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INTRODUCTION

Amnesty International submits this briefing to the United Nations (UN) Committee against Torture (the Committee) ahead of its examination, in November 2013, of Belgium's third periodic report on the implementation of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention or UN Convention against Torture).

The document highlights the main aspects of Amnesty International's ongoing concerns in Belgium in relation to the Convention. In particular, Amnesty International is concerned about the failure to fully comply with its obligations under articles 2, 3, 11, 13, 15 and 16 of the Convention.

This submission highlights concerns with respect to prison and detention facilities, in particular overcrowding, the lack of effective complaint procedures, conditions in detention and the failure of the government to provide prisoners with intellectual or psychological disabilities or mental disorders with the care they are entitled to by law. The submission also highlights cases of police violence and violations of the principle of non-refoulement. Finally, Amnesty International draws the Committee's attention to the absence of a National Preventative Mechanism in line with the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and of a National Human Rights Institution that complies with the Paris Principles.

PRISONS AND DETENTION FACILITIES

INTRODUCTION - PRISONERS' LEGAL STATUS (ARTICLES 2(1), 11, 16 – LOIPR §31-32)

The rights of prisoners are specified in the Act on Principles of Prison Administration and Prisoners' Legal Status (commonly referred to as the 'Dupont Act') of 12 January 2005 which defines prisoners' legal status and lays down rules governing prison administration.¹ Until the adoption of this law, most aspects of life in detention, including prisons, were left to the discretion of the prison authorities.

Amnesty International welcomed the adoption of the Dupont Act and its detailed provisions regarding prisoners' rights.² Under the Act custodial sentences must be served in conditions

¹ Loi de principes du 12 janvier 2005 concernant l'administration pénitentiaire ainsi que le statut juridique des détenus.
http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2005011239&table_name=loi

² See, for example, Amnesty International, Belgium: Asylum seekers and irregular migrants, excessive use of force by police, prison conditions and the banning of face veils, AI Doc. EUR 14/001/2010, 8 November 2010. <http://www.amnesty.org/en/library/info/EUR14/001/2010/en>

consistent with human dignity, which enable prisoners to preserve or enhance their self-respect, while encouraging their sense of personal and social responsibility, and preserving law and order (article 5).³ The Act stipulates the detainees' rights regarding material conditions, contact with the outside world, possibilities of obtaining information and legal assistance, freedom of expression, religion, labour and social security, order and safety, disciplinary sanctions and health care.

Since its adoption in 2005 several provisions have been amended⁴, sometimes adversely affecting prisoner's rights as originally intended, as detailed below, and significant parts of the Dupont Act have yet to enter into force.⁵ Amnesty International highlights the following provisions that have yet to be fully implemented:

- The establishment of consultative bodies⁶ within each prison (article 7);
- Oversight mechanisms - the establishment of the Central Supervisory Body and monitoring bodies within each prison (Commissions de Surveillances) (article 26-27, 29-31) (see below Monitoring Mechanism).
- The creation of individual plans for each detainee, aimed at compensation, possible transfers, rehabilitation and reintegration into society (article 35-40).
- Separation of prisoners. Article 15 §2 provides for the designation of specific prisons or prison sections for different categories of prisoners (remand detainees, female detainees, detainees accompanied by children under the age of three, detainees serving prison sentences of at least 5 years, detainees who need specific care (due to age, physical or mental health), and against whom a particular form of punishment may be used) (see below Remand custody);
- Complaint procedures for detainees (articles 147-166), including complaints regarding transfers of detainees (art. 17-18) (see below Complaint procedure);

³ Art. 5. § 1er. L'exécution de la peine ou mesure privative de liberté s'effectue dans des conditions psychosociales, physiques et matérielles qui respectent la dignité humaine, permettent de préserver ou d'accroître chez le détenu le respect de soi et sollicitent son sens des responsabilités personnelles et sociales.

⁴ Laws amending the Dupont Act: Law of 17 March 2013; Law of 2 March 2010; Law of 21 February 2010; Law of 20 July 2006; Law of 23 December 2005.

⁵ Article 180 of the Dupont Act states that the King decides when and which articles will enter into force. Royal Decrees have been adopted but the following articles have yet to enter into force: 7, 14-15, 17-18, 20-41, 43, 48-52, 75, 81-97, 99-102, 147-166, 167§2 and 3.

⁶ These consultative bodies are meant to establish a climate of consultation. To this end each prison should have a consultative body to allow detainees to express themselves on issues in the interest of the prison community so that they can participate in the process. (Free translation of article 7 of the Dupont Act : Dans chaque prison, on tentera d'instaurer un climat de concertation. A cet effet, on créera dans chaque prison un organe de concertation afin de permettre aux détenus de s'exprimer sur les questions d'intérêt communautaire pour lesquelles ils peuvent apporter leur participation.

- Provisions⁷ with regard to material conditions, fire safety and hygiene (article 41) (see below Conditions of detention);
- Provisions with regard to the prison regime (articles 48-52);
- The right of the detainee to participate in work activities (articles 81-86);
- Provisions regarding health care and health protection (articles 87-97, 99);
- Medical expertise and medico-psychosocial expertise (articles 100-101);
- Right to social assistance and services relating to the detention plan (articles 102).

This Chapter focuses on the implementation of monitoring and oversight mechanisms, effective complaint procedures and on conditions of detention congruent with the rights of persons deprived of liberty and respect for their human dignity. It should be noted that the current situation, with substantive provisions of the Dupont Act yet to be implemented, leaves many decisions regarding the right of detainees at the discretion of the prison directors.

In its 2012 report, the European Committee for the Prevention of Torture (CPT) called on the Belgian authorities to implement the remaining provisions without further delay.⁸ Since then, no progress has been made.

⁷ The provisions in the articles 48-51 relate to the general rule that detainees spend time in common rooms for work or common activities. It lists two options and clarifies under what circumstances the director of the prison can allow exceptions to individual detainees. Article 52 provides suspects the right to retreat to their cell.

⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 23 au 27 avril 2012*, CPT/Inf (2012) 36, Strasbourg, 13 December 2012, www.cpt.coe.int/documents/bel/2012-36-inf-fra.htm , §87.

MONITORING MECHANISM – THE CENTRAL PRISON MONITORING COUNCIL (ARTICLES 2(1), 11, 13, 16-LOIPR 27 (B & C))

The Central Prison Monitoring Council and monitoring bodies for each prison (Commissions de Surveillance) were established by Royal Decree (4 April 2003).⁹ They are tasked with monitoring the treatment of detainees and supervising the adherence to the regulations in force. Observations are reported to the Minister of Justice and the Federal Parliament, and the Commissions can present recommendations on penal matters.

The Dupont Act provides for the consolidation in law of the establishment of the Commissions de Surveillance and Central Prison Monitoring Council, previously set out by the aforementioned Royal Decrees. However, the relevant provisions have not all entered into force¹⁰ and in practice, the functioning of the Commissions and the Council is flawed.

The latest report of the Council raises several serious concerns regarding its effectiveness and independence. The Council complained *inter alia* that nominations of its members had taken place irregularly¹¹, that the secretaries assigned by the Minister of Justice were not suited to the task¹² and that the body lacked adequate funding¹³. The Commissions de Surveillance are composed of volunteers, who sometimes have difficult relations with the prison authorities, who do not receive any training and who are often overwhelmed by their tasks. The Commissions de Surveillance are also poorly funded.¹⁴ The Council concluded that the Belgian authorities did not seem to want an independent control mechanism. The Federal Ombudsman subsequently addressed some of the concerns and stated that the independence of the institution is compromised: “Since the power to appoint the members of the Council and the Commissions, the establishment of their operating rules and the allocation of their resources is entrusted to the Minister of Justice, the executive (...) is master of the level of supervision of prisons.”¹⁵

In protest at this situation, in April 2012 the Central Prison Monitoring Council announced the suspension of all its operations until “all legal obligations are met”¹⁶. It is unclear

⁹ Arrêté Royal du 4 avril, 2003 modifiant l'arrêté royal du 21 mai 1965 portant règlement général des établissements pénitentiaires, http://www.ejustice.just.fgov.be/doc/rech_n.htm

¹⁰ The relevant articles are the articles 26-27 & 29-31 of the Dupont Act (*op cit*). These have yet to enter into force,

¹¹ Conseil central de surveillance pénitentiaire et commissions de surveillance, *Rapport Annuel 2008-2010*, justice.belgium.be/fr/binaries/rapport_conseil_central_surveillance_penitentiaire_2008-2010_tcm421-156810.pdf, page 7.

