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**REPORT  
BY THE COUNCIL OF EUROPE  
COMMISSIONER FOR HUMAN RIGHTS,  
THOMAS HAMMARBERG,**

**on his visit to Belgium  
15-19 December 2008**

For the attention of the Committee of Ministers  
and the Parliamentary Assembly

<b>Executive summary</b> .....	<b>3</b>
<b>Introduction</b> .....	<b>4</b>
<b>I. National system for protecting human rights</b> .....	<b>5</b>
1. Accession to European and international human rights conventions .....	5
2. Constitution and Belgian judicial system.....	5
3. National human rights structures and national co-ordination of human rights issues.....	7
4. Police.....	8
a. Police and human rights .....	8
b. Protection of arrested persons' rights during police questioning .....	9
<b>II. Prison system</b> .....	<b>9</b>
1. Prison overcrowding.....	9
2. Dilapidated state of some prisons .....	11
3. Health conditions in prisons .....	12
4. Protection of prisoners' rights.....	12
5. Prison staff.....	13
6. Action taken by the authorities to improve the situation in prisons .....	13
<b>III. Immigration and asylum</b> .....	<b>14</b>
1. Right of asylum.....	14
2. Deprivation of migrants' liberty/migrants' detention conditions.....	15
a. Administrative detention of asylum seekers and irregular migrants .....	15
b. Material detention conditions .....	17
c. Solitary confinement, special regimes and complaints procedure.....	18
d. Access to translation, information and legal aid .....	19
3. Effective avenues of appeal against detention or deportation .....	20
4. Open facilities for families with children and separated minors .....	20
5. Regularisation .....	22
<b>IV. Measures against discrimination, racism and violence against women</b> .....	<b>22</b>
1. Legislative framework and equality bodies .....	22
2. Gender discrimination and violence against women.....	24
3. Discrimination based on language .....	25
<b>V. Protection of children's rights</b> .....	<b>27</b>
1. Youth justice .....	27
a. Anti-social behaviour.....	27
b. Detention.....	28
c. Relinquishment of jurisdiction .....	29
2. Corporal punishment.....	30
<b>VI. Anti-terrorism measures</b> .....	<b>30</b>
<b>VII. Recommendations</b> .....	<b>32</b>
<b>APPENDIX I: List of authorities and organisations met or consulted during the visit and the places visited</b> .....	<b>35</b>
<b>APPENDIX II: Comments by the Belgian authorities [in French only]</b> .....	<b>37</b>

## Executive summary

Commissioner Thomas Hammarberg and his delegation visited Belgium from 15 to 19 December 2008. In the course of his visit, the Commissioner held discussions with federal, regional and community authorities, parliamentarians, members of the judiciary, independent human rights structures, and representatives of civil society. Several institutions were also visited.

**I. National system for protecting human rights.** Human rights are enshrined in the Constitution and Belgium has ratified a large number of Council of Europe and United Nations treaties related to human rights. Nevertheless, human rights protection could be strengthened especially by the ratification of Protocol No. 12 to the ECHR and the Framework Convention for the protection of national minorities. Efforts have been undertaken to improve the functioning of the judicial system although proceedings of excessive length persist. There is a great number of complaints bodies and human rights structures in Belgium. The Commissioner notes that a national human rights action plan could also be adopted and that the independence and transparency of the mechanism for monitoring police activities could be further strengthened. The Commissioner considers that the fundamental rights of persons held in police custody should be guaranteed as from the time they are placed in custody.

**II. Prison system.** The Commissioner ascertained unacceptable overcrowding and inhumane detention conditions in a number of prisons. He welcomed the recent adoption of an ambitious construction and renovation programme for the prison estate. However, he urged the authorities to swiftly improve the prisoners' situation in terms of hygiene, lack of privacy and safety, and to close cells which are not fit for detention. Alternatives to imprisonment should be developed in order to reduce overcrowding. Untried, convicted and psychiatric detainees should be detained separately. The Commissioner calls for the setting up of an effective and independent mechanism to deal with prisoners' complaints.

**III. Asylum.** The asylum procedure has recently been improved and speeded up. The Commissioner considers nevertheless that it could be made more transparent and accessible in terms of available information. He calls for an end to the systematic detention of certain categories of asylum seekers and the special treatment of asylum claims made at the border.

**IV. Detention of migrants.** Living conditions and access to health care should be improved in the closed centres for aliens and in particular in 127 and INAD Centres. The Commissioner considers that frontline legal advice services should be created to advise and inform migrants detained in these centres of their rights. He calls for a review of the practice of special regimes in closed centres. The deadline to appeal against deportation decisions should be extended to at least five days. The Commissioner welcomes the new policy not to detain most irregular migrant families and considers the new housing system a substantial improvement. However, he regrets that in certain cases children and their parents continue to be detained and calls for an appropriate solution also for these cases. The commitments made to establish a procedure to regularise certain irregular migrants should be clarified.

**V. Action to combat discrimination, racism and violence against women.** Belgium has recently adopted a number of important laws and measures in this field. Efforts should be pursued to achieve effective gender equality. The Commissioner calls for the action plan against violence in the family to be extended to all forms of violence against women and for improvements in the support afforded to victims. He has taken note of several reported cases of potential discrimination based on language particularly in the Flemish and Brussels Capital Regions. Therefore, he recommends that an effective and impartial mechanism be set up to address complaints on the ground of language with reference to the anti-discrimination legislation. Training on this legislation should be provided to civil servants and elected representatives.

**VI. Minors.** Youth justice system in Belgium is still relatively protective although concerns remain particularly regarding the detention of minors. New closed centres for minors should be opened in the near future. Some of these will be placed far away from urban areas. The Commissioner calls for an increase of resources to ensure the effectiveness of alternative measures to children's detention as well. He urges to put an end to the detention of minors with adults in cases of relinquished jurisdiction and to review this procedure. A law

explicitly prohibiting corporal punishment as well as measures to promote education without violence should be adopted.

**VII. Counter-terrorism.** Terrorism related offences and special methods of investigation should be defined with greater precision. The Commissioner calls for an appropriate and proportionate use of anti-terrorism measures such as the restrictions placed on the rights of the defence or the protection of personal data.

## Introduction

1. The Council of Europe Commissioner for Human Rights, Mr Thomas Hammarberg, made an official visit to Belgium from 15 to 19 December 2008<sup>1</sup> following an invitation from the Prime Minister, Yves Leterme. This was the last in the Commissioner's series of regular visits to all Council of Europe member states to assess the effective implementation of human rights.<sup>2</sup>
2. During his visit, the Commissioner met the Deputy Prime Minister and Minister of Justice and Institutional Reform, Mr Jo Vandeuren, the Minister for Foreign Affairs, Mr Karel De Gucht, and the Minister for Migration and Asylum Policy, Ms Annemie Turtelboom. Meetings with the Prime Minister, Yves Leterme, the Deputy Prime Minister and Minister for the Interior, Mr Patrick Dewael, and the Deputy Prime Minister and Minister for Employment and Equal Opportunities, Ms Joëlle Milquet, had to be cancelled because of political problems arising within the Federal Government during the visit.
3. At the regional and community level, the Commissioner had meetings with the Minister-Presidents (Prime Ministers) of the Flemish Region, the German-speaking Community and the Brussels-Capital Region, the Flemish Minister for Culture, Youth, Sport and Brussels Affairs, the Flemish Minister for Internal Administration, Urban Planning, Housing and Integration, the Flemish Minister for Mobility, Social Economy and Equal Opportunities, the French Community's Minister for Childhood, Youth Support and Health and the Walloon Minister for Internal Affairs and the Civil Service. He also had meetings with members of the Senate and the Chamber of Representatives, the Presidents of the Constitutional Court, representatives of Bar Councils and members of civil society.<sup>3</sup> He held discussions with the Federal Ombudsmen, the Directors of the Centre for Equal Opportunities and Opposition to Racism, the Director of the Institute for Equality between Women and Men, members of the Standing Police Monitoring Committee, the Flemish Commissioner for Children's Rights and the Delegate General for Children's Rights of the French Community. He also met the Chair of the National Commission for Children's Rights.
4. The Commissioner visited Forest and Antwerp remand prisons, the closed centre at Merksplas and two Brussels shelters for victims of domestic violence. His team also visited the closed centres for aliens "127" and "127 bis", the closed centre for the temporary placement of minors at Everberg and the accommodation facilities in Zulte for families in the process of being repatriated.
5. The Commissioner would like to thank the Belgian federal, regional and community authorities for their co-operation and willingness to engage in constructive dialogue. He particularly wishes to thank the Ministry for Foreign Affairs and Belgium's Permanent Representation in Strasbourg for their valuable assistance in organising the visit and ensuring that it ran smoothly. He would also like to thank all those he met for their approachability and open-minded, constructive attitude.
6. Belgium's institutional framework divides powers among federal, regional, community and local authorities, which can make it difficult to ascertain which authority is responsible for a particular matter. It is also common for several authorities to be competent for the same aspect at different levels. For instance, the ratification of human rights conventions often has to be consented to by the federal, regional and community parliaments. This division of powers must not be allowed to result in gaps in the

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<sup>1</sup> The following advisers accompanied the Commissioner on his visit: Mr Lauri Sivonen, Mr Julien Attuil-Kayser and Ms Delphine Freymann.

<sup>2</sup> See the Commissioner's mandate – Article 3 (e), Resolution (99) 50 on the Council of Europe Commissioner for Human Rights.

<sup>3</sup> See list set out in Appendix I.

protection or upholding of human rights. Accordingly, the report emphasises that the various authorities share responsibility for implementing its recommendations. Belgian civil society helps to protect human rights and regularly contributes to public debate. The Commissioner admired the leading role played by some associations and the outstanding co-ordination between numerous NGOs in relation to issues such as the rights of migrants, women and children.

7. This report sets out to identify ways of improving the protection and promotion of human rights in Belgium. It is based on information obtained from civil society representatives, among others, during the visit as well as the memoranda, reports and statistics supplied by the Belgian authorities both at the time and afterwards. It naturally refers to relevant reports by human rights monitoring bodies within the Council of Europe and other international organisations. This first assessment report by the Commissioner does not purport to provide a comprehensive analysis of the human rights situation in Belgium, but simply addresses a number of aspects he regards as priorities with a view to improving human rights protection. The Commissioner is keen to lay the foundations for dialogue and co-operation with the Belgian authorities and civil society in relation to the implementation of the report's recommendations, with the goal of ensuring ongoing improvements in human rights protection in Belgium.

## **I. National system for protecting human rights**

### **1. Accession to European and international human rights conventions**

8. A founding member of the Council of Europe, Belgium was the first state to ratify the European Convention on Human Rights ("ECHR") in 1951. It has ratified most of the Council of Europe's human rights protection instruments, and has continually strived to ensure a high level of respect for such rights. In addition, Belgium plays an active role in developing and promoting international human rights protection standards. In 2000, it ratified the Rome Statute on the creation of the International Criminal Court.
9. The Commissioner welcomes the commitments entered into by Belgium, *inter alia*, by ratifying the revised European Social Charter and its additional protocol providing for a system of collective complaints. Human rights protection in Belgium could be strengthened, however, if Belgium ratified Protocol No. 12 to the ECHR, which prohibits all forms of discrimination. Ratifying the Council of Europe Convention on Action against Trafficking in Human Beings would also boost the protection of trafficking victims and help deter the perpetrators. During his visit, the Commissioner discussed with all the authorities concerned the possibility of ratification of the Framework Convention for the Protection of National Minorities. Most of those he spoke to appeared to be in favour of ratifying this Convention, signed by Belgium in 2001.
10. At the United Nations level, ratifying the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Rights of Persons with Disabilities would build on the commitments entered into by Belgium.

### **2. Constitution and Belgian judicial system**

11. Section II of the Belgian Constitution contains numerous provisions relating to human rights. It enshrines a large number of economic and social rights as well as civil and political rights, guaranteeing aliens the same level of protection as nationals. Moreover, this section is regularly supplemented to bring it into line with the country's national and international commitments. Article 14a, for instance, which abolishes the death penalty, was inserted in 2005 following the ratification of Protocol No. 13 to the ECHR.
12. The Constitution provides for the independence of the judiciary. In addition, Belgium has reformed its judicial institutions so as to afford greater protection in this area. Turning the Arbitration Court into the Constitutional Court is a noteworthy example. The latter is responsible for scrutinising laws, decrees and

statutes in the light of the fundamental rights and the principle of equality enshrined in the Constitution. Matters may be referred to it, in the form of preliminary questions or applications for judicial review, by the federal, regional and community governments and parliaments or by any natural or legal person with the relevant capacity to take part in legal proceedings. It comprises equal numbers of French- and Dutch-speaking members, and takes decisions in linguistically mixed formations. Since having its mandate extended to all the human rights enshrined in the Constitution in 2003, the Court has been asked to deal with and rule on numerous laws and decrees affecting those rights, and plays a lead role in protecting them.

13. Belgium has a system of administrative courts to consider applications to set aside administrative acts. The highest administrative court is the Council of State, which comprises one French-speaking and one Dutch-speaking chamber. Which chamber has jurisdiction depends on the impugned administrative authority; the Flemish chamber, for instance, decides cases brought against the Flemish region or Flemish municipalities. The judicial system, for its part, is made up of civil, criminal and specialised courts. The Court of Cassation is the highest of these courts, with three 16-judge chambers. Each chamber also has one French-speaking and one Dutch-speaking division.
14. According to the report by the European Commission for the Efficiency of Justice (“CEPEJ”), Belgium spends €78 per capita each year on its justice system, which is the fifth highest level in Europe. This budget increased by 25% between 2004 and 2006.<sup>4</sup> Notwithstanding the significant sums spent, the Belgian judicial system is still relatively slow. Between 2004 and 2008, the European Court handed down nearly 70 decisions<sup>5</sup> regarding Belgium for proceedings of excessive length, ranging from six to more than 20 years. Lengthy proceedings are an issue for all civil, criminal and administrative courts. They are the result, *inter alia*, of the under-resourcing of the justice system in terms of both the number of judges and operational resources. The problem is particularly marked in Brussels courts for bilingual posts although the problem has diminished considerably since the establishment of two-level linguistic examinations for the recruitment of judges.
15. Delays are also caused by the complex nature of Belgium's legal proceedings and legislation and the organisation of its judicial system. In an effort to remedy these problems, Belgium has recently made a number of legislative amendments and organisational changes. For instance, the Programme Act (*loi-programme*) of 22 December 2003 extends the availability period of supplementary judges who assist judges with specific mandates, promotes the continued use of bilingual judges in Brussels and improves the scope for recruiting lawyers as court assistants. Changes were made in 2005 in order to speed up criminal proceedings – *inter alia* by setting deadlines and timetables for hearings – and facilitate mediation. Nevertheless, Belgium continues to be one of the only European states to have only few simplified procedures for civil, criminal and administrative cases.<sup>6</sup>
16. Proceedings have been speeded up by the Act of 26 April 2007 amending the Judicial Code in order to reduce the judicial backlog. It allows a procedural timetable to be set for civil cases, and makes it unusual for cases to be adjourned. In addition, provision is made for extending judges' scope to fine a party where it has clearly acted unreasonably in bringing proceedings or used them as a delaying tactic. This discourages actions doomed to failure, allowing judicial resources to be concentrated where they are most needed. The Act also strengthens the system for monitoring judges' compliance with statutory time-limits for the consideration of judgments and imposing penalties where necessary. In the event of unwarranted delays, magistrates may now be subject to disciplinary measures.
17. Some court decisions have accepted that the state can be rendered liable before the civil courts for excessively lengthy civil proceedings, and that compensation may be awarded for the damage suffered as a result. This procedure for acknowledging the responsibility of the state before the civil court with reference to an excessive length of civil proceedings and to obtain compensation for the damage suffered is henceforth regarded as effective within the meaning of the ECHR. Under a recent Act, where

<sup>4</sup> CEPEJ report, “European Judicial Systems: Efficiency and Quality of Justice”, 2008 edition.

