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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 2000

Addendum

BELGIUM

[14 August 2001]

The information submitted by Belgium in accordance with the consolidated guidelines on the initial part of reports of States parties is contained in core document HRI/CORE/1/Add.1/Rev.1.

The annexes to this report may be consulted in the files of the secretariat.

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INITIAL REPORT OF BELGIUM

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

I. INFORMATION OF A GENERAL NATURE

1. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the "Convention") has recently become part of the Belgian legal order. Signed by Belgium on 4 February 1985, approved by the Act of 9 June 1999 and ratified on 25 June 1999, the Convention entered into force on 25 July 1999. It was published in the Moniteur belge on 28 October 1999.

2. It should be noted at the outset that a bill to bring Belgian law into line with the Convention was approved by the Council of Ministers on 16 February 2001 (see below, in particular the commentaries to articles 1, 4 and 16 of the Convention). The opinion of the Council of State was delivered in June 2001. The bill may be amended when it is considered by Parliament.

3. Belgium, which endorses the principle enunciated in article 5 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, is also bound by several other international instruments prohibiting torture or similar treatment, in particular:

> The International Covenant on Civil and Political Rights, article 7 of which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation; and
>
> The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), article 3 of which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

4. Duly introduced into the Belgian domestic legal order (parliamentary approval, ratification by the King and publication in the Moniteur belge),[1] the provisions of these instruments thus form an integral part of the Belgian domestic legal system and have mandatory force. Since the Le Ski decision, delivered on 27 May 1971, the Court of Cassation has clearly affirmed the primacy over domestic legal provisions of provisions in international treaty law having direct effect in the national legal system.

5. Belgian courts (criminal, civil, and, increasingly, administrative), must apply these international provisions to the extent that they are self-executing. By this is meant a clear treaty provision, legally self-contained, which imposes on the Belgian State an obligation either to refrain from acting or to act in a specific manner, and which may be cited as a source of law in itself by individuals under Belgian jurisdiction without there being any need for complementary domestic legislation.

6. In the context of these two international instruments, Belgium has entered into commitments allowing individuals who consider that the rights guaranteed under them have been violated to bring actions against the State in the bodies established by the instruments in question. Belgium is a party to the Optional Protocol to the International Covenant on Civil and Political Rights, which established the right of individuals to submit communications to the Human Rights Committee. It has also made the declaration provided for in article 25 of the European Convention on Human Rights allowing individual petitions.

7. Lastly, on 23 July 1991 Belgium ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, of 26 November 1987 (entry into force on 1 November 1991), which established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the Committee has the authority to visit any place within the jurisdiction of a signatory State in which individuals are deprived of liberty by a public authority (premises of the commune police and gendarmerie, custodial centres for foreign nationals, and prisons).

8. The European Committee for the Prevention of Torture carried out two periodic visits to Belgium, from 14 to 23 November 1993 and from 31 August to 12 September 1997. A third visit is scheduled for 2001. Pursuant to the visits the Committee submitted to the Belgian Government reports containing sets of comments, observations and recommendations, thereby initiating a dialogue with the Belgian authorities. On the basis of those reports the Government in turn formulated interim and follow-up reports on the measures taken to implement the recommendations contained in the Committee's reports. The Belgian authorities have made a considerable effort to report not only on the legislative and administrative measures which, where appropriate, they were called upon to take, but also on the effective application in practice of the Committee's recommendations. These reports, annexed hereto, have been made public.

9. It should be noted that the European Convention for the Prevention of Torture was formulated on the basis of three fundamental principles: prevention, cooperation and confidentiality. In this connection it must be emphasized that the Committee's role is not to condemn States but, rather, to help them avoid ill-treatment of persons deprived of their liberty. It is for the Committee to determine whether there are general or specific conditions or circumstances which may deteriorate to the point where acts of torture or inhuman or degrading treatment or punishment might occur, or which might lend themselves to the perpetration of such inadmissible acts or practices. Prevention is thus the keystone of the entire monitoring system instituted by the Convention.

10. The Committee's work is designed to be an integral part of the system of the Council of Europe for the protection of human rights; it represents a preventive non-judicial mechanism that complements the a posteriori judicial monitoring mechanism of the European Court of Human Rights.

11. Lastly, various non-governmental organizations (Amnesty International, International Prison Watch, International League for Human Rights) were consulted in the drafting of this initial report. Annexed hereto is a set of documents and reports prepared by these organizations reflecting the situation in Belgium with regard to the Convention.

II. INFORMATION IN RELATION TO EACH OF THE ARTICLES IN PART I OF THE CONVENTION

Article 1

12. Article 1 defines the concept of torture, as it is to be understood in the context of the Convention, and indicates which acts fall within its scope. This is the first time that the term has been defined in an international instrument. The definition is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

13. The definition of torture as such is not incorporated in the Belgian Penal Code. In fact the bill adopted by the Council of Ministers on 16 February 2001 with the aim of bringing the Penal Code into line with the normative provisions of the Convention[2] (see below) proposes no exact definition of torture. This approach, already adopted in other Belgian legislation on the subject (for example, article 2 of the Act of 7 February 1994 on human rights assessment of development cooperation policy), leaves room for a changing interpretation of torture in the light of the development of case law, avoiding a too narrowly predefined framework.[3] On this subject the following two observations may be made: firstly, the interpretation of torture as defined in the new article of the Penal Code (art. 417 bis) does not take account of certain restrictions set forth in the Convention; secondly, it reflects the definition of torture emerging from the decisions of the European Court of Human Rights relating to article 3 of the European Convention on Human Rights.

Article 2

Paragraph 1

14. Paragraph 1 establishes the obligation for States parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction. It must be read in conjunction with article 4, paragraph 1, which requires States to make offences of all acts of torture, including attempts to commit torture and acts which constitute complicity or participation in torture (see below, article 4, paragraph 1, commentary).

15. Here there enter into consideration not only the laws authorizing ratification of the relevant international instruments, first and foremost among them the Convention, but also legislative provisions and bills that criminalize torture and establish punishments for acts of torture, as well as those setting out judicial remedies available to victims. The judicial authority as a guardian of individual freedom under the Constitution acts within the framework established by the law.

16. Thus the law prohibits and penalizes torture, and the judicial authorities punish it. This punitive machinery, by its very existence, has an obvious preventive and deterrent value. It is complemented by administrative measures, mainly consisting of guidelines from the executive on standards of conduct for government officials to ensure compliance with the law.

17. There follows a list of the principal legislative, administrative, judicial and other measures that Belgium has adopted to prevent the commission on its territory of acts of torture. A detailed consideration of the measures follows.

Legislative provisions

18. Bringing Belgian law into line with article 2 of the Convention necessitates adaptation of the country's substantive criminal law. Existing provisions punishing acts of torture are not broad enough to comply with the Convention. Article 438 of the Penal Code applies only to acts of torture committed against an arrested or detained person; article 347 bis makes acts of torture an aggravating circumstance in crimes relating to hostage-taking; article 398 on intentional assault is too vague; and the scope of the Act concerning the prosecution and punishment of serious violations of the Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional to the Geneva Conventions is restricted to serious violations of the Conventions and Protocols.

19. To meet the requirements of the Convention, on 16 February 2001 the Council of Ministers adopted a bill designed on the one hand, to insert in the Penal Code three new articles characterizing torture (art. 417 bis), inhuman treatment (art. 417 ter) and degrading treatment (art. 417 quarter), as offences and also to adapt to the content of these new articles the articles characterizing torture as an aggravating circumstance in cases of hostage-taking (art. 347 bis), indecent assault or rape (art. 376). The bill takes into account the comments by the Council of State in its opinion of 4 December 1998 on the preliminary bill on accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see annex).

20. Other legislative provisions include:

- The Act of 16 June 1993 concerning the punishment of serious violations of international humanitarian law (as amended by the Act of 10 February 1999), which refers, in article 1, paragraph 3 (2) to "torture or other inhuman treatment, including biological experiments";

- The Extradition Act of 15 March 1874 (as amended by the Acts of 31 July 1985 and 14 January 1999) and the bilateral and multilateral treaties concluded between Belgium and other States;

- The Police Functions Act of 5 August 1992, which provides, in article 1, paragraph 2, that the police services must, in the discharge of their administrative or judicial police duties ensure respect for and contribute to the protection of individual rights and freedoms and the democratic development of society. In the event of failure to respect these provisions, the injured party may initiate legal proceedings either against the police officer in question or the public authority by which he is employed;

- The Act of 7 December 1998 (Moniteur belge, 5 January 1999) establishing an integrated police service, with a two-tier structure;

- The Act of 13 May 1999 (Moniteur belge, 16 June 1999) embodying the disciplinary regulations applicable to members of the police services;

- The Royal Decree of 30 March 2001 (Moniteur belge, 31 March 2001) embodying the legal status of members of the police services ("Mammoth" Decree);

- The Act of 30 October 1998, adding article 422 bis of the Penal Code, on harassment;

- The Organization Act of 18 July 1991 on oversight of the police and intelligence services;

- The Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens, as amended by the Acts of 28 June 1984, 14 July 1987, 18 July 1991, 7 December 1992, 6 May 1993, 1 June 1993, 6 August 1993, 24 May 1994, 8 March 1995, 13 April 1995, 10 July 1996, 15 July 1996, 9 March 1998, 29 April 1999, 7 May 1999 and 2 January 2001, by the Royal Decrees of 13 July 1992, 7 December 1992, 31 December 1993 and 22 February 1995 and by the Royal Implementing Decree of 8 October 1981, itself amended on several occasions;

- The draft royal decree establishing the regime and regulations applicable to premises in Belgian territory run by the Foreign Nationals Office, where foreign nationals are held, placed at the disposal of the Government and kept pursuant to the provisions cited in article 74/8 (para. 1) of the Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens. This draft royal decree will rescind the Royal Decree of 4 May 1999 (Moniteur belge, 6 June 1999) on the same subject;

- The draft basic act governing prison administration and the legal status of prisoners (work of the Dupont Commission);

- The Act of 1 July 1964 on social protection of the mentally handicapped and repeat offenders;

- The Pre-Trial Detention Act of 20 July 1990;

- The Protection of Mentally Ill Persons Act of 26 June 1990;

- The Protection of Young Persons Act of 8 April 1965, as amended on several occasions, and the decrees adopted by the communities on this question (Decree of 4 March 1991 on assistance to young people adopted by the French community, and the coordinated decrees of the Flemish community of 4 April 1990); and

- The bill on patients' rights.

Administrative measures

21. The administrative measures taken by the Government to implement the Convention include:

> The General Prison Regulations, title III of which covers the inspection and oversight of prisons;
>
> The draft police code of ethics;
>
> General Order No. J/815 of 8 February 1996 on instruction for the armed forces in the law of armed conflict and the rules of engagement, with reference to the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977, as well as to the Act of 16 June 1993, which is intended to establish the general framework for instruction in the law of armed conflict and the rules of engagement with a view to attaining standardization and ensuring that the rules that must be known and respected by combatants at varying levels of responsibility are taught.

Paragraph 7 of the Code of Conduct of the Department of Defence (May 1999) also refers to human rights and international humanitarian law:

> "7. I undertake to defend democracy and its values and to respect human rights and international humanitarian law in all circumstances. I undertake to treat every individual with respect on a basis of equality. I will not tolerate any form of discrimination. I will assist any individual in danger."

Other measures

22. Reference should be made to the work of the Working Group on the law governing detainees (administrative and judicial arrests).

Paragraph 2

23. In Belgium, article 1, paragraph 2, of the Act of 16 June 1993 on the prosecution and punishment of serious breaches of the Geneva Conventions of 12 August 1949 and of the Additional Protocols of 8 June 1977 sets forth punishment for torture and other inhuman treatment, including biological experiments, whether in the context of international armed conflict or non-international armed conflict.[4]

24. Article 5, paragraph 1, of the Act stipulates that no interest, no necessity of a political, military or national nature, may justify, even in the context of reprisals, the offences covered by article 1 of the Act.

25. Article 5, paragraph 1, merely confirms in a legal instrument what has already been established in legal theory and precedent: a state of necessity may not be invoked in humanitarian law as a general justification precisely because it is intended to govern exceptional situations.[5]

26. The legislator, in adopting article 5, paragraph 1, wished to establish a hierarchy of values a priori, without seeking to balance the minimal protection accorded individuals by humanitarian law against military necessities or the survival of the nation.[6]

27. Further, the domestic provisions applicable in time of war (Decree Law of 11 October 1916 on states of war and states of siege, Act of 16 June 1937 granting the King authority to take the necessary measures for the mobilization of the country in the event of war, Act of 10 May 1940 on delegation of authority in time of war) and the Military Penal Code do not provide any justification for torture.

28. Other than in the event of armed conflict, covered by the Act of 16 June 1993, ordinary law provisions, namely article 392 et seq. of the Penal Code ("Homicide and intentional bodily injury") are applicable to cases of torture (see article 4 of the bill on alignment of Belgian law with the Convention).

29. Under ordinary criminal law, necessity constitutes a general ground for justification which, although not enshrined in any legal instrument, is unanimously acknowledged in legal theory and judicial doctrine.

30. Necessity is the situation in which a person finds himself when he has no other reasonable recourse than to commit an offence to protect an interest equal to or greater than that injured by the offence.[7]

31. Is this ground for justification applicable in the event of acts of torture? In other words, is it possible to imagine exceptional circumstances other than armed conflict (covered by the Act of 16 June 1993) in which recourse to torture could be justified under criminal law? A state of necessity can be admitted as justification only if it meets several conditions, namely: the value of the interest sacrificed must be less than or at most equal to that of the interest to be safeguarded; the right or interest to be safeguarded must be in imminent and grave peril; it must be impossible to avoid injury other than by the offence; and the agent must not have created by his actions the situation placing him in a state of necessity.[8]

32. These are restrictive conditions but do not necessarily exclude the invocation of a state of necessity to justify acts of torture.

33. This question has already come before the Penal Code Reform Commission, which has proposed the insertion, in that part of the future code relating to legal grounds for objective justification of an offence, of an article providing that "no interest or necessity, however vital it may be, can justify an act constituting inhuman or degrading treatment. Neither a state of war or the threat of war or of armed conflict, nor a threat to national security, nor a state of siege or other state of emergency, nor the need for information, nor any other exceptional circumstance can justify, even as reprisals, violation of a peremptory norm embodied in international instruments relating to fundamental human rights".[9]

34. The work of the Penal Code Reform Commission has thus far not concluded. There is, however, agreement among legal theoreticians as to the "non-derogable" nature of humanitarian law, which includes the prohibition of torture.[10] To our knowledge there are, however, no court decisions dealing with this issue other than in the context of armed conflict.

35. Further, while article 1 of the Police Functions Act of 5 August 1992 provides that "the police services must, in the discharge of their administrative or judicial police duties, ensure respect for and contribute to the protection of individual rights and freedoms and the democratic development of society", article 37 of the Act authorizes the use of force by any police official "having regard to the risks involved therein" and "only in order to pursue a legitimate objective which could not otherwise be achieved". The article goes on to state that "any recourse to force must be reasonable and proportionate to the objective pursued". A legitimate objective thus justifies recourse by police officials to force.

36. Recourse to force is distinct from torture, as defined in article 1 of the Convention (any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as …). That the legitimate use of restraint by the police forces may cause severe pain or suffering similar to one or other form of torture cannot, however, be completely excluded.

37. It should be noted that several international norms are applied which take precedence over norms of domestic law[11] and which are directly applicable by Belgian courts. This is true of the provisions of the European Convention on Human Rights. Article 3 of this Convention, prohibiting torture, is formulated in absolute terms, without qualification or any possibility of derogation (of the Convention, art. 15). The same is true of the International Covenant on Civil and Political Rights, ratified by Belgium and directly applicable, which enshrines the non-derogable nature of humanitarian rights, including the prohibition of torture.

38. In conclusion, it is not legally possible in Belgium to invoke a state of necessity, exceptional circumstances, a state of war, or any other ground that would justify torture.

Paragraph 3

39. This provision prevents an order by a superior or public authority from being invoked as justification for torture. Article 70 of the Penal Code states that "no offence is committed where the act is ordered under the law or at the command of higher authority". This is true of the more specific instances cited in articles 152 and 260 of the Penal Code.[12]

40. The case-law of the Court of Cassation has reduced the scope of this provision, which it interpreted as follows in its decision of 18 February 1953:

> "(…) An act of violence by an official is legitimate only if, pursuant to an order duly given in accordance with the law or regulations, it does not exceed the level strictly necessary to comply with the order[13] (…)."

41. The Court of Cassation has on several occasions acknowledged the principle of lawful resistance to abuse of authority, holding that:

> "Whereas, exceptionally, individual resistance to an unlawful act of authority is legally recognized, it is on condition, in particular, that the act should be flagrantly unlawful and that it should necessitate an immediate reaction."[14]

42. Although the existence of this precedent is to be welcomed, it does not seem an adequate guarantee against abuse of authority in terms of article 2, paragraph 3, of the Convention. It is thus essential, to ensure that Belgian law conforms with the provisions of the Convention, to incorporate the content of article 2, paragraph 3, in the draft amendment to the articles of the Penal Code that characterize torture (art. 417 bis) and degrading treatment (art. 417 quater) as offences (see commentaries to articles 4 and 16 of the Convention).

Rules applicable to the integrated two-tier police force

43. In the context of police reform in Belgium, the Act of 7 December 1998 (Moniteur belge, 5 January 1999) establishes an integrated, two-tier police force. The Act provides:

> "Article 123. Police officials shall at all times and under all circumstances contribute to the protection of citizens and the assistance that citizens are entitled to expect, as well as, when circumstances so require, to respect for the law and the maintenance of public order.
>
> They shall respect and undertake to ensure respect for human rights and fundamental freedoms."

44. The provisions that follow this article govern the duties of availability for duty, impartiality, integrity and discretion on the part of police officials. Equality of opportunity for men and women within the integrated police force is also guaranteed under article 129 of the Act.

45. The Act of 13 May 1999 (Moniteur belge, 16 June 1999) containing the disciplinary regulations governing members of the police services provides that:

> "Article 3. Any act or behaviour, even outside the course of official duties, which represents dereliction of professional obligations or is likely to imperil the dignity of the service constitutes an infringement of discipline and may give rise to disciplinary action";
>
> "Article 8. Members of the service who, in grave and urgent circumstances, in the context of preparation for or execution of an administrative or judicial police operation, refuse to obey the orders of their superiors or wilfully refrain from implementing them shall incur heavy disciplinary punishment. Nevertheless, a manifestly unlawful order may not be carried out."

46. Under article 1 of the Police Functions Act of 5 August 1992, police officers must, in the discharge of their duties, ensure respect for and contribute to "the protection of individual rights and freedoms and the democratic development of society. In the discharge of their duties they shall use force only under the circumstances provided for by law" (see below, commentary to articles 37 and 38 of the Act, under article 4 of the Convention).

