes judges themselves are the cause of the increased difficulties criminal defence lawyers have in assisting their clients:

- Requests for adjournments of cases seem to be increasingly denied, although these requests may have very founded reasons (lack of time for preparation of a big case, clients who first contact their lawyer a few days before the hearing,…). The flexibility of judges on this point is clearly decreasing (recently, a judge made a press statement saying that she would begin to principally refuse all requests for adjournments). Although a minority of these requests may be unfounded and only aim to buy the client some more time), the majority of lawyers handle such requests with the necessary care. Judges sometimes appear to forget that lawyers are obliged to prepare (increasingly complex) cases with outdated means and often at very short notice, while the prosecution had months or years to prepare the case for trial. It is remarkable in this respect to note that demands for adjournments made by the prosecution (to further investigate a certain fact or to answer the arguments of the defence) are always accepted by the judge, while lawyers often have to deliver a constant battle for justifying similar requests.

- Criminal defence lawyers who enter the court are sometimes confronted with the fact that their case has already been treated in their absence. This happens both during the pre-trial stage at the occasion of the appearances before the investigating courts which decide on the extension of the arrest warrant as during the trial stage. There is common agreement

among lawyers and judges that a lawyer can request to wait with the treatment of the case until he/she has arrived. The minimum condition in this respect is that the court is duly notified (by fax or telephone) at the latest at the beginning of the court session. Recently however, an increasing number of cases appear where the judge, despite the notification by the lawyer, started the treatment of the case. In some circumstances delays can be very annoying (e.g. if, in a case with several defendants, all lawyers are present except for one lawyer who only notified the court of his delay) and judges sometimes have to treat a high number of cases in one session. If however the lawyer has duly notified the court (as well as the prosecutor and the other lawyers in the case) and has a founded reason not to be in time (e.g. pleading in another case, stuck in traffic,…), there seems to be no reason to start with the treatment of the case in absence of that lawyer. If the court is reluctant to wait any longer, there is always the option of an adjournment. The mutual respect has to be present in both directions.

- In collocation procedures, the lawyer who will assist his/her client at the hearing before the justice of the peace normally receives a copy of the request for collocation together with the medical report of a doctor stating that the conditions of the law are fulfilled (the person suffers from a mental illness and forms a danger for him/herself or for others).[96] Recently, (at least) one Justice of Peace has instructed the court registrar no longer to send the medical report to the lawyer. The notification sent to the lawyer now states that "the medical report can be viewed at the court registry" during a limited period of time on the day before the hearing. The lawyer is thus obliged to go to the registry and looses valuable time (which could, for example, be used for visiting the client in the institution). Apart from the question whether this is compatible with the law, such an initiative seems to serve no goal at all but interfering with the ability of the lawyer to act in the best interests of his client.

These are but a few examples of situations where fair trial rights are not directly violated, but where measures of a practical and organizational nature hinder the criminal defence lawyer in doing his job. This criticism cannot be generalized. There are very useful and effective initiatives where judges do their best at organizing their court sessions in the most efficient way and some projects have been launched (e.g. the new 'drug chamber' of the court of first instance in Ghent[97]) where the various actors work together harmoniously. The examples do illustrate the need for all actors to step up their efforts in trying to establish a work environment of mutual respect with a minimum of flexibility and courtesy on all sides. Pointless procedural debates caused by some lawyers do not always serve the interests of the client, but judges should resist the temptation of letting this influence their general perception of criminal defence lawyers in a negative way. When lawyers are obliged to act firmly in order to protect the interest of their clients, this should be done with courage, prudence and skill. The main challenge for judges is to differentiate these reasonable efforts from those which intend to misuse procedural guarantees in an unfounded way.

2.2.3. Perception of criminal defence lawyers

The abovementioned remarks concerned the interaction between the bar and other criminal justice actors. In protecting the best interests of clients, the attitude of and among lawyers themselves can also prove problematic.

[96] Law of 26 June 1990 on the protection of mentally disordered persons.

[97] With the aim of providing drug offenders with the most adequate treatment, an intense collaboration has been set up between lawyers, judges, prosecution and social services.

The following main elements can be deducted from interviews and practical experience.

- A large group of lawyers seems to assist their clients in criminal cases in a professional way and with an adequate knowledge of fair trial rights.