<sup>5</sup> This number includes judgments, friendly settlements and striking out of the list.

<sup>6</sup> CEPEJ, 2008 report, p.160.

a penal case gives rise to a finding of a violation by the European Court, it may be reopened even if a final judgment has been handed down under domestic law. The Commissioner invites the authorities to continue with legislative amendments and organisational changes designed to simplify proceedings and bring them into line with the decisions of the European Court of Human Rights.

### **3. National human rights structures and national co-ordination of human rights issues**

18. Set up under the Act of 22 March 1995, the Office of the Federal Ombudsmen is an independent body responsible for mediating between administrative authorities and individuals. It comprises two ombudsmen, one French-speaking and the other Dutch-speaking. The ombudsmen are responsible for considering complaints about the operation of federal administrative authorities. They have the power to investigate the operation of any federal administrative department at the Chamber of Representatives' request. They can make recommendations and report on the operation of administrative authorities.
19. The Centre for Equal Opportunities and Opposition to Racism ("the Centre") is an autonomous public authority, attached for administrative purposes to the Ministry of Employment and Equal Opportunities. It is responsible for considering complaints from victims or witnesses of acts of racism, xenophobia or discrimination in the broad sense. Its tasks include informing and advising victims, arranging mediation and, where necessary, bringing court proceedings at the applicants' request. It is also empowered to submit opinions, expert appraisals and recommendations concerning integration policies, the law relating to aliens, efforts to combat poverty, financial insecurity and social exclusion and action against international trafficking in human beings. The Centre is entitled to take part in court proceedings in cases within its remit, and has done so on a regular basis.
20. The Ombudsmen's role coincides with that of the Centre in the area of aliens' rights. The two institutions work together by pooling information and referring complaints to one another in accordance with their respective remits.
21. With regard to discrimination on the ground of sex, there is the Institute for Equality between Women and Men ("the Institute") which is an autonomous public authority. It is attached for administrative purposes to the Ministry of Employment and Equal Opportunities. It receives complaints from people considering themselves to be victims of gender discrimination. The Institute is responsible for guaranteeing and promoting gender equality and combating all forms of discrimination and inequality based on sex by developing and implementing a suitable legal framework and instruments and taking appropriate action. It considers complaints from persons claiming to be victims of discrimination based on sex and is entitled to take part in legal proceedings.
22. With regard to the protection of children's rights, there is a Flemish Commissioner for Children's Rights and a Delegate General for Children's Rights of the French Community. The former is an independent public authority set up by the Flemish Parliament; the latter comes under the authority of the Government of the French Community. They receive and investigate complaints, take up children's rights issues and make recommendations aimed at promoting children's rights. The Standing Police Monitoring Committee ("Committee P") is responsible for receiving and considering complaints of police abuse.<sup>7</sup>
23. The Commissioner met representatives of most of the federal human rights structures, and was favourably impressed by their work in protecting human rights. He wishes to emphasise that, if they are to be effective and gain the public's trust, institutions responsible for considering complaints against public authorities or monitoring their activities from a human rights perspective must be independent and have the necessary resources to fulfil their remit. In addition, potential complainants should be clearly informed of these institutions' role and degree of independence.
24. The Commissioner was informed of discussions under way in Belgium about setting up a national human rights institution. In a 2003 statement, the Belgian Government had indicated its intention to set

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<sup>7</sup> Also see section I. 4 below.

up such an institution. Accordingly, a group of NGOs drew up a draft co-operation agreement between the federal state and the federated entities on the establishment of a Belgian Commission of Fundamental Rights. In this connection, the United Nations Committee Against Torture<sup>8</sup> has voiced its disappointment that Belgium has not yet established an independent national human rights institute enjoying a broad mandate in accordance with the "Paris Principles".<sup>9</sup>

25. In any event, the Commissioner notes that, at present, Belgium does not have either a national human rights action plan or machinery for overall co-ordination of the various agencies in this area. Such an action plan could improve the protection and promotion of human rights by means of a comprehensive, consistent approach involving all the relevant players, including civil society representatives. The Commissioner has issued a recommendation<sup>10</sup> on systematic work for implementing human rights at the national level, which contains guidelines for drafting human rights action plans; in particular, it is important to carry out a baseline study of the situation and of the structural framework for human rights protection.
26. The Commissioner is convinced that such an assessment would help to clarify the respective responsibilities of the authorities and agencies concerned, and identify the various shortcomings in the area of human rights protection with a view to remedying them. The national human rights action plan should be regarded as a co-ordinated, open-ended process aimed at ensuring ongoing improvements in human rights protection in Belgium.

#### **4. Police**

##### *a. Police and human rights*

27. The Commissioner attaches great importance to the role of police authorities in protecting human rights. Since 2003, the Belgian federal police have developed an equality and diversity policy for an integrated police force, encompassing areas such as communication, recruitment, training and integration. During his visit, the Commissioner was informed that human rights are dealt with during basic and in-service training for members of the Belgian police force. The Commissioner recommends that human rights be covered in greater depth as part of basic and in-service training and through the organisation of special training courses.
28. In the Commissioner's view, policing in a democratic society requires police authorities to be willing to be monitored and held accountable for their actions. Independent monitoring and complaints bodies must be set up to deal with alleged incidents of police malpractice. The independence of such bodies can only be ensured effectively if they are placed outside police and ministry structures.
29. Complaints against the Belgian police may be dealt with by the internal monitoring unit, by the General Police Inspectorate attached to the Interior Ministry or by Committee P. The latter committee, which is attached to the federal parliament, conducts external police audits. It is responsible for overseeing, on the one hand, the overall operation of police, inspection and monitoring departments and, on the other, the performance of police-related duties by all the officers and staff concerned. Committee P may decide, "where it considers that the details of a complaint or report do not concern organisational failings, negligence or serious individual breaches",<sup>11</sup> to transfer it to the local or federal police. Where complaints are deemed to relate to failings, negligence or serious and individual breaches, they are dealt with by Committee P on the basis of an investigation conducted either by its own investigation unit or by the internal monitoring unit within the police department in question. Where the allegations are of a criminal nature, the complaint is transferred to the prosecuting authorities.

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<sup>8</sup> CAT/C/BEL/CO/2, 21 November 2008, § 12.

<sup>9</sup> Set out in Resolution A/RES/48/134 of the United Nations General Assembly of 20 December 1993.

<sup>10</sup> "Recommendation of the Commissioner for Human Rights on systematic work for implementing human rights at the national level", 18 February 2009, CommDH(2009)3.

<sup>11</sup> Article 10, as amended, of the Institutional Act of 18 July 1991.



30. In 2006<sup>12</sup>, Committee P received 2,314 complaints about local and federal police operations. A total of 1,508 complaints lodged directly with Committee P were concluded in 2006. Of these, about 6% were transferred to the prosecuting authorities, 45% were ruled to have involved no breaches or failings, and 8% gave rise to a finding that a breach or failing had occurred.
31. In its 2008 report<sup>13</sup>, the UN Committee Against Torture considered that the fact that “many of the members of Committee P are police officers and individuals seconded from police services” raised “concerns as to the guarantees of independence to be expected from such an external oversight body”. In addition, civil society groups have criticised Committee P’s investigation unit for failing to place sufficient emphasis on hearing victims during its investigations. The police monitoring body’s lack of transparency has also been mentioned, particularly the fact that it does not provide detailed information about the substance of complaints or the outcome of its investigations. Furthermore, in its 2006 annual report, Committee P regrets that “judges often show considerable clemency towards offences committed by police officers”, emphasising the need for harsh but fair sanctions in the event of a finding against a police officer.<sup>14</sup> The Commissioner invites the Belgian authorities to make the machinery for monitoring police activities more independent and transparent, and more effective at the investigation stage.

b. *Protection of arrested persons' rights during police questioning*

32. The Commissioner notes that Belgian legislation on detention on remand does not provide for a lawyer to be present when a suspect is questioned by the police, or even when an accused is examined by the investigating judge before the latter has decided to issue an arrest warrant. The “Grand Franchimont” proposal to reform criminal procedure endorsed by the Senate in 2005 but never approved by the Chamber of Representatives, established new rights for anyone held in custody prior to appearing before the investigating judge including the right of access to a lawyer for persons held in custody for more than eight hours.
33. The Commissioner is disappointed that this reform was never implemented. In its reports on Belgium, the European Committee for the Prevention of Torture (“CPT”) has recommended that Belgian law normally guarantee access to a lawyer from the commencement of deprivation of liberty by the police, and that a person deprived of his or her freedom be allowed to inform a relative or a third party of his or her situation.<sup>15</sup> In addition, according to the established case-law of the European Court of Human Rights, “the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation”.<sup>16</sup> The Commissioner recommends that the authorities amend the provisions of the Code of Criminal Procedure in order to guarantee the fundamental rights of persons deprived of their liberty, as soon as they are taken into custody.

## II. Prison system

### 1. *Prison overcrowding*

34. There are 33 prisons in Belgium. Prisons are divided into two categories: remand prisons for those held under the law on remand in custody, and prisons for sentenced offenders, in which custodial sentences are served. Belgium has a prison capacity of 8,456. In early 2008, 9,871 people were being held in Belgian prisons, with another 584 convicted offenders under electronic surveillance.<sup>17</sup>
35. The Commissioner notes that with 1,449 supernumerary inmates in early 2008, prison overcrowding is a real scourge, which has continued to worsen in Belgium in recent years. More than 75% of prisons are

<sup>12</sup> Committee P, 2006 annual activity report.

<sup>13</sup> CAT/C/BEL/CO/2, 21 November 2008 § 11.

<sup>14</sup> Committee P, 2006 annual activity report, point 2.2.4.1.

<sup>15</sup> CPT/Inf (2002) 25 § 52-53; CPT/Inf (2006) 15 § 19-20.

<sup>16</sup> European Court of Human Rights, Panovits v. Cyprus judgment, 11 December 2008.

<sup>17</sup> Figures supplied by the Justice Minister in response to a parliamentary question in the Senate on 28 February 2008.

overcrowded, with occupation rates of 150% in some cases. Overcrowding is found in all types of prison, including both remand prisons and prisons for sentenced offenders. The CPT has been drawing attention to this problem since 1994, recommending that the authorities give very high priority to implementing measures aimed at reducing overcrowding in Belgian prisons and improving prisoners' living conditions.<sup>18</sup>

36. Prison overcrowding in Belgium is caused by a range of factors, including greater use of remand in custody, longer sentences, consecutive sentences, fewer early releases and the fact that many committed mental patients awaiting placement in specialised institutions spend an extended time in prison owing to a lack of available places. Overcrowding may also be attributed to the lack of investment in alternative sentences and the longstanding inadequacy of the budgetary resources allocated to the prison sector.
37. During his visit, the Commissioner noted that the prison service has to put up with prison overcrowding. The directors of the prisons visited explained that they are powerless to deal with the problem: they cannot refuse new prisoners or decide on release dates, and are forced to find practical solutions for managing the supernumerary prisoners.
38. Prison overcrowding exacerbates detention conditions. Given that the number of prisoners considerably exceeds actual prison capacity, their treatment does not comply with the law. Overcrowding prevents many prisoners from exercising their basic rights, thereby violating their human dignity.
39. The Dupont Act<sup>19</sup> provides for the separation of untried and sentenced prisoners. The prison overcrowding situation has blurred the distinction between the two types of prison, however: remand prisons have gradually been used to house sentenced prisoners, generally those either sentenced to short prison terms or awaiting classification and transfer to another prison. The Commissioner wishes to emphasise the need to separate untried and sentenced prisoners. This principle, reiterated in the European Prison Rules<sup>20</sup>, is based on respect for the presumption of innocence.
40. Overcrowding worsens the working conditions of prison warders, social workers, psychologists and doctors. They cannot discharge their duties properly owing to a lack of time and resources and inadequate facilities. Among other things, this adversely affects prisoners' rehabilitation, thereby thwarting one of the main purposes of prison.
41. The Commissioner visited the Antwerp and Forest remand prisons, which are seriously overcrowded. In its report published back in 2002, the CPT noted that Antwerp prison was subject to a very high level of chronic overcrowding.<sup>21</sup> On the day of its visit, the remand prison had 715 inmates (including 44 women) for a capacity of 439 places. Forest prison, with a capacity of 405 places, had 690 inmates during the Commissioner's visit.
42. Although Antwerp remand prison has been renovated and is well maintained, overcrowding interferes with its logistical arrangements. Forest remand prison is dilapidated and unsanitary, and overcrowding simply worsens detention conditions.
43. During his visit, the Commissioner noted that prison overcrowding has a serious impact on detention conditions in terms of hygiene, lack of privacy, and safety. For instance, some prisons do not have enough linen for their inmates, the amount of food distributed is occasionally inadequate, and shower access is limited. Exercise time is cut short and activity programmes are minimal. As a result, many inmates of such prisons, including that of Forest, spend 23 hours a day in their overcrowded cells. The number of visits is reduced in inverse proportion to the increase in the number of inmates. Overcrowding

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<sup>18</sup> CPT/Inf (94) 15; CPT/Inf (98) 11.

<sup>19</sup> Section 11 of the Act of 12 January 2005 on Principles of Prison Administration and Prisoners' Legal Status.

<sup>20</sup> Rule 18.8: "In deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain: a. untried prisoners separately from sentenced prisoners."

<sup>21</sup> CPT/Inf(2002)25 § 70.

causes tension and even violence within prisons. Hospital and court transfers take longer, and in some cases inmates' access to their lawyers is restricted.

44. During his visit, the Commissioner was struck by the number of prisoners per cell: at Antwerp, four-person cells may hold up to 10 people, while one-person cells may hold three. As already detailed by the CPT during its visit<sup>22</sup>, some prisoners sleep on mattresses on the floor because there is not enough space for extra beds. In total, 100 of the prison's inmates do not have beds. Likewise, cells in C and D blocks at Forest remand prison are extremely overcrowded. Small one-person cells are occupied by three prisoners. Three-person cells hold five prisoners. Once again, some prisoners are forced to sleep on mattresses on the floor, which have to be folded up during the day so that the prisoners can move around.
45. The Commissioner wishes to point out that individual cells are a right enshrined in the European Prison Rules.<sup>23</sup> Although the Dupont Bill provided for an "individual living space" for each prisoner, however, the final Act<sup>24</sup> grants only the right to a "living space". As the CPT has emphasised on a number of occasions, overcrowding is no justification for breaking certain basic rules such as the one prisoner-one bed principle.<sup>25</sup>
46. The Commissioner noted that some cells in these prisons do not have separate toilets, despite accommodating several people. They are cramped, and the only separation is a screen about a metre high in front of the toilets. The toilets in these cells are not partitioned off sufficiently to afford a modicum of privacy. The Commissioner considers it unacceptable for prisoners to have to use the toilet in view of their fellow inmates.

## **2. Dilapidated state of some prisons**

47. The Commissioner found some prisons to be dilapidated and unsanitary as well as overcrowded. In its report published in 1994<sup>26</sup>, the CPT observed "a pernicious combination of overcrowding, a lack of suitable sanitary facilities and a very restricted programme of activities" at St. Gilles prison, as well as "the generally ramshackle and dilapidated state of the prison", concluding that "to subject prisoners to such a combination of conditions amounts [...] to inhuman and degrading treatment".
48. The Commissioner was particularly struck by detention conditions at Forest remand prison. It was opened in 1901, and some blocks have hardly been renovated since. The state of the building is a matter for grave concern. Damp problems make the premises unsanitary, and its electricity and plumbing are dangerous. Some parts of the prison are unstable, such as the kitchen, which was in danger of collapsing and had to be closed as a matter of urgency. Hygiene is poor; inmates and warders reported that the prison was infested with cockroaches and rats.
49. The cells are dilapidated and damp. Their stifling atmosphere in summer and the lack of ventilation have forced inmates to break some of the window panes. The Commissioner noted that these panes had not been replaced, even though it was cold during his visit and cold air was able to get into the cells. This problem should be remedied by replacing the broken windows and ensuring that the cells are better ventilated.
50. In the Commissioner's opinion, the situation in the two blocks housing those inmates who work in the prison is particularly disturbing. Their cells are dilapidated and unsanitary. As well as bars, the windows are fitted with wire mesh that blocks out the light. These cells do not have toilets: prisoners have to use buckets, which they are allowed to empty twice a day. Cells without any sanitary facilities are also found at other prisons. The Commissioner considers it intolerable to subject prisoners to such appalling

<sup>22</sup> CPT/Inf (2002) 25 § 70.