¹² *Ibid.*, page 9.

¹³ *Ibid.*, page 10.

¹⁴ *Ibid.*, pages 14-17.

¹⁵ Le Médiateur Fédéral, *Rapport Annuel 2010*, www.federalombudsman.be/sites/1070.b.fedimbo.belgium.be/files/ra2010-fr.pdf, page 134.

¹⁶ Alarmkreet: Centrale Toezichtsraad voor het Gevangeniswezen schort alle activiteiten op, *De*

whether the Council's activities are still suspended. Amnesty International has received information that there are initiatives to bring the Council under the auspices of the Parliament, thereby improving its independence.

Amnesty International recommends that the Belgian authorities:

- *guarantee the independence of the Central Prison Monitoring Council and the Commissions de Surveillance, including by bringing the Council under the auspices of the Parliament, thereby removing the executive power's control over the mechanism.*
- *ensure adequate funding for the mechanisms to effectively carry out their mandates.*

COMPLAINT PROCEDURES (ARTICLE 13 - LOIPR 27 (B & C))

Amnesty International is concerned about delays in establishing the complaint mechanisms for detainees (Complaint Commissions and Appeals Commission) as foreseen under the Dupont Act. Further, there appear to be no initiatives underway to create such safeguards.

Amnesty International recommends that the Belgian authorities:

- *establish without due delay an independent complaints mechanism, as envisaged in the Dupont Act.*

STRIP SEARCHES- AMENDMENT TO THE DUPONT ACT (ARTICLE 16)

On 16 September 2013, new legislation regarding strip searches and disciplinary sanctions entered into force¹⁷. It concerns amendments to the Dupont Act which *inter alia* make available standard procedure on strip searches when the prisoner enters prison, before he or she is placed in a punishment cell and, in conformity with prison guidelines, after meeting visitors.¹⁸ In these situations, prison guards will no longer need to ask for prior individual authorization nor will they need to show that a regular search is not enough to ensure safety.

The organization is concerned that by making strip searches part of the procedure, the Belgian authorities might not adhere to the principle that searches of prisoners should be as unobtrusive as possible, strictly limited to security needs and avoiding humiliation.¹⁹ This

Juristenkrant, 26 April 2012, <http://www.legalworld.be/legalworld/Alarmkreet-Centrale-Toezichtsraad-voor-het-Gevangeniswezen-schort-alle-activiteiten-op.html?LangType=2067>

¹⁷ Loi du 1 Juillet 2013 modifiant la loi de principes du 12 janvier 2005 concernant l' administration pénitentiaire ainsi que le statut juridique des détenus, art. 5.

¹⁸ Press release Federal Public Service of Justice. *Durcissement de la loi de principes concernant le statut juridique interne des détenus*, 15 May 2013, http://justice.belgium.be/fr/nouvelles/communiqués_de_presse/news_pers_2013-05-15.jsp?referer=tcm:421-224202-64

¹⁹ Amnesty International, *Combating Torture – A Manual for Action*, AI Doc. ACT 40/001/2003. 25 June 2003. <http://www.amnesty.org/en/library/info/ACT40/001/2003> , page 103.

new legislation disables an important control mechanism to prevent abuses, namely the prior, written authorization by the prison director. In its 2012 report on the situation in prisons from 2008 to 2010, the Central Prison Monitoring Council, noted that searches were already often conducted:

- without respect to the detainee's privacy
- without specific reason and while the detainee was in his cell
- with "shameful conduct" from certain guards
- where the justification for the measure usually is only provided afterwards
- with frequent infractions to the legal provisions.²⁰

Making strip searches standard practice by removing safeguards is likely to increase the likelihood of such concerns to reoccur.

Amnesty International recommends the Belgian authorities:

- *to revoke the recent legislative amendments to the Dupont Act regarding strip searches.*

CONDITIONS OF DETENTION

OVERCROWDING IN PRISON FACILITIES (ARTICLE 11, 16 - LOIPR, §32)

Despite measures by the government, overcrowding of prison facilities remains one of the greatest causes for concern in the Belgian detention system. The data available on the website of the Federal Directorate General Statistics and Economic Information (DGSEI) clearly show that, since 1997, the number of persons detained has been consistently higher than the prison capacity. Moreover, the gap between the number of people in prison and the available capacity has never been wider than in 2013. Graph 1 clearly shows how over the past 16 years the problem has steadily worsened.²¹

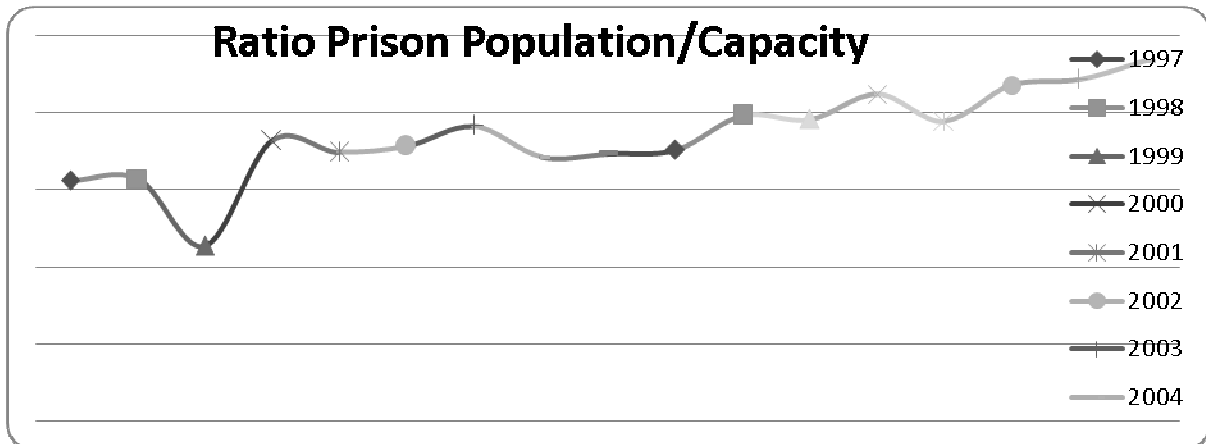
The prison population has increased faster than overall prison capacity. Data from 1997 to 2013 show that the number of detainees has increased by 43% whereas over the same period capacity has increased by 26%.²² The 2012 annual report published by the Directorate General for Penitentiary Institutions shows that several large prisons have average

²⁰ Conseil central de surveillance pénitentiaire et commissions de surveillance, *Rapport Annuel 2008-2010*, page 44.

²¹ Data pulled from the website of the Federal Directorate General Statistics and Economic Information (DGSEI). The graph shows that, the overall overcrowding increased from 111% in 1997 to almost 127% in March 2013. <http://statbel.fgov.be/fr/statistiques/chiffres/population/autres/detenu/>. The data shows the situation on 1 March of each year. Source of the data: Federal Public Service for Justice, Directorate General EPI Penitentiary Institutions.

²² *Ibid.*

overcrowding rates of over 50%.²³



The effects of overcrowding are detrimental to the welfare of prisoners and the proper functioning of the prison system. Overcrowding causes or exacerbates problems such as limited and unhygienic accommodation, lack of privacy, reduced safety, reduced activities, insufficient capacity of medical care, inter prisoner violence^{24,25,26} and strikes by prison staff. Dilapidated facilities are being kept open and temporary solutions became necessary. Amnesty International is concerned that systemic overcrowding and its effects can result in inhuman and degrading treatment of detainees.

Successive governments have adopted measures to tackle overcrowding in prisons. An audit by the *Court of Audit*²⁷, presented to Parliament in early 2012, examined seven measures

²³ Service Publique Fédérale Justice. *Rapport annuel 2012 de la direction générale des Etablissements pénitentiaires (DG EPI)*. http://justice.belgium.be/fr/publications/jaerverslag_epi_2012.jsp, page 102.