47. Further, it should be noted that the principle that a police official may not hide behind the orders of a superior to escape prosecution for violation of fundamental human rights is set forth in the Royal Decree of 30 March 2001 governing the legal status of police personnel (Moniteur belge, 31 March 2001):

> "Article III.II.3. A member of the force to whom a manifestly unlawful order is given (…) shall immediately communicate his intention not to carry out the order to the superior who has given the order or to his superior";
>
> "Article III.II.4. A member of the force is responsible for carrying out the orders given to him by his superiors".

48. The principle is contained in the final paragraph of article 8 of the Act of 13 May 1999 on the disciplinary regulations applicable to members of the police services. "Nevertheless, a manifestly unlawful order may not be carried out".

Article 3

Paragraphs 1 and 2

Removal of aliens

49. In this regard Belgian law conforms to the provisions of article 3 regarding the prohibition of refoulement or expulsion to a State where the individual in question is liable to face torture.

50. The legal corpus governing the removal of aliens includes the following instruments:

> The Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985;
>
> The Chicago Convention on International Civil Aviation of 7 December 1944, approved by the Civil Aviation Act of 30 April 1947, which refers to removal;
>
> The Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens, as amended by the Acts of 28 June 1984, 14 July 1987, 18 July 1991, 7 December 1992, 6 May 1993, 1 June 1993, 6 August 1993, 24 May 1994, 8 March 1995, 13 April 1995, 10 July 1996, 15 July 1996, 9 March 1998, 29 April 1999, 7 May 1999 and 2 January 2001, by the Royal Decrees of 13 July 1992, 7 December 1992, 31 December 1993 and 22 February 1995, and by the Royal Implementing Decree of 8 October 1981, itself amended on several occasions;

Article 37 of the Police Functions Act of 5 August 1992, which determines the circumstances in which the use of force is authorized;

A protocol of agreement concluded on 24 May 2000 between the Ministry of the Interior and Sabena Airlines on "INADS" (aliens who are not admitted and who will be returned);

Final directives on the use of force in the event of removal, also formulated by the Minister of the Interior in 1999;

A ministerial decision of 11 April 2000 regulating conditions of transport on board civil aircraft of passengers posing particular security risks (Moniteur belge, 14 April 2000).

51. The Act of 15 December 1980 provides for four different forms of removal (a general term) of aliens (see annex, guidance note on a comprehensive immigration policy, approved by the Council of Ministers on 1 October 1999).

Refoulement

52. Refoulement (return) is the administrative decision on removal whereby an alien who has not yet crossed the Belgian frontier is forbidden to enter the territory of the States parties to the Schengen Agreement by the border control authorities, acting on the authority of the Ministry of the Interior.

53. An alien may be turned back if he attempts to enter Belgium in one of the circumstances covered by article 3 of the Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens, and by article 5 of the Convention applying the Schengen Agreement.

54. This same Act specifies in article 3 that the rules it sets forth also apply unless a derogation is provided for under an international treaty or by law. Accordingly, no refusal of admission can be made in violation of the principles set forth in article 3 of the Convention. In practice persons who do not meet the legal requirements for admission to Belgium and who fear torture in the event of refoulement to another State seek asylum in Belgium, invoking a fear of persecution within the meaning of article 1 of the Convention relating to the Status of Refugees of 28 July 1951, which is binding on the Belgian authorities and which, in its article 33, prohibits return of a refugee to a country in which he fears for his life or freedom.

55. In application of this rule the Council of State has reiterated on a number of occasions that it is forbidden to return an alien who has been refused the status of political refugee to his country of origin, where there are substantial grounds for believing that he would be subjected to inhuman or degrading treatment.[15]

Expulsion

56. Expulsion is the decision (Royal Decree) whereby the King may remove from the territory an alien permanently resident in Belgium or a national of the European Union or of the European Economic Area to whom a residence permit has been granted, following the opinion of the Advisory Committee on Aliens, which is called upon to advise on certain decisions relating to aliens. It is a consultative body made up of magistrates, lawyers and persons concerned with the defence of aliens' interests.

57. The above-mentioned aliens may be expelled only if they have committed serious violations of public order or national security.

Repatriation

58. Repatriation is the decision (ministerial order) whereby the Minister of the Interior may remove from the territory an alien who is not permanently resident in Belgium, after having obtained, where appropriate, the opinion of the Advisory Committee on Aliens.

59. An alien not permanently resident may be repatriated when he has violated public order or national security or has not complied with the conditions imposed on his stay, as provided for in the Act of 15 December 1980 (art. 20).

Order to leave the country

60. An order to leave the country is the administrative decision on removal whereby the Minister of the Interior or the Aliens Office requires an alien not authorized or permitted to stay more than three months or to reside permanently in Belgium to leave the country. This decision may be enforced in two ways: voluntarily, in which case the decision generally sets a time limit for leaving the country, varying with the circumstances (article 7, paragraph 1, of the Act), and the alien is able to leave the country at his convenience; or forcibly, in certain cases, when the Minister of the Interior or the Aliens Office deems necessary, and the alien is taken to the border of the country from which he comes or into which he may be admitted. He may be taken to the border in this way either immediately or after a delay (ibid., para. 3). In the latter case, he may be held for as long as is strictly necessary for the enforcement of the decision.

Personnel and departments responsible for expulsions

61. The expulsion measure is notified by the Ministry of the Interior (Directorate-General of the Aliens Office), or on its instructions by a law enforcement officer. Decisions on refoulement (return) are taken by the Aliens Office and are enforced at the airport by airline staff, assisted in some cases by the federal police. The forcible implementation of an order to leave the country is the task of the federal police (repatriation under escort). Repatriation is accompanied by measures of a psychological, medical and social nature applied in advance, on departure and, in some cases, during the flight.

62. Cases of removal (refoulement and the forcible implementation of orders to leave the country) are as a rule entrusted to the airlines. It should be noted that, under article 74/4 of the Act of 15 December 1980, a carrier which has transported to Belgium a passenger who is not in possession of the documents required to enter the country (as a rule a valid national passport, together with a visa where applicable), or who falls into one of the other categories referred to in article 3 of the Act, must transport him or arrange for him to be transported to the country from which he comes or a country into which he may be admitted.

63. Agreements have been concluded with carriers to encourage the practice of boarding checks and lower the fines which are applicable when this obligation is not complied with.

64. On 22 September 1998, Semira Adamu, a Nigerian, died during an attempt to return her to Togo.[16] The Government decided to set up a special consultative commission to review instructions relating to removal, under the chairmanship of Professor Vermeersch (see annex, final report of 21 January 1999). The commission recommended, among other things, that in any expulsion procedure certain coercive measures should be permanently forbidden, "in particular any action to block normal breathing (for example, adhesive tape or a pillow over the mouth) and any forced administration of pharmaceutical products (except those administered by doctors in emergencies, which would naturally lead to abandonment of the attempted removal)". New guidelines issued in July 1999 for the use of federal police engaged in accompanying persons being expelled reflect the Commission's recommendations. These guidelines are also applicable to the new police services.

Removal of unaccompanied minors

65. In principle unaccompanied under-age children are not removed, except where their behaviour and available information concerning their overall situation indicate that they may travel alone and are sufficiently mature. An unaccompanied minor aged under 16 may be removed only if, in the country of origin, the country of usual residence, the country of nationality or each country into which he may be admitted, either a parent, a legal guardian or relatives can accommodate the minor, or a reception centre can take charge of him.

Number of expulsions

66. The following figures are supplied for guidance:

	Refoulement	Order to leave the country	Repatriation	Deportation
1994	n.a.	8 530	1 964	311
1995	1 980	7 898	2 699	803
1996	2 839	8 856	3 794	466
1997	2 645	9 983	3 042	170
1998	3 952	9 309	3 042	212
1999	4 659	11 443	1 802	101

Extradition

67. Extradition is governed by the Extradition Act of 15 March 1874 (as amended by the Acts of 31 July 1985 and 14 January 1999) and by bilateral treaties (over 50) and multilateral treaties between Belgium and other States. Particularly noteworthy are the Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985, which also contains provisions relating to extradition (arts. 59-66), and recently (Act of 22 April 1997) the European Convention on Extradition concluded in Paris on 13 December 1957, its two additional protocols and its additional agreement.

68. It should be pointed out that article 2 bis of the Extradition Act of 15 March 1874, a new article introduced by the Act of 31 July 1985 (Moniteur belge of 7 September 1985), goes a long way towards meeting the obligation under the Convention not to extradite any person to a State where he faces a risk of torture:

> "Extradition may not be granted if there are serious grounds for believing that the request has been submitted for the purpose of prosecuting or punishing a person for reasons of race, religion, nationality or political opinion, or that the person's situation might be aggravated for one of those reasons."

69. Extradition will also be refused if the requesting State does not provide formal assurances that, if the death penalty may be imposed, it will not be carried out (article 1, paragraph 2 (3), of the Act of 15 March 1874). Even if the guarantee of the right to a fair trial in the requesting country is not in itself a condition of extradition, this requirement may constitute a ground for the Government to refuse extradition in its final decision as inadvisable. When ratifying the European Convention on Extradition, Belgium, like other countries, lodged a reservation under which it is authorized not to grant extradition when the person being sought might be brought before a special court, or when his surrender is likely to have exceptionally serious consequences for him, in particular because of his age or state of health.

70. A refusal to extradite a person to a State where he might undergo acts of torture is not a new obligation where Belgium is concerned. Since the European Court of Human Rights handed down its decision in the Soering case,[17] Belgium has been under an obligation to refuse extradition in such cases, in the same way as all States parties to the European Convention on Human Rights. Hence the 1984 Convention does no more than strengthen an existing obligation.

71. Nevertheless, this provision runs counter to what is laid down in certain bilateral treaties on extradition concluded by Belgium which do not list the risk of torture as a ground for refusing extradition. However, if the other contracting State is also a party to the present Convention or the European Convention on Human Rights or the International Covenant on Civil and Political Rights, these treaties prevail over an extradition treaty and offer grounds for refusing to extradite a person who runs the risk of being subjected to acts of torture in the requesting State.

72. At present, there are only four States which are not parties to these conventions but have concluded a bilateral extradition treaty with Belgium:

> Honduras (Convention concluded at La Paz on 24 July 1908, Moniteur belge of 4 July 1909);
>
> Liberia (Convention concluded in Brussels on 23 November 1893, Moniteur belge of 11 May 1895);
>
> Pakistan (Convention on extradition concluded on 29 October 1901 between Belgium and Great Britain and additional Conventions of 5 March 1907 and 3 March 1911, applicable to Pakistan by arrangement made by means of an exchange of notes dated Brussels, 23 January and 20 February 1952, Moniteur belge of 1 June 1952);
>
> Swaziland (Convention on extradition concluded on 29 October 1901 between Belgium and Great Britain, applicable to Swaziland by arrangement made by means of an exchange of notes dated Mbabane, 13 May 1970 and 18 August 1970, Moniteur belge of 13 February 1971).

73. It would be desirable to update these treaties in the light of the new imperatives relating to the protection of human rights facing our State. It is important to note that Belgium has never received any extradition request from these countries. In 1999, Belgium sought and obtained the extradition of a Belgian national from Honduras. In that case, no problem relating to the application of the Convention arose.

Article 4

Paragraphs 1 and 2

Current provisions

Criminal Code

74. Bringing Belgian law into line with article 4 involves adapting Belgian substantive criminal law. The area of application of the current provisions aimed at combating acts of torture is not sufficiently broad to correspond to what is laid down in the Convention. In the first place, article 438 of the Criminal Code provides that:

> "When a person under arrest or detention has been subjected to physical torture, the perpetrator shall be punished by forced labour for a period of 10 to 15 years.
>
> "The punishment shall be forced labour for a period of 15 to 20 years if the torture has caused an apparently incurable disorder, or a permanent inability to work, or the complete loss of the use of an organ, or a serious mutilation.
>
> "If the torture has caused death, the perpetrator shall be sentenced to forced labour for life."

75. However, this article covers only cases of torture suffered by a person under arrest or detention. Article 347 bis of the Criminal Code provides that acts of torture constitute aggravating circumstances in offences relating to hostage-taking.

76. Mention should also be made of article 376 of the Criminal Code, which relates to rape or indecent assault, aggravated by acts of physical torture, and article 398, on wounding with intent to harm, but these provisions are not sufficiently precise to meet the requirements of the Convention fully.

Act of 16 June 1993 concerning the punishment of serious violations of international humanitarian law

77. Mention should be made of the Act of 16 June 1993 concerning the punishment of serious violations of the Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 (Moniteur belge of 5 August 1993), article 1 of which condemns, inter alia, "torture or other inhuman treatment, including biological experiments".

78. However, this Act covers only "serious offences which, by action or omission, cause harm to the persons and property protected under the Conventions signed in Geneva on 12 August 1949 and approved by the Act of 3 September 1952, and under Additional Protocols I and II to those Conventions, adopted in Geneva on 8 June 1977 and approved by the Act of 16 April 1986, without prejudice to the penal provisions applicable to other violations of the conventions referred to in the present Act and without prejudice to the penal provisions applicable to violations committed by negligence (…)" (art. 1).

79. The Act of 16 June 1993 was amended by the Act of 10 February 1999, which broadened its area of application. In addition to serious violations of the Geneva Conventions and their Additional Protocols, the Act criminalizes genocide and crimes against humanity. Hence the field of application of this Act covers more than torture when it constitutes a serious violation of the Geneva Conventions, since it extends to acts of torture which are essential elements of the crime of genocide (art. 1, para. 1 (2)) or of crimes against humanity (art. 1, para. 2 (6)).

Articles 37 and 38 of the Police Functions Act: use of force or coercion

The principle

80. Police officers are regularly led to use coercive measures. The use of such measures is clearly limited by the conditions set out in articles 37 and 38 of the Police Functions Act of 5 August 1992.

81. The existence of these provisions is to be welcomed, but they were criticized by the Council of State, which considered them too general in nature. The law should have made express provision for recourse to coercive measures in each situation, it felt, and should also have stipulated the triggers and mode of application. Parliament did not adopt this approach, which it considered too burdensome.

82. The Council of State's criticisms were partially taken into account in the Act, however. The principal scenarios involving the use of force were dealt with in specific, detailed provisions: coercive measures (art. 1, para. 3); personal searches (art. 28); vehicle searches (art. 29); confiscation (art. 30); administrative arrest (art. 31); the use of force (art. 37); and the use of firearms (art. 38).

83. Moreover, the conditions in which the police services may apply coercive measures are also dealt with in the legislation concerning the organization of the police services (for example, the use of handcuffs, prison vans or tear-gas grenades).

84. The preamble to the Act sets out what is meant by the use of coercive measures and force. This concept must be viewed in the broad sense, covering all procedures for neutralizing an individual, up to the act of killing him or her. The concept of coercive measures embraces, in addition to material coercion in the physical sense of the term, encroachments on the freedom of the individual (deprivation of liberty, identity checks, searches, confiscation, etc.).

Conditions set out in articles 37 and 38 of the Police Functions Act

85. Any use of force is subject to respect for the following four principles:

Lawfulness: The use of force must correspond to a lawful purpose.

Necessity: The use of force must be the last resort in pursuing the objective sought, when it cannot be achieved otherwise.

Proportionality: The use of force must be gradual, reasonable and in keeping with the objective sought.

Appropriateness: Force must be used in accordance with the context of the action. It may not harm another interest which is higher than that which it is wished to protect.

Standing Committee on the Supervision of the Police Services

86. Annexed hereto are the 1999 and 2000 reports of the Standing Committee on the Supervision of the Police Services. These reports contain statistics relating to complaints, allegations and criminal investigations into police officials in connection with behaviour considered to violate the law or their code of conduct.

Royal decree of 30 March 2001 establishing the legal status of the personnel of the police services (Moniteur belge of 30 March 2001) (see above)

Minors (Protection under the Criminal Law) Act of 28 November 2000

87. In order to strengthen the protection of children, in particular against the various forms of sexual exploitation, an Act on the protection of minors under the criminal law was adopted

on 28 November 2000 (Moniteur belge, 17 March 2001). This Act, which entered into force on 1 April 2001, introduced various amendments to the Act of 13 April 1995 on provisions to prosecute and punish trafficking in human beings and child pornography.

88. A number of elements are taken into account. The Act on the protection of minors under the criminal law includes provisions strengthening the protection of children against the various forms of sexual exploitation, abduction, neglect and starvation, and abandonment. It revises and seeks to rationalize the penalties and aggravating circumstances related to the age of the victims, in cases of sexual abuse and serious ill-treatment.

89. Worthy of note is the introduction of a specific article relating to sexual mutilation of women and young girls, which clearly lays down that such practices are inadmissible and contains provision for tailored punishments.

90. Article 409 of the Criminal Code reads as follows:

> "1. Any person who has practised, facilitated or encouraged any form of mutilation of the genital organs of a person of the female sex, with or without that person's consent, shall be liable to imprisonment for a term of three to five years.
>
> "Attempts to commit such offences shall be punishable by imprisonment for a term of eight days to one year.
>
> "2. If the mutilation is practised on a minor or for pecuniary reward, the punishment shall be rigorous imprisonment for a term of five to seven years.
>
> "3. When the mutilation has caused an apparently incurable disorder, or a permanent inability to work, the punishment shall be rigorous imprisonment for a term of 5 to 10 years.
>
> "4. When mutilation unintentionally causes the death of the victim, the punishment shall be rigorous imprisonment for a term of 10 to 15 years.
>
> "5. If the mutilation referred to in paragraph 1 has been carried out on a minor or a person who, by virtue of her physical or mental state, was not in a position to care for herself, by her father, mother or other older relatives, any other person who has authority over or is responsible for the care of the minor or disabled person, or any person who cohabits occasionally or habitually with the victim, the minimum level of the punishments set out in paragraphs 1 to 4 shall be doubled in the case of imprisonment, and increased by two years in the case of rigorous imprisonment."

91. This new article does not characterize acts of torture as aggravating circumstances, but in future it will be possible to punish torture inflicted in the form of mutilation of sexual organs in the same way as any other form of torture when the new article 417 bis is incorporated in the Criminal Code (see above).

Bill to bring Belgian law into line with the Convention

92. It has proved necessary to coordinate and adapt the provisions of the Penal Code which, whether explicitly or not, relate to acts of torture.

93. On 16 February 2001 the Council of Ministers approved a bill - which may be amended when it is considered by Parliament - designed to insert in the Penal Code three new articles characterizing torture (art. 417 bis), inhuman treatment (art. 417 ter) and degrading treatment (art. 417 quater) as offences, and also to adapt to the content of these new articles the articles characterizing torture as an aggravating circumstance in cases of hostage-taking (art. 347 bis), indecent assault or rape (art. 376).

94. Reference is made to the observations on article 16 of the Convention relating to the new characterizations of inhuman treatment and degrading treatment in the Penal Code.