<sup>23</sup> Rule 18.5: "Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation."

<sup>24</sup> Act of 12 January 2005 on Principles of Prison Administration and Prisoners' Legal Status.

<sup>25</sup> CPT/Inf (2002) 25 § 70 and CPT/Inf (2006)15 § 93.

<sup>26</sup> CPT/Inf (94) 15 § 85.

hygiene conditions, and urges the authorities to stop using those blocks whose cells are not fitted with toilets as soon as possible.

### **3. Health conditions in prisons**

51. The Commissioner noted organisational and practical shortcomings in the provision of health care in Belgian prisons. The Dupont Act enshrines the right to health protection and to medical treatment in prison.<sup>27</sup> The Commissioner refers to his observations during his visit and to the International Prisons Observatory's 2008 report.<sup>28</sup> The Committee Against Torture has said that it is concerned at detention conditions, in particular the lack of qualified staff, the dilapidated facilities, inadequate care and the absence of ongoing treatment.<sup>29</sup>
52. The Commissioner welcomes the fact that multidisciplinary teams were set up within psychiatric wings in 2007. Nevertheless, there are not enough qualified staff for the number of inmates, there are long waiting lists for doctor's or nurse's appointments, and consultations are too short, all of which undermines the standard of care. In addition, the lack of warders to carry out medical transfers causes organisational problems and limits access to treatment.
53. In terms of amenities, some medical facilities are just as dilapidated and unsanitary as the rest of the prison. For instance, the psychiatric wing at Forest remand prison is old and lacks proper amenities. Detention conditions for psychiatric detainees within the Belgian prison system are particularly problematic. Psychiatric wings are occupied by psychiatric detainees who have to wait a long time for a transfer to a social protection institution and by prisoners with mental illnesses, drug addictions or suicidal tendencies. Many psychiatric wings are overcrowded, such that some psychiatric detainees are held in "normal" cells. During his visit to Antwerp remand prison, for instance, the Commissioner noted that the psychiatric wing had a capacity of 51 places, but held 100 mentally ill prisoners. In the Commissioner's view, such a situation deprives psychiatric detainees of access to hospital staff and the treatment they need. The Commissioner notes that the government intends to build two social protection institutions.
54. In addition, according to Justice Ministry figures, the number of suicides in Belgian prisons is on the rise: 14 inmates committed suicide in 2008. There were 10 suicides in 2003, compared with eight in 2004 and 11 in 2005 and 2006. In the Commissioner's view, overcrowding in psychiatric wings must be addressed as a matter of urgency, and prisoners guaranteed a high standard of medical treatment within a reasonable timeframe. The special detention regime for psychiatric detainees should be fully applied.

### **4. Protection of prisoners' rights**

55. The Dupont Act defines prisoners' legal status and lays down rules governing prison administration. It grants prisoners a specific legal status and certain fundamental rights. Under the Act, custodial sentences must be served in conditions consistent with human dignity, which enable prisoners to preserve or enhance their self-respect, while both appealing to their sense of personal and social responsibility and preserving law and order. The Commissioner regrets, however, that many of the Act's provisions have not entered into force to date.<sup>30</sup>
56. With reference to the European Prison Rules<sup>31</sup>, the Commissioner wishes to point out that prisons should be subject to independent monitoring. Belgium signed the Optional Protocol to the United Nations Convention Against Torture ("OPCAT") on 24 October 2005, but has not ratified it to date. Under this

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<sup>27</sup> Sections 87 et seq.

<sup>28</sup> International Prisons Observatory, *Notice 2008*, p.102 et seq.

<sup>29</sup> CAT/C/BEL/CO/2, 21 November 2008 § 23.

<sup>30</sup> Section 180 of the Dupont Act provides that the King shall set the date on which the Act and each of its provisions enters into force.

<sup>31</sup> Rule 93.1: "The conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public."

Protocol, the States Parties have to set up an effective independent national mechanism designed to prevent torture by means of unannounced visits to all places of detention.

57. Belgian set up monitoring committees and a Central Prison Monitoring Council in 2003.<sup>32</sup> They are responsible for independent monitoring of the treatment of prisoners and compliance with the rules in force. The Commissioner notes, however, that the committees are staffed by volunteers rather than professionals, such that some of them are not operational in practice. Their inspections are scattered and fragmented. Owing to a lack of co-operation between the committees and the central council, it is not possible to publish a consolidated annual report on problems in the various prisons.<sup>33</sup> The Commissioner recommends that the Belgian authorities ratify the OPCAT and rapidly set up an effective mechanism for visiting places of detention, in accordance with the obligations deriving from the Protocol.
58. Under the Dupont Act, prisoners will be entitled to lodge complaints with complaints boards to be attached to the monitoring committees. The complaints boards will be responsible for dealing with complaints from individual prisoners, who will be able to dispute prison management decisions concerning them. These provisions of the Dupont Act have not entered into force to date, however. The Commissioner recommends that the Belgian authorities introduce an effective individual complaints system for prisoners by setting up an independent body.
59. The Commissioner welcomes the agreement in principle to allow the Office of the Federal Ombudsmen to run regular advice sessions in prisons. He recommends that it be granted the necessary resources to organise such sessions. In this connection, the Commissioner notes that the ombudsmen already receive complaints from prisoners, particularly where the latter are unable to have rehabilitation plans prepared for them or receive visits.

#### **5. Prison staff**

60. Prison staff are recruited by competitive examination; no qualifications are needed. The length of their basic training was increased from six weeks to three months since 2007. The Commissioner considers this to be still quite short and welcomes the plans to further increase the length of initial training and to review the recruitment procedure.
61. Prison staff complain about the conditions in which they have to work because of overcrowding, the failure to meet prisoners' basic needs and the lack of security in some prisons. They face tough working conditions and an excessive workload, bearing the brunt of inmates' stress and violence towards one another, which are compounded by overcrowding. Their work is further complicated by the fact that their numbers do not reflect actual occupancy rates in overcrowded prisons.
62. Prison staff exercise their right to strike as means of protesting against their unsatisfactory working conditions. Numerous strikes took place in 2006, 2007 and 2008. Depending on the degree of mobilisation, there may not be any prison staff on duty during a strike. Strikes lasted several weeks in some prisons, without any kind of skeleton service, thereby depriving prisoners of the enjoyment of their most basic rights. The CPT found that prisoners' living conditions during the 2005 strikes were far from adequate, despite the use of security forces and Red Cross and civil defence teams.<sup>34</sup> The Commissioner wishes to reiterate the CPT's recommendation that a skeleton service be introduced in the event of strikes by prison staff.

#### **6. Action taken by the authorities to improve the situation in prisons**

63. During his interview with the Justice Minister, the Commissioner conveyed his concerns about overcrowding and the dilapidated state of several Belgian prisons. The Minister said that the Government regarded the overcrowding problem as a priority, and outlined the measures to be taken

<sup>32</sup> Royal Decree of 4 April 2003 amending the Royal Decree of 21 May 1965 on General Prison Regulations.

<sup>33</sup> International Prisons Observatory, *Notice 2008*, October 2008, p.176.

<sup>34</sup> CPT/Inf (2006) 15 § 107 et seq.

under the 2008-2012 Master Plan for More Humane Prison Facilities. The plan provides for measures such as renovating old prisons to bring them up to standard, building new prisons and closing down some prisons, including Forest prison and St. Gilles prison in Brussels. The plan is designed to extend the prison estate with a view to reaching a total capacity of 10,200 places. A new “enlarged” Master Plan has subsequently been adopted which foresees the closing down of further prisons.

64. In this connection, the Commissioner took note of the concerns voiced by some NGOs about the building of “high-security” prisons, devoid of any human dimension, which would do little for rehabilitation.
65. The Commissioner notes the action recently taken by the Belgian authorities to address prison overcrowding. Nevertheless, he wishes to point out that simply extending the prison estate will not suffice. Such an extension must go hand in hand with a comprehensive criminal justice policy aimed at curbing the structural process of prison population inflation. In this connection, he refers to the Committee of Ministers’ Recommendation concerning prison overcrowding<sup>35</sup>, according to which “the extension of the prison estate should rather be an exceptional measure, as it is generally unlikely to offer a lasting solution to the problem of overcrowding”.
66. It will be some time before the master plan’s implementation has any real impact on the overcrowding rate. Accordingly, the Commissioner calls on the Belgian authorities to take immediate action to address the unacceptable detention conditions of prisoners forced to live in overcrowded and often dilapidated cells.
67. In addition, the Commissioner notes the efforts made to develop alternative sentences to imprisonment. However, some studies appear to show that alternative measures are applied only occasionally as a substitute for immediate prison sentences, and are used mainly as a substitute for other, less restrictive measures.<sup>36</sup> The Commissioner recommends that the authorities promote non-custodial sentences. Such measures help to maintain offenders’ social and family ties and facilitate their rehabilitation.

### III. Immigration and asylum

#### 1. *Right of asylum*

68. The Act dealing with resident aliens<sup>37</sup> was substantially amended in September 2006. In particular, these amendments introduced the concept of subsidiary protection. Such protection covers those persons not entitled to refugee status, where there is good reason to believe they would be at genuine risk of “serious harm” if repatriated. In addition, the new provisions significantly modified the asylum process and the rights of aliens living in Belgium.<sup>38</sup> Nevertheless, there are still problems, particularly in relation to the family reunification procedure, which continues to be complicated even for refugees. Following his visit, the Commissioner was informed that legislative amendments aimed at facilitating this procedure had been adopted. The Commissioner hopes that these modifications will expedite the family reunification procedures in practice.
69. Prior to the entry into force of the September 2006 Acts<sup>39</sup>, the processing of asylum applications in Belgium took an excessive length of time, with bottlenecks before the Council of State. In order to deal with the backlog and the ensuing procedural delays, the 2006 Acts set up the Office of the Commissioner-General for Refugees and Stateless Persons (“CGRA”) to act as the primary independent administrative authority in the asylum field, and the Council for Alien Disputes (“CCE”) to rule on

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<sup>35</sup> Recommendation No. R (99) 22 of the Committee of Ministers concerning prison overcrowding and prison population inflation, 30 September 1999.

<sup>36</sup> International Prisons Observatory, *Notice 2008*, 8 October 2008, p.152.

<sup>37</sup> Act of 15 December 1980 on Aliens (Entry, Residence, Establishment and Deportation).

<sup>38</sup> Human Rights Without Frontiers International, *Human Rights in Belgium*, March 2008.

<sup>39</sup> Act of 15 September 2006 reforming the Council of State and establishing a Council for Alien Disputes, and Act of 15 September 2006 amending the Act of 15 December 1980 on Aliens (Entry, Residence, Establishment and Deportation).

appeals. The Council of State is now competent for only a limited number of applications to set rulings aside. In order to speed up the procedure, it was also decided to abolish the process of ruling on an application's admissibility, which is now examined at the same time as its substance. Only the CGRA can examine applications.

70. According to all those consulted by the Commissioner, the new procedure has significantly speeded up the asylum process and reduced the backlog of applications. There were 5,248 applications pending before the CGRA in December 2008, compared with a backlog of more than 10,000 in January 2006. Another factor is the gradual reduction in the number of applications received, which dropped from more than 42,691 in 2000 to about 12,000 in 2008.<sup>40</sup> The asylum process now takes nine months on average. There are still problems, however, in respect of those applications previously awaiting consideration by the former Permanent Refugee Appeals Commission. The CCE took over from the Commission on 1 June 2007 and has so far only been able to clear 37 per cent of the backlog. However, the authorities pointed out that asylum seekers who have not received a final decision from the competent bodies within a period of four years – three years for families – can obtain residence permits.
71. While the Aliens Office's role has changed a great deal, it still retains a marginal role for deciding on asylum applications. In the case of multiple asylum applications and the absence of new elements, the Aliens Office can issue the decision of not taking the application into consideration. The application is then immediately rejected without being forwarded to the CGRA. According to the Bar Councils, the Aliens Office lacks transparency and makes it difficult for lawyers to provide new information. Where the Aliens Office disallows an application, the only avenue for appeal is to apply to the CCE to have the decision set aside on points of law. The Commissioner notes that asylum seekers rejected at this stage cannot provide factual evidence to demonstrate the merits of their case, and invites the authorities to allow this.
72. The new asylum procedure gives lawyers a greater role, requiring a comprehensive grasp of the procedure and the related deadlines. Non-governmental organisations voiced their concerns about the potential repercussions of inexperienced young lawyers having to defend complex cases. For their part, lawyers told the Commissioner that they had trouble communicating with specialised courts and gaining access to their clients' case-files. Moreover, the asylum seeker may feel excluded from the procedure which concerns him or her.
73. As the United Nations High Commissioner for Refugees notes with disappointment<sup>41</sup>, the CCE does not have investigative powers of its own, and must instead consider appeals primarily on the basis of evidence compiled at first instance. The fact that the CCE does not have a legal aid office makes it difficult to secure an interpreter's services free of charge. This is also the case for the translation of documentary evidence that applicants may wish to file as part of their appeals. Such restrictions on the rights of the defence are compounded by a sense that the new authority lacks transparency, given its limited publication of statistics and previous rulings. The Commissioner encourages the Belgian authorities to make the asylum procedure more transparent including at the appeals stage.

## **2. Deprivation of migrants' liberty/migrants' detention conditions**

### *a. Administrative detention of asylum seekers and irregular migrants*

74. Belgium's closed centres for aliens hold several categories of people, including aliens who do not satisfy conditions of entry and who may or may not have applied for asylum, people entering the country under the "Dublin system"<sup>42</sup> and irregular migrants.<sup>43</sup>

<sup>40</sup> CGRA, *Davantage de protection offerte par le CGRA en 2008*, 8 January 2009. Note: 3,331 applications, or 27% of all asylum applications, were subsequent applications from people having previously applied for asylum in Belgium.

<sup>41</sup> UNHCR, *Note aux partis politiques concernant la protection des réfugiés, des bénéficiaires de la protection subsidiaire et des apatrides en Belgique*, Brussels, 30 March 2007.