²⁴ In 2009 the CPT remarked on the reluctance of prison staff to intervene in violent situations and stressed the obligation to protect prisoners against other prisoners who might harm them. CPT, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 28 septembre au 7 octobre 2009*, CPT/Inf (2010) 24, Strasbourg, 23 July 2010, www.cpt.coe.int/documents/bel/2010-24-inf-fra.htm, § 91.

²⁵ During its 2011 visit to the prison of Tilburg the CPT cited allegations that the prison was facing serious problems of inter-prisoner violence. CPT, *Report to the Governments of Belgium and the Netherlands on the visit to Tilburg Prison carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 19 October 2011*, CPT/Inf (2012) 19, Strasbourg, 26 June 2012, <http://www.cpt.coe.int/documents/bel/2012-19-inf-eng.htm>, § 14.

²⁶ The CPT had also received allegations of inter-prisoner violence in the prison of Andenne. CPT/Inf (2012) 36, *op cit.* § 56.

²⁷ "The Court of Audit performs a financial audit and a legality audit and monitors the sound use of public funds. Its checks concern the expenditures and receipts of the federal community, regional and provincial governments. The results of these three kinds of audit lead to information statements that are

aimed at reducing prison overcrowding: decreasing remand detention, increasing community service sentences and electronic monitoring, transferring detainees of foreign origin to their home country, inclusion of detainees with intellectual and psychosocial disabilities in the mental health care system, reforming provisional release and conditional release, and expanding prison capacity (the so-called Master Plan). The selection of the measures was based on the policy notes of successive Ministers for Justice from 1996 to 2010. The Audit concluded that no structural reduction of overcrowding had occurred as a result of these measures, and that only measures increasing the use of conditional release had shown a significant impact.²⁸

The CPT has also noted recently that despite the measures taken by the Belgian authorities, overpopulation has not ceased to increase. The CPT stated that prison overcrowding not only implies undignified conditions of detention, tied to promiscuity and violence, but that it also deprives prisoners of certain fundamental rights and has adverse effects on the effectiveness of the punishment and on the prevention of recidivism.²⁹

One of the measures taken to counter prison overcrowding is the so-called *Master Plan 2008-2012-2016 for a Prison Infrastructure with Humane Conditions*. The plan aims at increasing the capacity of the prison system and improving the conditions for prisoners in the process. The Court of Audit notes that, “even if (other) measures could produce a stagnation of the prison population from 2012 onwards, after the completion of all the projects in the Master Plan, there would still be a shortage of 900 spots.”³⁰ At the Working Group Session of the Universal Periodic Review (UPR) of Belgium in 2011, the country accepted several recommendations related to overcrowding and prison conditions.³¹

Amnesty International continues to call for a swift solution and joins the Court of Audit in its call for a global plan³² to end overcrowding in prisons. Such a plan should not only focus on enforcement of prison sentences and capacity but also look at Belgium’s penal law policies and procedures. It should focus on eradicating conditions and practices that violate the human rights of prisoners. In addition, the authorities must examine the wider social and economic problems that may be associated with resort to criminal behavior.

regularly submitted to the legislative assemblies. The Court is also charged with a jurisdictional task.”
<https://www.ccrek.be/EN/Presentation/TasksAndPowers.html>

²⁸ Court of Audit. *Mesures de lutte contre la surpopulation carcérale - Rapport de la Cour des comptes transmis à la Chambre des représentants*. December 2011, <https://www.ccrek.be/FR/Publications/Fiche.html?id=1ebadf21-41a6-4ef2-8e93-18a0fb74858e>, page 11.

²⁹ CPT/Inf (2012) 36, *op cit.*, §73-76.

³⁰ Court of Audit, *op cit.* page 114.

³¹ See for example. §§ 100.35-.41, 100.44 OHCHR. 11 July 2011. Report of the Working Group on the Universal Periodic Review - Belgium A/HRC/18/3. <http://daccess-ods.un.org/TMP/3974071.4430809.html>

³² Court of Audit, *op cit.*, page 31.

Prison overcrowding weighs heavily on the quality of life of prisoners and leads to inadequate conditions in terms of well-being, privacy and hygiene. The conditions in a number of prisons are a major cause for concern. The CPT considered that the conditions of detention in the prisons of Forest (in particular the C and D wings)³³ amount to inhuman and degrading treatment. Media and NGOs that monitor prisons have reported similar findings.³⁴ In June 2013, the mayor of the town decided to bar the arrival of new detainees to the prison.³⁵

The CPT³⁶ and the NGO Observatoire International des Prisons (OIP)³⁷ also reported serious concerns about the conditions in the prison of Jamioulx.

The Federal Ombudsman in 2010 reported on complaints received from inmates at the so-called 'cell block' of the Merksplas penal facility. He cited overcrowding, dilapidated and small cells, absence of sanitary equipment and running water in the prison section, as well as detainees being confined to these cells for 21 hours a day. The "cell block" is reportedly used for newly arrived detainees and for prisoners that have been given disciplinary sanctions. The Ombudsman recommended closing this section of the prison and reported subsequent amelioration of the facilities (two cells were transformed into shower and sanitary units) and a change in regimen. The Ombudsman remained concerned.³⁸

Prison facilities are often outdated, dilapidated and inmates face deteriorating conditions. The cells are overcrowded, cramped and lack sanitary provisions.

Amnesty International recommends that the Belgian authorities:

- *ensure that sufficient and adequate resources are allocated to prisons and to promptly*

³³ CPT/Inf (2012) 36, *op cit.*, § 15-19.

³⁴ See for example: Bart Debie getuigt over verblijf in gevangenis Vorst. *Het Belang van Limburg*. 31 October 2008,

<http://www.hbvl.be/nieuws/binnenland/bart-debie-getuigt-over-verblijf-in-gevangenis-vorst.aspx>;
Document exceptionnel : « Au cœur de la prison de Forest. » *RTL*. 7 July 2013,
<http://www.rtl.be/info/belgique/societe/1016198/document-exceptionnel-au-coeur-de-la-prison-de-forest-video>; La Ligue des Droits de l'Homme. *Prison de Forest: « Le seuil de l'insupportable a été atteint »*. 28 March 2008. <http://www.liguedh.be/espace-presse/123-communiqués-de-presse-2012/1423-prison-de-forest-l-le-seuil-de-linsupportable-a-ete-atteint-r>

³⁵ Le bourgmestre de Forest ferme les portes de la prison, *RTBF*, 20 June 2013,
http://www.rtbef.be/info/regions/detail_surpopulation-le-bourgmestre-de-forest-ferme-les-portes-de-la-prison?id=8022176

³⁶ CPT/Inf (2010) 24, *op cit.*, § 113-114.

³⁷ OIP Belgique. *Communiqué de presse – Surpopulation explosive à la prison de Jamioulx*. 15 June 2009. <http://www.oipbelgique.be/biblio/presse/090615%20-%20Surpopulation%20explosive%20a%20Jamioulx.pdf>

³⁸ Le Médiateur Fédéral. 13/07/2010. *Conditions de vie à Merksplas*.
<http://www.federalombudsman.be/fr/nouvelle/conditions-de-vie-%C3%A0-merksplas>

and effectively address the issue of prison overcrowding.

- *ensure that all persons deprived of liberty are held in humane conditions, which are commensurate with human dignity.*

- *create a comprehensive plan aiming to reduce and eventually end overcrowding. Such a plan should focus on eradicating conditions and practices that violate the human rights of prisoners and include an examination of the wider social and economic problems that may be associated with resort to criminal behavior.*

REMAND CUSTODY- OVERCROWDING AND NON-SEPARATION OF PRE-TRIAL DETAINEES AND CONVICTED PRISONERS (ARTICLE 16 – LOIPR §32)

The current Belgian legislation on pre-trial detention explicitly refers to the exceptional nature of detention of suspects.³⁹ The law had the express goal of reducing the number of suspects in detention.⁴⁰ The minister also stated at the time that a positive effect on overcrowding could be expected as a result.⁴¹

Other efforts have been made to reduce the number of suspects in detention (e.g. through conditional release) but the percentage of suspects has remained high nonetheless. About 35-40%⁴² of all detainees have not yet been sentenced. An initiative to use electronic monitoring as an alternative to remand custody, is the most recent effort⁴³. The Minister estimates that about 10% of the suspects currently in detention could instead be monitored in such a way. Amnesty International recommends that in implementing this measure, the authorities should be wary of the possibility of a “widening the net” effect. The presumption should remain liberty and electronic monitoring should be used solely as an alternative to detention, not as an alternative to release.