95. The new article 417 bis which is to be inserted in the new section V of book II, title VIII, chapter I of the Penal Code reads as follows:

> "1. Any person who subjects another person to torture shall be liable to punishment in the form of rigorous imprisonment for a term of 10 to 15 years.
>
> "2. The offence referred to in paragraph 1 shall be punishable by rigorous imprisonment for a term of 15 to 20 years when it is committed:
>
> > "1. By a public officer or official or a law enforcement officer acting in the performance of his functions;
> >
> > "2. Against a person who is particularly vulnerable on account of pregnancy, illness, disability or a physical or mental handicap;
> >
> > "3. Against a minor who has not reached the age of 16; or
> >
> > "4. When the act has caused an apparently incurable disorder, a permanent physical or mental disability, complete loss of the use of an organ, or a serious mutilation.
>
> "3. The offence referred to in paragraph 1 shall be punishable by rigorous imprisonment for a term of 20 to 30 years when:
>
> > "1. It has been committed against a minor or a person who, by virtue of her physical or mental state, was not in a position to care for herself, by her father, mother or other older relatives, any other person who has authority over or is responsible for the care of the minor or disabled person, or any adult who cohabits occasionally or habitually with the victim; or
> >
> > "2. It caused unintentional death.

> "4. The orders of a superior or an authority cannot justify an offence of the type referred to in paragraph 1."

Characterization of torture as an offence

96. Given the nature and gravity of the constituent elements of torture, the task of bringing Belgian law into line with the Convention makes it essential to characterize such elements in the shape of a distinct principal offence. This has been done in the new article 417 bis.

97. It will be remembered that the new article 417 bis does not set out a precise definition of the concept of torture, in order not to confine it in too strictly predefined a framework. Two observations are pertinent in this regard: when interpreting the concept of torture as referred to in article 417 bis, certain restrictions stipulated in the Convention must be disregarded, and the definition of torture which has emerged in the case law of the European Court of Human Rights must be reflected.

98. As is made clear in the preamble to the bill, the concept of torture to be introduced into the Penal Code does not take into account the following fundamental restrictions set out in article 1 of the Convention:

(a) Restriction relating to the status of the perpetrator

99. The Convention focuses on acts carried out "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". In domestic law, there are no grounds for such a limitation. Neither the Belgian Penal Code (arts. 347 bis, 376 and 438) nor the case law of the European Court of Human Rights in relation to article 3 of the European Convention on Human Rights (in particular its judgement A. v. United Kingdom, 23 September 1998, para. 22) contain such a limitation.

(b) Restriction relating to special intent

100. The Convention requires that the suffering should have been inflicted with a specific purpose: "for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind (…)". The requirement relating to special intent, as stipulated in the Convention, is also ruled out from the interpretation of the new article 417 bis of the Penal Code. Both the terms of the definition and the preparatory work for the Convention demonstrate clearly that "gratuitous torture" is not the target here. This in no way prejudges the issue of whether it is desirable to place gratuitous torture within the sphere of application of the concept in domestic law. Hence Belgian courts may characterize as "torture" acts which inflict severe suffering even when the act constitutes "gratuitous torture".

(c) Restriction of scope relating to the juridical context within which the torture falls

101. The Penal Code does not take into account the following limitation stipulated in the last part of the definition of the concept of torture: "It does not include pain or suffering arising only

from, inherent in or incidental to lawful sanctions." It would be difficult to comprehend such a limitation in Belgian law, which cannot allow the infliction of severe suffering, as such, as a lawful sanction. It should be pointed out that neither the provisions governing custodial penalties nor those relating to the organization of the prison system should be interpreted as inflicting such suffering, as such.

102. Otherwise, the characterization contained in our domestic law is in keeping with the concept of torture in international law. In this way, the manner in which the concept of torture contained in article 417 bis should be interpreted coincides with that set out in the Convention as to the behaviour of the perpetrator and the nature of the suffering inflicted on the victim.

103. As regards the nature of the suffering, it is important to emphasize that such suffering may be physical or mental.

104. Account should also be taken of the element relating to the intensity of the suffering inflicted: the Convention speaks of "severe suffering". This expresses the idea that there is a threshold below which the characterization of torture is not appropriate. The act will then be characterized as "inhuman treatment", or as "degrading treatment" if the criteria for "inhuman treatment" are not met (see commentary to article 16 of the Convention). This distinction between these three concepts drawn on the basis of a threshold of intensity may be found in the case law of the European Court of Human Rights. In this way, the characterization of torture is reserved for "deliberate inhuman treatment causing very severe and cruel suffering" (Ireland v. United Kingdom, 18 January 1978, GA, No. 11, para. 167). Inhuman treatment is treatment which "deliberately causes mental or physical suffering of particular intensity" (Tyrer case, 25 April 1978, No. 12, judicial corporal punishment in the Isle of Man). Torture thus constitutes an aggravated form of inhuman treatment (Ireland v. United Kingdom, para. 167).

105. Yet it is not sufficient to emphasize the intensity of suffering in order to identify the specific nature of the new offence. It is also based on the gravity of the act, not inasmuch as it causes a degree of pain, but because it embodies a very special contempt for the individual.

Applicable punishment

106. The basic punishment laid down for the offence of torture is rigorous imprisonment for 10 to 15 years, that is, the punishment stipulated in article 438 of the Penal Code, under which physical torture was an aggravating circumstance in arbitrary or unlawful detention. In the case covered by this article, determination of the punishment - 10 to 15 years' rigorous imprisonment - is based on the most serious act, that is, torture. This explains why the punishment laid down for acts of torture is identical to that laid down in article 438 of the Criminal Code.

107. Paragraphs 2 and 3 of the new article 417 bis of the Penal Code institute a system of more severe punishments corresponding to a variety of circumstances: the special vulnerability of the victim, the age of the victim, the consequences of the act for the victim, the authority exercised by the perpetrator over the victim, the death of the victim.

108. It should be noted that all the punishments laid down in this bill have been brought into line with the Death Penalty (Abolition) and Serious Penalties (Amendment) Act of 10 July 1996 (Moniteur belge of 1 August 1996).

Order of a superior or an authority

109. As indicated above, paragraph 4 of article 417 bis incorporates the content of article 2, paragraph 3, of the Convention, in order to ensure that Belgian law is in conformity with the provisions of the Convention.

110. In this regard, it should be emphasized that provisions similar to those of paragraph 4 of article 417 bis are customary provisions in cases of serious offences. A similar provision is also to be found in article 5 of the Act concerning the punishment of serious violations of international humanitarian law of 16 June 1993, and also in article 7 of the statute of the International Criminal Tribunal for the Former Yugoslavia and article 6 of the statute of the International Criminal Tribunal for Rwanda, as well as in article 33 of the Rome Statute of the International Criminal Court.

Torture as an aggravating circumstance in hostage-taking[18]

111. Paragraph 5 of article 347 bis of the Penal Code provides that torture is an aggravating circumstance in hostage-taking. This provision retains its raison d'être despite the specific characterization of torture in the new article 417 bis of the Criminal Code. Under the rules governing combinations of offences, only the severest punishment is imposed. In cases of hostage-taking with the aggravating circumstance of acts of torture, paragraph 5 of article 347 bis provides for a punishment of rigorous imprisonment for life. In the event of a combination of offences, this will be the only punishment imposed, since it is severer than that laid down in article 417 bis for acts of torture.

112. In the interests of consistency with the new article 417 bis, it was deemed essential to remove the limitation to physical torture alone as set out in the former article 347 bis of the Criminal Code and extend it to all forms of torture. In this regard, it should be pointed out that torture as an aggravating circumstance in hostage-taking must be aimed at causing suffering distinct from that inherent in the principal offence.

Torture as an aggravating circumstance in indecent assault or rape

113. Article 376, paragraph 2 of the Criminal Code characterizes torture as an aggravating circumstance in indecent assault or rape. This provision retains its raison d'être in the context of the rules governing combinations of offences, but the restriction to physical torture alone must disappear. The above observation needs to be repeated: torture as an aggravating circumstance in indecent assault or rape must be aimed at causing suffering distinct from that inherent in the principal offence.

Article 5

114. Article 5 relates to the competence of Belgian courts to try acts characterized as offences under the Convention. This provision contains mandatory rules for the extension of the competence of the courts of States parties with the aim of increasing the number of cases in which acts characterized as offences under the Convention can be prosecuted in the courts of the States parties.

115. On 15 September 2000, as part of efforts to bring Belgian law into line with the provisions of the Convention, the Council of Ministers approved a bill to amend article 12 bis of the Preliminary Title of the Code of Criminal Procedure. The Council of State issued its opinion on 24 January 2001, and the bill was tabled in Parliament on 28 March 2001.

Bill amending article 12 bis of the Preliminary Title of the Code of Criminal Procedure[19]

116. The purpose of this bill is to convert article 12 bis into a generally applicable provision which confers competence on Belgian courts to hear all cases where an international convention contains a mandatory rule for the extension of the competence of the courts of the States parties. For example, the new formulation makes it possible systematically to meet conventional international obligations in this area constituting an application of the principle aut dedere aut judicare under which, when the alleged perpetrator of the act referred to in the Convention has been found on Belgian soil and has not been extradited to one of the competent States under the convention, he must be prosecuted in Belgium irrespective of his nationality, the nationality of the victim or the place where the offence was committed.

117. The above-mentioned article 12 bis has been replaced by the following provision:

> "Belgian courts are competent to hear cases involving offences committed outside the territory of the Kingdom which are referred to in an international convention by which Belgium is bound, when such a convention imposes on Belgium, in any way, an obligation to submit the matter to its competent authorities for prosecution."

118. It should be noted that the sole obligation falling on Belgium in the cases covered by article 12 bis is that of submitting the matter to its competent authorities for the purpose of prosecution - that is, to the government procurator, who continues to enjoy discretion as to the advisability of prosecution. Furthermore, article 12 bis must be read in conjunction with article 12, which precedes it, and stipulates that, subject to exceptions listed in the article itself, "the offences dealt with in the present chapter shall be prosecuted only if the accused is in Belgium".

Article 6

Paragraphs 1 and 2

119. In presenting the conditions attached to article 6, it is vital to indicate the various cases in which it might apply, once the above-mentioned bill has been adopted to bring Belgian law into line with the Convention, on the assumption that the suspect is on Belgian soil.

120. In the first category of situation, i.e. when the offence has been committed by a Belgian national on Belgian territory against another Belgian national, Belgium alone has jurisdiction. In a second category of situation, i.e. when the offence has been committed by a national of a foreign State on the territory of that State against another national of the same State, in accordance with the usual principle of international criminal law, that State alone has jurisdiction and is entitled to demand extradition of the offender or suspect. Belgium would generally agree to such extradition, in view of article 8 of the Convention.

121. The following may be applied, depending on the circumstances:

- The system of ordinary law, as provided for in the Code of Criminal Investigation: a preliminary investigation by the police services on the instructions of the crown procurator or automatically under the supervision of the crown procurator; arrest pending the institution of proceedings by an initiating order issued by an examining judge on the instructions of the crown procurator; possibly pre-trial detention if charges are preferred.

- Extradition law, as laid down in the Act of 15 March 1874, as amended by the Acts of 31 July 1985 and 14 January 1999 (see below).

122. In all cases, Belgian legislation enables the responsible authorities to ensure the presence or detention of the suspect and it prescribes an immediate investigation.

Lawfulness of arrest and detention

123. Under article 12 of the Belgian Constitution, “freedom of the individual is guaranteed. No one may be prosecuted except in the cases provided for in the law and in the manner prescribed therein. With the exception of cases of flagrante delicto, no one may be arrested except by virtue of a reasoned court order, which must be served at the time of arrest, or at the latest within 24 hours”.

System of ordinary law

124. Belgian legislation provides for two main types of arrest by law enforcement personnel: administrative arrest and judicial arrest.

Administrative arrest

125. (See commentary to article 11 of the Convention.)

Judicial arrest

126. Pursuant to the Pre-Trial Detention Act (LDP), in the case of a crime or offence committed in flagrante delicto a judicial police officer shall proceed to arrest the suspect (art. 1). In practice the arrest is often made by a law enforcement officer who is not a judicial police officer. Having no actual powers of arrest, the officer will merely take protective measures (in casu, to prevent the suspect from escaping) and immediately bring the suspect before a

judicial police officer[20]). The officer must immediately inform the crown procurator, in order that he may exercise immediate and effective control over the decision. Police custody may in no case exceed 24 hours from the time of arrest.

127. Only an examining judge is empowered to issue an arrest warrant (LDP, arts. 16-20), without which a person cannot be placed in pre-trial detention. At this stage, more specifically during his first examination of the accused, the examining judge is required to inform the accused of his right to choose a lawyer (art. 16, para. 4). If the accused fails to choose a lawyer, the examining judge shall so inform the President of the Bar Association or his deputy, in order that a lawyer may be appointed pro deo. The person arrested may not meet with a lawyer until he has been questioned by the examining judge. Immediately after questioning, the accused may communicate freely with a lawyer (art. 20, para. 1). He or she may do so even before the arrest warrant has been issued and served. In practice, lawyers are often not able to meet with their clients before the clients are admitted to prison.

128. Generally speaking, accused persons under an arrest warrant may communicate immediately with their relatives and associates. However, if the needs of the investigation so dictate the examining judge may prohibit the accused from communicating with persons other than their lawyer (art. 20). Such secrecy is reserved for exceptional situations.

Extradition law

129. A distinction should be drawn between the two phases of extradition proceedings:

Phase consisting of provisional arrest with a view to extradition, pending the transmission of the official extradition request. In such cases examining judges in Belgium issue a provisional arrest and detention warrant. The person arrested may challenge the legality of the arrest and apply to the Judges' Council Chamber for release (Extradition Act, art. 5, para. 5). An appeal may be lodged against the decision of the Judges' Council Chamber before the Indictment Division, whose decisions are subject to an appeal to vacate. The duration of provisional arrest is, however, limited. The maximum duration is 18 days (Benelux) or 40 days (Council of Europe). A few bilateral conventions provide for a longer period (75 days; see article 10 of the Convention between Belgium and the United States).

Phase consisting of detention pending extradition, which is based on the documents accompanying the official extradition request. Detention pending extradition is of a final nature, in that the person to be extradited is placed at the disposal of the Government (Extradition Act, art. 3).

130. Detention pending extradition may take place in two types of cases:

In the first case, the extradition is requested on the basis of an arrest warrant issued by a foreign authority. The Judges' Council Chamber is then called upon to enforce it. Although this is not an adversarial procedure, the person arrested may lodge an appeal with the Indictment Division. If the latter annuls the enforcement order, the person is released. If the enforcement order is upheld, the decision of the Indictment Division is

subject to an appeal to vacate. In a judgement of 5 December 1995, the Court of Cassation considered that an arrested person could apply to the Indictment Division for provisional release when he or she had lodged an appeal against the enforcement order issued by the Judges' Council Chamber. An appeal against the enforcement order makes detention pending extradition "provisional" until such time as the Indictment Division or the Court of Cassation has reached a final decision on the enforcement order. This procedure, established by the Court of Cassation, guarantees that detention pending extradition will be in conformity with article 5 of the European Convention on Human Rights.

In the second case, extradition is requested on the basis of a conviction issued by a foreign authority. In such cases, the person is arrested after being served the judgement. The service of the judgement is tantamount to an arrest warrant. The Extradition Act does not provide for a remedy against the service of the judgement. In urgent cases, however, the interim relief judge is empowered under ordinary law to verify the lawfulness of the detention and may, if necessary, order the person provisionally released. Interim relief judges are already applying this legal possibility in practice. Provisional release may also be requested before the interim relief judge issues a decision, if the extradition request has been based on an arrest warrant. This procedure, which was set forth in the above-mentioned Court of Cassation judgement, is nevertheless not applicable in cases where extradition has been requested for the purpose of enforcing a judgement.

131. The extradition legislation has been the subject of a study by the University of Antwerp, under the direction of Ms. Chris Van Den Wyngaert, which has led to a series of proposals for an overall reform of extradition law.

132. The proposed system makes the decision on the admissibility of the extradition a strictly judicial decision. It is taken by the Indictment Division on the basis of a public and adversarial procedure, and is binding on the Ministry of Justice. Only compliance with essential requirements (double jeopardy, exception for political offences, etc.) is subject to judicial review.

133. A bill amending the Extradition Act should be submitted to Parliament in the coming months. The bill, however, does not address the complex problem of detention with a view to extradition. It aims to establish an abundantly clear distinction, similar to that provided in the extradition legislation of the Netherlands, between provisional arrest, detention pending extradition after the arrival of the extradition request and the documents on which the request is based (i.e. detention during the procedure for determining the admissibility of the extradition request) and detention following the extradition decision (up to the surrender of the person at the border).

134. As the extradition procedure is not a procedure on the merits, it is not necessary for a remedy to be provided against the admissibility decision. It is likewise unnecessary to provide for an adversarial procedure. In Belgium, the Indictment Division issues an opinion on the admissibility and advisability of the extradition request. However, the opinion, which is rendered following adversary proceedings in which the foreigner, his counsel and the

Public Prosecutor are heard, is of merely advisory value. Consequently, it is not subject to an appeal to vacate. The opinion is kept secret, even from the foreigner, until the sovereign decision of the Government has been taken. The final decision in extradition proceedings is for the Government (Minister of Justice) to take and therefore represents an administrative act. The Minister is not bound by the Indictment Division's opinion and may take a decision that is contrary to it. However, it is very rare in practice for the Minister not to follow the Indictment Division's opinion. In any event, differences are based more frequently on purely technical reasons than on advisability.

135. Like all administrative acts, the Government's decision must be a reasoned one and is subject to applications for both stay of execution and annulment.

Paragraph 3

136. This point is covered by article 36, paragraphs 1 (b) and (c) and paragraph 2, of the Vienna Convention on Consular Relations of 24 April 1963, which stipulates:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (…)
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

137. Article 30 of the General Prison Regulations stipulates that, unless a prohibition to communicate has been ordered by the court, persons of foreign nationality, whatever the basis for their detention, are authorized to communicate, if they so desire, with consular and diplomatic officers from their country.

138. Pursuant to article 30 of the Regulations, a series of consular conventions have been concluded with various countries.[21] All the circulars in question stipulate that all foreigners arrested must always be informed of their right to enter into contact with consular officers of their country (sending State).

139. It is for the competent authorities of the State of residence (i.e. Belgium) to inform the authorities of the sending State of the provisional arrest, detention or limitation of liberty in any form whatsoever of a national of that State. The sending State shall be informed within three days of the arrest, detention or limitation of liberty. Consular officials have the right to visit detainees, speak with them in the language of either the sending State or the State of residence and remain in contact with them. They also have the right to exchange correspondence and communications with them. These rights are exercised in conformity with the laws and regulations of the State of residence.

140. All the conventions also contain a derogation from article 30 of the General Prison Regulations, in that, if consular officials appear at the prison to visit a national of their country, they must be able to communicate with the national regardless of his or her wishes. However, there is nothing to prevent detainees from subsequently declining the consul's services.

141. These provisions are not applicable to detainees who have political refugee status or have applied for recognition of such status.

Article 7

Paragraph 1

142. This paragraph derives directly from article 5, paragraph 2, and applies the principle of aut dedere aut judicare to the specific case of offences covered by the Convention. No further comments are therefore required.

Paragraph 2

143. Under Belgian law, acts of torture constitute serious offences, as was stated under article 4 above. Accordingly, they may be treated only as such by the competent prosecuting authorities. In addition the standards of evidence are independent of the grounds on which the State exercises its jurisdiction.