<sup>42</sup> Dublin Convention of 16 June 1990, as amended by Regulation No. 343/2003 of the Council of the European Union of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

75. Non-governmental organisations and the European Parliament's report<sup>44</sup> alike continue to highlight cases of aliens being arrested following a non-specific summons from the Aliens Office, even though the European Court condemned such arrests in 2001.<sup>45</sup> The Commissioner urges the authorities to issue clear instructions to the police and other relevant departments, so as to ensure that no aliens are arrested by such means.
76. Section 74/6 § 1a of the Act of 15 December 1980 provides for 15 situations in which asylum seekers may be detained. Aliens who are registered in another European state and those who have lodged an asylum application and come under the "Dublin system" can also be detained. Such detention, decided by the Aliens Office, does not appear to be always justified taking into consideration the actual risk of absconding or any guarantees these persons might provide that they will actually appear.
77. 730 asylum seekers were detained at closed centres in 2008. The Commissioner notes that half of these detained migrants were stopped at the border, particularly at airports, without valid tickets. In some cases, persons in possession of valid tickets may also be detained after lodging an asylum application at the border.<sup>46</sup> All such persons are systematically detained at holding centres 127 or 127 bis. Their asylum applications are then examined according to expedited deadlines designed to ensure that the entire process does not exceed two months, which is the maximum length of detention. However, a May 2008 Constitutional Court decision<sup>47</sup> found that the difference of treatment between the 15-day deadline for filing an appeal before the CCE and the 30-day deadline for other appeals had not been justified in the law. In accordance with the Constitutional Court's decision, the federal authorities have drafted a new bill. It provides for the retention of two different deadlines, of 15 and 30 days respectively, but sets forth a justification for such differential treatment, as required by the Constitutional Court's decision.<sup>48</sup>
78. The ordinary asylum procedure generally takes about 9 months. The implication is that, under the faster procedure of two months for applications at the border, such applications may not only be given priority, but that they could also be examined in less detail than other applications. The anxiety induced by detention is compounded by the material problems involved in compiling an application while in detention, such as the difficulty of obtaining evidence and the fact that detention centres are not properly equipped to satisfy the various procedural requirements. The Commissioner underlines that the required promptness of the asylum procedure should not compromise the detailed consideration of each application.
79. The detention of certain asylum seekers appears questionable especially since detention is systematic for many asylum seekers. The Commissioner invites the authorities to make those persons who lodge their asylum applications at the border subject to the same rights and procedures as other applicants. More generally, he wishes to point out that asylum seekers have not committed any offence, and that their systematic detention in some cases is clearly at odds with the need to base each detention decision on individual circumstances.
80. As regards the detention of irregular migrants, the law stipulates an initial time-limit of two months. A two-month extension may then be granted. By decision of the competent Minister, detention may be extended on a monthly basis up to a maximum duration of eight months, where this is "necessary for reasons of public order or national security". The average duration of detention is about 23 days, which

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<sup>43</sup> In Belgium, administrative detention in closed centres is officially referred to as "maintien à la disposition du gouvernement" in French. This terminology is also applied when families are kept in open facilities under the legislation concerning the entry and stay of aliens.

<sup>44</sup> European Parliament, *Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation from the LIBE Committee*, adopted on 29 May 2008, PE404.456v01-00.

<sup>45</sup> European Court of Human Rights, *Conka v. Belgium* judgment, 13 March 2001.

<sup>46</sup> CBAR, *Fiche d'aide juridique à l'usage des avocat(e)s de demandeurs/euses d'asile détenus durant la procédure d'asile à la frontière*, Brussels, 9 September 2008.

<sup>47</sup> Constitutional Court, judgment 81/2008 of 27 May 2008, B.45.10, p. 66.

<sup>48</sup> "B.45.9 It is conceivable that, in setting deadlines for the filing and examination of appeals, the legislature may take account of the fact that the applicant is being held in custody, a situation that ought to be kept as brief as possible. In accordance with the desire expressed in the preliminary documents quoted in B.44, however, the impugned provision does not make any distinction as to whether or not the alien having filed the appeal is being held in a specified place.", judgment 81/2008 of 27 May 2008.



implies that few extensions are granted. However, the statutory time-limit starts afresh following a deportation attempt thwarted by the objections of the person concerned. An alien may potentially be detained for an unlimited period in the event of multiple refusals to board. The Commissioner finds this situation particularly disturbing, given that it is not included in the figures published by the Belgian Government, which regards extensions to detention as new detentions. More generally, associations have highlighted a certain lack of transparency in the figures, along with the fact that limited information is available about holding centres. The Commissioner invites the Belgian authorities to ensure that, in practice, the duration of detention in closed centres does not exceed the maximum time-limit of eight months, which is already long, and to facilitate access to detailed information about such detention.

81. Following a decision by the Minister of Migration Policy and Asylum, it was announced that families with children would no longer be detained in closed centres as of 1 October 2008.<sup>49</sup> While this decision is being complied with in the vast majority of cases, some children and their parents are in fact still being detained. At the time of the Commissioner's visit to Centre 127 bis, a mother and her young teenage son had been in detention for 22 days. According to the authorities, five families with six minors, were detained between October and December 2008. Those turned back at the border were held for one day, and those having applied for asylum at the border were held for 20 days. In practice, the authorities continue to detain families stopped at the border without entry documents, considering that international obligations<sup>50</sup> require them to do so. Both the Delegate General for Children's Rights of the French Community and the Commissioner for Children's Rights of the Flemish Community<sup>51</sup> have, however, emphasised the adverse impact of detention in closed centres on children's health and development. The study on detention commissioned by the Interior Ministry even argued that "*in terms of children's rights and welfare, holding families with children is unacceptable in the current circumstances*".<sup>52</sup> Bearing in mind the positive alternatives already found for the great majority of families, the Commissioner invites the authorities to put a complete stop to the detention of minors in closed centres, so that they are no longer subjected to unsuitable accommodation conditions.

b. *Material detention conditions*

82. Closed centres for migrants have attracted greater scrutiny in recent years on the part of both Belgian associations and international organisations. In February 2008 the Chamber of Representatives, concerned about living conditions, asked the Federal Ombudsmen to audit closed and open centres for migrants in Belgium.
83. Belgium has six closed centres for aliens. The INAD Centre is located in the transit zone at Brussels Airport. With a capacity of 30 places, it is designed to accommodate persons turned back at the border (categorised as "inadmissible" by the Aliens Office). It receives regular visits from international organisations, including one by the CPT in 2005; on each occasion, the material conditions there have been deemed inappropriate for detention lasting more than a few hours, owing in particular to the lack of access to fresh air or any opportunity for exercise. Social workers, NGOs and visitors do not have access to this zone, and there are no facilities for children, although children are sometimes detained there. The Commissioner invites the authorities to comply as soon as possible with all the recommendations made by the CPT in its 2006 report.<sup>53</sup>
84. The closed centre for aliens known as Centre 127 is also located on airport premises. Set up as a temporary facility in 1988, it is made up of prefabricated containers placed at the end of the airport landing strip. It has a capacity of 60, but according to the authorities is now hardly ever full, owing *inter alia* to airlines' stricter screening of boarding passengers and the scrapping of a number of direct air routes from Brussels. During its visit, the Commissioner's team noted the facilities' dilapidated state and

<sup>49</sup> See also section III. 4 below.

<sup>50</sup> Especially the Chicago Convention on international civil aviation.

<sup>51</sup> Flemish Commissioner for Children's Rights, *Heen en retour: Kinderrechten op de vlucht*, September 2007.

<sup>52</sup> Sum Research, *Etude portant sur les alternatives à la détention de familles avec enfants dans les centres fermés en vue de leur éloignement. Partie 2: Vision et recommandations*, February 2007, p.19.

<sup>53</sup> Report on the visit to Belgium by the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment (CPT) from 18 to 27 April 2005, CPT/Inf (2006) 15, § 47.

the fact that they were wholly unsuitable for detention. Both detainees and staff are subjected to the continual stress of immediate proximity to the runway, where the noise is deafening and there is a permanent smell of kerosene.

85. People are housed in large 18-bed dormitories without any privacy. Owing to the lack of space, there are very few activities available for detained aliens. Outside access is confined to a small lawn that is difficult to use because of aircraft noise. The centre's location inside a military zone means that visits are particularly difficult for the detained aliens' relatives and friends. Lawyers and 24 accredited NGOs can access the centre in a more systematic way. Notwithstanding the staff's well-intentioned efforts, these factors give rise to tension and even violence among aliens. The Commissioner regards the decision to cease holding families at this centre as real progress, but is mindful that it was used for nearly 20 years to hold families. He notes that aliens continue to be detained in wholly unsuitable facilities unable to afford acceptable living conditions. The Commissioner calls for greater speed in the building work on the replacement centre, and for aliens to be detained at other centres pending this permanent solution.
86. Living conditions at the other four detention centres vary, depending in particular on the buildings' age and original purpose. At Merksplas and Bruges, for instance, detention is complicated by the scattered nature of the buildings. Aliens are subjected to a group regime: time-limits on shower access, movement as a group and set lights-out times. The Commissioner regrets the lack of privacy and autonomy, which is compounded by the fact that aliens have to sleep in large 16-person dormitories. As a result of the decision to stop detaining families with children, the various centres have been reorganised and renovation programmes drawn up. The Commissioner urges the authorities to provide decent detention conditions conducive to respect for the privacy and autonomy of all detained aliens.
87. Efforts are being made to protect the health of detained aliens, such as consultations with a nurse for all new arrivals. Further improvements are needed, however, particularly for people with diseases requiring regular monitoring and for pregnant women. Reference was made to the complex hospitalisation procedures at the various centres visited. Many of the aliens met complained about the increased use of anxiolytic drugs, the difficulty of consulting specialists other than dentists and the lack of medical attention. The lack of professional interpreters was also mentioned; in some cases, migrants, who may be of the opposite sex to the person undergoing a medical consultation, have to interpret between patient and doctor. A number of reports, including one by Médecins Sans Frontières<sup>54</sup>, back up these concerns, considering that detention is not the appropriate place for certain persons in need of medical or psychological attention. The Commissioner invites the authorities to improve access to medical services and to provide detainees with the same standard of care as that available outside. In-depth assessments should be carried out in order to determine the desirability of detaining certain patients.

c. *Solitary confinement, special regimes and complaints procedure*

88. The use of solitary confinement in closed centres is strictly regulated by law. The decision to order an initial 24-hour period of solitary confinement is taken by the centre's director. It may then be renewed by the Director General, and subsequently by the competent Minister. As a result, it appears that extended periods of solitary confinement are relatively uncommon. The Commissioner was informed, however, that solitary confinement is sometimes used for administrative purposes, for example in the event of transfers or imminent repatriation, and that it is more common in some centres than others. Moreover, some solitary confinement cells do not meet European standards. For instance, the solitary confinement cell at Centre 127 bis does not have any windows.<sup>55</sup>
89. In addition to solitary confinement, the Aliens Office has introduced a special regime<sup>56</sup> for aliens based on their behaviour. Those deemed problematic may be separated on grounds of their attitude or of psychiatric disorders or medical conditions not conducive to community life. According to the authorities,

<sup>54</sup> MSF Belgium, *Le coût humain de la détention. Centres fermés pour étrangers en Belgique*, 23 May 2007.

<sup>55</sup> The authorities did, however, indicate that the five new cells to be built will have windows.

<sup>56</sup> Paragraph 83 of the Royal Decree of 2 August 2002: "solitary confinement of an occupant whose behaviour jeopardises the group's peace and safety".

this regime is justified by the need to protect both the individuals concerned and the rest of the group. Nevertheless, it is tantamount to ordering extended periods of solitary confinement without any legal basis. According to the authorities, the use of the special regime is subject to a grounded reporting obligation to the Aliens Office. In contrast to solitary confinement *per se*, the decision to apply the special regime is not based on precise criteria and its duration is not specified. Furthermore, those subjected to this regime are sometimes placed in solitary confinement cells. Moreover, civil society representatives referred to several cases of forced application of sedatives on “agitated” foreigners. The Commissioner urges the authorities to put a stop to such arbitrary, unregulated practices.

90. A Complaints Board was set up in September 2003. Complaints may be laid by any detainee who considers that his or her rights have been breached. However, its effectiveness appears to be limited by the strict criteria applicable, the five-day deadline for laying complaints, the lack of investigations in the event of mediation or deportation and, above all, the requirement that complaints be lodged with the director of the closed centre. The Centre for Equal Opportunities is of the view that the system does not afford sufficient guarantees of independence and impartiality.<sup>57</sup> In December 2008, the ministerial order establishing this board was set aside by the Council of State on technical grounds.<sup>58</sup> The Commissioner invites the Belgian authorities to take this opportunity to set up a fully independent complaints body with a straightforward procedure for filing complaints; it could be similar in nature to the body to be set up to consider complaints from prisoners.

d. *Access to translation, information and legal aid*

91. As noted during the visit, the closed centres do not have an established interpreting system. Many of the documents handed out to newly arrived aliens are translated into various languages, so that they understand the reasons for their detention and the centre’s rules. When it comes to oral communication, however, while professional interpretation services are often used, it is not uncommon for other detainees to be asked to act as interpreters in day-to-day communication. These communication problems are compounded by the fact that many aliens speak only one of Belgium’s two main languages, and may be detained in a centre where the other main language is the one in common use. The various language barriers make it difficult to explain to aliens why they are being detained and to provide them with information.
92. One problem with access to information is that leaflets handed out to aliens are not always updated as soon as the regulations change. In addition, aliens’ only sources of independent advice are their lawyers or NGOs authorised to enter the centre. There are social workers at each centre, but they are often extremely busy and may not be in a position to offer informed, independent advice.
93. It is a complicated matter to secure access to legal aid from inside a detention centres Aliens have to act through a social worker or another intermediary in order to obtain legal aid; this can slow down the process of finding a lawyer, and may even dissuade people from requesting one. Indeed, civil society representatives believe this is why the *Chambre du Conseil* receives so few applications for release.<sup>59</sup> Aliens detained at the INAD Centre find it extremely difficult to assert their rights, given that there are no social workers or outside communication. The closed centres do not have any frontline legal advice services able to inform aliens of possible avenues of appeal, although the law provides for such services. The Commissioner has seen how effective they are in other countries, both in offering aliens immediate, independent legal advice of a high standard and in defusing tension. He invites the authorities to introduce such services at all closed centres, and at the INAD Centre in particular, and to allocate the necessary funding to ensure that they are professional, independent and of a high standard.

<sup>57</sup> Centre for Equal Opportunities and Opposition to Racism, *Migration, rapport 2007*, p.161.

<sup>58</sup> Council of State, Administrative Disputes Section, Human Rights League and MRAX v. Belgium judgment, No. 188.705, 10 December 2008.

<sup>59</sup> Report by nine NGOs, *Faire valoir ses droits en centre fermé*, November 2008.

### **3. Effective avenues of appeal against detention or deportation**

94. The decision to detain an alien at a closed centre is taken by the Aliens Office. Aliens may appeal against their detention before the *Chambre du Conseil*, but such supervision is neither systematic nor regular. It is therefore up to each alien to submit one or more applications. In addition, this authority simply verifies the legality of such detention, without considering the decision's expediency or proportionality. Such appeals do not have suspensive effect in respect of repatriation measures. The Commissioner urges the Belgian authorities to introduce systematic monitoring of the detention of aliens, focusing on the expediency and proportionality of such decisions as well as their legality, and to ensure that this avenue provides a wholly effective remedy.
95. With regard to repatriation, the only available form of appeal with suspensive effect is an emergency appeal, which must be submitted to the Council for Alien Disputes within 24 hours. The CCE has 48 hours – or three days in exceptional circumstances – to rule on the application. If no decision has been taken by the end of this period, the measure may be executed. In May 2008, the Constitutional Court found that the one-day deadline was too short to allow aliens and their lawyers to submit a substantive application. Its judgment gives the Belgian Government until 30 June 2009 to amend this provision. The Commissioner recommends that the Belgian authorities extend the deadline to at least five days in order to ensure that this avenue of appeal is genuinely effective.
96. In January 2008, the European Court found against Belgium<sup>60</sup> for the practice of “releasing” people into the transit zone at Brussels Airport. This situation affected detained aliens who had been refused entry into Belgium, but whose release had been ordered by the *Chambre du Conseil*. In order to comply with the latter's decision the authorities would “release” them into the airport transit zone. The European Court unanimously found that keeping people in a transit zone constituted a violation of Article 3 of the ECHR. Belgium states that it has put a stop to such releases since the judgment. However, the Commissioner has received information which may lead to questions as to whether similar practices may in fact persist.<sup>61</sup>
97. While considerable efforts have been made, particularly in the wake of the Vermeersch Commissions' reports, there are still concerns that the police may resort to excessive measures during deportation operations. The Commissioner was also informed of certain disturbing cases in which passengers had been disembarked and subsequently prosecuted for peacefully protesting against the presence in their aircraft of an alien in the process of deportation. The Commissioner urges the authorities to step up the monitoring of deportation operations and to refrain from prosecuting passengers who peacefully protest against such operations.