- There seems to be a considerable group of lawyers who are not specialized in criminal cases and therefore often lack the knowledge of elementary principles of both criminal law and criminal procedure.

  This ignorance and incompetence is, according to several judges, particularly present among somewhat older lawyers who are no longer (actively) aware of or skilled in new evolutions or matters of a high technical nature (special investigative techniques, clearing of irregular evidence from the file, the European dimension of the criminal procedure such as the European arrest warrant, complex new legislation on substantive criminal law such as human trafficking or criminal organizations,…). A number of judges reported that they frequently have to make 'corrections' *ex officio* in criminal cases in order to respect the fair trial rights of suspects (when their lawyer was not even aware of the need to make this correction).

- There seems to be an increasing repressiveness among a proportion of (mostly young) lawyers towards their clients ("*they deserve to be in prison", "they have themselves to blame*",…) which leads to a decreased engagement. This could be explained by the general hardening of society and the debate on migration, crime committed by foreigners, etc.

  A relatively large group of young lawyers (In particular trainees) also seem to be increasingly unaware of some fundamental requirements in order to assist their client (the word 'naive' was used by one particular judge) such as their client's background (especially when it concerns minority groups such as Roma gypsies) and are perceived as lacking a critical and interested attitude. This is illustrated by the fact that too few (young) lawyers communicate adequately with their clients, especially if these are detained in prison. Many young lawyers do not seem capable of making an essential contribution to the debate before (particularly investigating) courts, because they have no knowledge outside the file (leaving aside the question whether in most cases the file has been sufficiently studied).

These elements seem to necessitate a more thorough education and training of young lawyers (starting already at university and continued in the professional education of lawyers during their traineeship). The findings also seem to support the debate for a restriction of criminal defence work to specialized lawyers.

2.2.4. Limitation of criminal defence work to specialized criminal defence lawyers

In Belgium the provision of legal services is not limited to qualified (specialised) criminal defence lawyers. There are no minimum quality of service requirements of any kind placed on lawyers doing criminal defence work.

Especially in the framework of (second-line) legal aid, this can be problematic: every lawyer-trainee (also those totally inexperienced in or even reluctant to doing criminal defence work)

must principally accept every case appointed to them during their traineeship and will thus inevitably be appointed to indigent suspects/defendants in criminal cases. This system is often criticized due to the fact that some of these lawyers appear not to be capable of protecting the interests of their clients in (often) complicated criminal cases.

Due to the increasing technical nature and complexity of criminal cases and with the aim of providing clients with a lawyer who is sincerely engaged (which implies, *inter alia*, that the lawyer actively gathers information on the client's background and personal situation), a firm plea can be made for limiting criminal defence work to specialized lawyers, at least in the legal aid system (where at present all trainees can/must do criminal defence work). All questioned actors agree with such a proposal. Moreover, most trial judges explicitly welcome such an idea because for them *"it is more agreeable to lead a trial where prosecution and defence can perform with equal arms"*.

2.2.5. Comments on the structure and organisation of the legal aid system in relation to criminal defence work

The general opinion among most questioned criminal justice actors is that the legal aid system (both in general as specifically in relation to criminal defence work) functions properly, but that some improvements are possible (of which some are more intrusive than others). The two most commonly heard suggestions are discussed below.

- The idea of limiting the appointment of lawyers under legal aid for criminal defence work to those trainees (or other lawyers who have registered in the legal aid system) with a specialisation in criminal defence, was welcomed by the overall majority of questioned actors. As has already been indicated throughout the text, this would probably improve the quality of legal aid in criminal affairs in a substantial way. Such a specialisation would not require a radical change of the system. It could follow the example of what is currently being done in cases of minors. The same specialisation could also be introduced in cases of (internment of) mentally disordered persons, since the assistance of this category also requires a thorough knowledge of the applicable legislation, the psychiatric aspects as well as a 'human approach' with which not all lawyers are gifted.

- Most questioned actors agree that the legal aid system should be made more *attractive* by changing some aspects of it. Firstly, the remuneration of lawyers doing criminal defence work under legal aid should be increased. Since the average remuneration per case for the year 2006-07 was around 400 euro, it is evident that specialised criminal defence lawyers who are used to being paid reasonably well by their clients, are not enthusiastic for assisting indigent defendants. Secondly, not only should the remuneration be substantially increased, the payment should also be done sooner (e.g. on a monthly basis) than at present (where lawyers are usually paid 1 to 1,5 years after they have worked in the case). Thirdly, the 'point system' used as the basis for determining the remuneration, should be made more flexible in the sense that a differentiation should be introduced according to the nature, complexity and size of the case. The current system (where a huge drug trafficking case with several defendants is not 'valued' higher than a mere shop lifting case) is not realistic and does certainly not stimulate lawyers who are appointed in a big and complex criminal case to study the file in-depth.