Paragraph 3

144. All persons facing charges are entitled to fair treatment regardless of the nature of the offence with which they are charged, in accordance with Belgian law and the international instruments to which Belgium is a party, foremost among them the International Covenant on Civil and Political Rights (art. 14) and the European Convention on Human Rights (art. 6).

Article 8

145. This article requires States parties to include the offences set forth in article 4, i.e. acts of torture, attempts to commit torture, complicity and participation in torture, in any extradition treaty concluded with another State party. Belgium will, of course, respect this obligation when concluding any bilateral or multilateral extradition treaty with other States parties.

Article 9

146. This provision is typical of those appearing in several international conventions on criminal matters, such as the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970 (art. 10) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971 (art. 11).

147. It should be noted that Belgium does not have comprehensive legislation governing judicial assistance. At present, however, judicial assistance in Belgium is governed by the following three international instruments: the Benelux Treaty of 27 June 1962, the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and the Convention applying the Schengen Agreement of 19 June 1990, as well as the following general domestic legislative provisions: articles 11 and 873 (2) of the Judicial Code and article 11 of the Extradition Act of 14 March 1874.

Article 10

148. The rules prohibiting and punishing the use of torture, which appear in the basic provisions or draft provisions regulating each of the professions concerned, are or will be included in the training courses organized for their members.

Training of the police[22]

149. It should be noted that, following the adoption of the Act of 7 December 1998 organizing an integrated, two-tier police force, work began on the elaboration of a code of ethics for the police services. The code will include the principle that all police officers shall treat persons under their supervision with respect for human dignity and shall in all circumstances refrain from subjecting such persons to inhuman, humiliating or degrading treatment or punishment. The code of ethics should encourage the development of attitudes and behaviours that will improve the quality of relations between police officers and the public.

150. Multidisciplinary training (legislative, psychological and social training and training relating to professional practice) has begun, concerning appropriateness of the use of force and the need to introduce it gradually. Outside partners are participating (universities, League of Human Rights, Centre for Equal Opportunity and Action to Combat Racism). The goal is to ensure that relations are managed in a way that is conducive to the development of democratically-oriented standards of behaviour.

151. Recourse to force and the conditions under which force may be used are the main focus of the integrated police basic training course. Respect for persons of foreign origin and for human rights are a principal theme of the entire basic training course for police officers. The annex contains the training programme for the officials of the integrated police at their different levels of responsibility.

Training of prison staff

152. All the courses regularly draw attention to the two main aspects of a prison officer's work: security and reinsertion. Trainers emphasize concepts such as respect, listening to others and communication. Participants are encouraged to think about and discuss prison officers' daily behaviour. The human rights aspect is given in-depth treatment in the course on the European Prison Rules.

Training of personnel responsible for expulsions and closed centres

153. Before the reform of the police services every gendarme received one to five years' training (for non-commissioned and commissioned officers respectively). This initial course of training included the corpus of legislation relating to foreigners. In addition, each gendarme assigned to border control underwent a further selection process and followed a six-month training course before receiving removal assignments. A detailed training course in border control and escorting aliens was prepared. In 1999, 432 hours were devoted to training in removal of aliens and every staff member responsible for removals is bound to respect the procedure.

154. The centres' security staff receive the training necessary for appropriate intervention to deal with violence when tensions arise. Training focuses on three areas: first, students are asked to describe the legal frame of reference for the staff of the closed centres (for example, responsibilities), second, they learn to evaluate difficult situations and take preventive measures (including, if necessary, a psychological approach, communications aptitude, etc.) and third, they learn to neutralize a dangerous individual in an evenhanded manner. (The annex contains the training programme which senior officers of the integrated police force will be following.)

Training for the armed forces

155. It will be recalled that torture is prohibited under the Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 (Convention I, arts. 3 and 50; Convention II, arts. 3, 12 and 51; Convention III, arts. 3 and 130; Convention IV, arts. 3, 32 and 147; Protocol I, arts. 11, 75 and 85, and Protocol II, art. 4).

156. The courses organized for the armed forces on armed conflict law and the rules of engagement, which include the Geneva Conventions and Additional Protocols, provide for the prohibition of torture and other cruel, inhuman or degrading treatment.

157. These courses will naturally be adapted to focus on the Convention against Torture. In each of the armed forces, advisors in the area of armed conflict may be asked to follow up the course contents relating to the prohibition of torture.

Training of judicial personnel

158. Human rights training is part of the basic training provided for judicial interns, which is compulsory; it includes information about the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and ends with a visit to the European Court of Human Rights.

159. In addition, the ongoing training programme for judges devotes a number of study days to raising awareness of the Convention's provisions. Training sessions include the right to freedom, the prohibition of torture and the detention and interrogation of accused persons.

160. Children's judges receive specific training that includes the status of minors placed in specialized institutions.

Article 11

161. The concepts of custody and treatment of persons who have been arrested, detained or imprisoned in any way whatsoever correspond to distinct legal situations, which are presented successively below.

Police custody and pre-trial detention

Administrative arrest and judicial arrest

Administrative arrest

162. Belgian law provides for two main types of arrest by law enforcement personnel: administrative arrest and judicial arrest.

163. Administrative arrest may be defined as "loss of the right to freedom of movement, ordered by a police offer with a view to preserving, maintaining or restoring public order, the duration of which is so brief as to render ineffective any remedies aimed at having it lifted".[23]

164. Articles 31 to 33 of the Police Functions Act of 5 August 1992 harmonized and extended the existing provisions concerning administrative arrest. Under these provisions, a policeman may, in case of absolute necessity, administratively arrest a person who is causing an obstruction, causing an actual breach of the peace or preparing to commit certain offences, or, with a view to making him desist, a person committing certain offences. Article 22 of the Act also permits administrative arrests when dispersing crowds in the context of the maintenance and restoration of public order.

165. Administrative arrest cannot last longer than the circumstances warranting it, and can in no case ever exceed 12 hours. Where a person is concurrently subjected to administrative and judicial arrest for the same acts, the duration of the administrative arrest is included in the 24-hour period of deprivation of liberty to be taken into consideration in application of the Pre-trial Detention Act. The Act provides for the obligation to record administrative arrests in a

special register and to inform the burgomaster or, if necessary, the special administrative police authority, at the earliest opportunity. A police officer who has made an administrative arrest is therefore bound to so inform the administrative police officer to whom he reports as soon as possible. Any arrest that undermines an individual's fundamental rights must immediately be monitored by a hierarchical superior having the status of administrative police officer. In addition, article 147 of the Penal Code sets forth penalties for illegal or arbitrary arrests.

166. If such monitoring does not take place, article 155 of the Penal Code sets forth penalties for an administrative or judicial police officer who neglects or refuses to end an illegal detention that has been brought to his attention.

167. Article 34 of the same Act deals with identity controls. Any person who cannot or will not establish his identity may be held for the period necessary for the establishment and verification thereof. However, that period may in no case exceed 12 hours. The person being controlled may in some circumstances be asked to accompany the police official to the police station or gendarmerie. He will have to wait there under surveillance until his identity is established (in appropriate premises, but not necessarily in a cell or provisional lock-up). If recourse to force is necessary, he may be confined to a cell, and thus administratively arrested, in which case the fact will then be recorded in accordance with article 33.

168. Lastly, article 35 of the Act provides that "administrative and judicial police officers may not unnecessarily expose arrested or detained persons to public curiosity. They may not subject them or allow them to be subjected to the questions of journalists or third parties unconnected with their cases, photograph them or allow them to be photographed, except as necessary for their identification or for other purposes determined by the competent judicial authority. The identity of the persons concerned may not be revealed without the consent of the competent judicial authority, except in order to inform their families of their arrest or detention."

Judicial arrest

169. (See commentary to article 6 of the Convention.)

Guarantees against ill-treatment of persons under administrative or judicial arrest

Right to inform a relative or a third party

170. There is as yet no single legal mechanism in Belgium. Article 31, paragraph 4, of the Police Functions Act stipulates that "any individual who is under administrative arrest may request that a person in his or her trust should be so informed". This article refers not to an actual right, but simply a possibility, of having a trusted individual informed of one's arrest.

171. Article 35, paragraph 3, of the Act, which deals with judicial arrest, provides implicitly for the possibility of informing a relative in cases where a person is taken into custody, unless the needs of the inquiry dictate otherwise.

172. There is no time limit on the exercise of this right. This is due to the fact that the period of deprivation of liberty is extremely short (24 hours at the most for judicial arrest - see Pre-Trial Detention Act, article 1).

173. In practice, therefore, anyone who has been arrested may request that a person of his or her choice should be informed. However, the police are not bound to inform anyone at any cost. This third person must be a trusted individual who will not be responsible for further disturbances of public order. As the person arrested is not authorized to inform the third person directly, the police will do so. The police must make a normal and reasonable effort to inform the person in question. It should be noted that, when minors are arrested, the parents or third persons holding parental authority are immediately informed of the arrest and place of detention. A legislative initiative should shortly be harmonizing the legislation in this area.

Access to a lawyer

174. Belgian law currently makes no provision for a detainee to have access to a lawyer of his or her choice immediately after arrest.

175. On issuing arrest warrants, examining judges inform accused persons of their right to choose a lawyer. If the accused has not chosen or does not choose a lawyer, the judge so informs the President of the Bar Association or his deputy, pursuant to article 16, paragraph 4, of the Pre-Trial Detention Act. A lawyer is then appointed (possibly pro deo, i.e. free of charge for persons in need). Article 20 of the Act stipulates that the accused may communicate freely with his or her lawyer immediately after the first hearing. It should be borne in mind that, when the needs of the investigation so dictate, an examining judge may prohibit accused persons from communicating with persons other than their lawyer (art. 20). Such confidentiality is reserved for exceptional situations.

Access to a doctor of one's choice

176. The legislation does not explicitly provide for detained persons having access to a doctor. In practice, a detainee is generally entitled to be examined and treated by a doctor of his or her choice. When a detainee cannot or will not choose a doctor, the duty doctor is called in.

177. Article 442 bis of the Penal Code provides that anyone who withholds aid from another person in danger is subject to prosecution. Paragraph 1 of this provision reads as follows:

> "A person who fails to assist or to provide assistance to a person exposed to serious danger, whether he has seen for himself the situation of this person or whether the situation is described by those who request his intervention, shall be liable to eight days' to six months' imprisonment and/or a fine of 50 to 500 francs."

178. It is therefore obvious that if a police officer notes that the detainee's condition requires medical treatment, a doctor will be called in.

179. It should, however, be noted that it is not always possible to call in a doctor of the detainee's choosing. In such circumstances the duty doctor is generally called, as he or she is able to provide assistance at night or on weekends or holidays.

180. Similarly, when a person who is intoxicated through the effect of alcohol or drugs is detained for committing a crime or offence or for infringing the highway code, the police officer will immediately request the services of a doctor.

181. Police officers are required to be present during examinations and blood collection. In cases involving drinking and driving, it is compulsory for members of the police to be present.

182. If a doctor issues a medical certificate, the detainee may request that the certificate should be entered into his file. The file may be consulted by the detainee and his counsel.

183. The manner in which medical examinations are conducted depends, on the one hand, on the police stations' internal regulations, which may be issued by the commanding officer under article 171 bis of the new Communes Act, and, on the other, the Code of ethics which the doctor deems fit to apply, according to the circumstances.

184. Generally speaking, if the doctor agrees and if his security is guaranteed, examinations may take place out of the hearing and sight of the police.

Right to be informed of one's rights

185. At present the provisions applied are article 5, paragraph 2, and article 6, paragraph 3 (a), of the European Convention on Human Rights, which read as follows:

> Article 5, paragraph 2: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."
>
> Article 6, paragraph 3: "Everyone charged with a criminal offence has the right (…) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

186. Accused persons also have the possibility of being informed of their rights pursuant to article 20 of the Pre-Trial Detention Act, which enables them to communicate freely with their lawyer.

187. A few police bodies have taken the initiative of posting a document of this nature in the detention area. In the Wavre district, for example, there are plans to post an information bulletin concerning the rights of arrested persons in the cell complex. This initiative may be extended to other districts, preferably through approval by the local prosecutor's office. The units' attention will be drawn to this possibility.

188. Expanding this measure and adopting legislation to make it compulsory would be a concrete and effective means of completing the set of preventive measures for combating unlawful police violence in the framework of detention.

Standard, comprehensive detention file

189. No such forms currently exist. At present, steps taken by the police in connection with deprivation of liberty are carefully entered in the record of the proceedings. These include the time of the beginning and end of the interrogation, the time of notification of the arrest by the police officer and the time when the person is brought before the judge.

Working Group on the Rights of Arrested Persons (administrative arrest and judicial arrest)

190. On the occasion of its first report on the situation in Belgium, the Council of Europe's European Committee for the Prevention of Torture made recommendations concerning the rights granted to arrested persons in cases of administrative and judicial arrest. The recommendations concern, in particular, the right to inform a trusted individual that an arrest has taken place; the right of access to a lawyer; the right to consult a doctor of one's choice; the obligation to inform an arrested person of his or her rights; and the establishment of an individual detention file.

191. At the initiative of the Minister of Justice, a working group was established in January 1999 to consider these recommendations.

192. The Working Group, chaired by a member of the Division of Criminal Legislation and Human Rights of the Ministry of Justice, is comprised of representatives of the Prosecutors' Association, the General Commissariat of the Gendarmerie, the General Commissariat of the Judicial Police, the Ministry of the Interior (general police of the Kingdom), the Ministry of Justice (Prison Administration, Division of Criminal Legislation and Human Rights) and the medical and bar associations.

193. The Working Group met four times: 29 January 1999, 18 November 1999, 19 January 2000 and 23 February 2000. (Following the meetings, the Working Group prepared a report containing the policy guidelines it had developed on the basis of the recommendations.)

Military justice

194. Article 41 of the Act of 14 January 1975 regulating discipline in the armed forces provides that:

> "1. When a member of the armed forces is guilty of one or more serious breaches of discipline, he may be placed under supervision in his unit if such a measure is required for the needs of the inquiry or the maintenance of order. Such measure is decided by the commanding officer or his deputy in command.

"2. A member of the armed forces accused of committing an offence may also be placed under supervision in the same conditions, for the purpose of being handed over to the judicial authorities.

"3. Placement under supervision shall not exceed 24 hours."

195. It should be emphasized that supervision is a disciplinary measure taken by the commanding officer (or his deputy) for the needs of the inquiry or the maintenance of order. The measure can also be taken to preserve, maintain or restore peace, security and discipline in the military.

196. In the case of a flagrant crime or flagrant offence within or outside the unit, the military authority that discovers the crime or offence takes the necessary measures to prevent the escape of the serviceman in question, and immediately places him at the disposal of a criminal investigation officer.

Detention in a prison establishment

197. For detainees, the competent examining bodies (Judges' Council Chamber, Indictment Division) are responsible for monitoring the legality of detention.

Inspection and supervision of prison establishments

198. Section III of the General Regulations for Prison Establishments deals with the inspection and supervision of establishments. Such establishments are subject to inspection by officials of the Ministry of Justice (General Regulations, art. 28).

199. In accordance with articles 611 and 612 of the Code of Criminal Procedure, prison establishments are also visited by examining magistrates, presidents of assize courts, provincial governors and burgomasters.

200. The members of the country's various legislative assemblies (Chamber of Representatives, Senate, regional and community councils) also have access to prison establishments, upon presentation of proof of their position. In order to enter an occupied cell or establish contact with specific detainees, authorization from the Ministry of Justice is required (General Regulations, art. 6).

201. In addition, each establishment has an administrative commission composed of members appointed for six years by the Minister of Justice (General Regulations, arts. 129 to 138). The administrative commission brings to the attention of the Minister any information that it deems relevant.

202. One or more members of the administrative commission take turns, for a month at a time, visiting the establishment at least once a week in the capacity of commissioner of the month.

203. The medical service of prison establishments pays particular attention to any sign of ill-treatment. Moreover, several articles of the General Regulations provide guarantees against ill-treatment.

Provisions on placement in a punishment cell

204. These provisions stipulate that:

- This measure is applied only when other forms of punishment have had no effect; the measure may not exceed nine days and may not be carried out without the person in question being examined by a doctor who, for medical reasons, may oppose the execution of the punishment (art. 82);

- Detainees placed in punishment cells shall have at least a mattress. They shall be given a pillow and blankets for the night (art. 85);

- A doctor shall visit, every day, detainees placed in punishment cells (art. 86);

- Detainees placed in punishment cells are also visited every day by the director or deputy director as well as by the chief warder.

Provisions on security and maintenance of order

205. These provisions stipulate:

Article 107: "Instruments of restraint, such as handcuffs, fetters and straitjackets, shall be used only on the order of the director and only insofar as other means of restraint have failed, when the behaviour of a detainee poses a danger to himself or to other persons or is likely to result in material damage. The director shall call the doctor immediately".

Article 108: "The instruments referred to in article 107 shall not be used as a means of punishment".

Article 108: "All violence and abuse against detainees is prohibited; only restraints that are absolutely essential to the maintenance of order shall be permitted".

Provisions on personnel

206. Article 41, paragraph 2, of the General Regulations for Prison Establishments provides that officers shall treat detainees with justice, humanity and understanding but without familiarity, showing concern for the physical and psychological state of the persons under their supervision.

207. In addition, article 29 of the Code of Criminal Procedure provides that any constituted authority, public official or officer who, in the performance of his duties, becomes aware of a crime or an offence, is obliged to report it immediately to the crown procurator.

208. The press and the Human Rights League have considerable access to prison establishments.

Treatment and legal status of detainees

209. A commission is responsible for drafting a "basic act governing prison administration and the legal status of prisoners". The commission, established by Royal Decree of 25 November 1997, is the outcome of the task, entrusted in October 1996 to Professor Dupont of the Catholic University of Louvain, to prepare a preliminary draft of a prison act.

210. The commission takes as its starting point the findings of the European Committee for the Prevention of Torture (CPT) during its first visit to Belgium according to which "effective complaint and inspection procedures are a basic guarantee against ill-treatment in prison" (CPT report No. 244).

211. The commission also considers that external and independent monitoring and an effective appeal procedure are essential conditions for guaranteeing prisoners' rights.

212. Among the subjects to be dealt with in the basic act, it is important to mention the following (see annex, explanatory memorandum concerning the preliminary draft of the basic act governing prison administration and the legal status of prisoners):

- Fundamental principles governing the treatment of detainees, which will be in keeping with the spirit of the European Prison Rules and the requirements of the European Convention on Human Rights;

- Objectives of punishment involving deprivation of liberty;

- Basic principles relating to the internal material legal status of detainees. This concerns the legal status of the detainee in the context of actions and decisions taken by the authorities that affect his life as an inmate in a prison establishment: living conditions, contacts with the outside world (correspondence, visits, telephone communication, etc.). The basic idea is that the detainee is a citizen and that limitations on his fundamental rights must be legally justified on the basis of their necessity and efficiency;

- Regulations governing detainees' external legal status (duration, interruptions and end of detention). The judiciary will play an important role in restoring the relationship between the adaptation of the punishment and the execution of the punishment. It is also important to provide all the necessary procedural guarantees (prison courts or courts for the enforcement of sentences, which should be understood as multidisciplinary jurisdictions presided over by a judge);

- Introduction of the right of complaint for detainees, which should, as a matter of priority, make it possible to resolve conflicts through conciliation. Such complaints should be settled by an appropriate body only as an additional measure.