### **4. Open facilities for families with children and separated minors**

98. Like many European countries, Belgium used to detain families with children, some of whom were very young, in holding centres pending the organisation of their return. On 1 October 2008, the Minister for Migration Policy and Asylum announced that families with children would no longer be detained in closed centres, but accommodated in open facilities supervised by “coaches”. The Commissioner welcomes these measures, which have drastically reduced the number of accompanied children detained. More than 800 children were detained in closed centres in 2006. The Aliens Office opened three houses in Zulte in October 2008, and six flats in the municipality of Tubize have been in use since 16 February 2009. Based on the number of families detained in closed centres in recent years, the Belgian authorities believe these nine dwellings will provide sufficient accommodation.
99. The families “housed” in these facilities have either been asked to leave the country, or were apprehended in Belgium but are the responsibility of another European state under the “Dublin system”. Like the persons who are taken to holding centres, families travel to these dwellings with a police escort.

<sup>60</sup> European Court of Human Rights, *Riad and Idiab v. Belgium* judgment, 24 January 2008.

<sup>61</sup> In particular, the case of Rudy Nzimo in which the decisions of the *Chambre du Conseil* establishing the illegality of the detention of the applicant have not been executed.

It appears that their destination is not always explained to them, occasionally causing families considerable anxiety.

100. The three houses in Zulte are designed for families with several children. In these houses, each family lives independently and has its accommodation, medical and food costs covered. The “coaches” act as social workers, but are also available to explain the families’ legal situation and the scope for voluntary return, and to provide social and medical attention. The stated purpose of such facilities is to avoid the trauma of detention, particularly for children, while encouraging voluntary return. The Minister for Migration Policy and Asylum told the Commissioner that she hoped to see the coaching system made available to families as soon as they entered the country, but that this came within another Ministry’s remit.
101. During the visit, those interviewed acknowledged that they were still in an experimental phase of learning about both the role of coach and the organisation of such facilities. There was clearly a genuine desire to help aliens cope as well as possible during their time in the houses, and to allow them to leave the country in a dignified manner on a date of their choosing. Bearing in mind the gradual introduction of this system, the interviewees said that the families accommodated so far had not been in the country for long, which would simplify their return, but that difficulties might arise in the future.
102. Based on discussions and observations during the visit, the Commissioner regards these new facilities as a significant improvement for such families, who will not have the experience of being held in custody. From a legal standpoint, the Aliens Office places families under administrative detention (“maintien à la disposition du gouvernement”). As with closed centres, such detention is ordered for a renewable period of two months in the case of aliens having been asked to leave the country, and one month in the case of those subject to the “Dublin system”. Although this is provided for by law, the Commissioner was informed that a Royal Decree was being drafted in order to cover more detailed aspects of the facilities and justify this legal deprivation of liberty. The legal force of such arrangements is a particularly important issue, given that families may subsequently be detained in closed centres if they abscond or fail to comply with house rules. Provision is made for just four coaches to supervise the nine families accommodated at two separate, geographically removed sites. This is clearly too few, given the tasks assigned to them. While welcoming the undeniable progress made, the Commissioner invites the authorities to allocate additional human and financial resources in order to ensure the outright success of such placements.
103. Belgium has undertaken a great deal of reform in the area of protection for separated children.<sup>62</sup> A special bureau was recently set up within the Aliens Office. As of 7 May 2007, separated or non-accompanied minors are no longer detained at the border but in open centres. Nevertheless, children may still be detained where there are doubts as to whether they are actually minors. Sixty-one minors were detained in 2007. It is therefore still possible for children to spend several days in detention pending the results of medical examinations to establish their age. Such examinations do not seem to be carried out according to an official procedure, and various methods are apparently used. Developing a nationwide multidisciplinary procedure would ensure more consistent assessments of the age of those concerned. A guardianship system was introduced in May 2004 in order to provide such children with assistance and protection.<sup>63</sup> The guardians need more training, however, and better co-ordination at national level. The standard of care minors receive appears to vary between facilities. While welcoming the efforts already made to afford such children greater protection, the Commissioner invites the authorities to improve the standard of care that separated minors receive, to professionalise the guardianship system and to introduce multidisciplinary procedures for determining the age of the minors.

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<sup>62</sup> The term “separated children” refers to children who have been separated from both parents or from their previous legal or customary primary care-giver, but not necessarily from other relatives. See, General Comment No 6. (2005) of the UN Committee on the Rights of the Child. CRC/GC/2005/6.

<sup>63</sup> Programme Act of 2002: Guardianship Arrangements for Unaccompanied Minors (so-called “Tabitha Act”), which entered into force on 1 May 2004, following the adoption of the Royal Decree of 22 December 2003.

## **5. Regularisation**

104. Under Belgian legislation, irregularly resident aliens may be regularised in certain circumstances. According to civil society estimates, there are at least 100,000 irregular migrants living in Belgium. However, as the Centre for Equal Opportunities explains in detail<sup>64</sup>, the inherently unverifiable nature of this group makes it difficult to confirm such figures. As the Parliamentary Assembly notes, Belgium undertook a large-scale regularisation programme in 2000.<sup>65</sup> The Government agreement of 18 March 2008 provided for a further regularisation programme to be put in place. A ministerial circular was to be drafted accordingly, setting out the various criteria and procedures applicable. In any case, the agreement briefly outlines some of the criteria for regularising migrants, in particular on exceptional, humanitarian or economic grounds, or where the person concerned has put down enduring roots in the local community.
105. This agreement and subsequent announcements generated considerable expectations among irregular migrants, particularly those who felt that they fulfilled one or more of the criteria listed. The ministerial circular that was to allow such regularisations has yet to be adopted. A sense of hope appears to have been kindled among many of those concerned, notwithstanding their irregular status. The lack of progress has led to a great deal of uncertainty, however. According to the Bar Councils, a number of unscrupulous people have taken advantage of the situation to raise aliens' expectations of "miracle" solutions, preying on their gullibility.
106. Undocumented migrants have also started protest movements in an attempt to influence policy-makers. Public places have been occupied, and some groups have embarked on lengthy hunger strikes in the hope of having their situation examined. In order to put a stop to such movements, the authorities have in fact issued residence permits in certain cases.
107. On 6 November 2008, the Federal Ombudsman submitted a report and recommendations to the Government concerning the legal uncertainty into which irregular migrants have been plunged. He emphasises that the failure to observe the announced timetable has exacerbated that uncertainty, noting that "persons found by identity checks to be unlawful residents are being deported, although the announcement on two occasions of a timeframe for the circular's adoption has given unlawfully resident foreign nationals legitimate grounds to hope that their situation will be reviewed in accordance with Government promises".<sup>66</sup>
108. During his meeting with the Minister for Migration Policy and Asylum, the Commissioner took note of the current criteria for regularisation and of the fact that around 10,000 persons had been regularised in 2008. In the Commissioner's view, regularisation measures help to protect the rights of those concerned; nevertheless, he acknowledges that it is up to each state to decide on its own policy on the issuing of residence permits. In any event, such policies should be implemented in a transparent manner, and must not lead to inequality among those eligible for this type of regularisation. Accordingly, the Commissioner urges the Belgian authorities to clarify the undertakings that they have made in this regard as soon as possible, and to introduce a transparent, egalitarian procedure.

## **IV. Measures against discrimination, racism and violence against women**

### **1. Legislative framework and equality bodies**

109. Articles 10 and 11 of the Belgian Constitution, which prohibit discrimination, are applicable generally without any restriction either as to the grounds of discrimination or to situations concerned. Specific legislation against discrimination and racism has been reformed recently at federal, community and

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<sup>64</sup> Centre for Equal Opportunities and Opposition to Racism, *Migration, rapport 2007*, pp. 76-83.

<sup>65</sup> Parliamentary Assembly, *Regularisation programmes for irregular migrants*, 10 July 2007, doc. 11350, §52.

<sup>66</sup> Report and recommendations by the Federal Ombudsman following the examination of complaints 08GF1373/08GF1414/08IN2256, 6 November 2008.

regional levels. The new legislation goes beyond the requirements of EU equality directives and also takes the relevant jurisprudence of the Belgian Constitutional Court into account, especially as regards the grounds of discrimination.

110. Four new federal Acts against discrimination and racism were adopted on 10 May 2007 coming into force on 9 June 2007. The Law combating certain forms of discrimination, transposing Council Directive 2000/78/EC, covers the grounds of religious or philosophical conviction, sexual orientation, civil status, birth, wealth, age, actual or future state of health, disability, a physical or genetic characteristic, political conviction, language, and social origin. The four latter grounds are new in the Belgian legislation. The Law modifying the Law of 30 July 1981 repressing acts inspired by racism and xenophobia transposes Council Directive 2000/43/EC and covers the grounds of nationality, presumed race, skin colour, descent, and national or ethnic origin. The Gender Law transposes the EU Directives implementing the principle of equality between men and women in the fields of employment and work as well as the Council Directive 2004/113/EC and relates to the ground of sex including gender identity.
111. The non-discrimination legislation is applicable in the fields of employment, access and provision of services, social security and protection, citations in official documents, and access to economic, social, cultural and political activities open to the public. While both direct and indirect discrimination as well as incitement to discriminate are covered, the legislation also includes provisions on harassment and reasonable accommodation for persons with disabilities. Comparable legislative frameworks have also been put into place in the communities and regions in their respective spheres of competence.<sup>67</sup>
112. Finally, the Law adapting the Penal Code to the legislation repressing acts inspired by racism and xenophobia implements the new legislative reform in the sphere of criminal law. The criminalisation of incitement to hatred as well as racist motivation as an aggravation factor in sentencing for penal cases remain part of the new legislation. In 2004, the Federal Government also adopted the Principles of a Federal Action Plan against racist, anti-semitic and xenophobic violence. During the visit, the Belgian authorities informed the Commissioner that a fully fledged national action plan against racism and xenophobia would be adopted in 2009.
113. The Centre for Equal Opportunities and Opposition to Racism was created in 1993 as an independent equality and complaints body at the federal level.<sup>68</sup> Its remit is to promote equal opportunities and to combat all forms of discrimination based on presumed race, colour, descent, national or ethnic origin, sexual orientation, civil status, birth, property, age, religious or philosophical beliefs, actual or future health status, disability and physical characteristics. The Institute for the Equality of Women and Men, created in 2002, is the federal equality body mandated to promote equality between women and men and to combat any form of discrimination and inequality based on sex.<sup>69</sup> During his visit, the Commissioner met with the Directors of the Centre and the Institute. He was impressed by the dedicated work these bodies were carrying out against discrimination. However, the Commissioner notes that no equality body has so far been designated to combat discrimination based on language under the reformed non-discrimination legislation.
114. Currently, the federal equality bodies are not mandated to act under community and regional non-discrimination legislation. Nevertheless, a process of negotiation between the federal, community and regional authorities is already under way to find a solution to the situation. The option of designating the current federal equality bodies to act as equality bodies under the relevant community and regional legislation is a likely outcome of the process. The Commissioner encourages the Belgian authorities to solve this question shortly. As complaints mechanisms, equality bodies play an essential role in addressing human rights violations. In order to be effective, such bodies should be independent, adequately resourced and easily accessible to the public. The Commissioner points out that if the

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<sup>67</sup> See, in particular, Decree of 10 July 2008 on the framework of the Flemish policy for the equality of opportunities and treatment, the Decree of the French Community of 12 December 2008 related to the fight against certain forms of discrimination and the Decree of the German Community of 17 May 2004.

<sup>68</sup> see also above under chapter I.3.

<sup>69</sup> see also above under chapter I.3.

competences of the current federal equality bodies are extended as foreseen, this should be matched with additional resources for carrying out their new responsibilities.

115. The Commissioner is aware of the contact visit to Belgium by the European Commission against Racism and Intolerance ("ECRI") which took place in September 2008 for the preparation of the 4th ECRI report on Belgium.<sup>70</sup> The ECRI report, published on 26 May 2009, analyses in detail the situation in Belgium regarding racism and intolerance. Due to the simultaneous publication of the report by ECRI, the Commissioner has decided to focus in the present report on two specific questions related to discrimination, namely gender discrimination, including violence against women, as well as discrimination based on language.

## **2. Gender discrimination and violence against women**

116. In 2002, the principle of gender equality was enshrined in the Belgian Constitution. While gender equality has been subject to specific legislation especially in terms of discrimination (see above) a series of laws has also been adopted since 1994 (Smet-Tobback Act) to enhance the participation of women in political decision-making. The legislative measures have gradually introduced a comprehensive quota system for electoral lists at all levels to ensure gender parity. After the federal elections of 2007, the final composition of the Chamber of Representatives included 55 women (36.7 % of the total) while 29 members of the Senate (40.8 % of the total) were women. Five of the 15 current members of the Federal Government are women. Although comparable progress has also been achieved in elected assemblies at other levels, it should be noted that the number of women mayors (*bourgmestre*) remained just below 10 % after the local elections of 2006.
117. Women still earn less than men on the labour market in Belgium. In its 2008 report on gender pay gap, the Institute for the Equality of Women and Men pointed out that in 2005 this gap had remained stagnant at 15 % for full-time employees in manufacturing and services – just like the previous year. Among younger women aged 25-30 years the wage gap had even increased. In the public sector, the gender pay gap amounted to 10 % among those with a contractual employment relationship while no gender wage gap was evident among statutory civil servants. Almost 60 % of the interpretable part of the pay gap was attributed to the different labour market positions of women and men – more specifically, in relation to their occupation, sector of employment, type of employment contract and working hours. Part-time work increased the pay gap considerably. In its report published on 2 April 2009, in which the standardised European indicator is used, the Institute finds a pay gap of 11 % for the year 2006. The Institute for the Equality of Women and Men has also reported that it receives regularly complaints concerning discrimination on the labour market from transgender persons.<sup>71</sup> Furthermore, it should be noted that women have a higher risk of living under poverty. The risk of poverty for women was estimated at 16 % in 2004 against 14 % for men.<sup>72</sup>
118. The Commissioner calls on the Belgian authorities to persevere in their efforts to achieve effective gender equality. Particular attention should be given to tackling the pay gap through reinforced policy measures, for example by addressing the disproportionate distribution of women and men in the different sectors of the labour market. Further steps are also required for increasing the number of women occupying leadership positions in the country.
119. Violence against women remains a significant problem in Belgium, although data on the phenomenon are still insufficient. Police statistics on physical violence in the family between couples recorded 16,254 cases for 2007 in a continuously rising trend from 2000 when the figure was at 6,424.<sup>73</sup> The Act of 24 November 1997 against violence in the family rendered physical violence between a couple an aggravating circumstance in sentencing. An Act of 28 January 2003 supplementing Article 410 of the Criminal Code also provided for the possibility for the victim to be granted the family residence and to

<sup>70</sup> ECRI, Report on Belgium (fourth monitoring cycle), adopted on 19 December 2008, published on 26 May 2009, CRI(2009)18.

<sup>71</sup> The Institute is currently carrying out an online survey on the situation of transgender persons in Belgium.

<sup>72</sup> Femmes et hommes en Belgique : statistiques et indicateurs de genre, édition 2006. Institut pour l'Égalité des Femmes et des Hommes.

<sup>73</sup> Statistiques policières de criminalité – Belgique 2000-2007. Police Fédérale – CGOP / Données de Gestion.



receive child benefits. In 2006, two circulars (COL 3 and 4/2006<sup>74</sup>) were issued by the authorities which clarified the responsibilities of the police and the justice system in dealing with intra-familial violence with the general aim to ensure that cases of domestic violence receive prompt attention.