2.2.6. Police performance in relation to fair trial rights

Taking account of the significance of the case file within the Belgian criminal proceedings, the way in which the content of the file (i.e. the results of investigative actions by the police) is presented is of utmost importance in regard to fair trial rights.

Without generalising and bearing in mind the specific role of each actor within the criminal justice system (and the risks these roles bring with them), critical questions can be raised in relation to the performances of police investigators in the course of criminal investigations.

All too often, reading a case file reveals that the investigators have crossed the borders of what is expected from them. They often take on the role of judge themselves by drawing suggestive conclusions and by expressing statements on the guilt of the suspect ("based on these elements it can be concluded that the suspect is guilty...") instead of merely giving an objective presentation of the information that was collected. This trend indicates both a lack of knowledge about fundamental principles of criminal law (e.g. the presumption of innocence) and a low degree of professionalism.

Another finding that was pointed out by some questioned actors is the pressure that police investigators can put on the magistrates leading an investigation. In some circumstances, prosecutors or investigating judges seem to lose control of an investigation because they are confronted with investigators who want to push the case in a certain direction, without there being substantial evidence for it. Often leading magistrates lack the steadiness to block this attempt and to 'steer' the investigation as it should be. Consequently, trial judges are sometimes confronted with incomplete or badly managed cases. If the judge does not correct this 'deficiency', such cases pose evident risks for the fair trial of the defendant.

There is an urgent need for education and training of police investigators with regard to basic skills such as conducting interrogations, drawing up the reports of interrogations and with regard to the fundamental principles of criminal law and criminal procedure. Insufficient performances at these levels, have a negative impact on the entire criminal proceedings and can be damaging for the fair trial rights of suspects/defendants.

2.3. Political culture of support for defendants rights

2.3.1. Public attitude

The political culture regarding fair trial rights can obviously not be seen separately from the attitude of the public regarding criminal justice. Since the 1970s the theme of insecurity due to crime has gradually taken a more prominent place in the broad social debate, the political speech and the media coverage. In the Belgian context, the rise of crime and feelings of insecurity have from the start been associated with the (increased) presence of (particularly) Turkish and Moroccan migrants and from the 1990s also illegal persons and asylum seekers. The electoral breakthrough of the "Vlaams Blok" political party (now "Vlaams Belang") in 1991 (as a result of centralizing the themes of foreigners and insecurity by crime) led to the development in Flanders and Belgium of a 'security speech' and a 'security logics' which, from that moment on, has influenced (criminal) policy.

On 19 October 2007 the results of the second justice barograph were presented.[98] The general view on justice has improved significantly since 2002: 66% of the respondents stated to trust Justice. The satisfaction with the operation of Justice knows a similar rise (from 43% in 2002 to 60% in 2007). This tendency could partially be explained by the efforts that were made in several departments, but one should not be blind for the specific time period during which the barographs were organized (the first edition took place when the social wounds of the Dutroux-Nihoul case were still fresh and trust in Justice was at an absolute low). It could be that the 2007 measurement should thus be regarded as the starting point and real evolutions could only be detected after the following edition (planned for 2010).[99]

An important aspect of the research is the view on the severity of sentencing. For five of the six groups of offences which were measured (organized crime, sexual offences, murders, drug-related crime and financial crime) a large majority (sometimes up to 87%) finds that judges are too lenient (only for the sixth category, the traffic offences, a majority is opposed to more severe sentencing). Furthermore, according to 68% of the respondents disrespect for criminal procedure rules cannot legitimate an acquittal (especially elders and young people, persons professionally tied to Justice and those who had already experienced a criminal trial favored a more severe sanctioning of violation of criminal procedure).