213. These reforms will require amendments to the Judicial Code, the Penal Code and the Code of Criminal Procedure.

214. With a view to strengthening the supervision of prison establishments, the preliminary draft of the basic act provides, at the federal level, for the establishment of a new supervisory authority and, at the local level, the transformation of existing bodies (the administrative commissions) into supervisory commissions that place greater emphasis on their supervisory responsibilities.

Supervision

215. At the federal level, a central supervisory council of the prison administration will be established. The Council's primary task will be to carry out independent monitoring of prison establishments, the treatment of convicted persons, and respect for the provisions applicable to such prisoners. The Council will also play a role in matters relating to detainees' right of complaint.

216. At the local level, the administrative commissions will be replaced by supervisory commissions. Such commissions will have a more prominent role as independent monitoring and supervisory bodies than did the administrative commissions. The commissions will also be entitled to mediate in cases of detainees' complaints in order to reach a friendly settlement and thereby avoid an official complaint procedure.

Official complaint procedure

217. Detainees' complaints will be dealt with by a complaints commission composed of three members appointed within the supervisory commission and presided over by an effective judge from the judiciary. There must be general grounds for complaint: these may relate to any decision taken by the director or on his behalf concerning the complainant. Failure or refusal to take a decision within a legal time limit or, if there is no such time limit, within a reasonable time limit, will be deemed to be equivalent to a decision.

218. The complaint procedure shall be initiated in the complaints commission by a written complaint within a maximum time limit of seven days following the date on which the detainee was informed of the decision against which he wishes to lodge a complaint. The complainant shall have the right to a lawyer or a person authorized for that purpose by the complaints commission. A decision on the complaint shall be taken as soon as possible, at the latest, within four weeks following the date on which the complaint is lodged.

219. The merits of the complaint shall be considered on the basis of two criteria: the legality of the decision that has been challenged (conformity or non-conformity of the decision with the statutory requirements in force in the prison and the binding provisions contained in treaties applicable in Belgium) and the reasonableness or fairness of the decision, bearing in mind all the interests involved.

220. The commission shall be entitled to declare the complaint inadmissible in whole or in part and/or that the decision in question is substantiated or unsubstantiated in whole or in part. If the complaint is substantiated, the complaints commission shall overturn the decision and, in such case, shall either request the director to take another decision in the light of the commission's decision, or decide that its decision shall replace the director's decision that has been overturned, or confine itself to a full or partial annulment of the decision that has been challenged.

221. Appeals against decisions of the complaints commission shall be lodged with the appeals commission of the Central Supervisory Council.

Protection of detainees' health

222. There are plans to ensure that health care provided in prisons meets the standards of health care available in society at large. The equivalence of health care in prisons and in society at large is expressly stated in article 19 of Council of Europe recommendation R(98)7, which deals with the ethical and organizational aspects of health care in prisons. The article in question provides that "doctors who work in prison should provide the individual inmate with the same standards of health care as are being delivered to patients in the community. The health needs of the inmate should always be the primary concern of the doctor".

223. Equivalence relates to the quality of the care provided. The mere fact of being a detainee in no way justifies a quality of health care inferior to that available to persons who have not been deprived of their liberty.

224. Equivalence implies, following the example of the organization of health care in society at large, not only the availability of sufficiently qualified staff and the necessary equipment, but also that the policy concerning, and the organization and provision of, such care are comparable to care provided outside the prison, and that the same rules of ethics and professional practice are observed.

225. There are provisions that not only entitle detainees to health care equivalent to health care provided in society at large but also recognize that such care must be adapted to their particular medical needs.

226. Moreover, the principle of equivalence is closely related to the principle of continuity, according to which detainees are entitled, for the duration of their internment, to continue health care begun prior to their imprisonment. This principle must guarantee, particularly in the light of the principle of normalization, that there is no (negative) discontinuity between the quality of care that a detainee had before he entered prison and the quality of care provided in the prison, that is, that the nature and quality of the medical care that he receives in a specific prison must be guaranteed for the term of his imprisonment.

227. Moreover, it should be pointed out that detainees shall enjoy important rights of patients, particularly:

- The right to information about every aspect of his health care;

- The principle that treatment under duress shall be prohibited through the establishment of a regulation according to which a detainee cannot be subjected to an examination or medical treatment to which he has not freely consented. This regulation expresses respect for human dignity. Detainees have the right to refuse all or part of an examination or treatment. Likewise, the exceptions provided for under the law concerning compulsory examinations or treatment in society at large also apply, of course, to prisoners.

228. In view of the vulnerability of detainees, they may not be subjected to any medical or behavioural experiments that may cause physical or mental harm; detainees shall give their consent in writing, after having been duly informed of the possible effects, before being subjected to experiments that can reasonably be expected to have positive effects on their physical or mental health.

Case law

229. With regard to the lawfulness of detention, several cases have been brought before the interim relief judge. The interim relief judge is competent to rule on and terminate any unwarranted or manifestly unlawful detention. In practice, the interim relief judge very often declares himself incompetent:

- Either because the detention is not manifestly unlawful and he has no right, since his rulings are provisional, to give an opinion on the substance of the case;

- Or because the matter concerns detainees' complaints; in this case, in accordance with the Pre-Trial Detention Act of 20 July 1990, the monitoring of the lawfulness of detention falls within the competence of the examining bodies (Judges' Council Chamber, Indictment Division).

230. Moreover, the European Court of Human Rights considered that Belgium had violated article 5, paragraph 1, of the European Convention on Human Rights (legality of detention) by transferring an internee to a social protection establishment only several months after the social protection committee had designated that establishment as a place of detention (Aerts v. Belgium, judgement of 30 July 1998).

231. With regard to the ill-treatment of prisoners, the following should be mentioned:

- The judgement of 25 February 1988 of the Liège Court of Appeal upholding the decision of the Liège court of first instance that had sentenced two prison officers to five months' imprisonment with a suspended sentence of three years for battery. The court also awarded the detainee the provisional amount of 50,000 Belgian francs. At the disciplinary level, in October 1999 the college of heads of service gave an official reprimand to one of the two sentenced officers. The college took no punitive action against the second officer owing to the time that had elapsed between the incident and the college's consideration of the matter, as well as the exemplary behaviour of the officer in question during that time.

- The judgement of 21 November 1996 of the Court of Cassation, which considered that the use of means of restraint, such as handcuffs or fetters, was not a normal security measure for a hospitalized detainee but an exceptional measure that could be used only in the strict conditions specified in the General Prison Regulations.

- An order of 26 June 1998 of the president of the Brussels court of first instance requiring the Administration to take all the necessary measures to allow the appellant to continue his detention in adequate conditions, that is, by ensuring that he was not exposed to places where he would face a high risk of drug abuse. The detainee, who was trying to overcome his drug dependence, complained that he had been placed in a cell with a detainee who was a drug addict. He considered himself for that reason to be a victim of inhuman and degrading treatment.

232. Detainees placed in strict solitary confinement regularly brought actions before the interim relief judge, invoking a violation of the European Convention on Human Rights. In recent years, no action of this type has been declared admissible. In an order of 8 April 1999, the president of the Brussels court of first instance considered that "it appears that the regime to which the appellant has been subjected does not constitute degrading or inhuman treatment as described in article 3 of the European Convention on Human Rights: on the contrary, it is commensurate with the danger that the appellant poses to prison staff, other prisoners and society in general, given his previous behaviour, and it is certainly not disproportionate to the risk that must be prevented". A number of actions for interim relief have also been brought by the Human Rights League concerning detention conditions in certain establishments (Namur, Mons and Tournai). Although various interim relief judges visited the places in question in response to each complaint, the hearings essentially concerned the admissibility of the action brought by the League. On 19 September 1996, the Court of Cassation finally considered that the League did not have an interest in bringing an action under article 17 of the Judicial Code.

Detention of aliens

Special regulations on the detention of aliens

233. This matter is governed by the provisions of the Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens.

234. An alien who is the subject of a custodial measure may institute a recourse procedure against such measure by lodging an appeal with the Judges' Council Chamber of the Correctional Court in his place of residence or the place where he was found (art. 71, para. 1) or the place where he was kept. He may lodge an appeal from month to month.

235. The Judges' Council Chamber rules within five working days of the date on which the appeal was lodged, failing which the alien is released from custody. It hears arguments put forward by the alien or his counsel in his defence and the opinion of the prosecutor (art. 72, para. 1).

236. Proceedings are conducted in accordance with the legal provisions on pre-trial detention, except for those concerning the arrest warrant, the examining judge, the prohibition of communication, the warrant of commitment, provisional release or release on bail or the right to examine the official status file (art. 72, para. 4). The alien's counsel may consult the file at the registry of the competent court during the two working days that precede the hearing and will receive notice to that effect by registered letter (art. 72, paras. 5 and 6).

237. The Judges' Council Chamber ascertains whether or not the measures involving custody and removal from Belgian territory are in keeping with the law, without giving a ruling as to their advisability (Act of 15 December 1980, art. 72, para. 2).

Detention centres for foreign nationals

238. The six centres for foreign nationals are closed holding centres in which - within an adapted framework - certain categories of aliens, namely aliens who may not be admitted into Belgian territory (persons lacking the necessary entry documents), asylum-seekers, asylum-seekers whose cases have been dismissed, and illegal aliens, may reside while waiting for authorization to enter the territory or for their repatriation. Only asylum-seekers at the border and aliens lacking the necessary entry documents are regularly placed in the closed centres.

239. The draft royal decree establishing the regulations and rules of operation applicable to the places situated in Belgian territory and administered by the Aliens' Office, where aliens are detained, placed at the Government's disposal, or held, pursuant to the provisions of article 74/8, paragraph 1, of the Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens, will repeal the Royal Decree of 4 May 1999 (Moniteur belge, 6 June 1999), which deals with the same subject.[24]

240. The draft royal decree, which sets out the fundamental rights and duties of the occupants of the centres, relaxes the regulations governing the centres and provides more guarantees for the occupants. Specifically, the draft royal decree deals with the following subjects:

1. Regulations concerning occupants:

   - Rules relating to arrival in the centre;

   - Rules relating to residence in the centre (exchange of correspondence, use of the telephone, visits with occupants, inspections of the centre, the moral and religious rules governing the centre, medical and social assistance, legal assistance, activities of non-governmental and other organizations in the centre, and the material well-being and hygiene of occupants.

2. The rules governing life in the centre, and the disciplinary regime:

   - Duties of occupants in the centre;

- Offences: the disciplinary regime stipulates very clearly what behaviour may be punished, what forms of punishment may be applied and what criteria determine the severity or duration of punishment. The obligation to hear the persons is an important additional guarantee for the resident in question. Punishment involving placement in an isolated space may be imposed only in cases of physical aggression or vandalism, or when the resident commits the same offence three times. The central administration monitors cases in which this form of punishment is applied. The royal decree also provides for restraining measures to control a resident. Such measures are temporary, and their use must always be reasonable and commensurate with the intended purpose;

- Transfer to another establishment.

3. Security and maintenance of order (escape, risk of suicide, fire).

4. Administrative requirements (release and removal, birth, death).

5. Individual complaints by occupants, monitoring of the centres, annual report.

Length of detention

241. The Act of 29 April 1999 reducing the administrative detention of aliens residing illegally in Belgian territory (Moniteur belge, 26 June 1999) reduced the maximum length of such detention from eight to five months. Detention for eight months has been retained only in cases where it is necessary to safeguard public order, or in the interest of national security. Such detention may be repeated if the resident refuses to cooperate in the repatriation arranged for him (see, inter alia, Court of Cassation judgement of 28 September 1999).

242. An alien who is the subject of a custodial measure taken by administrative decision may file an appeal against that measure with the judiciary, in particular the Judges' Council Chamber (Act of 15 December 1980, arts. 71 to 74).

Special case: administrative detention of a juvenile alien

243. The Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens does not contain any provision that specifically prohibits the administrative detention of a juvenile alien.

244. However, in practice, juveniles under the age of 18, whether alone or accompanied, are detained in a closed centre, only in two circumstances that rarely arise:[25]

- When a child, whether accompanied or not, seeks asylum at the border but does not possess the documents required for entry into the territory, pending the decision on his or her application (art. 74/5 of the Act of 15 December 1980, incorporated by the Act of 18 July 1991 and amended by the Act of 15 July 1996). Detention in a closed centre is of brief duration as the asylum procedure in such cases is accelerated;

– When the asylum application is submitted inside the Kingdom, juveniles accompanying their parents may exceptionally be kept in a centre together with them when they do not possess the documents required for entry and if it is not their first asylum application (art. 74/6, of the Act of 15 December 1980, incorporated by the Act of 6 May 1993 and amended by the Act of 15 July 1996).

245. The asylum-seekers centre within the Kingdom (Centre 127 bis) has a wing reserved for families with children.[26]

246. The detention may not exceed two months. Nevertheless, the law provides the possibility of extending the detention by two-month periods when the necessary steps for removing the alien have been taken, when they are pursued with all due diligence and when there is still a possibility of repatriation within a reasonable period.

247. Decisions to detain and extend detention in a centre may be appealed to the Judges' Council Chamber of the Correctional Court in the aliens' place of residence, the place in which they were found or the place where they are kept, depending on the circumstances.

248. An appeal to the Judges' Council Chamber may be lodged from month to month (in certain cases, it is lodged by the Minister of the Interior himself). The Judges' Council Chamber gives a ruling, within five working days from the date on which the appeal was lodged, on the conformity of the custodial measure with the law. If the Judges' Council Chamber fails to rule within the prescribed time, the alien is released.

Monitoring

249. The Commission that deals with individual complaints from occupants, which was established by the Minister of the Interior pursuant to article 132 of the draft royal decree repealing the Royal Decree of 4 May 1999, is an independent body presided over by a judge and composed of a representative from the Centre for Equal Opportunity and Action to Combat Racism and the Secretary-General of the Ministry of the Interior or his representative, with the exception of any member of the staff of the Aliens' Office. The Centre, which is responsible for receiving individual complaints, examines the complaints and refers those which it considers serious to the Commission.

250. There is ample opportunity to visit the centres. The visits may be made by parliamentarians, a number of representatives of non-governmental organizations and representatives of the Centre for Equal Opportunity and Action to Combat Racism. In future, the following persons will be authorized to visit the centres: parliamentarians, judges, the governor, the burgomaster, representatives of the Centre for Equal Opportunity and Action to Combat Racism, the Office of the United Nations High Commissioner for Refugees, the European Commission on Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Permanent Commission for Appeals by Refugees, the Commissioner General for Refugees and Stateless Persons, the General Representative for the Rights of the Child, the United Nations Committee against Torture and a limited number of non-governmental organizations. This is governed by the aforementioned draft royal decree.

251. There are also other forms of monitoring. The monitoring service of the central administration is responsible for administering the closed centres, and there is hierarchical monitoring of the staff of the closed centres.

252. In the context of the problem of the forced expulsion of aliens, a ministerial decree issued by the Minister of Transport, governing transport conditions on board civilian aircraft for passengers who pose special security risks was adopted on 11 April 2000 (Moniteur belge, 14 April 2000). The decree sets out the procedure for the expulsion of an alien with an escort and, at the same time, provides for the possible use of restraints on board.

Detention during an extradition procedure

253. (See commentary to article 6 of the Convention.)

Internment of mentally ill offenders

Placement of an accused person under observation

254. The purpose of the procedure for placing an accused person under observation is to diagnose his mental state and to ensure the most favourable material conditions for such an examination.

255. Pursuant to article 1, paragraph 4, of the Social Protection Act of 1 July 1964, the examining judge who issued the arrest warrant may, exceptionally, through a well-founded order, recommend that the warrant be executed in the psychiatric annex of a prison when there is reason to believe that the accused is either suffering from a mental disorder or in a serious state of mental instability or deficiency, which renders him incapable of controlling his actions.

256. The order will be upheld only if it is confirmed within five days in accordance with the procedure set out in article 21 of the Act of 20 July 1990 on Pre-Trial Detention. The confirmation constitutes a decision to continue detention, beginning on the date of the aforementioned order.

257. The competent examining bodies also have the power to place under observation an accused person who is already bound by an arrest warrant. In such case, the decision to place the person under observation constitutes, from its date of issue, a new decision to continue detention (Act of 1 July 1964, art. 1, para. 2).

258. Placement under observation may also be ordered by a trial court pending a final decision, either ex officio, at the request of the prosecution or at the request of the defence. The procedure is adversarial and is described in article 2 of the Act of 1 July 1964. The prosecution or the accused may appeal against decisions ordering or refusing placement under observation (art. 3).

259. The period of placement under observation may not exceed one month, unless the competent body that decided on or confirmed placement under observation orders an extension for a further month. The extension may be renewed but placement under observation may not exceed six months.

260. When placement under observation is terminated and confinement is not immediately ordered, the accused person remains bound by the arrest warrant and the general law on pre-trial detention is applicable to him (art. 6, para. 7).

Internment of mentally ill offenders in social protection establishments

261. This matter is governed by the Social Protection Act of 1 July 1964 concerning abnormal persons or habitual offenders.

262. Pursuant to article 14 of the Act, the social protection committees are competent to designate, with complete independence, the place of confinement. These administrative bodies established for each psychiatric annex are fully autonomous and enjoy jurisdictional powers. Thus, the committees can decide on provisional or permanent release.

263. The decision to release the person in question may be opposed by the crown procurator. In such case, the file is submitted for a decision to a higher social protection committee, which gives a ruling on the case. The internee's lawyer may, in accordance with article 19 bis of the Social Protection Act, appeal a decision in which the committees decide that there are no grounds for release.

264. The committees place internees either in a specific establishment under the Ministry of Justice, or in establishments administered by the regions, or in private psychiatric establishments that agree to accept such patients.

265. It should be noted that an internment committee was established on 23 September 1996. The task of the committee was to make a critical study of the aforementioned Social Protection Act and practices in that area, and to develop future prospects. The final report of the committee was issued in April 1999 (see annex).