Article 11 of the Law on Principles Governing the Administration of Prison Establishment and

³⁹ Art. 2. Loi du 20 juillet 1990 relative à la détention préventive.
http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1990072035&table_name=loi

⁴⁰ In 1988, just before the law on preventative detention was passed, the percentage of suspects in the overall prison population was 31%. La Chambre des Représentants. *Projet de loi relatif à a détention préventive*. 1255 2-89 90. 9 July 1990,
<http://www.dekamer.be/digidoc/DPS/K2051/K20514691/K20514691.pdf>

⁴¹ La Chambre des Représentants. *Projet de loi relatif à a détention préventive*. 1255 2-89 90. 9 July 1990, <http://www.dekamer.be/digidoc/DPS/K2051/K20514691/K20514691.pdf>, page 5.

⁴² SPF Justice, *Justice en chiffres*, 2012,
http://justitie.belgium.be/nl/binaries/0210_JIC_2012_FR_tcm265-230189.pdf, page 45; SPF Justice, *Détention préventive sous surveillance électronique*, 13 November 2012,
http://justice.belgium.be/fr/nouvelles/communiqués_de_presse/news_pers_2012-11-13.jsp.

⁴³ ; SPF Justice, *Détention préventive sous surveillance électronique*, 13 November 2012,
http://justice.belgium.be/fr/nouvelles/communiqués_de_presse/news_pers_2012-11-13.jsp

the Legal Status of Detainees (Dupont Act) provides for the separation of untried and sentenced prisoners. In several prisons this principle is not adhered to, reportedly due to overcrowding. By way of example: the CPT noted during its visit to the prison of Forest that, with exception of the separation of drug addicts, there wasn't any kind of categorization of detainees. Both sentenced and untried prisoners as well as 'interned prisoners'⁴⁴ were housed in the same prison wings.⁴⁵

Amnesty International recommends that the Belgian authorities:

- *ensure that pre-trial detention is only used when it is deemed necessary to prevent the suspect from fleeing, interfering with witnesses or when the suspect poses a clear and serious risk to others which cannot be contained by less restrictive means;*
- *ensure that alternatives to pre-trial detention do not create a widening of the net effect;*
- *ensure that pre-trial detainees and convicted persons are detained separately.*

PRISON STAFF STRIKES (ARTICLE 16 – LOIPR §32)

Dissatisfaction over overcrowding, understaffing and unsafe working conditions have led to countless strikes by prison staff. During the strikes, the tasks of the prison staff are often taken over by police officers who lack the necessary training and skills to deal with prisoners. The CPT has repeatedly expressed concern about the dramatic impact these strikes have on the prisoners' rights and safety. The CPT reported that during these strikes prisoners are deprived of their basic needs such as the provision of food, hygiene and care; that their activities are compromised, that contact with lawyers and visitors is restricted and that prisoners have to remain in their cell for 24 hours.⁴⁶ The CPT also noted numerous allegations of ill-treatment by police.⁴⁷

⁴⁴ Loi du 21 avril 2007 relative à l'internement des personnes atteintes d'un trouble mental, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2007042101&table_name=loi. Article 8, § 1 states: "Les juridictions d'instruction, sauf s'il s'agit d'un crime ou d'un délit politique ou de presse, et les juridictions de jugement peuvent, ordonner l'internement d'une personne :
- qui a commis un fait qualifié crime ou délit punissable d'une peine d'emprisonnement et
- qui, au moment du jugement, est atteint d'un trouble mental qui abolit ou altère gravement sa capacité de discernement ou de contrôle de ses actes et
- pour lequel le danger existe qu'elle commette de nouvelles infractions en raison de son trouble mental." Article 2 provides: "L'internement des personnes atteintes d'un trouble mental est une mesure de sûreté destinée à la fois à protéger la société et à faire en sorte que soient dispensés à l'interné les soins requis par son état en vue de sa réinsertion dans la société."

⁴⁵ CPT/Inf (2012) 36, *op cit.*, § 16.

⁴⁶ CPT, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 18 au 27 avril 2005*, CPT/Inf (2006) 15, Strasbourg, 20 April 2006, <http://www.cpt.coe.int/documents/bel/2006-15-inf-fra.htm>, § 108 ; CPT/Inf (2010) 24, *op cit.*, §83 and CPT/Inf (2012) 36, *op cit.*, § 85.

⁴⁷ CPT/Inf (2010) 24, *op cit.*, § 84-85.

Despite repeated recommendations by the CPT⁴⁸, Belgium is still failing to manage these recurring strikes by custodial staff in an efficient manner and failing to ensure a guaranteed level of service to prisoners during strikes.

Amnesty International recommends that the Belgian authorities:

- *ensure a guaranteed level of services to detainees during prison staff strikes, in particular that prison staff strikes do not impinge on detainees' human rights.*

MEDICAL CARE (ARTICLE 16 – LOIPR §32)

As provided in article 88 of the Dupont Act, all prisoners must have access to health care that is equivalent to health care outside the prison and is suited to their specific needs. According to the Central Prison Monitoring Council this goal has not been achieved. The Central Prison Monitoring Council stated that equivalent medical care is not a priority among the prison management and that medical needs exceed the available resources and infrastructure.

Overall the Council found the organization and the administration of medical services to be inadequate. 9,9 % of all prison complaints were related to medical care. Three quarters of reported complaints concerned the organization of the health services and the consultation and examination during detention. Prisoners reportedly are confronted with long waiting times for specialized care, delayed medical interventions, lack of continuity of medical care and dissatisfaction with the access to minimum health care services on weekends and public holidays. The prisons are characterized by an extreme shortage of medical staff, especially at night and during weekends.⁴⁹ The CPT found the doctor/prisoner ratio in the prison of Forest to be “totally insufficient”. At the time of the visit, the prison housed over 700 detainees, the medical staff consisted of three doctors assisted by a team of 6 full time and 20 part-time equipped nurses. There was no medical staff present at night and during weekends.⁵⁰

Amnesty International recommends that the Belgian authorities:

- *provide adequate health care to prisoners, suited to their specific needs and equivalent to health care outside prison.*

“SPECIAL INDIVIDUAL SECURITY REGIME” IN BRUGES AND LANTIN (ARTICLE 16 – LOIPR §32)

In June 2008, two special wards were created in the prisons of Bruges and Lantin. These are

⁴⁸ See for example: CPT/Inf (2006) 15, *op cit.*, §117; CPT/Inf (2010) 24, *op cit.*, §87; CPT/Inf (2012) 36, *op cit.*, §86.

⁴⁹ Conseil central de surveillance pénitentiaire et commissions de surveillance, *Rapport Annuel 2008-2010*, http://justitie.belgium.be/nl/binaries/centrale_toezichtsraad_rapport_2008-2010_tcm265-156810.pdf, pages 37-39.

⁵⁰ CPT/Inf (2012) 36, *op cit.*, §27-28.

the so-called “special individual security wards”. The special wards are specifically intended for holding convicted male prisoners who are difficult to control, because they display extreme and persistent behavioral problems, combined with aggression towards staff members and other prisoners. In 2009, the CPT expressed concern that three out of the eight detainees in the ward did not fulfill the initial admission criteria⁵¹ as set out in art 116 of the Dupont Act.