A clear conclusion can be made concerning the execution of sentences: 60% of the respondents find that convicted persons should be obliged to execute their full sentence (in 2002 this was only 53%); only 35% favors a conditional release (especially people aged 26 to 45 and people with a lower or secondary education call for a more strict prison policy). Regarding youth delinquency, 80% of the respondents wishes to preserve the model that place young offenders in an institution where education and guidance are central (this is a rise compared to 2002 (76%) despite the increased media attention for youth delinquency cases such as the Joe Van Holsbeek murder).

2.3.2. The current political climate: shifting towards or moving away from fair trial rights?

A quick scan of the viewpoints of some of the major (Flemish) political parties immediately shows that there is no attention to fair trial rights, unless in a negative way. Besides the main themes that can be found in almost every party's programme (reform of the prosecution and police, elaboration of alternative sentencing and mediation, better regulation of the stage of execution of sentences) the fair trial rights of suspects/defendants are remarkably absent.

There are, however, a number of themes (which more or less relate to fair trial rights) that are prominently present.

- *Facilitated access to justice*: according to the Flemish Socialist and Green party, the current legal aid system is insufficient. Proposals include a decrease of expedition rights on copies of documents, an increase of the income criteria in second-line legal aid, an elaboration and professionalization of first-line legal aid and an automatic linking of

[98] See HOGE RAAD VOOR DE JUSTITIE, *De Belgen en justitie in 2007. Resultaten van de tweede justitiebarometer*, Brussel, Bruylant, 2007, 76p. In 2004 the Universities of Leuven and Liège developed a 'justice barograph' to map the average citizen's attitude towards the judicial system. The barograph research involves a telephonic inquiry of a representative sample of the Belgian population.

[99] J. DE HERDT and A. MONSIEURS, "Na regen komt zonneschijn? De resultaten van de tweede justitiebarometer", *N.C.* 2007, afl. 6, 448.

second-line legal aid to exemption of the procedural costs for indigent persons (thus avoiding the need for a separate procedure in this respect).

- *A limitation of the consequences of procedural errors*: it is striking to see the number of parties which include in their programme (not more than vague) proposals for limiting procedural errors that lead to an acquittal to an absolute minimum. According to the Flemish Socialist party, *"the error should harm the interests of the defendant"* and *"only when the fundamental rights of defence has effectively been violated, an acquittal should be possible"*. The Flemish Christian Democratic party takes this even a step further: *"it should be avoided that people are acquitted merely because of procedural errors"*.

- *A better protection of (the rights of) victims*: one of the red threads throughout many of the political viewpoints regarding Justice, is the attention for victims. The message towards the public is that victims should come in the first place. Concrete proposals include according victims (not suspects/defendants) a free copy of their file (Flemish Liberal party) and according victims a free interpreter during the entire proceedings (Flemish Socialist party). The Flemish Green party illustrated their need for "*respect for the rights of defence"* by stressing the possibility of prohibition for offenders to frequent a particular street or place or the possibility for freezing assets of suspects in property crime…

In the current political climate, there is clearly no room for discussing the rights of suspects/defendants. This is logical if account is taken of the current attitude in the public opinion (see supra): talking about the fair trial rights of suspects/defendants is simply not a popular theme. Which Government or political party would want to burn their fingers on unpopular measures in the field of criminal defence? It seems that the Proposal for a new CPC (introducing additional rights for suspects/defendants as well as for victims and entailing some necessary 'modernising' measures in the field of criminal procedure) will remain in Parliament's cupboard for possibly a very long time.

Although the apparent current (political) shift towards victims' rights, a more effectively working judicial apparatus and away from the procedural guarantees could be explained by the increasing critical attitude and repressiveness among the public, this should not be allowed to undermine some of the fundamental principles of a modern criminal justice system. Proposals as those cited above where it is stated that acquittals should be made impossible in the case of procedural errors are not only (politically) cheap, but also extremely dangerous. Procedural rules form the fundamental guarantee against unlawful actions of police and prosecution. A strict application of the sanctions in case of procedural errors is therefore a *condition sine qua non* in order to ensure a fair trial for every suspect/defendant, regardless of their origin, income, status or background. Acquittals of defendants (sometimes even in serious cases such as drug trafficking or organized crime) due to procedural errors can seem unreasonable and even unacceptable. It should be stressed however that such acquittals are rare and that the current system of excluding irregular evidence functions adequately and is capable of restricting such cases to an absolute minimum.[100] If nevertheless the trial judge is