266. The principal recommendations contained in the Internment Committee's report are the following:

- The internment of a mentally disturbed offender must remain subject to proof of the acts with which he is charged, the persistence of his mental disturbance and also the danger that he poses to society. This last concept should be explicitly stated in the act. It would also be advisable to consider not only the offender's ability to control his actions but also his ability to understand the seriousness of his acts;

- The new act should provide expressly that internment can be ordered only if the offender poses a danger to society (danger defined as "risk of relapse");

- The act should, in addition to placement under observation, provide for other forms of multidisciplinary and unidisciplinary assessments. The procedure for using this last measure should be simplified. The examining judge should be able to order such assessments as long as he is seized of the case;

- A new structure should be put in place for Belgium's eight psychiatric annexes, which to this day have never fully carried out their mandate of placing arrested persons under observation. The annexes should be responsible only for problem detainees. In this regard, the committee welcomes the recent establishment of a prison research and clinical observation centre. The task of the centre, which has the status of a State scientific institution, is to carry out multidisciplinary observation in optimum conditions; the centre will begin operating in 2000;

- The composition of the social protection committees should be reviewed. They should be presided over by a serving judge, and the lawyer, who is a member of these committees, should be replaced by a specialist in social reintegration. His presence in the committee is no longer justified since the Act of 1964 provided that internees must be assisted by a lawyer;

- The definitive release of an internee is possible only after receipt of a psychiatric report re-evaluating his mental state and the danger he poses;

- For the treatment and follow-up of internees, adequate medical structures should be created. In this regard, the committee proposes the establishment of a "justice-public health" partnership (cf. the situation in France), and an integrated and diversified network of both outpatient and residential treatment. In addition, the care of internees should be the subject of a written, tripartite agreement on guidance and therapy, specifying the rights and duties of the internee, the therapist or therapy service and the social defence committees;

- The extension of a convict's internment beyond the duration of his sentence should be the subject of a new judicial decision and should no longer depend on the decision of the Minister of Justice;

- The status of recidivists, habitual offenders and certain sexual offenders placed at the Government's disposal should no longer be governed by the Social Protection Act. Under the Social Protection Act, such persons are not offenders with a mental disturbance that justifies their internment.

Patients' rights

Current situation in Belgium

267. No regular codification of patients' rights currently exists in Belgium. The legislation contains a number of specific laws. Mention may be made of the following:

Civil Code (responsibility, art. 1382);

Penal Code (culpable abstention);

Medical Practice Act (obligations of medical practitioners);

Hospitals Act (medical file and nursing history);

Protection of Privacy Act (right of access);

Protection of Mentally Ill Persons Act (freedom of opinion).

268. Existing provisions often concern the rights of patients in specific situations or rights which do not relate to the patient's person. A code of ethics has developed in parallel and contains a number of provisions (which are not, however, binding) concerning the doctor-patient relationship. A number of principles have been established on the basis of case law. Lastly, a series of private initiatives have also emerged (charters and mediation services in some hospitals, for example).

Inception of the bill

269. Developments abroad in particular have increasingly incited Belgium to group patients' rights and to fill and clarify gaps. The aim was to put forward a set of patients' rights to ensure that the patient is in a position to defend himself and no longer dependent on the medical care provider or establishment. To put it another way, the authorities wish to establish an overall framework enabling a better balance to be achieved in the relation between the care provider, the health-care establishment and the patient.

270. It was in this context that the Council of Ministers, at its session of 30 June 1997, gave the Minister of Public Health the responsibility of preparing a draft bill. The draft was approved by the Council of Ministers on 8 June 2001.

271. Generally speaking, the bill contains a series of chapters relating to the classic rights of patients, namely:

The right to quality service and respect for privacy. Every patient has the right to quality service in keeping with his needs, which respects his dignity and his right to self-determination, without discrimination. In addition the patient has the right to respect for his privacy, particularly as regards information on the state of his health;

Rights relating to the patient's record. Every patient may consult his medical record, which is carefully preserved, obtain a copy of it and add to it, as necessary. The health-care provider[27] will, however, have the right to maintain the confidential nature of his personal notes and information concerning third parties. When consulting his record, the patient may be assisted by a confidential adviser. If he chooses the doctor as his witness, he will have the right to indirect access to the care provider's personal notes;

The right to information on the patient's state of health. The patient is given the right to receive all information enabling him to understand the state of his health. The doctor may nevertheless refuse to transmit to his patient information which could aggravate his illness. In this case it is his duty to consult a colleague in order to confirm the appropriateness of his decision. The patient may also refuse to be informed about the state of his health. This refusal will be added to his medical record;

The right of consent. No patient may receive treatment or undergo an operation without his permission. In order to be able to give or refuse his consent, the patient has the right to prior clearly defined information. If he refuses to give his consent, he must nevertheless be informed of the consequences of his refusal;

The right to free choice of a health-care provider. The patient shall have the right to choose his health-care provider. The bill specifies that if health-care services are provided in a health-care institution, the latter must furnish certain information on its operation. A royal decree will determine what types of information may be communicated. These may relate to the identity and the qualification of the health-care provider who will be responsible for the patient and the nature of the legal relations between the latter and the health-care institution;

The right to mediation in the event of complaints. Before undertaking frequently long and costly legal proceedings against a doctor, should it be necessary, the patient may call on a mediation service which will be responsible for arranging an amicable solution. A royal decree must first be drawn up, however, to define more clearly the legal framework of this mediation service. It should be specified that a system of representation will be provided for persons who do not have protected status under ordinary law.

Detention in institutions other than prisons, for reasons other than the commission of offences

272. A major reform has taken place in our country in this respect. The Protection of Mentally Ill Persons Act of 26 June 1990 (which came into force on 27 July 1991) repealed chapters 1 to 6 of the Act of 18 June 1850 on the mentally ill, in organizing administrative procedures for placement and custody at home. The measures of deprivation of liberty set out in the new Act (namely, placement in observation and keeping the patient in a hospital or family environment) may henceforth be taken only under a judicial decision, following a procedure which ensures all guarantees for the mentally ill person, particularly as regards the rights of defence (adversary proceedings, mandatory presence of a lawyer, detailed medical report, possibility for the mentally ill person to be assisted by a psychiatrist or a confidential adviser, periodic review of the measure).

273. The Act sets out the principle that, as regards mental illness, liberty must be the rule and the restriction of liberty, as a measure of protection, the exception. This principle is embodied in articles 1 and 2 which define the scope of the Act.[28]

274. Treatment, whether in a hospital or in a family environment, is conducted in two phases, these being the observation phase and the maintenance of hospitalization.

275. The Act embodies the principle whereby the deprivation of liberty of a mentally ill person must be preceded by judicial proceedings. Decisions to release the patient, however, may be taken by the doctor in charge of the establishment in which the person has been placed.

276. Both the decision to place a person under observation and the decision to maintain hospitalization are taken by a justice of the peace. Any person concerned may apply in writing to the justice of the peace in the mentally ill person's place of residence, or, if not known, his domicile, or, if not known, to the justice of the peace in the place where he is located. This application must be accompanied by a detailed medical report describing the state of health of the person whose placement under observation is requested and the symptoms of his illness.

277. After an initial visit by the justice of the peace to the mentally ill person, who must in any case be assisted by a lawyer, chosen by himself or officially appointed, the case is heard in closed session, unless the mentally ill person or his lawyer requests otherwise.

278. The mentally ill person may appoint a psychiatrist to assist him, as well as a confidential adviser.

279. The judgement must be handed down by the justice of the peace in a public hearing within 10 days of the application being filed.

280. In an emergency, the crown procurator of the place where the mentally ill person is located may decide that he should be placed under observation, following which, in accordance with the usual procedure, he sends an application to the justice of the peace who must also hand down a decision within the above-mentioned deadline. The observation period may not exceed 40 days and may, if necessary, end sooner. If the person needs to be kept in the establishment beyond this period, the director of the establishment transmits a detailed report from the doctor in charge to the justice of the peace certifying this. In such cases, the justice of the peace must take a further decision to maintain the placement for a period of two years, which may be extended each time for a period not exceeding two years.

281. During that period, the doctor in charge may decide, with the agreement of the mentally ill person, on outpatient treatment for a maximum period of one year.

282. The mentally ill person may also be placed in a family on the decision of the justice of the peace and in accordance with a procedure identical to that described above. In this case too there are two separate periods: observation and placement which, similarly, cannot exceed two years.

283. Unless otherwise specified, the decisions of the justice of the peace handed down in application of the law may not be opposed. An appeal is possible, however. In this case, the matter must be assigned to a court consisting of three judges.

284. The Act also guarantees respect for the fundamental rights of all mentally ill persons, including freedom of opinion, religious or philosophical belief and privacy of correspondence (art. 32).

Treatment of children deprived of their liberty, including any form of detention, imprisonment and placement in a custodial setting

285. Apart from the possibility of relinquishment of jurisdiction on the basis of article 38 of the Protection of Young Persons Act of 8 April 1965, a minor cannot be the subject of an arrest warrant.

286. When an examining judge is required to issue an arrest warrant for a defendant who was a minor when the acts were committed and who has been the subject of a measure by ordering the juvenile court to relinquish jurisdiction, ordinary law provisions governing pre-trial detention are applied. On such occasions, the examining judge is not required to rule on the legality or the reliability of that decision.

287. Under article 53 of the Act of 8 April 1965, juvenile courts may decree a custodial measure in a detention centre for a period which may not exceed 15 days. This article was repealed by the Act of 4 May 1999 (Moniteur belge of 2 June 1999) and will enter into force at latest on 1 January 2002.

288. The provisions of the Pre-trial Detention Act do not apply to this decision.

289. Article 5, paragraph 1, of the European Convention on Human Rights does not prevent the issue of a provisional custody measure in respect of minors, but imprisonment should lead within a short period to the application of a supervised education regime in a specialized environment with resources adequately adapted to its purpose.[29]

290. It should be mentioned that procedural guarantees in juvenile courts have also been improved. The Act includes a number of measures which should improve the legal status of minors, mainly during the preparatory phase of the proceedings.

291. In the first place, the Act explicitly guarantees the right to be heard. Article 52 ter (para. 1) provides that a minor aged 12 must be heard by the juvenile judge before a provisional measure can be taken, unless this is impossible for some special reason. The minor must also be heard in disputes between persons exercising parental authority over him (new art. 56 bis).

292. In accordance with article 52 ter (para. 2), minors have the right to a lawyer each time they appear before the juvenile court. Minors also have the right to legal assistance during the preparatory phase of the proceedings. If the minor has no lawyer, a lawyer is officially appointed (art. 54 bis). Justification must be provided for the order imposing a provisional measure (new art. 52 ter, para. 3). In addition, the duration of the preparatory proceedings is theoretically restricted to a maximum of six months (new art. 52 bis).

293. The provisional measure of confinement in a closed educational institution is subject to additional procedural guarantees (new art. 52 quater). Lastly, the right to consult the file has been extended; the minor and his lawyer may now consult the file even in the case of a provisional custody measure (art. 55, para. 2).

294. In this regard, the French and the Flemish Communities provide the following explanations.

French Community

295. As to children placed in a supervised educational institution under a protection measure imposed by the juvenile court pursuant to the Protection of Young Persons Act of 8 April 1965, it should be pointed out that the Decree of 4 March 1991 on assistance to young persons, which is responsible for the enforcement of such measures, provides that placement in a closed institution may be entrusted only to an establishment that is a member of the group of public institutions for the protection of young persons (IPPJs). Such accommodation is reserved for a young person who has been prosecuted and subjected to a judicial decision explicitly prescribing such placement.

296. In addition, young persons placed in a public institution for the protection of young persons (IPPJ), in other words in an institution reserved for young offenders, enjoy specific rights, whether in an open or closed system.

297. As regards the right of access to the group of public institutions, a public institution may not refuse a young offender unless it is full. This first guarantee is intended to prevent a judge from discovering that no institution will accept a young person and then deciding to place him in a penal establishment, in accordance with article 53 of the Act of 8 April 1965.

298. When admitted to a public institution, whether under an open or a closed system, the young person receives a copy of the general regulations of the group of public institutions. These regulations are designed to emphasize the rights of young people and not the constraints to which they may be subjected. They specify how the young person is to be received, the guarantees of his rights of defence, the information to which he has a right, the principle of respect for his philosophical, political and religious beliefs, the form of his communications with the outside world, his periods of leave and absence, how his behaviour is to be assessed, including positive or negative sanctions, which may not under any circumstances be humiliating or harassing, the conditions of possible solitary confinement and the guarantees of his rights in general. He also has the right to be acquainted with the specific regulations of the institution in which he is placed.

299. If the young person is placed in a public institution for more than 45 days, he must be the subject of a medical-psychological report. This report will be transmitted, within 75 days of the date of admission, to the placement authority and the competent administration. The initial report will be supplemented by quarterly reports and studies.

300. Placement in a closed institution is part and parcel of deprivation of liberty. Limitations on such placement in a closed institution are provided for:

(a) Closed detention may take place only in a public institution;

(b) Placement in a closed institution is reserved strictly for young people who have committed an act deemed to be delictual;

(c) A young person may be placed in a closed institution only through a court ruling;

(d) The institution in which the young person is placed must perform pedagogical and educational functions and possess the necessary instruments.

301. Young people in closed institutions also enjoy other rights, such as the right to communication and to pocket money, etc.

302. The Community Youth Assistance Council must pronounce on the number of available places in closed institutions to receive young offenders. In the French Community it is set at 50. In practice, 45 places are reserved in a closed environment for boys and 5 for girls.

303. The Decree also provides for very strict guarantees for solitary confinement of young people entrusted to the IPPJ group. The modalities of solitary confinement and their monitoring are regulated by the Government Order of 21 March 1997, which also defines the standards applicable to the premises.

304. As part of the competences of the French Community, namely, aid and assistance to young persons in danger or difficulty, including those who have committed a delictual act and are subject to a protection measure ruled by the juvenile court, the task of public institutions for the protection of young persons, including closed institutions, is first and foremost pedagogical and educational.

305. In this context, confinement is not an objective in itself, but a means of providing for young “delinquents” who have committed serious and often violent acts for whom placement in a closed institution is not only a means of ensuring social peace but also a possibility of protecting them from themselves. A period in a public institution should therefore be understood as an educational measure intended to interrupt the progress of the delinquency. The objective is the social rehabilitation of the young person, with the involvement of his family.

306. In order to achieve this objective, the group of public institutions provides several types of treatment:

- Short-term custody of 15 days , in an open institution, essentially intended as a period of arrest so as to avoid imprisonment on the basis of article 53 of the Protection of Young Persons Act of 8 April 1965;

- An orientation period (of 40 days in an open institution or a maximum of three months in a closed institution) intended from the start to establish a project for reintegration into society and the family in cooperation, where appropriate, with other services, in particular in the private sector;

- Educational care, in an open or closed institution, as the magistrate may decide, for a period which may be of longer duration, although on average not exceeding three or four months.

307. Intervention by the institution takes the form in this case of:

- A programme of educational and vocational apprenticeship;

- A social rehabilitation project;

- The concern to individualize care in terms of the young person's problems;

- Possible therapy.

308. The successful outcome of the interventions implies that the staff of the institutions have received proper training, including the management of stress and violence. This training is provided by the General Youth Assistance Department, in collaboration with Ministry personnel. Methodological seminars conducted in the IPPJs with the collaboration of outside experts supplement this training.

309. The success of the interventions also implies that the educational projects drawn up by each institution for each intervention are complied with. It may be noted that this is not always the case, either because there is a lack of places in the sections conducting the appropriate project, or because judges, confronted with the lack of specialized infrastructures, entrust to public institutions young persons with problems that the institutions are ill-equipped to deal with because they are beyond the scope of an educational establishment: drug addicts, young people with psychiatric problems or who manifest dangerous behaviour for which no educational measures can be envisaged for the time being and for which relinquishment of jurisdiction proceedings are in progress.

310. The difficulties involved in these "irregular" placements have led to a reflection, which is still relevant, on the need to entrust young persons to public institutions advisedly, for appropriate care and for a period not longer than is strictly necessary. Each institution is working on setting up new educational projects (supported by the administration, the management bodies of the institutions and their staff) with a view to providing diversified care, particularly outside the institution.

311. A working group has addressed the question of minors with specific problems, such as drug addicts or young people with psychiatric problems, and has concluded that there is a need to create synergies between the different levels of authority in order to be able to take these young people into care. Such synergies have yet to be established.

312. Because of the repeal of article 53 of the Protection of Young Persons Act of 8 April 1965, which will take effect as from 1 January 2001, consideration should also be given to providing emergency care, in a closed environment and for a relatively short time, for some of the minors currently in detention centres on the basis of this article.

313. More generally, the French-speaking youth assistance sector, with the support of its advisory body, the Community Council, has for some years been engaged in reflection on the most appropriate form of providing care for its young people.

314. Alternative solutions to placement, and more particularly initiatives to avoid custodial measures for young offenders, have been supported by the Government of the French Community since the protection of young persons became a Community responsibility in the 1980s.

315. These include the development of the educational and philanthropic services which organize measures of rehabilitation for young "delinquents" and ensure their follow-up by the social services. A project about to materialize aims at giving the services that so wish the mission of mediating between the young persons and victims, which, if successful, would make it possible to avoid bringing the matter before the courts.

316. The French Community is now in the process of conducting a vast reform of the private sector with a view to diversifying the treatment it provides, including the care of young persons who have committed an act classified as delictual. Encouragement is given to the follow-up of young people in their own environment, and to improving the synergy between private services and public institutions; this should make it possible to relieve congestion in the latter and to ensure better social rehabilitation of the young people in question.

317. It would be regrettable not to mention the firm stand taken by the Minister for Youth Assistance of the French Community against the confinement of minors in Centre 127 bis or the INAD Centre. Mention should also be made of the contacts between the centres and the Aliens Office for medical follow-up of children placed in them.

Flemish Community

(Some of the comments which follow might also be included under article 10 of the Convention.)

318. The Community establishments, as public institutions, have a double subsidiary mission:

- They take in young people whose past has shown that it was impossible to keep them in a normal educational situation, or even in a closed private establishment. This means that the authorities guarantee the right to aid, assistance and education both for young people in a problematical educational situation and those who have committed offences. Method and quality are the two essential conditions which Community establishments must meet;

– Community establishments' role is merely to execute, which means that the placement of young people is always a binding consequence of a decision and a committal order handed down by a juvenile court. In this context there can be no question of unlawful confinement, but rather of inappropriate recourse to such establishments in the two meanings of the term: either because of the lack of availability of suitable educational placement, as juvenile judges would ideally wish for in their committal decision, or because the problem cannot be effectively remedied in a Community establishment.

Instruments of social aid

319. Community establishments have opted for a series of instruments exclusively directed at the well-being, independence and emancipation of the young person:

– Basing themselves on a mission and a vision targeting social rehabilitation as a final aim;

– Reporting (annually) on the implementation of the Convention on the Rights of the Child by the Belgian State;

– Reporting on cultural minorities (annual report on progress achieved in the framework of the Interdepartmental Commission on Ethnic and Cultural Minorities);

– Organizing training and apprenticeships for counsellors and trainers e.g.: controlling aggression, resistance to stress; apprenticeship through practice; ability to direct and manage conflicts; industrial first aid in the workplace; fire-prevention and safety; creative techniques;

– Giving attention to safety, educational and health standards when solitary confinement is necessary:

  • the sole aim must be to protect the young person himself and/or the educators and/or other young people;

  • immobilization is strictly prescribed so as to avoid injury;

  • a modus operandi and a register of reports on visits (interviews with …, several daily visits for the purpose of …) are prepared for the person so confined;

  • the central administration must be informed in writing and in detail of any extension of solitary confinement and must accept or refuse the extension;

  • solitary confinement is subsidiary to alternative less restrictive measures and is limited to as short a period as possible.

320. As regards the infrastructure, a pilot project is in progress in the De Zande establishment, to experiment with a specially designed solitary confinement room. The room will make possible permanent suspension - respect for privacy being ensured by advance warnings - and its wall-coverings will exclude any possibility of self-mutilation.