The decision to place a detainee in a special individual security ward is taken by the Director-General of the prison administration upon recommendation of the director of the prison where the detainee is being held (art. 118 of the Dupont Act). The article further states that the detainee may appeal against this decision with the Appeals Committee of the Central Prison Monitoring Council (articles 23 and 118 §10). However, this provision has not yet entered into force. The default mechanism is to lodge an appeal before the Court of First Instance⁵². However, in light of the very significant restrictions that may be implemented under this regime and their possible duration, Amnesty International is concerned that this appeal procedure does not provide sufficient guarantees and is not adequately adapted to these particular cases.

Amnesty International recommends that the Belgian authorities:

- *put an end to the transfers of prisoners who do not fulfill the initial admission criteria to these special sections and to implement the Dupont Act in full, including article 118 §10 of the Act.*

TRANSPORTATION OF DETAINEES (ARTICLE 16 – LOIPR §32)

The transportation of detainees is regulated by an unpublished binding directive from the Ministry of the Interior and an internal police directive.⁵³ The CPT reported that, depending on the kind of threat the prisoners pose, three levels or regimes are used. “Level 3” transfers reportedly involve *inter alia* the prisoner’s eyes and ears being covered with special equipment (opaque goggles and a helmet which can be used to play deafening music). The CPT recommended that the Belgian authorities stop the use of these particular tools.⁵⁴ Belgium’s response to this recommendation disappointingly merely asserted that the use of goggles and earphones was not systematic but restricted to certain situations.⁵⁵

⁵¹ CPT/Inf (2010) 24, *op cit.*, § 95.

⁵² C. HERMANS, “Rapport CPT 2009”, 128 *FATIK* 2010, page 31.

⁵³ Directive MFO-1 du 13 décembre 2001 relative à la police des cours et tribunaux, au transfèrement des détenus et au maintien de l’ordre et de la sécurité dans les prisons en cas d’émeute ou de troubles (non publiée) ; Directive DGA/DAO-GDB 160 M du 10 février 2005.

⁵⁴ CPT/Inf (2010) 24, *op cit.*, §42-44.

⁵⁵ Réponse du Gouvernement de la Belgique au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relatif à sa visite en Belgique du 28 septembre au 7 octobre 2009. <http://www.cpt.coe.int/en/states/bel.htm>, page 17.

Amnesty International recommends that the Belgian authorities:

- *stop the use of opaque and/or significantly distorting goggles and headphones during transportation of detainees.*

DETENTION OF OFFENDERS SUFFERING MENTAL ILLNESS (ARTICLE 16 – LOIPR §32 (D))

This Committee has commented on the detention of “mentally ill offenders”⁵⁶. In recent years, despite initiatives to construct new forensic psychiatric facilities, the situation has not improved.⁵⁷

According to the most recent statistics, in 2011, Belgium counted 4093 “mentally ill offenders”, indicating an increase of 24% over the six previous years.⁵⁸ 1099 of them were detained in prisons, accounting for 10% of the total prison population. They are held in psychiatric wings or in cells blocks among regular prisoners.⁵⁹ Particular causes for concern are overcrowded psychiatric wings, a lack of qualified staff, dilapidated facilities, inadequate care, the absence of ongoing treatment and medical examinations, and solitary confinement.

In its 2012 report, the CPT stressed that prisoners with mental disorders should benefit from treatment with an individual-based approach. The CPT however remarked that proper individual treatment of mentally ill offenders is often underdeveloped or completely lacking in the psychiatric wings of penal institutions due to lack of qualified staff and adequate infrastructure.⁶⁰ The psychiatric wing of the prison of Forest was found to employ only one full time psychiatrist. The waiting list for psychiatric consultations amounted to over 150 detainees. The CPT also stressed the complete absence of psychiatric staff in the psychiatric

⁵⁶ CAT, Consulting Observations, CAT/C/BEL/CO/2, 19 January 2009 para 23. For Belgian legislation on ‘*l'internement des personnes atteintes d'un trouble mental*’ see footnote 44.

⁵⁷ Conseil central de surveillance pénitentiaire et commissions de surveillance, *Rapport Annuel 2008-2010*, page 38.

⁵⁸ Moens I. and Pauwelyn L., *Geen opsluiting, maar sleutels tot re-integratie. Voorstellen voor een gecoördineerd zorgtraject voor geïnterneerden*,

http://issuu.com/w247/docs/2012_forensische_psychiatrie?mode=window&backgroundColor=%23222222, page 8.

⁵⁹ *Ibid.* page 19.

⁶⁰ CPT/Inf (2012) 36, *op cit.*, § 37.

wing during weekends and at night.⁶¹

The Central Prison Monitoring Council received allegations that in some prisons, offenders suffering mental illness were placed in solitary confinement without medical supervision.⁶² The CPT recently expressed serious concern regarding a mentally ill prisoner who during the time of the CPT visit had been held in solitary confinement for over 14 months. He was not allowed contact with other prisoners, he could only exit his cell in handcuffs and chains, outdoor exercise took place in solitude and in handcuffs, he was handcuffed and chained during medical and dental treatment, and during rare visits he was handcuffed and chained to the wall, while there were three guards present.⁶³

The waiting list for transfers from prisons to specialized psychiatric institutions can take up to two or three years.⁶⁴

On 2 October 2012, the European Court of Human Rights ruled that Belgium had violated the right to liberty and security (art. 5 ECHR) of L.B., a man with mental health problems, by detaining him for over seven years in prison facilities which were inadequate for his condition.⁶⁵ Most recently, on 13 January 2013, the Court again held Belgium responsible for violations, this time of Articles 3, 5 §1 and §4, in a case concerning a mentally ill offender who had been in detention in a prison psychiatric wing for over 15 years, the Court stated that the Belgian authorities failed to provide him with proper care and that he therefore had been subjected to degrading treatment. The Court once again remarked on the existence of a structural problem regarding the lack of places for suffering mental illness in psychiatric facilities.⁶⁶

The Belgian government has announced the construction of two forensic psychiatric institutions in Ghent and Antwerp, which would respectively provide 272 and 180 places for medium to high risk offenders with intellectual or psychosocial disabilities or mental disorders. The Ghent institution should be completed in March 2014, the Antwerp facilities in December 2014.⁶⁷

Amnesty International recommends that the Belgian authorities:

⁶¹ *Ibid* §35-36.

⁶² Conseil central de surveillance pénitentiaire et commissions de surveillance, *Rapport Annuel 2008-2010*, page 39.

⁶³ CPT/Inf (2012) 36, *op cit.*, §40.

⁶⁴ Conseil central de surveillance pénitentiaire et commissions de surveillance, *Rapport Annuel 2008-2010*, page 38.

⁶⁵ ECHR, L.B. vs. Belgium (Application 22831/08), 2 October 2012, Strasbourg, § 85.

⁶⁶ ECHR, Claes vs. Belgium (Application 43418/09), 10 January 2013, Strasbourg, § 98.

⁶⁷ *Vr. en Antw.* Senaat, 6 februari 2012, (Vr. 5/5494 B. Anciaux).

- *provide sufficient places in specialized psychiatric facilities for offenders with intellectual or psychological disabilities and mental disorders, so that they are no longer held in prisons. In these facilities, they should be provided with adequate medical treatment.*

POLICE VIOLENCE

USE OF CONDUCTED ENERGY DEVICES

Conducted energy devices (CED) or stun-guns are potentially lethal. Any use of CEDs must be strictly regulated and controlled. Use of such weapons should be limited to situations where officers would otherwise be justified in resorting to firearms.⁶⁸ Where CEDs are authorized subject to these limitations, they should be deployed only by specialist officers who are subject to rigorous training and accountability systems which conform to UN standards on the use of force.⁶⁹

Article 37 of the Law of 5 August 1992 on the Police Function regulates the use of force by Belgian police in general and states that officers can use force if they take into account the risks and have a legitimate objective that cannot be obtained through other means. The article further states that violence needs to be proportionate and that prior warning should be given. Article 38 introduces specific limitations on the use of firearms. For the use of CEDs by police only article 37 applies.⁷⁰

CEDs are not part of the standard police equipment in Belgium. Specialized training is required and a Royal Decree of June 2007 stipulates that officers must report every shooting incident.⁷¹ When the CPT visited Belgium in 2009, the use of this weapon in “contact” mode was not considered ‘shooting’.⁷² This distinction clearly allows for abuse. Following its visit in 2009, the CPT reported on two instances where prisoners suffered the use of CEDs

⁶⁸ Amnesty International has found that over 400 individuals in the USA have died after being shocked by police tasers since June 2001, see Amnesty International public statement of 2 June 2010, AI Index: AMR 51/049/2010, <http://www.amnesty.org/en/library/info/AMR51/049/2010/en>

⁶⁹ Amnesty International, ‘*Less than Lethal? The Use of Stun Weapons in US Law Enforcement*’, Amnesty International Publications, 2008, <http://www.amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf>, 51.