[100] At present, the issue of irregularly procedure evidence in criminal affairs is dominated by the Cassation jurisprudence, which is based on the following rules[100]: in principle, the use of evidence (by the judicial authorities) that was produced through committing a crime, or by violating a criminal procedural rule, through violating the right to privacy or the right to human dignity, is not allowed. The judge can however *only* exclude irregularly achieved evidence if (1) the disrespect for certain formalities is sanctioned (by the law) by nullity or (2) if the irregularity affects the credibility of the evidence or (3) if the use of the evidence violates the right to a fair trial. According to this doctrine, the judge decides freely on the admissibility of irregularly obtained evidence in the light of the articles 6 ECHR and 14 ITCPR, taking into account the elements of the case as a

confronted with a flagrant procedural error which leads to the inadmissibility of the prosecution, this is the price that should be paid in order to effectively preserve the right to a fair trial. One can only hope that those with political power and responsibility are not blind for these unpopular but fundamental arguments in their quest for the electorate's vote.

3. Conclusions

In assessing the quality of a criminal justice system, it is tempting to look at other systems and to select those aspects which seem better and more effective. No system is perfect, however, and each system has to be analysed from its own historic, cultural and social background. Merely criticising a system by comparing it to the best practice of other systems is therefore both sensitive and difficult.

The Belgian criminal justice system is well functioning and has in the last ten years introduced many adversarial elements in the principally non-adversarial pre-trial stage. The defence now has more rights to operate effectively in the course of judicial investigations. In a system where the pre-trial stage, in practice, dominates the trial proceedings to a large extent (cf. the significance of the case file; the fact that the immediacy principle is only theoretical), this tendency has put the focus of the entire criminal process *even more* on the pre-trial investigation. If something is not accomplished there, it is often very hard to make it happen in the trial stage (e.g. additional inquiries, hearing of new witnesses).

This evidently has resulted in the fact that all actors (prosecution, defence, civil party) are increasingly engaged in an anxious struggle to determine the outcome of the case before the trial has even started. In a system where the emphasis is put more and more on the investigative proceedings, the recognition and implementation of effective defence rights in the investigative stage are *vital* in order to guarantee a fair trial throughout the whole trial. Particularly on this point, the current study has detected many shortcomings.

In general it can be concluded from the study that Belgium scores *moderately* in guaranteeing effective defence rights. Although a number of rights are both sufficiently recognized in law and implemented in practice (such as the right to legal advice, the presumption of innocence, the right to appeal, the right to reasoned decisions and the right to translation of documents and assistance of an interpreter), a lot of improvements are necessary if Belgium wants to meet the ECHR standards.

Throughout the report, several suggestions were made to enhance effective defence rights both in law and in practice. Below are listed a number of *key aspects*, reflecting the three main conditions for meeting fair trial rights: *compliance with the ECHR* (including legal recognition of the rights, procedural protection and no discrimination of the poor), a supporting *professional culture* and sufficient *political commitment*. As has already been made clear in the report, these conditions are interacting and only the presence of all three conditions can effectively guarantee suspects/defendants a fair trial.

Compliance with the ECHR

whole, including the way in which the evidence was obtained and the circumstances in which the irregularity was committed.

- **Information on the nature and cause of the accusation in judicial investigations of those suspects not officially accused**

  At present, investigating judges are not obliged by law to inform persons who are not officially accused (e.g. in the course of an interrogation by the investigating judge) but who are targeted in a judicial investigation (on request of the prosecutor or following the action of a civil party) of the fact that they are the subject of a judicial investigation, and, *a fortiori*, to inform them of the nature and cause of the accusation. Due to the fact that these targeted persons have the same legal rights as those officially accused (see article 61bis CPC), there seem to be no reasonable arguments to object against the introduction of an obligation for investigating judges to officially accuse such persons, by which they are immediately informed of the nature and cause of the accusation.

- **Letter of rights**

  Suspects who are arrested, are not informed explicitly about their procedural rights (except for the notification in article 47bis CPC at the start of an interrogation). There is no legal obligation to inform suspects of their right to remain silent. It should be considered to install such an obligation.

  Moreover, a letter of rights should be introduced. This would not require a lot of effort: a mere sheet of paper listing the main defence rights (translated in all possible languages) could be handed to every suspect who is arrested. This could be combined with an extension of the notification in article 47bis in the sense that interrogators would have to mention explicitly in the report that the person has not only been informed of his/her rights but also understands them.