120. The Belgian authorities have also implemented national action plans in this field. The second Action Plan against conjugal violence runs for the period 2004-2007. The Action Plan included awareness raising activities aimed at victims and perpetrators on the ground, research, an awareness raising campaign for young people and training. The Belgian authorities informed the Commissioner that a new action plan against violence in the family (2008-2009) was adopted on 15 December 2008 and that they envisaged extending its scope to other types of gender specific violence (female genital mutilation, forced marriage and honour crimes). The authorities also planned to give particular attention to setting up treatment programmes for offenders. According to the authorities, a multiannual and extended plan of action would be adopted before the end of the year 2009. In its conclusions of 2008, however, the UN Committee on the Elimination of Discrimination against Women (“CEDAW”) expressed its concern that the previous action plans against conjugal violence in Belgium had not amounted to a comprehensive and coordinated national strategy to combat all forms of violence against women and girls.<sup>75</sup>
121. The Commissioner visited two long-term shelters in the Brussels region which provided accommodation to women victims of violence. He talked to victims of violence, the staff and a representative of the police. While it was acknowledged that long-term accommodation was available to meet the needs of the victims, it was pointed out that in the Brussels region there was a lack of dedicated shelters for accommodating women victims of violence and their children in urgent situations. Instead, women victims of violence often had to resort to general emergency accommodation before being assigned a place in a more long-term facility.
122. The Commissioner encourages the Belgian authorities to step up their efforts to stem violence against women and to extend the new action plan in this field to cover all forms of violence against women. He calls on further measures to be taken to improve victim support services so that all victims of violence, including migrant women and women with disabilities, can receive the attention they deserve. Particular attention should be given for ensuring the availability of specialised emergency accommodation to women and their children.

### **3. Discrimination based on language**

123. Within Belgium, there are four linguistic regions. Three of them are monolingual: French-language Region in Wallonia, Dutch-language Region in Flanders, and German-language Region composed of German-speaking municipalities in Wallonia. The fourth linguistic region is bilingual: Dutch and French-language Brussels Capital Region. The territoriality principle requires that within each monolingual region, all communications between the authorities and the public take place in the language of that region. However, as an exception to this rule, residents in certain municipalities situated in the fringe areas of the linguistic regions, which have been granted “linguistic facilities”, have the right to request that in their dealing with the authorities other language than that of the linguistic region concerned be used.
124. Belgium signed, but has not yet ratified, the Framework Convention for the Protection of National Minorities (“FCNM”) on 31 July 2001.<sup>76</sup> Belgium has not signed the European Charter for Regional or Minority Languages. In 2002, on the request of the Parliamentary Assembly of the Council of Europe,

<sup>74</sup> *La circulaire commune de la ministre de la Justice et du Collège des procureurs généraux (COL 3/2006) relative à la définition de la violence intrafamiliale et de la maltraitance d'enfants extrafamiliale, l'identification et l'enregistrement des dossiers par les services de police et les parquets* and *La circulaire (COL 4/2006) relative à la politique criminelle en matière de violence dans le couple*, entered into force on 3 April 2006.

<sup>75</sup> CEDAW/C/BEL/CO/6, 7 November 2008.

<sup>76</sup> At its signature, Belgium made the following reservation: “The Kingdom of Belgium declares that the Framework Convention applies without prejudice to the constitutional provisions, guarantees or principles, and without prejudice to the legislative rules which currently govern the use of languages. The Kingdom of Belgium declares that the notion of national minority will be defined by the inter-ministerial conference of foreign policy.” The authorities informed the Commissioner that no consensus on the definition had yet been found.

the European Commission for Democracy through Law (“Venice Commission”) issued an Opinion on the possible groups of persons to which the FCNM could be applied in Belgium. The Venice Commission pointed out that German-speakers should be considered as a minority at the state level. However, due to the distribution of competences between authorities at different levels in Belgium, the Venice Commission stated that French-speakers in the Dutch-language region and in the German-language region may be considered as a minority as may Dutch-speakers and German-speakers in the French-language region.<sup>77</sup> The Parliamentary Assembly endorsed the opinion of the Venice Commission in its Resolution 1301.<sup>78</sup>

125. The Commissioner is also aware of the monitoring activities, with reference to the European Charter of Local Self-Government, of the Congress of Local and Regional Authorities of the Council of Europe in this field. The Congress sent a fact-finding mission to Belgium in May 2008 to examine the non-appointment by the Flemish authorities of three mayors from municipalities with facilities in Flanders. The non-appointment of the mayors was related to the fact that during the 2006 local elections and the June 2007 federal elections in several municipalities with facilities in Flanders, voting letters had been sent to the French-speaking residents in French in contravention of the general language legislation on this matter. French had also been spoken in meetings of municipal councils. On 2 December 2008, the Congress initiated a monitoring procedure by its Institutional Committee into the question and adopted a resolution and a recommendation on the situation of local democracy in Belgium. It encouraged the Flemish authorities to appoint the three mayors without delay and called for a review of the language laws to allow for the use of both French and Dutch at the meetings of the municipal councils concerned.<sup>79</sup>
126. In Belgium, a mechanism (the Permanent Commission for Language Supervision - PCLS) has been set up to receive individual complaints against alleged violations of language legislation. The Commission, which is an advisory body, is mandated to investigate all violations of the administrative language legislation. The Commission is divided into a Flemish and a French section, each retaining competence over their respective regions. For the Brussels Capital Region and for municipalities with linguistic facilities, the PCLS convenes in a joint assembly made up of both sections. However, the PCLS has not been mandated to act under the 2007 non-discrimination legislation on the ground of language. According to the authorities, the courts have competence in the matter and the Council of State can annul certain administrative decisions for the violations of the language legislation. However, no equality body has yet been identified for this new ground of discrimination at federal or other level.
127. There have been allegations of discrimination on the ground of language in the access to housing and public services in recent years. One of them related to the Flemish Housing Code, as amended on 15 December 2006, and its requirement of applicants to social housing in Flanders to demonstrate willingness to learn Dutch. The Constitutional Court, in its ruling of 10 July 2008, considered that the language requirement of the Act was not disproportionate to the objective which was to enable everyone to lead their lives in human dignity. However, it clarified that the requirement to show commitment to learn Dutch could not impose an obligation of result to demonstrate any knowledge of Dutch. Furthermore, the Court stated that the commitment to learn Dutch could not be required of French-speaking residents in municipalities with language facilities if they wished to avail themselves of such facilities.
128. Language requirements of similar kind have also been imposed in some Flemish municipalities in relation to the purchase of municipal land, hire of municipal halls, enjoyment of certain social security benefits and access of children to municipal playing grounds. Moreover, municipal regulations have been applied to oblige vendors at market places to delete from their advertising boards French translations of products on sale. After complaints, the Flemish authorities have acted against some of these practices on the basis of the Belgian Constitution and the current non-discrimination legislation. In

<sup>77</sup> European Commission for Democracy through Law, CDL-AD(2002) 1, *Opinion on possible groups of persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium*, 12 March 2002.

<sup>78</sup> Council of Europe, Parliamentary Assembly, Resolution 1301 (2002) *Protection of Minorities in Belgium*.

<sup>79</sup> Recommendation 258 (2008) and Resolution 276 (2008) – Local Democracy in Belgium: non-appointment by the Flemish authorities of three mayors. Congress of Local and Regional Authorities.

the bilingual Brussels Capital Region, there have been complaints about the insufficient availability of public services in Dutch, for example in the fields of administration, education and health. Measures to increase bilingualism in the Brussels region have been undertaken in recent years with positive results especially among health professionals. However, difficulties appear to persist in the context of urgent medical interventions in the Flemish municipalities around Brussels.

129. While the Commissioner fully understands the importance of language learning to integration efforts, he is concerned that obligatory language requirements for accessing municipal services may stigmatise persons whose mother tongue is not Dutch and jeopardise efforts to foster tolerant communities which respect diversity. As far as the enjoyment of social rights is concerned, the proportionality of any language requirement must be strictly applied to avoid unnecessary discrimination. The Commissioner urges the Belgian authorities to set up an effective and impartial mechanism to deal with complaints regarding discrimination based on language under the current non-discrimination legislation. Particular attention should be given to the composition of the mechanism to ensure its independence and impartiality. It is also essential to provide training to public officials and elected representatives about the obligations stemming from the reformed non-discrimination legislation with particular reference to the ground of language to ensure compliance with the legislation. Moreover, in order to extend the available remedies against discrimination and enhance the protection of minority rights in Belgium, the Commissioner reiterates his recommendation to the Belgian authorities to ratify Protocol 12 on the general prohibition of discrimination to the European Convention on Human Rights as well as the Framework Convention for the Protection of National Minorities.

## **V. Protection of children's rights**

130. In Belgium, the protection of children's rights is primarily a community-level competence, although the federal and regional authorities are responsible for a number of crucial issues such as youth justice and the detention of minors. Measures taken at the community level are closely and actively supervised by the Delegate General for Children's Rights of the French Community and the Flemish Commissioner for Children's Rights. There is no independent structure responsible for protecting the rights of children living in the German-speaking community, however. The Commissioner invites the latter's authorities to consider ways of remedying this deficiency, either by establishing a special institution or by making such protection the responsibility of an existing independent body. Issues also arise as to the supervision of federal activities affecting children. In addition to these independent structures, Belgium acted on the recommendations of the United Nations Committee on the Rights of the Child by setting up the National Commission for Children's Rights in May 2007. The Commission is a forum bringing together federal, community and regional authorities as well as associations working in the area of children's rights. It provides scope for pooling information and consulting civil society in connection with the preparation of international reports on children's issues. Its power to monitor the implementation of international bodies' recommendations has yet to take effect.

### **1. Youth justice**

131. In 1965, Belgium opted to address the issue of minors in conflict with the law by introducing legislation with an educational focus. In accordance with an approach centred on education and rehabilitation, minors do not commit offences, but rather "acts designated as offences". Legislative amendments have gradually modified this approach, however, introducing a restorative approach but also a more punitive dimension based on penalties. While there is some cause for concern, it should be emphasised that, in contrast to that of other states, Belgium's youth justice system is still relatively protective of minors' rights and specific needs.

#### *a. Anti-social behaviour*

132. Action has been taken against minors whose behaviour is deemed anti-social but not criminal. Recently, a few private companies and individuals have used devices called "Mosquitos" to stop young people from congregating in certain places. This machine has the particularity of emitting an extremely high-

pitched sound – compared to that of a mosquito – which only minors and young people can hear. It appears that its use has been abandoned in response to the joint reaction of the Delegate General and the Commissioner for Children’s Rights and to pressure from civil society, and that the federal government intends to legislate on the subject.

133. Likewise, some municipalities, particularly in the French community, have started to impose curfews on young people with a view to restricting their freedom of movement after a certain time or in certain neighbourhoods. The stated purpose of such practices is to curb anti-social behaviour and petty crime. However, the Commissioner is of the opinion that they stigmatise young people and minors and discriminate against them by restricting their freedom of movement and assembly. Municipal administrative penalties may also be imposed. As the NGO Coalition on the Rights of the Child points out, such measures imposed by non-independent municipal officials lie outside the juvenile justice system.<sup>80</sup> The Commissioner urges the Belgian authorities to ensure that action to combat anti-social behaviour does not clash with children’s rights.

b. *Detention*

134. Under Belgian law, children are not criminally responsible until they turn 18. Youth judges can impose a range of educational and rehabilitation measures on minors having committed an act designated as an offence. From the age of 12 years, judges can place a minor in a public institution for the protection of young persons (“IPPJ”) under an open educational regime. From the age of 14, judges can order that a minor be placed in an IPPJ under a closed educational regime. There are five IPPJs in the French Community and two – in four locations – in the Flemish community. Such placements are decided by a federal authority – a youth judge – but executed by the Youth Ministry of each community. As a result of this division of competence, minors may be dealt with differently depending on the community of their origin. Above all, in contrast to adult prisons, these youth facilities do not have special, independent monitoring and complaints mechanisms.
135. There is also a federal closed centre for the temporary placement of minors at Everberg. Originally set up in 2002 for a period of two and a half years, the centre is still in use, and there are plans to expand it. Minors are initially placed there for a five-day period, which may be subject to two one-month extensions on the decision of a judge. Although the average length of detention has increased slightly in recent years, it is still less than a month. The centre only takes boys over the age of 14; the average age in 2008 was 16 years and eight months. It has 24 beds for children placed by the Flemish and French communities, and two for the German-speaking community. The law prohibits overcrowding at this centre, which almost always operates at full capacity. The management had to reject 245 placement requests in 2008.
136. The federal justice department and the Flemish and French Ministries in charge of youth protection and aid share responsibility for managing the centre. Logistics, transfers and security are federal competences, while the Flemish and French communities deal primarily with education and teaching. It appears that the two communities’ authorities differ in their approach to the centre in terms of both the use of available places and the regime applied. They have differing disciplinary rules, and solitary confinement continues to be a cause of concern.<sup>81</sup> Likewise, the Flemish community’s management team is half the size of its counterpart in the French community. The Commissioner invites the authorities to review disciplinary methods and penalties at the Everberg centre and to ensure a consistent approach to education and rehabilitation for all children. In its 2006 report, the CPT mentioned the fact that children from the French community were sometimes housed in the Flemish block owing to a lack of available places.<sup>82</sup> This is an ongoing problem even if the French-speaking boys placed in the Flemish section can follow an educational and teaching programme carried out by French-speaking staff. The Commissioner urges the authorities to abandon this practice, so that such children are not subjected to *de facto* isolation.

<sup>80</sup> CODE, *Les mineurs et les sanctions administratives communales pour incivilités*, June 2007.

<sup>81</sup> CPT/Inf (2006) 15, §§ 57 and 64.

<sup>82</sup> CPT/Inf (2006) 15, § 59.

137. During his visit, the Commissioner was informed of the proposed creation of 280 new places for minors in closed facilities, doubling the number of beds available. For instance, the former prison at Tongres, which had been turned into an educational museum, is in turn to become a closed centre for minors. The capacity of the Everberg closed centre is to be increased from 50 to 128 places. Civil society representatives are concerned about these proposals, as are the Delegate General and the Commissioner for Children's Rights. Most of the existing closed facilities are located at some distance from major cities, and it is often difficult for families to maintain regular contact with detained children. As an example, the Everberg centre is seven kilometres from the nearest railway station, and there are no bus routes within three kilometres. The proposed new closed centre to be set up temporarily at St. Hubert, in the French community, is 160 kilometres from Brussels, yet most of the children will come from that city. Such distances are a cause for concern in terms of the maintenance of minors' social and family networks, communication with lawyers and court appearances by minors. The Commissioner invites the Belgian authorities to explore ways of ensuring that minors deprived of their liberty are held in facilities close to their place of residence. Efforts should also be made to ensure that all such centres are served by public transport.
138. New legislative provisions extend the scope for alternative protective measures to the placement of minors in closed centres and the Commissioner has been informed that additional means have been allocated for their implementation. Nevertheless, it is feared that the increased number of places in closed centres will result in the holding of more minors in such facilities. The placement of minors in closed centres, which under Article 37 of the Convention on the Rights of the Child is supposed to remain the exception, is likely to become more common. The Commissioner urges the authorities to ensure that alternative penalties and educational measures are fully effective, so as to limit the use of placements in closed centres, and to have regard to the European rules on juvenile offenders<sup>83</sup> in implementing such proposals.

c. *Relinquishment of jurisdiction*

139. Under Section 57a of the 1965 Act, youth judges can relinquish jurisdiction over the case of an alleged juvenile offender. They may propose to the prosecuting authorities that the case be tried by a specific chamber within the Youth Court where they consider, on the basis of the alleged offender's personality, that the protective measures available to them are inadequate. In the case of a serious criminal act committed by a young person whose jurisdiction has been relinquished by a youth judge, the ordinary criminal courts (*cour d'Assises*) may also be competent. In practice, this means that young people over the age of 16 who have committed a serious offence may be tried as adults rather than by the youth court. Should the offender receive a prison sentence, he or she will be held in an adult prison. Furthermore, a minor over whom jurisdiction has been relinquished may be remanded in custody with adults. This situation concerns only a small number of minors each year. About 150 minors were subject to such measures in 2008, mainly in the Brussels region; courts in the Walloon and especially the Flemish districts made very little use of it. Children are not only tried as adults, but also held in the same prisons as adults, without any special protection or attention. The particularly intolerable living conditions currently found in many Belgian prisons make this possibility all the more disturbing.
140. The process of relinquishing jurisdiction, which has been criticised on numerous occasions by both civil society and international bodies<sup>84</sup>, continues to be applicable – and to be applied – in Belgium, notwithstanding a bill proposing separate detention of minors. It shows that the special court system for minors is unable to cope with the full range of juvenile offending. Moreover, proximity to adults during detention is harmful to minors, who are at risk of bullying and violence. The lack of special attention and educational and social programmes for such children merely exacerbates the risk of prison becoming a crime school, thereby limiting any efforts at rehabilitation. The Belgian authorities have indicated that important improvements should take place in autumn 2009 with the implementation of Section 606 of the

<sup>83</sup> Recommendation CM/Rec(2008)11 of the Committee of Ministers on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008.