⁷⁰ CPT/Inf (2010) 24, *op cit.*, § 36.

⁷¹ Arrêté Royal relatif à l’armement de la police intégrée, structurée à deux niveaux, ainsi qu’à l’armement des membres des Services d’Enquêtes des Comités permanents P et R et du personnel de l’Inspection générale de la police fédérale et de la police locale, *MB* 22 Juin 2007, art. 17. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2007060363&table_name=loi

⁷² CPT/Inf (2010) 24, *op cit.*, § 37.

which had not been reported.⁷³

Despite the limitations set to the use of CEDs by police officers, there are indications that the current regulations are not being interpreted in such a way that the CEDs should be used solely as an alternative to the use of firearms. One such instance occurred in March 2010. The special units of the federal police (CGSU) were tasked with the removal of a group of apparently peaceful environmental activists who were occupying a forest near Bruges (the 'Lappersfortbos')⁷⁴. During the removal at least one officer used a stun-gun in contact mode on an activist chained to a tree. The (unsuccessful) use of the stun-gun was reportedly only aimed at inflicting pain so that the activist would cooperate. The Minister of the Interior reported on the incident in Parliament and insisted that the use of force in this instance, including the application of an electric shock, was proportionate.⁷⁵

Amnesty International recommends that the Belgian authorities:

- *require that all incidents involving the use of CED's are reported, and that these data are publicly available. It should also take measures to ensure that CED's are used solely used as an alternative to the use of firearms.*

DEATHS IN CUSTODY

In February 2013, a televised documentary was aired about the death of a young man in a police holding cell. The documentary graphically shows how, on 6 January 2010, Jonathan Jacob, aged 26, died in a police holding cell as a result of a violent intervention by the special intervention unit of the Antwerp local police. The documentary shows how a six person squad in full riot gear stormed the cell where Jacob was held alone and naked, how he was immobilized and beaten and subsequently tranquilized. Reportedly the coroner's report shows how the death was the result of internal bleeding caused by the blows to the body administered by members of the special intervention unit.

Investigations into the events are ongoing. Questions remain as to the procedures followed and the decisions taken. For instance, why the special intervention unit was activated, why this particular tactic (called the "disturbed procedure") was used, why Jonathan Jacob was not admitted to a psychiatric facility as ordered by a magistrate and, should reports to this effect prove to be true, how that same magistrate could order the tranquilization of the man

⁷³ *Ibid*, § 39.

⁷⁴ Liga voor Mensenrechten, *Hardhandige politionele interventie bij de ontruiming van het Lappersfortbos*, 31 March 2010.
http://www.mensenrechten.be/index.php/site/nieuwsberichten/hardhandige_politionele_interventie_bij_de_ontruiming_van_het_lappersfortbo

⁷⁵ Parliamentary Question – Commission for Internal Affairs 17.03.2010. "Question of M. Stefaan Van Hecke to the Minister of Internal Affairs on the « the use of tasers » (n° 20479)"
http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=OCDCQFjAB&url=http%3A%2F%2Fwww.dekamer.be%2Fdoc%2FFCCRI%2Fpdf%2F52%2Fic836x.pdf&ei=4y0oUsmFCInBhAfdy4DADQ&usq=AFQjCNFUU_nZ6_fGtemG2zzwbZ_oh4iKQ&bvm=bv.51773540.d.d2k&cad=rja

without a prior medical examination.

After the documentary was aired and more than three years after the events, the Minister of the Interior Affairs announced new guidelines for the use of force by police officers⁷⁶. It is unclear whether these have been produced.

Amnesty International recommends that the Belgian authorities:

- *undertake a full investigation into the death of Jonathan Jacob in custody, the findings of which are made public, and that those alleged to have been responsible be brought to justice.*

USE OF STATEMENTS OBTAINED THROUGH TORTURE AS EVIDENCE (ARTICLE 15, LOIPR §30)

On 25 September 2012, the European Court of Human Rights ruled in *El Haski v. Belgium* that Belgium had violated Lahoucine El Haski's right to a fair trial by using evidence likely to have been obtained through torture in criminal proceedings.⁷⁷ Lahoucine El Haski had been convicted in 2006 of participating in the activities of a terrorist group on the basis of testimonies of witnesses interrogated in third countries, including Morocco. The Court found that there was a "real risk" that statements used against him from Morocco may have been obtained through torture or other ill-treatment, and that the Belgian courts should have excluded such evidence.⁷⁸

At the time of writing, draft legislation concerning the inadmissibility of unlawfully obtained evidence is pending before the Chamber of Representatives. This draft legislation aims at creating a new article 32 of the Preliminary Title of the Code of Criminal Procedure, transposing the settled case-law of the Court of Cassation regarding unlawfully obtained evidence into legislation.⁷⁹ The currently applied case-law, known as the *Antigoon* case-law,

⁷⁶ <http://www.dekamer.be/doc/PCRI/pdf/53/ip133.pdf>

⁷⁷ ECHR, *El Haski vs. Belgium* (Application 649/08), 25 September 2012, Strasbourg. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113336>.

ECHR, *Belgian courts should have excluded testimony where there was a "real risk" that it had been obtained by torture or inhuman or degrading treatment*, 25 September 2012. <http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=003-4090205-4797367>.

⁷⁸ Amnesty International Report 2013. *Belgium*. <http://www.amnesty.org/en/region/belgium/report-2013>

⁷⁹ Wetsontwerp tot wijziging van de voorafgaande titel van het Wetboek van strafvordering wat betreft de nietigheden. File progress:

entails that judges have the obligation to disregard unlawfully obtained evidence in three cases: if the evidence violates procedural requirements that are prescribed by law under penalty of nullity, if the unlawfulness affects the reliability of the evidence or if the use of the unlawfully obtained evidence violates the right to a fair trial.⁸⁰

In the case of El Haski, the judges of the Court of Appeal of Brussels considered that by merely mentioning reports from human rights organizations, the defendant failed to provide any concrete evidence that the statements had been obtained through torture or ill-treatment. The European Court of Human Rights found however that diverse, objective, and concurring information from UN bodies recommendations, including the Committee against Torture, and reports from human rights organizations did demonstrate the existence of a 'real risk' that the statements in question had been obtained in Morocco through treatment contrary to the prohibition of torture and other ill-treatment. It concluded that therefore the jurisdictions should have done more to satisfy themselves that there was no such risk.⁸¹

Amnesty International recommends that the Belgian authorities:

- *ensure that the proposed changes to art. 32 of the Preliminary Title of the Code of Criminal Procedure explicitly mention that any evidence obtained by a treatment contrary to the Convention against Torture must be declared inadmissible, and ensure that the relevant standard and burden of proof allow for the effective application of this absolute prohibition, including by taking due account of the particular challenges one faces when arguing that evidence has been obtained by such treatment.*

<http://www.dekamer.be/kvcr/showpage.cfm?section=flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?dossierID=1924&legislat=53&inst=S>

⁸⁰ Court of Cassation, 14 October 2003, AR P.03.0762.N;

Troisième rapport de la Belgique sur la Convention contre la torture et autres peines ou traitement cruels, inhumains ou dégradants, établi selon la nouvelle procédure facultative, CAT/C/BEL/Q/3, 139-140, http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT-C-BEL-3_fr.pdf

⁸¹ "99. Selon la Cour, ces informations, issues de sources diverses, objectives et concordantes, établissent qu'il existait à l'époque des faits un « risque réel » que les déclarations litigieuses aient été obtenues au Maroc au moyen de traitements contraires à l'article 3 de la Convention. L'article 6 de la Convention imposait en conséquence aux juridictions internes de ne pas les retenir comme preuves, sauf à s'être préalablement assurées, au vu d'éléments spécifiques à la cause, qu'elles n'avaient pas été obtenues de cette manière. Or, comme indiqué précédemment, pour rejeter la demande du requérant tendant à l'exclusion de ces déclarations, la cour d'appel de Bruxelles s'est bornée à retenir qu'il n'avait apporté aucun « élément concret » propre à susciter à cet égard un « doute raisonnable »." ECHR, *El Haski vs. Belgium* (Application 649/08), 25 September 2012, Strasbourg, § 99.