- **Extension of the period in which deprivation of liberty by the police is possible without the intervention of an investigating judge**

  The current 24 hour period is too short to allow a thorough initial investigation and examination of the suspect's situation. As a result, several arrest warrants are issued because of a shortage of time and simply not to take any risks. Once the arrest has been ordered however the entire pre-trial detention apparatus comes into force. An extension to (at least) a 48 hour period is welcomed by most actors. This would allow a better and more efficient investigation in the initial stage of the proceedings.

  This could be combined with the assistance of a lawyer during the initial interrogation by the police, although there is certainly no consensus on this point.

- **Adequate facilities for the defence for preparation of the case in the pre-trial stage**

  Lawyers are expected to offer a maximum engagement in cases of pre-trial detention. This should be accompanied with the best facilities for preparing the case. The Belgian practice in this respect is totally outdated and involves a pointless waste of time and resources. The right to a copy of the file or even digitalized copies should be introduced in an earlier stage of the pre-trial proceedings, irrespective whether the suspect is arrested or not.

- **Legal aid system**

A limitation of criminal defence work in the legal aid system to lawyers who have a special qualification and specialization in this field, would generally be seen as an improvement. The situation where lawyers-trainees with no interest in or knowledge of criminal law are appointed to assist suspects/defendants is not acceptable and possibly deprives these suspects/defendants of their right to an effective defence.

This limitation to qualified lawyers should be accompanied with measures to make the remuneration in second-line legal aid more attractive: a more realistic point system (taking account of the complexity and size of cases), an increased value per point and a regular payment are some of the main suggestions in this respect.

- **The use of audio recording during interrogations**

Audio recordings of interrogation would facilitate the job of both lawyers and judges. Discussions on what the suspect did or did not say would be avoided. It would be easier to check the lawfulness of the interrogation and professional conduct of the interrogators. It could also be resource efficient: the time-consuming work of making the interrogation reports by the investigators themselves could be replaced by the typing out of the recordings by administrative personnel, which would give the police more time for their core (investigating) task.

Audio recordings are already used in interrogations with use of a polygraph. It should be considered to extend this to all interrogations. In a system where lawyers are not allowed to be present during interrogation, this could provide more (fair trial) guarantees while not touching upon the non-adversarial character of the pre-trial stage.

- **Interpreters**

Although the right to an interpreter is legally recognized in every stage of the proceedings, the quality and practical organisation of the profession of interpreters (and translators) is problematic. The total lack of any selection and quality criteria, education, deontological code, control and complaint procedure concerning sworn interpreters and translators, clearly indicates the need for an urgent legislative intervention.

- **Better implementation of the alternatives for pre-trial custody**

At present, many suspects who are eligible for a conditional release remain in pre-trial detention because of the shortage in capacity of those institutions offering guidance or treatment for sexual offenders, drug addicts, etc. Increased funding of and support in this field is essential for effectively implementing the legally available alternatives for pre-trial detention. In case of foreign suspects without legal status, the only solution seems to be a common approach at a European and international level allowing for the systematic transfer of proceedings to their country of origin.

- **Investigating judges**

In the Belgian criminal justice system, the investigating judge is seen as the basic guarantee for a balanced investigation (à charge and à décharge) with respect for the fundamental (defence) rights of suspects. This specific position is deemed to compensate the non-adversarial character of judicial investigations. It can be questioned whether this

is often not mainly a theoretical principle. Without generalizing, investigating judges in practice often appear to adopt a rather one-sided view on the case and are frequently reluctant to investigate the case fully à décharge, even when proposals are made in this respect by the defence.

Without expressing a *general* critique towards investigating judges - who usually do a (very) good job -, the current report merely aims to contribute to the debate regarding the core mission of investigating judges (often referred to as the "most powerful" actor within the entire system). Investigating judges should constantly be aware of their legal task to investigate à charge and à décharge with the presumption of innocence as a starting point, and should not *choose* in favor of a specific party or build the case from a particular (one-sided) viewpoint.

Professional culture

- There is an urgent need for systematic consultation between the various criminal justice actors (in particular judges, prosecutors and lawyers) in order to guarantee a reasonable and professional interaction between them. A 'healthy distrust' is useful and necessary, but at present the debate regarding fundamental issues (such as additional inquiries) or practical requests (such as adjournments) is often transformed into a heated fight fueled by the frustrations of each party towards the other. Mutual respect between the various actors within the criminal proceedings should not only be a theoretical concept, but should continuously and effectively be implemented in practice.