<sup>84</sup> Concluding Observations of the Committee on the Rights of the Child: Belgium, 13 June 2002, CRC/C/15/Add.178, § 31-32.

Criminal Investigation Code. The Commissioner wishes to issue a firm reminder that it is essential to detain minors separately from adults, and recommends that the Belgian authorities put a stop to the detention of minors in adult prisons.

## **2. Corporal punishment**

141. The Belgian Constitution has, since 2000, provided that “every child has the right to respect for his moral, psychological, physical and sexual integrity”. The criminal and civil codes have subsequently been amended a number of times, but these provisions are not interpreted as entirely prohibiting corporal punishment. The European Committee of Social Rights found in 2005 that Belgium was in breach of Article 17 of the European Social Charter by failing to prohibit corporal punishment.<sup>85</sup> In its decision, the Committee held that Belgium should explicitly prohibit parents and “other persons” from inflicting violence on children.<sup>86</sup> Likewise, the Committee on the Rights of the Child has urged Belgium to prohibit corporal punishment and to run education and awareness-raising campaigns on the issue.<sup>87</sup>
142. With a view to preventing and dealing with violence and abuse, each community has set up special complaint and advice services for young people. In 2006, the Birth and Childhood Office’s SOS-Enfants teams received reports concerning 4,198 children, more than 60% of which involved cases of sexual, physical or psychological abuse.<sup>88</sup> The Delegate General and the Commissioner for Children’s Rights also stated that they received numerous complaints in this area. Concerned about the ongoing use of corporal punishment, the Commissioner urges the Belgian authorities to comply with the decision of the European Committee of Social Rights by passing a law prohibiting explicitly the practice, so as to send a clear signal to children, parents and the general public. Further efforts should also be made to promote positive parenting and education without violence, by means of special campaigns.

## **VI. Anti-terrorism measures**

143. Belgium has passed specific anti-terrorism legislation in recent years. In 2003, Parliament passed an Act defining terrorist offences.<sup>89</sup> The Commissioner notes that, in 2004<sup>90</sup>, the United Nations Human Rights Committee voiced its concern that the Act’s definition of terrorism lacked clarity. An Act legalising investigative techniques known as “special research methods”<sup>91</sup> was also passed in 2005. The investigation and surveillance methods used in the fight against terrorism have the effect of extending such powers.
144. The Counter-terrorism Monitoring Committee’s 2007 report<sup>92</sup> deplored the tension within the Belgian judicial system surrounding the application of these anti-terrorist Acts. The Commissioner notes that the legislation’s application tends to encroach on the rights of the defence and the right to respect for privacy, data protection and informational self-determination. Accordingly, it is essential to ensure that such provisions are clear, appropriate and proportionate. The Commissioner recommends that the Act precisely define terrorist offences, and that the scope of special investigative methods be narrowly defined.
145. During his visit, the Commissioner was informed of a draft royal decree on police files.<sup>93</sup> The purpose of the decree is to allow local and federal police officers to collect, process and store personal data,

<sup>85</sup> Decision on the merits, World Organisation against Torture (OMCT) v. Belgium, Complaint No. 21/2003, 26 January 2005.

<sup>86</sup> § 18 of the decision: “any setting outside the family home other than schools or prisons, such as non-institutional childcare facilities and arrangements”.

<sup>87</sup> Concluding Observations of the Committee on the Rights of the Child: Belgium, 13 June 2002, CRC/C/15/Add.178, § 24.

<sup>88</sup> Service SOS-Enfants, *Rapport d’activités 2006 de l’Action enfance maltraités*.

<sup>89</sup> Act on Terrorist Offences, 19 December 2003.

<sup>90</sup> CCPR/CQ/81/BEL § 24.

<sup>91</sup> Act of 6 January 2003 as amended by the Act amending Various Aspects of the Code of Criminal Procedure and the Judicial Code with a view to Improving Investigative Techniques in the Fight Against Terrorism and Serious and Organised Crime, 27 December 2005.

<sup>92</sup> Committee T, 2007 report, pp. 39 et seq.

<sup>93</sup> Draft Royal Decree on Rules for the Processing of Personal Data and Information by the Two-tier Integrated Police Force in connection with the Nationwide General Data Base.

including “physical and psychological” details, “consumption habits”, “political and religious opinions” and “sexual orientation”. Through this measure, the Government is seeking to enhance and expand its efforts to combat and prevent terrorism. For the last decade, the police have been entering information about Belgian citizens into the nationwide general data bank set up under the 1998 Police Reform Act. The royal decree sets out to regulate such data banks. It has been hotly debated, including within the Federal Parliament. Criticisms of the text related mainly to its lack of clarity, the irrelevance of some data, the lack of protection for minors, the lack of effective monitoring mechanisms and the fact that citizens would not have access to the data.

146. The Commissioner fully acknowledges the need to collect and process data essential to the prevention of terrorist activities. However, bearing in mind the high error rate of preventive investigations, legislation in this area must be as detailed as possible in its definition of the criteria for entering a person into an anti-terrorist data base and in its determination of the use of such data bases. The Commissioner notes that it is essential to strike a balance between the fight against terrorism, and the broader fight against crime, and individuals’ right to protection against intrusions into their privacy and against the improper collection, storage, sharing and use of data concerning them. An independent assessment of the use and impact of such data bases must be carried out in order to ensure that they are necessary and proportionate. The Commissioner recommends that the authorities make sure that the restrictions placed on the rights of the defence and the rights to respect for privacy and protection of personal data, in the name of the detection and prevention of terrorist activities and the fight against crime, are necessary, appropriate, proportionate and provided for by law.

## **VII. Recommendations**

147. The Commissioner, in accordance with Article 3, paragraphs (b), (c) and (e), and Article 8 of Resolution (99) 50 of the Committee of Ministers, recommends that the Belgian authorities:

### **National system for protecting human rights**

1. Ratify Protocol No. 12 to the European Convention on Human Rights, the Framework Convention for the Protection of National Minorities and the Council of Europe Convention on Action against Trafficking in Human Beings.
2. Consider ratifying the Optional Protocol to the United Nations Convention Against Torture and institute a system of visits to custodial facilities.
3. Draw up an action plan for the protection and promotion of human rights.
4. Continue with reforms aimed at shortening procedural delays and reducing congestion in the courts.
5. Make the system for monitoring police activities more independent and transparent, and more effective at the investigation stage.
6. Amend the provisions of the Code of Criminal Procedure so as to guarantee the fundamental rights of persons deprived of their liberty, with effect from the time when they are taken into custody.

### **Prison system**

7. Take all necessary steps to put a swift stop to the overcrowding and inhumane detention conditions in some prisons, and ensure that the Master Plan is implemented rapidly with a view to speeding up the extension and renovation of the prison estate.
8. Take urgent action to bring about an immediate improvement in prisoners' situation in terms of hygiene, lack of privacy and safety, in particular by observing the one prisoner-one bed rule and closing those cells not fitted with toilets.
9. Ensure that prisoners receive appropriate medical treatment and make psychiatric detainees subject to a special detention regime.
10. Detain untried and convicted prisoners separately.
11. Set up an effective, independent system for individual complaints by prisoners.
12. Develop and promote alternative sentences to imprisonment.

### **Asylum**

13. Issue clear instructions to security forces and other relevant agencies in order to ensure that aliens are not arrested by means of non-specific summons.
14. Make the asylum process more transparent, particularly in respect of applications rejected by the Aliens Office as well as by facilitating access to information and statistics.
15. Put an end to the systematic detention of certain categories of asylum seekers whose asylum applications have been lodged at the border and make those concerned subject to the same rights and procedures as other applicants.



### **Detention of migrants**

16. Find a way of ensuring that minors are no longer detained in closed centres, and assess the necessity and desirability of detaining certain aliens who are ill.
17. Bring the INAD Centre into line with European standards, in particular by allowing access to an outside exercise area.
18. Close Centre 127 and provide for the aliens held there to be detained at other existing centres pending the opening of the replacement centre, and ensure respect for the privacy and autonomy of all detained aliens, particularly at the Merksplas and Bruges centres.
19. Provide detained aliens with the same standard of health care as that available outside.
20. Review the unregulated practice of applying special regimes at closed centres.
21. Institute an effective, independent system for individual complaints by detained aliens.
22. Set up frontline legal advice services at all closed centres, and allocate the necessary funding to ensure that they are professional, independent and of a high standard.
23. Extend the deadline for appealing against deportation decisions to at least five days.
24. Allocate additional human and financial resources to the open facilities for alien families.
25. Clarify as soon as possible the commitments to regularise irregular migrants, and introduce a transparent, egalitarian procedure.

### **Action to combat discrimination, racism and violence against women**

26. Designate independent, adequately resourced and easily accessible bodies to promote equality and receive complaints under community and regional non-discrimination legislation.
27. Step up efforts to achieve effective gender equality, with a particular focus on reducing the pay gap and increasing the number of women in leadership positions in the country.
28. Extend the action plan against violence in the family to cover all forms of violence against women, and improve support services for women victims of violence to ensure the availability of specialised emergency shelters.
29. Set up an effective, impartial mechanism responsible for considering complaints about discrimination on the ground of language under the current non-discrimination legislation.
30. Provide civil servants and elected representatives with training on the obligations arising from the amended non-discrimination legislation, with a particular focus on the ground of language.

### **Minors**

31. Set up an independent agency responsible for protecting children's rights in the German-speaking community.
32. Review disciplinary methods and penalties at the Everberg closed centre.
33. When opening new closed centres, take into account their distance from major cities and ensure that they are accessible.

34. Allocate the necessary resources to ensure that alternative measures to the detention of minors are fully effective.
35. Put an end to the detention of minors in adult prisons in cases where the youth court has relinquished jurisdiction.
36. Pass a law explicitly prohibiting corporal punishment and make further efforts to promote positive parenting and education without violence.

**Counter-terrorism**

37. Ensure that anti-terrorism legislation precisely defines offences, and that the scope of special investigative methods is narrowly defined.
38. Ensure that the restrictions placed on the rights of the defence and the rights to respect for privacy and protection of personal data, in the name of preventing terrorist activities, are necessary, appropriate, proportionate and provided for by law.

**APPENDIX I: List of authorities and organisations met or consulted during the visit and the places visited**

**Belgian Authorities**

Deputy Prime Minister and Minister of Justice and Institutional Reform, Mr Jo Vandeurzen  
 Minister for Foreign Affairs, Mr Karel De Gucht  
 Minister of Migration and Asylum Policy, Ms Annemie Turtelboom

Minister-President of the Flemish Government, Mr Kris Peeters  
 Flemish Minister for Culture, Youth, Sport and Brussels Affairs, Mr Bert Anciaux  
 Flemish Minister for Internal Administration, Urban Planning, Housing and Integration, Mr Marino Keulen  
 Flemish Minister for Mobility, Social Economy and Equal Opportunities, Ms Kathleen Van Brempt

Minister-President of the Brussels-Capital Region, Mr Charles Picqué

Minister-President of the German-speaking Community, Mr Karl-Heinz Lambertz

French Community's Minister for Childhood, Youth Support and Health, Ms Catherine Fonck

Walloon Minister for Internal Affairs and the Civil Service, Mr Philippe Courard

Delegation of the Federal Parliament (Chamber of Representatives and the Senate) including members of the Belgian delegation to the Parliamentary Assembly of the Council of Europe

Presidents of the Constitutional Court

The Federal Ombudsmen

Directors of the Centre for Equal Opportunities and Opposition to Racism  
 Director of the Institute for Equality between Women and Men  
 Flemish Commissioner for Children's Rights  
 Delegate General for Children's Rights of the French Community  
 Members of the Standing Police Monitoring Committee

Chair of the National Commission for Children's Rights

Flemish, French- and German-speaking Bar Councils

**Non-governmental organisations**

Amnesty International Belgium (French-speaking and Flemish Sections)  
 Gender Equality Resource Centre - Amazone  
 Belgian Refugee Assistance Committee (CBAR)  
 NGO Coalition for the Rights of the Child (CODE)  
 Co-ordination and Action for and with Refugees and Aliens (CIRE)  
 Défense des Enfants International – Belgium (French-speaking Section)  
 Human Rights without Frontiers International  
 Jesuit Refugee Service Belgium  
 Kinderrechtencoalitie Vlaanderen  
 Human Rights League (French-speaking and Flemish Sections)  
 Movement against Racism, Anti-Semitism and Xenophobia (MRAX)  
 Nederlandstalige Vrouwenraad

International Prisons Observatory – Belgian Section  
Vluchtelingenwerk Vlaanderen

### **International organisation**

United Nations High Commissioner for Refugees

### **Places visited**

Forest and Antwerp remand prisons  
Closed centre for the temporary placement of minors at Everberg  
Closed centre for aliens at Merksplas  
Closed centre for aliens “127”  
Closed centre for aliens “127 bis”  
Accommodation facilities in Zulte for families in the process of being repatriated  
Shelters for victims of domestic violence “Vogelsang” and “Les Trois Pommiers” in Brussels

### **Colloquy**

The Commissioner addressed the Colloquy “Article 23 of the Constitution: 20 years afterwards – assessment regarding economic, social and cultural rights” organised by the Free University of Brussels and SPF Emploi for the 60<sup>th</sup> anniversary of social rights in Belgium.

## **APPENDIX II: Comments by the Belgian authorities [in French only]**

### Remarques liminaires :

En tant que membre fondateur du Conseil de l'Europe, la Belgique considère les droits de l'homme comme essentiels à tout Etat démocratique. Notre pays s'est engagé à respecter ces droits et à en promouvoir le respect. La Belgique accorde une très grande importance au travail que réalise le Conseil de l'Europe dans la promotion et la mise en œuvre des normes internationales en matière de droits fondamentaux.

La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales est un instrument indispensable à la dignité et la liberté de chacun. La Belgique veut assurer que le respect de ses dispositions soit garanti à tous.

Dès lors, le travail du Commissaire aux droits de l'homme, ainsi que l'existence d'autres mécanismes de contrôle, est primordial pour garantir le respect de ces principes. C'est dans cette perspective que nous avons accordé la plus grande attention à la visite du Commissaire en Belgique, en décembre 2008.

Nous remercions le Commissaire pour le rapport constructif qu'il a rédigé sur la Belgique, et nous lui sommes gré d'avoir pu exprimer nos commentaires sur certains passages.