321. The assistance provided by the Flemish Community's special youth assistance establishments nevertheless comes up against a number of acute problems that jeopardize the well-being of young people and mainly derive from:

- The fact that Community establishments have no hold over a series of external parameters, such as their obligation to provide care, which rules out any educational selectiveness. This leads to the inappropriate placement of persons in an illegal situation, drug addicts, young people suffering from behavioural problems, psychiatric cases, unaccompanied minors, or incapacitated adults;

- The lack of infrastructures (maximum capacities are established by law in terms of security and functioning) and of specialized personnel. As a result, supply does not always keep abreast of demand (decisions by the juvenile judge) and sometimes no supply is even possible. This lack of places leads to waiting lists and the need to accommodate young people in detention centres.

The future

Mission

322. At its meeting on 18 February 2000, devoted to the organization of capacity for the reception, guidance, observation and residential support, in a closed or semi-open environment, of young offenders who have committed serious offences, the Flemish Government gave the Flemish Minister with competence in assistance to persons the authority to consult with the Federal Minister of Justice with a view to harmonizing political initiatives for drafting new youth legislation and for the organization by the services of the Ministry of the Flemish Community of the reception of young offenders in a closed environment. Wide-ranging experiments are being conducted in the areas of assistance and services for young offenders; their aim is to develop, with the necessary scientific assistance, alternatives to confinement, in particular: apprenticeship and change of environment, work of general interest, mediation with a view to reparation.

Modern establishments

323. The buildings and structures of the Community establishments go back to the end of the nineteenth century and have not been adapted to a modern view of a residential establishment of a positive educational nature. The Flemish Government therefore approved a plan for infrastructure renovation to be extended over several years which it began implementing in 1997. The plan provides for the total renovation of the four sites - two semi-open and two closed establishments - located at Mol, Ruiselede and Beernem - and is based on a different and more extensive concept of the functional approach to the buildings, which will now offer the young residents a whole range of material, educational, health-related, moral, social and psychological aspects, as recommended by the scientific theories put forward in this regard.

Specialization and quality

324. A close examination of the main processes should make it possible to improve quality, the aim being total quality on the basis of the European Formulation for Quality Management (EFQM) model. On 18 February 2000, the Flemish Government decided to increase the capacity of the De Hutten closed site so that young people would no longer have to be confined to a detention centre as from 1 January 2001. This will make it possible for the renewal of the substance and quality of the procedure to materialize.

The Education Commission

325. In accordance with the mission entrusted to it, the Education Commission of the special youth assistance Community establishments will continue to explore the sphere of social action in Flanders and to develop scientific research and contribute aid and advice to the establishments in defining their future missions and in their day-to-day management.

Article 12

326. Wherever there is reasonable ground to believe that an act of torture has been committed, it will be legitimate to initiate not only an investigation but also judicial proceedings, if the victim brings an action as set forth in article 13. It should be mentioned that under article 29 of the Code of Criminal Procedure "any authority or any public official or officer who in the course of his duties obtains knowledge of a crime or an offence shall be required to notify the crown procurator immediately (…) and to transmit to this magistrate all relevant information, reports and documents".

327. The State authorities may also undertake an administrative or disciplinary investigation to be entrusted to the officers in charge or the inspection unit of the body in question. They may then institute legal proceedings under article 274 of the Code of Criminal Procedure, which provides that "The Procurator-General, whether automatically or on the orders of the Minister of Justice, shall entrust the crown procurator with responsibility for the prosecution of any offences that come to his attention."

328. As a rule, the government procurator may automatically engage proceedings for the punishment of offences; he is not required to wait for a complaint - from the victim in particular - to initiate public action. He furthermore does not need an authorization to proceed (Constitution, art. 31).

329. The decision to prosecute may be taken only after a review of the lawfulness and advisability of proceedings. The review of lawfulness will comprise an appreciation concerning the apparent grounds for public action (constituent elements of the offence, evidence, guilt of the suspect, identification of the suspect, absence of ground for justification) and the admissibility of public action (competence of the Office of the Public Prosecutor, obstacles to proceedings or causes of their extinction). Although the law has long been silent on the subject, legal doctrine

has recognized that the Public Prosecutor has the power to assess the advisability of proceedings. This practice was formally recognized in the Act of 12 March 1998 since new article 28 quarter (para. 1) of the Code of Criminal Procedure provides that the crown procurator decides on the advisability of proceedings.

330. The Public Prosecutor initiates the public action. Once this is done, it comes within the realm of the judiciary.

331. The preliminary phase of criminal proceedings is devoted to identifying the offences and their perpetrators, assembling evidence and preparing the criminal dossier. This is the task of the judicial authorities in which they are assisted by the police.

332. The Code of Criminal Procedure has recently been revised, in particular, the provisions concerning the preparatory phase of the criminal trial.

333. The main features of the Act of 12 March 1998 designed to improve the criminal procedure as regards the earlier and later stages of investigation (Moniteur belge of 2 April 1998) (l'information and l'instruction) are presented briefly below.

Introduction of rules governing police investigations

334. Practice has shown that the examining judge is called in only in quite specific situations in which it is legally mandatory or necessary to open an investigation in order to obtain coercive measures. The earlier stage of the investigation has therefore now become the usual procedure in pre-trial criminal proceedings, whereas the Code of Criminal Procedure practically did not cover it. It was necessary, both to ensure legal certainty and a successful preparatory phase of proceedings, to define the earlier stage of the investigation and to recall certain principles concerning it. This is why the Act of 12 March 1998 devotes some articles to rules governing the earlier stage of the investigation.

335. The law defines the earlier stage as comprising the group of steps aimed at identifying the offences, their perpetrators and the evidence and assembling the elements to be used in the public action. The law admits that the crown procurator can carry out all the earlier parts of the investigation himself, with the exception, on the one hand, of those which restrict or impair individual rights and freedoms and, on the other, those for which the law provides.

Definition of the role of the examining judge

336. The Act seeks to reinforce the independence of the examining judge by making him no longer subject to supervision by the Procurator-General. It is important to mention that the aforementioned Act maintains the role of the examining judge who assembles the evidence for the prosecution and the defence for all the accused, but provides that the government procurator may ask the examining judge to perform certain investigative steps without opening a full investigation.

Confidentiality of the earlier and later stages of the investigation, and legal exceptions

337. The main reasons for confidentiality of the two stages of the investigation are (a) the need for efficiency in the search for the truth and (b) to safeguard the presumption of innocence. This principle is clearly set forth in the Act of 12 March 1998 and exceptions may be made only by law.

338. The Act provides for three exceptions to the confidentiality of the two stages of the investigation:

- An exception should be made for individuals being questioned, who should, if they wish, be able to receive, free of charge, a copy of their statements and thus verify that these correspond with the record;

- The Act regularizes a practice that has been established for some 40 years, whereby the prosecutor's office provides the media with certain information if that is in the public interest. A lawyer may also communicate information to the media if that is in a client's interest;

- Lastly, the Act of 12 March 1998 provides that defendants who are not in detention and claimants for criminal indemnity may consult the criminal file. A request should be addressed to the examining judge not less than one month after the charges are laid or the criminal indemnity claim is brought. However, the same request may not be repeated within three months.

The victim's place in the investigation

339. The Code of Criminal Procedure now provides for:

- The right of the victim's relatives to see the victim's body if a post-mortem is ordered. The judge ordering the post-mortem evaluates the status of the relatives submitting the request and decides when they will see the body;

- The right of victims and their relatives to courteous and considerate treatment, through the provision of essential information and the assistance of specialist services, including judicial assistants;

- The "injured-party statement", which confers an intermediate status between victim as such and victim as complainant, by virtue of which victims have the right to add any documents they deem necessary to the file and to be notified or informed of certain stages in the procedure such as discontinuation of the proceedings.

Remedies during the investigation

340. With no remedies available in the criminal courts and no way of making up for that lack using criminal procedure, action needed to be taken to correct a less than satisfactory state of affairs. The Act therefore establishes:

- The right of any person whose property is damaged through as a result of the earlier or later stages of an investigation to request the crown procurator or the examining judge to have it discontinued, and to appeal to the Indictment Division if the application is turned down or no reply is received;

- The right to request access to the file: the law allows the parties and the Public Prosecutor's Office to appeal the examining judge's decision concerning such request for access in the Indictment Division;

- The right to request a particular measure of investigation: the law now allows both accused and claimant to request the examining judge to take specific action and to appeal to the Indictment Division if the examining judge does not give a ruling within the prescribed time limit.

Verification as to the form by the investigating courts

341. The Act aims, as far as possible, to eliminate procedural errors from the preparatory stage of proceedings before cases reach the substantive stage and while it is still possible to avoid the irremediable consequences of any irregularities by resubmitting the case to the examining judge.

Reinforcement of the authority of the crown procurator and the examining judge over the police services and clarification of their respective duties and responsibilities in the investigation

342. The law now explicitly provides that the earlier stage of the investigation should be carried out under the supervision and responsibility of the crown procurator.

343. The proactive investigation has now been made part of the earlier stage, since the ultimate aim of this stage is to prosecute the perpetrators of offences. It is thus carried out under the authority of the government procurator's office.

344. The Act also provides a legal basis for the general directives required in order for the crown procurator to carry out criminal police operations within his district.

345. The police services are now obliged to notify the crown procurator of any investigation launched at their own initiative, and the procurator may, like the examining judge, stipulate which force is to conduct the inquiry.

Article 13

346. The right to bring a complaint is guaranteed under ordinary law to all persons who consider they have been subjected to torture.

347. Victims of offences do not bring a criminal action, but in order to enable them to bring a civil action in the criminal court where the government procurator's office fails to act, the Code of Criminal Procedure gives them the right to initiate a criminal action, if necessary, by direct application to the trial court (arts. 145 and 182) or by bringing criminal indemnification proceedings before the examining judge (art. 63).

348. Like all citizens, detainees may appeal to the court for the purposes of legal protection in general. They may bring a complaint concerning offences committed against them and they have the right to claim damages in the civil court; to appeal - within certain limitations - to the administrative court (Council of State); to apply for interim relief in respect of certain irregularities; and to bring cases of violations of fundamental rights before the European courts. The draft basic act governing prison administration and the legal status of prisoners establishes a right of complaint for detainees, which enables them to settle disputes through mediation (see above, article 11).

349. With regard to foreigners held in closed centres, article 131 of the previously mentioned draft royal decree, repealing the decree of 4 May 1999, establishes the individual right of every occupant to bring complaints. It should be possible for all occupants to complain to the centre director about their treatment in the centre and the way the decree and the internal regulations are applied. They may also approach the Director-General of the Aliens Office at any time or initiate legal proceedings in the competent court through their lawyer.

Article 14

350. In the event of an act of torture being committed in violation of article 1, paragraph 1, of the Convention, the judiciary has full jurisdiction and is competent to provide redress and compensation to the victim for harm arising from such an act.

Principle

351. The purpose of a criminal indemnity action is to obtain reparation for the harm caused by an offence. All persons who consider that they have been directly harmed by an offence may demand reparation and claim indemnification. The harm may be physical or moral or both.

352. Generally speaking, such claims may be devolved by succession, which means the victim's heirs inherit the right to reparation. If no criminal indemnity action has yet been initiated, the heirs may bring proceedings in their own right. If action has already been initiated, they may take over the case in that same capacity.

353. In the past, most people bringing a complaint before a police service or the prosecutor's office received no information concerning the action taken or any progress made in their case. In order to rectify that situation, the Franchimont Act established the notion of the injured party, an intermediate status between that of mere complainant or victim and that of claimant for criminal indemnification.

354. According to the new article (article 5 bis, paragraph 1, of the Preliminary Title of the Code of Criminal Procedure), anyone making a statement to the effect that he or she has suffered harm as a result of an offence acquires the status of injured party by virtue of that statement, which shall be made to the competent prosecutor's office either in person or through a lawyer.

355. Under the law, the injured-party statement establishes the following rights: the right to be assisted or represented by a lawyer; the right to add any documents to the file; and the right to be notified of discontinuation of the proceedings and the reasons therefor, of the opening of any investigation, and of any declaratory judgement in the investigating or trial courts (article 5 bis, paragraph 3.3, of the Preliminary Title of the Code of Criminal Procedure). Such information enables the injured party to make a claim for criminal indemnification at the right time, if desired.

Claim for criminal indemnification

The injured party's choices

356. Article 4 of the Preliminary Title of the Code of Criminal Procedure gives victims of an offence a choice: they can bring an action either in the criminal courts or in the civil courts. They have complete freedom of choice. The victim cannot bring an action for reparation of the same harm before both the criminal court and the civil court - it is one or the other.

Claim for criminal indemnification in the civil court

357. According to article 4 of the Preliminary Title of the Code of Criminal Procedure, criminal indemnity action must be suspended pending the final judgement in any criminal prosecution initiated before or during the criminal indemnification proceedings (criminal proceedings keep indemnity actions in abeyance). The rule applies as of the opening of criminal proceedings only, not from the opening of the earlier stage of the investigation.

358. The rule applies automatically. It may not be waived by the parties and the civil court must automatically suspend judgement. The civil court may, however, continue to consider the case provided it makes a ruling only after the final judgement in the criminal case has been handed down.

359. The rule does not apply if the decision to be taken by the criminal court can neither contradict the civil court decision nor affect the outcome of the claim before the civil court.

360. The logical effect of article 4 of the Preliminary Title of the Code of Criminal Procedure is to apply the general principle of law whereby the civil court cannot reopen a case involving a single offence giving rise to both criminal indemnity action and criminal proceedings, once a final judgement has been duly delivered by the criminal court (precedence of res judicata in the criminal courts over subsequent civil proceedings).

Criminal indemnification action in the criminal courts

361. A claim for criminal indemnification may be brought before the criminal courts, provided criminal proceedings have already been brought "at the same time and before the same court", as stated in article 4, paragraph 1, of the Preliminary Title of the Code of Criminal Procedure.

362. The Act of 11 July 1994 established two exceptions to this rule: these are contained in new paragraph 2 of article 4 of the Preliminary Title of the Code of Criminal Procedure.

363. As far as the criminal court is concerned, a criminal indemnity action is subsidiary to criminal proceedings. It follows from the subsidiary nature of the indemnity action that a claim for reparation is admissible in the criminal court only on two conditions:

- The claim must arise from an offence. The criminal court can receive the claim only if it originates from the commission of an offence and if the existence of that offence is established in the judgement;

- Criminal proceedings must have been duly brought in the criminal court (art. 4, Preliminary Title of the Code of Criminal Procedure).

364. Consequently, the criminal court is not competent to hear an application for indemnification for damage resulting from an offence if:

- At the time the application is made, a final judgement has already been handed down in criminal proceedings arising from that offence (article 4, paragraph 1, of the Preliminary Title of the Code of Criminal Procedure) or criminal action has been dropped owing to the offender's death or for any other reason (pardon, etc.);

- The criminal court rules that the charges are not substantiated;

- The criminal court is obliged to declare itself not competent (ratione materiae, ratione loci or ratione personae) to try the criminal case;

- The criminal court has not yet ruled on the criminal proceedings.

365. Lastly, any victim of an offence who wishes to obtain reparation for damages in the criminal court must formally bring criminal indemnification proceedings - known as constitution de partie civile - which the injured party may do through two procedures, either by bringing a complaint or by joining the proceedings.

State financial assistance for certain victims of offences

366. Experience has shown that many victims of offences to not obtain indemnification because the perpetrator of the offence is not known or subsequently proves to be insolvent. With a view to assisting victims of offences in cases where reparation is not obtained, a special benevolent fund for victims of deliberate acts of violence was established by the Act of 1 August 1985 on fiscal and other measures (arts. 28 to 41). The Act was amended by the Acts of 17 and 18 February 1997 to increase the assistance provided to the victims of offences.

367. The Fund is maintained through 10-franc contributions (multiplied by the applicable percentage) levied on every person convicted of serious or ordinary offences, as ordered by the court (art. 29).

368. Anyone suffering serious physical damage or whose health suffers as a direct result of a deliberate act of violence committed in Belgium may request assistance if it seems that effective and adequate reparation is unlikely to be obtained by any other means (art. 31).

Special cases: right to reparation of victims of unlawful deprivation of liberty (illegal arrest or detention, or "inoperative" or unjustified detention)

369. The right to reparation of victims of unlawful deprivation of liberty is governed by articles 27 to 29 of the Compensation for Inoperative Pre-trial Detention Act of 13 March 1973.

370. There are two possibilities in law: in one case the detention is unlawful, in the other it is lawful but is not subsequently justified by a court conviction.

371. The first situation is covered by article 27 of the Act, which establishes a right to compensation in the ordinary courts for anyone who has been deprived of their liberty in breach of the European Convention on Human Rights. In this case, detention is regarded as the result of a fault of the State and the victim may institute proceedings in the ordinary courts against the Belgian State in the person of the Minister of Justice.

372. The second situation is covered by articles 28 and 29 of the Act, which covers cases of persons lawfully detained in pre-trial proceedings for acts which, among other things, have not been established in court or which cannot be definitely attributed to the accused, who is entitled to the benefit of the doubt. Pre-trial detention is not, in this instance, the result of a fault of the State. The circumstances alone can lead to a finding that the arrest or detention is "inoperative", even though no blame can be attached to the examining magistrate or the courts.

373. The conditions for compensation are governed by article 28, paragraph 1, of the Act, as follows:

The person must have been held in pre-trial custody for more than eight days;

The arrest or detention must not have been provoked by the person's own conduct;

The person must have been exonerated directly or indirectly by an enforceable judicial decision; or, after benefiting from an order dismissing the proceedings, submits factual evidence or legal arguments proving his innocence; or has been arrested or held in custody following extinction of the prosecution by prescription; or, lastly, an order dismissing the proceedings expressly states that the act which gave rise to the custody does not constitute an offence.

374. The compensation procedure requires the person concerned to file an application with the Minister of Justice, who must give a ruling within six months. If the Minister of Justice refuses to grant compensation, or if the compensation is deemed insufficient by the victim, or should no decision be taken within six months, the applicant can lodge an appeal with an ad hoc three-member board comprising the First President of the Court of Cassation; the First President of the Council of State; and the senior member of the National Bar Association. The parties (applicant and representative of the Minister of Justice) are heard together with the Prosecutor-General of the Court of Cassation. The decisions of the ad hoc board are not open to appeal.

375. If the conditions established in article 28, paragraph 1, are met, the detainee may claim indemnification in a reasonable amount, taking account of all elements of public and private interest (art. 28, para. 2).

376. The damages shall be assessed in accordance with equitable principles, and not, therefore, with a view to full compensation. Limits may be set on the amount to be paid, depending on the victim's resources, for example, or on the impact of the decision on the public purse.

377. Aspects of the public interest taken into account by the board in its case law include: the distinction between prosecution and detention, the requirements of (and delays in) the investigation phase, the state of public finances, and the operation of the justice system. Aspects of private interest include those arising from the case (length of detention, media publicity) and those relating to the individual concerned (occupation, personality).