- Training and education are key elements in order to guarantee a qualitative performance of the various criminal justice actors and, as such, is inextricably bound to the fair trial rights of suspects and defendants. Improvement in this area is especially needed for lawyers-trainees, both on the technical (basic knowledge of criminal law and procedure) and human (communicating with clients, attention for clients' background) aspects of the profession. Police investigators are also in urgent need for more training regarding the basic principles of an investigation with respect for the presumption of innocence and regarding the techniques for making reports of investigative actions such as interrogations in a more professional way.

Political support

- In drafting new legislation, the political actors should not adapt an exclusive victim-oriented policy, inspired by the increasingly repressive public attitude. Procedural guarantees offer a fundamental protection against abuses and irregular conduct by police and investigating authorities. The consequence of procedural errors (sometimes leading to inadmissibility of prosecution and acquittals of criminals) should therefore not be regarded as something 'evil' but rather as a (small) price to pay in order to preserve the fair trial for every single person.

- A policy aimed at improving fair trial rights does not necessarily require drastic changes or big legislative reforms (e.g. providing a copy of the file to suspects in the pre-trial stage).

- In preparing new legislation in the field of criminal (procedure) law, more attention should be paid to the comments of the various actors on the terrain.

4. Annex

Extract from the Ministerial Decree of 21 August 2006 on the determination of the list with points for performances by lawyers responsible for fully or partially free second-line legal aid[101] (the list below covers performances in the field of criminal law, youth protection and the assistance of mentally disordered persons).

1. Mentally disordered persons

First appearance	12p
Following appearance	+ 6p

2. Criminal cases

2.1 Criminal defence

Police court: 8 points

With civil party (irrespective of the number of civil parties): + 7 points

Additional hearing (other than an adjournment or a mere pronouncement of the judgment): + 3 points

Dealing with the civil case following a judicial expertise: + 10 points

Correctional court: 20 points

With civil party (irrespective of the number of civil parties): + 7 points

Additional hearing (other than an adjournment or a mere pronouncement of the judgment): + 3 points

Dealing with the civil case following a judicial expertise: + 10 points

Investigating court ('Raadkamer'): 6 points (per appearance)

Assise court: per day (defence and civil party): 25 points

2.2 Civil action

Civil action in the hands of an investigating judge: 6 points

Civil action (except the Assise court): 10 points

2.3 Petition for clemency: 5 points

2.4 Rehabilitation ('eerherstel'): 10 points

[101] S.B. 28 August 2006

2.5 Commission for social defence: 6 points

2.6 Conditional release (per appearance): 6 points

2.7 Commission for financial help for victims of deliberate violence: 10 points

2.8 Mediation in criminal affairs: 6 points

2.9 Restorative mediation: 8 points

2.10 Appearance for bodies competent for provisional or conditional release: 6 points

2.11 Petition according to the Franchimont Law: 5 points

Petition restricted to viewing the file: 5 points (maximum 10 points per appointment)

2.4. Extradition: 10 points

2.5. Swift justice (appearance during the weekend) + 4 points

2.6. Probation commission (per hearing): 6 points

3. Youth cases (other than civil)

3.1 Juvenile court: 10 points

With a civil party (irrespective of the number of civil parties): + 7 points

Additional hearing (other than an adjournment or a mere pronouncement of the judgment): + 3 points

3.2 Juvenile judge (appearance in cabinet)

First appearance: 6 points

Additional appearance: + 3 points

Appearance during the weekend: + 4 points

3.3 Defence for the Special Committee for youth care / mediation commission special youth care (per appearance): 6 points

3.4 Restorative mediation / Restorative group consultation: 8 points (+ 6 points if the mediation or consultation is followed by a public hearing)

3.5 Civil action: 8 points (10 points for dealing with the civil case after a judicial expertise)

4. **Opposition as defendant**: half of the points that would be accorded for a new procedure
5. **Appeal**: same points as for the procedure in first instance
6. **Cassation**

   6.1 Request for legal aid (to be freed from paying the procedure costs): 10 points

   6.2 Cassation procedure: 25 points
7. **International courts**: 40 points
8. **Reimbursement of displacement costs**: 0,5 point per 20km starting from the lawyer's office