THE PRINCIPLE OF NON- REFOULEMENT (ARTICLE 3, LOIPR §9)

'CONSTRUCTIVE' REFOULEMENT

In October 2010, the Belgian authorities managed to coerce M.S., an Iraqi asylum-seeker, into giving up his fight against removal and returned him to Iraq. This happened in spite of the Belgian Commissioner for Refugees and Stateless Persons confirming in September that, if returned to Iraq, M.S. would be exposed to a real risk of torture or other ill-treatment. In 2005, M.S had been convicted of terrorism-related offences in Belgium and imprisoned. Immediately after completing this sentence, he was detained again pending removal to Iraq. Except for a period under a compulsory residence order, he remained in administrative detention until his removal to Iraq. The Belgian authorities' coercive methods included hinting that they would continue to subject him to successive periods of detention. He was detained upon arrival in Iraq on 27 October without access to his family or lawyers until his release on 23 November.⁸² Amnesty International considers the return of M.S. to be in breach with the principle of non-refoulement. On 31 January 2012, the European Court of Human Rights ruled that his return must be considered a forced return and that the Belgian authorities had not done all that could reasonably have been expected of them in order to guarantee the protection of article 3 ECHR.⁸³

Amnesty International recommends that the Belgian authorities:

- *refrain from engaging in 'constructive refoulement' in order to forcibly remove persons from its territory.*

DIPLOMATIC ASSURANCES AGAINST TORTURE

For the first time known to Amnesty International, Belgium sought diplomatic assurances against torture in order to extradite a person to a state where he would risk torture and other ill-treatment. Arbi Zarmaev, an ethnic Chechen, is wanted by the Russian Federation on suspicion of being an accomplice to murder. A request for extradition was granted in March 2011 by the Belgian Minister of Justice, despite the Court of Appeal advising against such transfer. The Court had found that there was a lack of adequate guarantees that Arbi Zarmaev's human rights would be respected in Russia. In such cases, the Court of Appeal only has advisory powers and the Minister for Justice decided instead that Zarmaev could be

⁸² Amnesty International Report 2011, Belgium. <http://www.amnesty.org/en/region/belgium/report-2011>

⁸³ ECHR, M.S. v. Belgium (Application 50012/08), 31 January 2012, Strasbourg, § 131.

extradited, basing his decision in part on diplomatic assurances sought and obtained from the Russian authorities that Zarmaev would be treated in accordance with the ECHR.⁸⁴ Arbi Zarmaev appealed against the Minister's decision. The Belgian section of Amnesty International intervened in the proceedings. On 30 January 2013, the Belgian Council of State upheld the decision of the Belgian Minister of Justice to extradite Arbi Zarmaev.⁸⁵ The case is currently pending before the European Court of Human Rights. The Court imposed an interim measure under rule 39 of its Rules of Court, which requires Belgium to suspend the execution of the extradition until it has ruled on the merits of the case.

Unenforceable diplomatic assurances against torture and other ill-treatment allows a sending government to circumvent the absolute prohibition of torture on sending a person to a place where he or she risks such abuse by accepting "guarantees" of humane treatment from the receiving state.⁸⁶ Amnesty International is concerned that governments that routinely violate their existing, multilateral human rights treaty obligations cannot and should not be trusted based on a simple diplomatic assurance to safeguard the rights of a returnee. The assurances are required in the first place because the receiving state's record of torture is so poor. The Committee against Torture has also found that "[t]he more widespread the practice of torture or cruel, inhuman or degrading treatment is, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be."⁸⁷ Amnesty International's opposition is two-pronged: first, it is based in principle on the need to maintain respect for the existing legally-binding international machinery of human rights protection; second, on a more practical level, it is based on years of research that reflect the inherent deficiencies with respect to the reliability and sufficiency of diplomatic assurances, which do not provide an effective safeguard against torture and other ill-treatment.⁸⁸ This Committee has also stated that "diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention."⁸⁹

⁸⁴ Amnesty International Report 2012, Belgium <http://www.amnesty.org/en/region/belgium/report-2012>

⁸⁵ Council of State, A. Zarmaev vs. Belgium, 30 January 2013, Brussels, <http://www.raadvst-consetat.be/arr.php?nr=222320&l=nl>

⁸⁶ Amnesty International. *United Kingdom: Briefing to the UN Committee Against Torture*. AI Index: EUR 45/002/2013. 24 April 2013. <http://www.amnesty.org/en/library/info/EUR45/002/2013/en>. For further information regarding Amnesty International's position on diplomatic assurances, see *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture*, AI Index: EUR 01/012/2010, April 2010. The Committee has taken a position against the use of diplomatic assurances in previous concluding observations, see for example CAT/C/CAN/CO/6, 25 June 2012, para.9 and CAT/C/CZE/CO/4-5, 13 July 2012, § 8.

⁸⁷ CAT, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013), Advanced unedited version, CAT/C/GBR/CO/5, p.18.

⁸⁸ <http://www.amnesty.org/en/library/info/EUR45/002/2013/en>

⁸⁹ CAT, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013), Advanced unedited version, CAT/C/GBR/CO/5, p.18.

Amnesty International recommends that the Belgian authorities:

- *cease seeking, using and relying on diplomatic assurances against torture and other ill-treatment to forcibly return persons to places where they are at risk of such violations.*
- *do not extradite Arbi Zarmaev to the Russian Federation.*
- *respect the interim measures imposed by the ECHR.*

OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTICLE 2, LOIPR §36)

Belgium signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on 24 October 2005.⁹⁰ Despite numerous and repeated recommendations by NGOs⁹¹, by other States⁹², by intergovernmental organisations⁹³, national institutions⁹⁴, Parliament⁹⁵ and by treaty

⁹⁰ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en

⁹¹ E.g. Amnesty International, *Submission to the UN Universal Periodic Review, 11th session of the UPR Working Group, May 2011*, http://lib.ohchr.org/HRBodies/UPR/Documents/Session11/BE/AI_AmnestyInternational-eng.pdf; Amnesty International, *Belgium: Amnesty International welcomes commitment to establish a National Human Rights Institution*, 21 September 2011, <http://amnesty.org/en/library/asset/EUR14/002/2011/en/12e3036a-c308-4622-bde4-6a556e5d894b/eur140022011en.pdf>

⁹² E.g. UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Belgium*, (A/HRC/18/3), Brussels, 11 July 2011, http://upr-epu.com/files/226/GDT_E.pdf

⁹³ E.g. Council of Europe, *Report by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, on his visit to Belgium* (CommDH(2009)14), 15-19 December 2008, Strasbourg, <https://wcd.coe.int/ViewDoc.jsp?id=1458603>

⁹⁴ E.g. Federale Ombudsman, *Jaarverslag 2010*, Brussel, 2011, 132-134,

bodies⁹⁶, and despite several pledges⁹⁷ and plans by successive Belgian governments⁹⁸, the OPCAT has not been ratified. The institutional and political complexities involved in establishing the national preventative mechanism provided in art. 3 OPCAT, are often mentioned as reason for the delay.