Article 15

Principle

378. Whereas in civil law it is the law itself that establishes what kinds of evidence are admissible and have probative value, in criminal law all types of evidence may be admitted, provided that they have been investigated and are submitted in certain forms and in accordance with certain rules, that they have been submitted during the deliberations and have been discussed by both parties.

Exclusion of irregular evidence

379. There are of course constraints on the freedom to provide evidence. Although the aim may be to establish the truth, the search for that truth cannot be conducted using any methods. Torture, for example, is prohibited, under the Convention against Torture and the other international instruments by which Belgium is bound, as mentioned at the beginning of this report.

380. On the basis of these international instruments, Belgian law and general principles of law, rules for the exclusion of irregular evidence have gradually been established in case law.

381. According to the Court of Cassation, evidence is illegal not only if it is obtained by an act explicitly prohibited by law but also if it is obtained by an act not consistent with the substantive rules of criminal procedure or the general principles of law, and specifically the right to a defence.

382. The illegality may arise from the form the evidence itself takes (for example, a confession obtained through the use of torture), the circumstances in which the evidence has been obtained (for example, monitoring telephone conversations in cases where this is not permitted by law) or the way the evidence is handled in court (for example, evidence that is not subject to discussion by both parties).

Probative value

383. An additional safeguard is provided by the fact that, where the law does not establish a particular type of evidence, the trial court has de facto discretion to determine the probative value of the evidence on which it bases its decision and which both parties have been free to discuss. This is the principle of "beyond reasonable doubt", as enshrined in article 542 of the Code of Criminal Procedure.

384. Conviction beyond reasonable doubt is based on a certainty. In order to satisfy, that certainty must be guided by conscience: it must be reasoned and requires a serious, impartial approach. A conviction should be based on the evidence.

385. Any statement shown to have been obtained using torture must therefore have been obtained in violation of the law and the court cannot use it against the accused.

Article 16

Inhuman treatment

Characterization of inhuman treatment as an offence

386. Acts constituting inhuman treatment are currently characterized as offences only in article 1, paragraph 3 (2) of the Act of 16 June 1993 concerning the prosecution and punishment of serious breaches of international humanitarian law. These provisions are not sufficient to

ensure that Belgian law is in conformity with the Convention. Given the specificity and seriousness of acts constituting inhuman treatment, it is now considered essential to include a specific offence in the Criminal Code, in order to make it possible to prosecute the perpetrators of inhuman acts.

387. A new article 417 ter, to be inserted into the new section V of book II, title VIII, chapter 1 of the Criminal Code, establishes within the Criminal Code a new offence of acts constituting inhuman treatment, and the penalties applicable to that offence, and precludes reference to superior orders or orders from a higher authority as a defence for such acts. The article reads as follows:

> "1. Any person who subjects another person to inhuman treatment shall be liable to punishment in the form of rigorous imprisonment for a term of 5 to 10 years.
>
> 2. The offence referred to in paragraph 1 shall be punishable by rigorous imprisonment for a term of 10 to 15 years when it is committed:
>
> (a) By a public officer or official or a law enforcement officer acting in the performance of his functions;
>
> (b) Against a person who is particularly vulnerable on account of pregnancy, illness, disability or a physical or mental handicap;
>
> (c) Against a minor who has not reached the age of 16; or
>
> (d) When the act has caused an apparently incurable disorder, a permanent physical or mental disability, complete loss of the use of an organ, or a serious mutilation.
>
> 3. The offence referred to in paragraph 1 shall be punishable by rigorous imprisonment for a term of 15 to 20 years when:
>
> (a) It has been committed against a minor or person who, by virtue of his physical or mental state, was not in a position to care for himself, by his father, mother or other older relatives, any other person who has authority over or is responsible for the care of the minor or disabled person, or by any adult who cohabits occasionally or habitually with the victim; or
>
> (b) It caused unintentional death.
>
> 4. Orders from a superior or a higher authority cannot justify the offence defined in paragraph 1."

388. Like the new article 417 bis of the Criminal Code, relating to torture, article 417 ter does not give a precise definition of inhuman treatment. This leaves room for an interpretation of the concept to emerge gradually in case law. Since inhuman treatment is not defined in those international instruments that refer to it, elements of a definition must be gathered from case law.

389. The case law of the European Court of Human Rights makes a distinction between inhuman treatment and torture on the basis of the intensity of the suffering inflicted on the victims. The concept of the severity threshold makes it possible to distinguish various "levels of severity" within article 3 of the European Convention on Human Rights. Thus, the term "torture" is applied to deliberate inhuman treatment causing very serious and cruel suffering (Ireland v. United Kingdom, 18 January 1978, GA, No. 11, para. 167). Inhuman treatment is treatment that deliberately provokes particularly intense mental or physical suffering (Tyrer case, 25 April 1978, No. 12: judicial corporal punishment in the Isle of Man). Torture thus constitutes an aggravated form of inhuman treatment (Ireland v. United Kingdom, para. 167).

390. The European Court of Human Rights case law also makes a distinction between the concepts of inhuman treatment and degrading treatment. In terms of its consequences for the victim, degrading treatment is clearly less serious than torture or inhuman treatment. The term "degrading treatment" is used for treatment that deeply humiliates a person before others or impels him to act against his will or conscience; it can also be used for treatment that degrades an individual "in his own eyes" (Tyrer case, paras. 29 and 32). A clear distinction is thus drawn between inhuman and degrading treatment, as recently noted by the European Court of Human Rights (Selmouni judgement, 28 July 1999, para. 96).

391. Domestic case law, too, makes a distinction between these different concepts. Thus the Court of Arbitration defines torture and inhuman treatment as any act whereby intense pain or serious physical or mental suffering is deliberately inflicted, for example in order to obtain information or confessions from victims or to punish them or put pressure on them or third parties or to intimidate them, while degrading treatment is understood to mean any act that deeply humiliates or debases victims in their own or others' eyes (Court of Arbitration, 19 December 1991). Another Court of Arbitration decision refers to the definitions given in European Court of Human Rights case law with regard to inhuman treatment and degrading treatment (Court of Arbitration, decision No. 51/94, 29 June 1994).

392. The concept introduced into the Criminal Code by new article 417 ter must be interpreted in the light of this case law. Inhuman treatment is treatment that deliberately provokes particularly intense mental or physical suffering, but does not reach the level of "very severe and cruel suffering", at which point the behaviour becomes an act of torture. Moreover, intensity of suffering is not the only criterion defining inhuman treatment. Like torture, the new offence of "inhuman treatment" is also defined by the seriousness of the act in terms, not of the suffering it causes, but of the profound contempt it demonstrates for the individual.

393. The concept of inhuman treatment in the new article of the Criminal Code is broader in scope than that contained in article 16 of the Convention and goes beyond the requirement for mere conformity. As with torture, domestic law has no reason to apply the condition in article 16, paragraph 1, restricting the application of the prohibition on inhuman treatment to particular perpetrators. The prohibition in article 417 ter therefore applies to all acts of inhuman treatment, whatever the perpetrator's status.

Applicable penalty

394. The basic penalty for the offence of inhuman treatment is 5 to 10 years' imprisonment, i.e. the penalty immediately below that provided for the offence of torture.

395. Paragraphs 2 and 3 of article 417 ter of the Criminal Code establish a system whereby the penalty is augmented depending on the circumstances. In line with the idea that inhuman treatment consists, in effect, in the same acts as those categorized as torture, but at a slightly lower level of seriousness, the circumstances are the same as those applied in augmenting the penalty for torture (see commentary to article 4 of the Convention and paragraphs 2 and 3 of new article 417 bis of the Criminal Code).

Orders from a superior or a higher authority

396. Under paragraph 4 of article 417 ter, the perpetrator of an act constituting inhuman treatment is precluded from justifying his actions by reference to orders from a superior or a higher authority. These provisions go further than the Convention. However, the Act of 16 June 1993 concerning the prosecution and punishment of serious breaches of international humanitarian law establishes the same legal regime for torture and for inhuman treatment. This approach is logical, since the two concepts are distinguished only by the crossing of a severity threshold, which by definition is relative, as shown by the divergence of interpretation between the European Commission and the European Court of Human Rights in the previously mentioned Irish case: the Commission characterized the interrogation techniques in question as torture, whereas the Court characterized the same techniques as inhuman treatment. By the same logic, article 5 of the Act of 16 June 1993 prohibits perpetrators of serious breaches of international humanitarian law from invoking the orders of a superior or a higher authority as justification for their behaviour, whether such behaviour involves acts of torture or inhuman treatment. There is no justification for establishing different regimes for the Act of 16 June 1993 and the Criminal Code when the offences are the same. It is for that reason that paragraph 4 was inserted in new article 417 ter.

Degrading treatment

Characterization of degrading treatment as an offence

397. Acts constituting degrading treatment are not, as such, characterized as offences in domestic law. In view of the importance attached to punishing acts constituting degrading treatment, it is now felt to be necessary to establish a specific offence in the Criminal Code.

398. Article 417 quater, to be inserted into new section V of book II, title VIII, chapter 1 of the Criminal Code, reads as follows:

> "Anyone subjecting another person to degrading treatment shall be liable to 15 days' to two years' imprisonment and /or a fine of 50 to 300 francs".

399. The concept of degrading treatment is, once again, not defined in the instruments that refer to it. The concept has been defined in case law, as previously described.

400. The interpretation to be given to the concept of degrading treatment in new article 417 quater of the Criminal Code follows similar lines to that deriving from case law with regard to the perpetrator's behaviour and the treatment to which the victim is subjected. According to European Court of Human Rights case law, degrading treatment occurs only when the treatment is inflicted against the wishes of the complainant. According to the Court's case law, such treatment was inflicted during periods of detention or as corporal punishment and always against the wishes or conscience of the victim. The legislator aims therefore to protect all persons from acts constituting degrading treatment to which they have not given their consent.

401. As with the scope of the offences of torture and inhuman treatment, and for the same reasons, the concept of degrading treatment in the new article of the Criminal Code is applied more broadly than that given in article 16 of the Convention. Degrading treatment constitutes an offence whatever the perpetrator's status - official or otherwise - being an act that deeply humiliates a person in his own or others' eyes, and which is committed against the wishes of the individual concerned.

402. Given that acts of degrading treatment are less serious than acts of torture and inhuman treatment, which are crimes, there is no reason to establish an offence of attempted degrading treatment or provide for aggravating circumstances for the offence. The Convention does not oblige States parties to criminalize attempted degrading treatment or to provide for aggravating circumstances for such an offence, which it defines more restrictively than this bill does.

Applicable penalty

403. Anyone guilty of degrading treatment is liable to 15 days' to two years' imprisonment and/or a fine of 50 to 300 francs.

Notes

[1] Belgium ratified the European Convention on Human Rights on 14 June 1955 (Moniteur belge, 19 August 1955) and the International Covenant on Civil and Political Rights on 21 April 1983 (Moniteur belge, 6 July 1983).

[2] It should be recalled that the bill is subject to amendment by Parliament.

[3] The Council of State, in its opinion No. 31.342/2, held that torture must be defined in the law as the bill departed from the definition proposed by the Convention, on the ground that it was too restrictive. In the view of the Council of State, the absence of a definition would make it difficult to arrive at a criminal definition of certain acts which could both be offences under the Penal Code and be classified as acts of torture or inhuman treatment. The Council of State takes the view that there is nothing to prevent inclusion in the law of the interpretation which has emerged from the decisions of the European Court of Human Rights regarding the concepts of torture and inhuman or degrading treatment. In this connection it should be noted that the Penal Code criminalizes a series of acts but does not contain definitions of the acts. For example, article 383 of the Penal Code makes offences of acts against decency without defining the exact scope of the concept, which has developed gradually in case law. The same approach was taken in criminalizing acts of harassment, which are not defined in article 442 bis of the Penal Code. It is, however, the case that certain provisions contain definitions of the concepts in question. Thus, the concept of rape has been defined in article 373 of the Penal Code since the Act of 4 July 1989. This practice of incorporating a definition in the text of the articles of the Code is exceptional, and is resorted to only when the legislator wishes to introduce a significant restriction or extension of the normal sense of a concept contained in criminal law. There is no reason to proceed any differently with respect to the criminalization of torture, or inhuman or degrading treatment. These concepts are made explicit by the preamble, which indicates the content that the judge gives to the concepts of torture, inhuman treatment and degrading treatment.

[4] A. Andries et al., "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", Rev. Dr. Pén. (1994), pp. 1114-1184.

[5] C. Hennau and J. Verhaegen, Droit pénal général (Brussels, Bruylant, 1991), p. 45; O. Dubois, "Le droit pénal des conflits armés et la théorie de la nécessité", Ann. Dr. (Louvain, 1995), pp. 95-112; E. David, Principes de droit des conflits armés (Brussels, Bruylant, 1999) 2nd ed., No. 4, 228, p. 724.

[6] O. Dubois, op. cit., pp. 95-112.

[7] F. Tukens and M. Van De Kerhove, Introduction au droit pénal (Brussels, Story Scientia, 1991), p. 209.

[8] Court of Cassation, combined divisions, 5 April 1996, RDP, p. 634.

[9] Penal Code Reform Commission, Observations, 1986, pp. 44-45, cited by C. Hennau and J. Verhaegen, op. cit., p. 45.

[10] A. Andries et al., op. cit., Rev. Dr. Pén. (1994), No. 3.69, p. 1168; C. Hennau and J. Verhaegen, op. cit., p. 45, O. Dubois, op. cit., Ann. Dr. (Louvain, 1995), p. 96.

[11] Le Ski decision, Cass. 27 May 1971, Pas. I, p. 886.

[12] "If the accused establishes that he acted on the orders of his superiors in matters falling within their authority and in respect of which there was a duty of hierarchical obedience, the penalties provided for under the preceding article shall be applied only to the superiors who gave the order" (art. 152).

"When a public official or officer or a law enforcement officer, orders or perpetrates any act contrary to a law or royal decree, if he establishes that he acted on the orders of his superiors in matters falling within their authority and in respect of which there was a duty of hierarchical obedience, he shall be exempt from any penalty, which, in the event, shall be applied only to the superiors who gave the order" (art. 260).

[13] Court of Cassation, Pas. I, 1953, pp. 352 and 353.

[14] Court of Cassation, 24 May 1976, Pas., 1976, 1014 and decision, 1976, 1053, reproduced in extenso by Legros, O.C., pp. 144-148.

[15] Council of State , 21 June 1991, No. 37,289 Revue de droit des étrangers 1991, page 343.

[16] Regarding the judicial follow-up to this incident, the case was set for hearing by the Council of State on 24 April 2001.

[17] Decision of 26 January 1989, Series A, No. 161, para. 111.

[18] It should be pointed out that in its opinion No. 31.342/2, the Council of State fails to see why inhuman treatment is not characterized as an aggravating circumstance in hostage-taking, on a par with torture. As its name indicates, the purpose of the bill is to bring Belgian law into line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Hence the bill is designed solely to adapt the aggravating circumstance of hostage-taking involving acts of torture to the new article 417 bis of the Penal Code. This observation also applies to article 376 of the Penal Code, as amended by the bill (see below).

[19] The introduction of article 12 bis in the Preliminary Title of the Code of Penal Procedure by means of the Act of 17 April 1986 (Moniteur belge of 14 August 1986) was designed to meet the need to bring Belgian law into line with such obligations in the context of the Convention of 3 March 1980 on the Physical Protection of Nuclear Material.

Under this article, "Belgian courts are competent to try cases involving offences under articles 331 bis, 477 to 477 sexies and 488 bis of the Penal Code which have been committed on the territory of one of the States parties to the Vienna Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980, or on board a vessel or an aircraft registered in one of those States, when the alleged perpetrator of the offence is on Belgian soil and the Belgian Government has not granted extradition to that State."

[20] Individuals who catch a person in flagrante are bound immediately to report the event to a law enforcement officer.

[21] Ministerial Circular No. 1470/VII of 25 June 1984 (Consular convention between Belgium and the German Democratic Republic);

Ministerial Circular No. 1449 of 3 August 1983 (Consular convention between Belgium and the People's Democratic Republic of Algeria);

Ministerial Circular No. 1394/VII of 24 June 1981 (Consular convention between Belgium and the Socialist Republic of Czechoslovakia);

Ministerial Circular No. 1393/VII of 23 June 1981 (Consular convention between Belgium and the People's Republic of Bulgaria);

Ministerial Circular No. 1340/VII of 16 January 1979 (Consular convention between Belgium and the United States of America);

Ministerial Circular No. 1339/VII of 15 January 1979 (Consular convention between Belgium and the Hungarian People's Republic);

Ministerial Circular No. 1334/VII of 13 November 1978 (Consular convention between Belgium and the Union of Soviet Socialist Republics);

Ministerial Circular No. 1333/VII of 9 November 1978 (Consular conventions between Belgium and Yugoslavia, Poland, Romania and Turkey);

Ministerial Circular No. 1284/VII of 15 December 1976 (Consular convention between Belgium and the Socialist Republic of Romania);

Ministerial Circular No. 1281/VII of 1 December 1976 (Consular convention between Belgium and the Socialist Federal Republic of Yugoslavia);

Ministerial Circular No. 1279/VII of 27 November 1976 (Consular convention between Belgium and the Polish People's Republic);

Ministerial Circular No. 1275/VII of 23 November 1976 (Consular convention between Belgium and the Republic of Turkey).

[22] See annex: training course for the gendarmerie and commune police before the reform of the police services.

[23] G. Bourdoux and C. De Valkeneer, La loi sur la fonction de police, Brussels, Larcier, 1993, p. 244.

[24] The decree is a comprehensive revision of the Decree of 4 May 1999. The specific changes are motivated by the comments made by the Centre for Equal Opportunity and Action to Combat Racism, the Closed Centres Commission and an informal parliamentary working group composed of members of Ecolo, Agalev, the Social Christian Party and the Socialist Party and

by the practical needs of the centres themselves. The comments made by the aforementioned bodies have been considered in the light of the following criteria: compatibility with the management of the policy relating to the closed centres, and compatibility with the basic option of the group regulations system.

[25] In this regard, the Minister for Youth Welfare of the French Community has taken a firm position against the detention of juveniles in Centre 127 bis or the INAD Centre.

[26] It should be mentioned that there are contacts between these centres and the Aliens' Office in order to allow medical care to be provided to children in the centres.

[27] This concept refers both to professional practitioners and the health-care institutions.

[28] Article 1: "With the exception of the measures of protection for which this Act provides, the diagnosis and the treatment of psychiatric problems cannot lead to any restriction of individual liberty, without prejudice to the application of the Social Protection Act of 1 July 1964 in respect of abnormal persons and habitual delinquents."

Article 2: "Measures of protection may not be taken, in lieu of other appropriate treatments, in respect of a mentally ill person unless his state so requires, either because he seriously jeopardizes his health and safety, or because he constitutes a serious threat to the life or physical safety of others.

Failure to adapt to moral, social, religious, political or other values may not in itself be considered to be a mental illness.

[29] European Court of Human Rights, 29 February 1988, Series A, No. 129, Revue de jurisprudence de Liège, Mons et Bruxelles, 1988, p. 457 (note by P. Martens).