Amnesty International recommends that the Belgian authorities:

- ratify the OPCAT without further delays;
- create an independent national preventative mechanism in full compliance with the requirements of the OP CAT;
- ensure that the process for deciding upon the national preventative mechanism is transparent, inclusive and comprehensive, and that it fulfils the criteria set up by the OPCAT for an effective national preventative mechanism, guaranteeing among other criteria its independence, full and unhindered access to all places of detention and persons deprived of their liberty, and adequate resources.

www.mediateurfederal.be/sites/1070.fedimbo.belgium.be/files/jv2010-nl.pdf; Strategische Adviesraad internationaal Vlaanderen & Strategische Adviesraad voor het Welzijns-, Gezondheids- en Gezinsbeleid, *Facultatief protocol bij het verdrag tegen foltering en andere wrede, onmenselijke of onterende behandeling of bestraffing* (SARiV Advies 2011/15, SAR WGG Advies 20110719_foltering), 25 July 2011, page 6, http://www.sariv.be/web/images/uploads/public/4622221373_20110725_SARiV_SARWGG_protocol_foltering_WEB.pdf

⁹⁵ E.g. Belgian Chamber of Representatives, *Résolution en vue de la ratification du protocole facultatif à la convention des Nations unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*.

(OPCAT) (DOC 53 0025/005), 20 July 2011, <http://www.lachambre.be/FLWB/pdf/53/0025/53K0025005.pdf>

⁹⁶ E.g. CAT, *Consideration of Reports Submitted by States Parties under article 19 of the Convention: Concluding Observations of the Committee Against Torture - Belgium* (CAT/C/BEL/CO/2), Genève, 19 January 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/403/25/PDF/G0940325.pdf?OpenElement>; CPT/Inf (2012) 36, *op cit.*,

⁹⁷ In the context of the voluntary pledges Belgium made in its application for the UN Human Rights Council, the country declared – in 2009 – that it is “currently doing everything it can to ratify [the OPCAT] without delay”. *Letter dated 25 March 2009 from the Permanent Representative of Belgium on the occasion of its candidacy for membership of the UN Human Rights Council* (A/63/801), 1 April 2009, http://www.upr-info.org/IMG/pdf/hrc_pledge_belgium_2009.pdf;

⁹⁸ E.g. Federale Regering, *Regeerakkoord Verhofstadt II*, July 2003, http://archive.verhofstadt.belgium.be/nl/politics/20030710-accord_gov.pdf; Federale Regering, *Regeerakkoord Di Rupo I*, 1 December 2011, http://premier.fgov.be/sites/all/themes/custom/tcustom/Files/Regeerakkoord_1_december_2011.pdf.

NATIONAL HUMAN RIGHTS INSTITUTION (ARTICLE 2, LOIPR §2)

Amnesty International has long campaigned for the establishment of a National Human Rights Institution (NHRI), in full compliance with the Paris Principles.⁹⁹ This Committee, the UN Human Rights Committee, the EU Fundamental Rights Agency, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, 18 States during the UPR and several NGO's have all recommended Belgium to establish a NHRI in accordance with the Paris Principles.¹⁰⁰

Respect for protection, fulfilment and promotion of human rights in Belgium show significant gaps which an NHRI could partly overcome. Amongst other elements, the institution should serve as a forum for discussion for civil society, academia and the authorities. In part due to the complex state structure in Belgium, this is highly necessary. The institution should also have an advisory and a monitoring role with regard to legislation, draft legislation and the follow-up of international jurisprudence and recommendations by international human rights

⁹⁹ UN General Assembly, *Paris Principles* (A/RES/48/134), 20 December 1993, http://www.info.gov.hk/info/eoc/annex6_e.pdf.

¹⁰⁰ CAT, *Consideration of Reports Submitted by States Parties under article 19 of the Convention: Concluding Observations of the Committee Against Torture - Belgium* (CAT/C/BEL/CO/2), Geneva, 19 January 2009, 12, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/403/25/PDF/G0940325.pdf?OpenElement>; UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant* (CCPR/C/BEL/CO/5), 16 November 2010, 8, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/467/12/PDF/G1046712.pdf?OpenElement>; EU Fundamental Rights Agency, *National Human Rights Institutions in the EU Member States - Strengthening the fundamental rights architecture in the EU I*, May 2010, http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf; CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant* (E/C.12/BEL/CO/3), 3 December 2007, 26, <http://www2.ohchr.org/english/bodies/ceschr/docs/cescr39/E.C.12.BEL.CO.3.pdf>; CERD, *Consideration of reports submitted by States parties under article 9 of the Convention* (CERD/C/BEL/CO/15), 11 April 2008, 10, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/416/85/PDF/G0841685.pdf?OpenElement>; CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Belgium* (CEDAW/C/BEL/CO/6), 7 November 2008, 34, <http://www.mensenrechten.be/pdf/CEDAW-C-BEL-CO-6.pdf>; UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Belgium*, (A/HRC/18/3), Brussels, 11 July 2011, 100.9, http://upr-epu.com/files/226/GDT_E.pdf; UN Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1*, 21 February 2011, 14, http://upr-epu.com/files/226/CIUN_E.pdf; Amnesty International, *Submission to the UN Universal Periodic Review, 11th session of the UPR Working Group, May 2011*, http://lib.ohchr.org/HRBodies/UPR/Documents/Session11/BE/AI_AmnestyInternational-eng.pdf; Amnesty International, *Belgium: Amnesty International welcomes commitment to establish a National Human Rights Institution*, 21 September 2011, <http://amnesty.org/en/library/asset/EUR14/002/2011/en/12e3036a-c308-4622-bde4-6a556e5d894b/eur140022011en.pdf>.

bodies. The NHRI should have the power to bring legal cases to protect the rights of individuals or to promote changes in law and practice. Such an institution could include the much needed independent preventative mechanism as provided for in OPCAT (cfr. supra).

The law establishing the NHRI must ensure that the NHRI has adequate funding and other resources in order to be able to fully carry out, and without undue restrictions and limitations, the aims and functions set out within the mandate, and particularly, to address the demands of the caseload that has been brought to its attention. The NHRI should have all necessary human and material resources to examine, thoroughly, effectively, speedily and throughout the country, the evidence and other case material concerning specific allegations of violations reported to it. Funding should be secured with a long-term perspective to enable the NHRI to plan and develop its activities with confidence about being able to fulfil them.

A Belgian national human rights institution can only be effective if it is a so-called 'interfederal' body. This means that it would be mandated to deal with all human rights issues, irrespective of whether they touch on federal or regional competencies. The creation of such an interfederal body requires an agreement between governments, to be ratified by the various parliaments.¹⁰¹

Belgium has repeatedly expressed its intention to create an NHRI. Not only at the national level, where the establishment of a NHRI was envisaged in coalition agreements, both in 2003 and 2011, but also at international level.¹⁰² In 2011, during the UPR of the UN Human Rights Council, Belgium supported the recommendations to establish a National Human Rights Institution.¹⁰³

It has been reported¹⁰⁴ that representatives of the regional and federal authorities have established a working group with the aim of establishing a national human rights institution, but to date there seems to be very little progress. Moreover, despite several requests by Amnesty International and other NGOs there have been no formal consultations with civil society on the establishment of a national human rights institution.

Amnesty International recommends that the Belgian authorities:

¹⁰¹ Theoretically, it is possible to achieve the same result by amending the Constitution but that seems politically unfeasible at present.

¹⁰² Federale Regering, *Regeerakkoord Verhofstadt II*, July 2003, http://archive.verhofstadt.belgium.be/nl/politics/20030710-accord_gov.pdf; Federale Regering, *Regeerakkoord Di Rupo I*, 1 December 2011, http://premier.fgov.be/sites/all/themes/custom/tcustom/Files/Regeerakkoord_1_december_2011.pdf.

¹⁰³ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Belgium*, (A/HRC/18/3), Brussels, 11 July 2011, 9, 35 and 100.9, http://upr-epu.com/files/226/GDT_E.pdf.

¹⁰⁴ Examen Périodique Universel de la Belgique au Conseil des Droits de l'Homme (2011) - Suivi à mi-parcours des recommandations acceptées. September 2009. http://diplomatie.belgium.be/en/binaries/BE_UPR-Rapport_mi_parcours_sept_2013_tcm312-233038.pdf, Rec. N°9.

- *establish a national human rights institution, in full compliance with the Paris Principles, with adequate funding and resources.*
- *ensure that the process to establish a national human rights institution is inclusive with an meaningful consultation process of civil society and other stakeholders.*

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