La Belgique accordera toute l'attention nécessaire aux recommandations formulées dans ce rapport, ainsi qu'à leur mise en œuvre, afin de permettre l'amélioration du système de protection des droits de l'homme.

### Méthodologie utilisée:

Les commentaires repris ci-dessous sont relatifs à certains passages spécifiques du rapport. Les numéros des paragraphes repris dans ce document correspondent à ceux du rapport du Commissaire.

Ces commentaires ont été formulés par les différentes autorités ayant participé à la visite du Commissaire. Il s'agit d'éclaircissements, de précisions et de mises à jour.

## **I. Système national de protection des droits de l'homme**

### **1. Adhésion aux conventions européennes et internationales des droits de l'homme**

§9 :

La Belgique a ratifié la convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains, le 27 avril 2009.

### **2. La constitution et le système judiciaire belge**

§ 15:

Pour ce qui concerne la dernière phrase de ce paragraphe, le gouvernement belge souhaite ajouter le commentaire suivant :

En ce qui concerne la matière pénale, des dispositions ayant pour but de simplifier les procédures existent. Il convient, à cet égard, de se référer aux mécanismes suivants :

- les amendes administratives, notamment prévues par les lois du 10 mai 1999 relative aux sanctions administratives dans les communes et du 21 décembre 1998 relative à la sécurité lors des matchs de football. De nombreuses autres lois spéciales prévoient également des systèmes d'amendes administratives qui ont pour effet le non-exercice de l'action publique ;

- la perception immédiate en matière de circulation routière, prévue par la loi du 16 mars 1968 relative à la police de la circulation routière ;
- la transaction prévue par l'article 216*bis* du Code d'instruction criminelle ;
- la médiation en matière pénale prévue par l'article 216*ter* du même Code ;
- la convocation par procès verbal prévue par l'article 216*quater* du même Code et enfin ;
- la citation directe prévue par l'article 182 du même Code (C.I.Cr.).

En ce qui concerne la procédure civile, il convient de citer :

- l'existence d'une procédure en débats succincts, dans les cas prévus par l'article 735 du Code judiciaire ;
- la procédure d'injonction de payer, visée aux articles 1338 à 1344 du même Code ;
- le projet de loi actuellement discuté au Parlement, qui étend aux situations purement internes le mécanisme simplifié consacré par le règlement européen relatif à l'injonction de payer.

Précisons que la loi du 8 août 1997 sur les faillites connaît également une procédure sommaire de clôture de la faillite, par laquelle les opérations de liquidation sont au maximum simplifiées.

§17:

La Belgique souhaite compléter ce paragraphe en indiquant qu'à ce jour, la procédure tendant à faire reconnaître la responsabilité de l'Etat devant le juge civil du fait de la durée excessive d'une procédure concerne non seulement la procédure civile mais également la procédure pénale et administrative.

En effet, la Cour européenne des droits de l'homme considère que la procédure tendant à faire reconnaître la responsabilité de l'Etat devant le juge civil du fait de la durée excessive d'une procédure est aussi considérée comme efficace pour les procédures pénales (Psherowsky c. Belgique ,7 avril 2009 )et administratives (De Liedekerke c. Belgique,3 mai 2005).

#### **4. La police**

##### *b. La protection des droits des personnes arrêtées au cours des interrogatoires de police*

§ 32:

Il est fait référence aux articles 33*bis* et suivants de la loi du 5 août 1992 sur la fonction de police, insérés par la loi du 25 avril 2007, qui contiennent certains droits pour les personnes arrêtées, pendant la phase de la détention administrative. Ces articles prévoient que ces personnes doivent être informées des motifs de leur arrestation, ainsi que la durée maximale de cette privation de liberté, dans une langue qu'elles comprennent. Elles peuvent également demander qu'une personne de confiance soit avertie. L'officier de police procédera à cette demande, sauf s'il a des raisons sérieuses de penser que ceci constituera un danger pour l'ordre public et la sécurité, et devra alors mentionner ces motifs dans le registre des privations de liberté. Lorsqu'un mineur d'âge est arrêté, la personne chargée de sa surveillance en est d'office avertie. Toute personne arrêtée a également le droit à l'assistance médicale, ainsi qu'à un examen médical par un médecin de son choix, ceci, à ces frais. Ces personnes ont enfin le droit, pendant toute la durée de leur privation de liberté, de recevoir une quantité suffisante d'eau potable, d'utiliser des sanitaires adéquats et, compte tenu du moment, de recevoir un repas.

§ 33 et recommandation n°6:

Dans le sens de la recommandation du Commissaire, le gouvernement belge annonce que suite aux arrêts Salduz et Panovits, la question de l'assistance de l'avocat pendant les auditions est de nouveau à l'ordre du jour, bien que la portée de ces arrêts ne soit pas tout à fait claire. Une large consultation de tous les groupes professionnels concernés est organisée par le Ministre de la Justice sur ce point.

§35 :

Selon les autorités compétentes, il n'y a pas de surpopulation dans les maisons de peine.  
§40 :

Il convient de remplacer « surveillant pénitentiaire » par « agent pénitentiaire ».

## **II. Le système pénitentiaire**

### **1. La surpopulation carcérale**

§43 :

Les autorités compétentes affirment que la quantité de nourriture distribuée est suffisante (c'est l'organisation de sa distribution qui est difficile). Par ailleurs, les détenus ont la possibilité de cantiner (les détenus qui n'ont pas de rentrées d'argent reçoivent une aide sociale de la prison qu'ils peuvent dépenser selon leurs besoins).

### **5. Le personnel pénitentiaire**

§60 :

Une augmentation du temps de formation (12 mois) et une refonte du système de recrutement sont actuellement discutées. Ces réformes devraient intervenir en janvier 2010.

### **6. Les mesures prises par les autorités pour améliorer la situation des prisons**

§63 :

Concernant ce paragraphe, les précisions suivantes sont apportées:

L'état de vétusté ne concerne pas toutes les prisons du pays mais seulement certaines d'entre elles. D'autres prisons ne posent pas de problème sur ce point.

Le Master plan dont il est question dans le présent rapport a été remplacé par un nouveau plan. Le Masterplan version II (ou Masterplan élargi), approuvé en conseil des ministres le 18 décembre 2008, se distingue du premier par la construction de prisons supplémentaires en remplacement de très vieilles infrastructures.

Il a en effet été résolument opté pour le remplacement d'établissements particulièrement vétustes, dont les besoins sont tellement importants et nombreux qu'ils nécessiteraient des années d'efforts. Six nouvelles infrastructures sur quatre lieux sont ainsi prévues pour remplacer les bâtiments anciens:

- Saint-Gilles /Forest/ Berkendael (femmes) deviennent Bruxelles I, Bruxelles II et Bruxelles III
- Dinant et Namur deviennent Marche-en Famenne.
- Anvers (Begijnenstraat) sera remplacé par Anvers
- Merksplas (cellulaire) sera remplacé par un nouveau bâtiment à Merksplas

Le fait que ces vieilles infrastructures seront remplacées ne signifie toutefois pas que des travaux ne seront plus effectués dans ces bâtiments.

§64 :

Pour les établissements de "haute sécurité", le gouvernement belge fait part des observations suivantes :

En ce qui concerne les sections de haute sécurité, il convient de remettre le contexte en place. La gestion des détenus qui présentent de manière durable un comportement agressif suivi parfois de passages à l'acte, est une problématique qui ne date pas d'hier. Il est vrai que par le passé, l'administration pénitentiaire n'avait

pas à proprement parler d'outils structurels pour gérer ce type de détenus. Elle utilisait donc la technique dite du "carrusel" qui était loin d'être une solution idéale.

La mise en oeuvre de la loi de principes sur les aspects "ordre et sécurité", ainsi que l'ouverture des sections de haute sécurité à Bruges et à Lantin, ont fortement modifié cette situation et ont permis une réflexion sur la manière d'envisager la problématique. Désormais, l'administration pénitentiaire dispose en effet d'outils théoriques ainsi que pratiques pour la gestion des détenus dits violents. Les sections de haute sécurité n'ont pas pour vocation de « parquer » le détenu en isolement jusqu'à la fin de sa peine, au contraire. Elles disposent d'un personnel qualifié et spécialement formé pour travailler avec ce type de détenus. Ces sections ont pour objectif de stabiliser et de normaliser le comportement de l'intéressé et ce, via un suivi extrêmement individualisé opéré dans un milieu structurant.

### **III. Immigration et asile.**

De manière générale, il est demandé de remplacer les termes « détention » par « maintien à la disposition du gouvernement » dans ce chapitre du rapport, étant donné qu'il s'agit du terme légal correct.

#### **1. Droit d'asile**

§ 68 :

Le rapport fait état de difficultés dans le cadre du regroupement familial. Cependant, la Belgique vient de modifier l'article 12bis de la loi du 15 décembre 1980, le 8 mars dernier, afin d'assouplir la procédure et plus particulièrement les conditions relatives aux documents à produire à l'appui d'une demande de regroupement familial.

§ 71 :

Des précisions sont à apporter à ce paragraphe. En effet, sa rédaction actuelle ne précise pas la notion de « *prise en considération de la demande* » et devrait donc être nuancée. Telle quelle, elle laisse entendre que finalement l'Office des Etrangers (OE) traite, selon la procédure décrite (non transmission de la demande au Commissariat Général aux Réfugiés et Apatrides (CGRA)) toutes les demandes d'asile.

L'Office des Etrangers ne possède qu'une compétence marginale dans l'examen d'une demande d'asile. Dans le cas de demandes d'asile multiples et seulement en l'absence de nouveaux éléments, l'Office des Etrangers peut notifier une décision de non prise en considération.

La décision de « non *prise en considération* » ne concerne que les demandes d'asile multiples qui ne contiennent pas de nouveaux éléments, c'est-à-dire, des éléments ayant trait à des faits ou des situations qui se sont produits après la dernière phase de la procédure au cours de laquelle l'étranger aurait pu les fournir. Si le demandeur d'asile fait valoir de nouveaux éléments, sa demande sera examinée par le Commissariat Général aux Réfugiés et aux Apatrides.

En outre, il convient d'indiquer que la décision de non-prise en considération d'une demande d'asile prise par l'Office des Etrangers est susceptible d'un recours en annulation auprès du Conseil du Contentieux des Etrangers. La Cour constitutionnelle a dans son arrêt du 27 mai 2008 (n° 81/2008), admis cette exception pour les demandes multiples et a par ailleurs confirmé que la compétence d'annulation du Conseil offrait aux justiciables une garantie juridictionnelle effective, devant une juridiction indépendante et impartiale, contre les décisions qui les concernent.

La jurisprudence du Conseil du Contentieux des Etrangers devra déterminer si les décisions de l'Office des Etrangers manquent de transparence à cet égard. Il y a donc un contrôle de la légalité de la décision qui est faite par une juridiction ; ce qui permet de garantir les droits des demandeurs d'asile.

§72 :



Le rapport du Commissaire mentionne que la nouvelle procédure est principalement écrite. Ceci n'est pas conforme à la réalité. En effet, l'instance d'asile principale dans la procédure d'asile est le Commissariat Général aux Réfugiés et Apatrides. Telle fut la volonté du législateur. Or auprès du Commissariat Général aux Réfugiés et Apatrides, la procédure est principalement orale : le demandeur d'asile bénéficie toujours d'une ou de plusieurs auditions dont la durée est de minimum trois heures.

Seule la procédure de recours auprès du Conseil du Contentieux des Etrangers se déroule principalement de manière écrite. Le caractère écrit de la procédure:

- offre aux parties y compris pour le demandeur d'asile une plus-value très importante. Cette plus-value se trouve dans l'obligation de motivation incombant au juge (art. 149 de la Constitution) et dont l'importance ne doit pas être sous-estimée. Cette obligation constitutionnelle implique que chaque élément repris dans la requête doit obligatoirement recevoir une réponse dans l'arrêt. Le caractère écrit de la procédure impose donc une obligation de motivation plus lourde qu'une procédure orale. Ceci a été confirmé récemment par le Conseil d'Etat dans son arrêt du 23 décembre 2008, n° 189174. En outre, le caractère écrit de la procédure n'est en réalité que partielle puisqu'une audience publique doit toujours avoir lieu ;
- il n'exclut pas que les parties et leurs avocats puissent formuler sous certaines conditions oralement leurs remarques au cours de l'audience, y compris, invoquer de « nouveaux éléments ». L'article 13 du règlement de procédure du Conseil du Contentieux des Etrangers prévoit également que le président puisse interroger les parties si nécessaire.

Le rapport fait état de difficultés de communication rencontrées par les avocats notamment pour l'accès au dossier de leur client. Le gouvernement belge souhaite apporter les précisions suivantes:

- Auprès du Commissariat Général aux Réfugiés et Apatrides: Il est possible d'obtenir une copie du dossier. La réception de la copie du dossier se fait dans les 48h de la demande de copie.
- Auprès du Conseil du Contentieux des Etrangers: Les parties et leurs avocats peuvent consulter le dossier au greffe durant le délai fixé dans l'ordonnance de fixation d'audience (art.39/61). Les heures d'ouverture du greffe sont, en comparaison avec celles d'autres juridictions, plus larges (chaque jour ouvrable de 8h à 16h et le jeudi de 8h à 18h). Les avocats en dehors de la Capitale bruxelloise peuvent adresser une demande écrite auprès du Conseil afin de recevoir une copie de certaines pièces. Ces copies leur sont envoyées dans les meilleurs délais.

§ 73 et recommandation n°14:

Sur le rôle du Conseil du Contentieux des Etrangers, le gouvernement fait remarquer qu'il est vrai qu'il ne dispose pas d'un pouvoir d'investigation propre. Un tel pouvoir n'est pas en soi une caractéristique d'une juridiction (administrative). Ce fait n'empêche pas que le Conseil procède à un nouvel examen à partir du dossier et des pièces de procédure. Il peut également prendre en compte l'avis que le Haut-Commissariat des Nations Unies pour les réfugiés peut donner sur la base de l'article 39/53 de la loi.

En outre, les parties peuvent présenter des éléments nouveaux. Dans son arrêt du 27 mai 2008, (n° 81/2008), la Cour constitutionnelle a estimé que le Conseil du Contentieux des Etrangers peut prendre en compte des « nouveaux éléments » :

- d'abord, ceux que l'étranger invoque dans la requête qu'il introduit auprès du Conseil du Contentieux des Etrangers (article 39/69, § 1er, 4°, et l'article 39/76, § 1er, alinéa 2) ;
- Ensuite, il peut lui-même décider de tenir compte de tout nouvel élément qui est porté à sa connaissance par les parties, y compris leurs déclarations à l'audience, même lorsqu'il n'en est pas fait mention dans la requête. Si la loi prévoit que ces éléments ne peuvent être pris en compte que lorsque les trois conditions cumulatives sont réunies (article 39/76, § 1er, alinéa 3), la Cour Constitutionnelle a estimé quant à elle que le Conseil du Contentieux des Etrangers, vu sa compétence de pleine juridiction, se doit d'examiner tout élément nouveau présenté par le requérant qui est de nature à démontrer de manière certaine le caractère fondé du recours. Le Conseil du

Contentieux des Etrangers doit donc en vertu de l'arrêt de la Cour Constitutionnelle être plus large dans la prise en compte de nouveaux éléments.

Donner un pouvoir d'instruction au Conseil du Contentieux des Etrangers n'est en outre pas opportun dans la mesure où le législateur a conféré un pouvoir d'annulation au Conseil. La compétence d'annulation supplée parfaitement à l'absence d'un pouvoir d'instruction détenu par l'instance d'asile centrale, le Commissariat Général aux Réfugiés et aux Apatrides. Cette possibilité permet au Conseil d'annuler une décision s'il juge qu'il n'est pas en mesure de statuer sur la base des éléments du dossier. Si le Conseil souhaite voir poser d'autres actes d'instruction, il a donc la possibilité d'annuler la décision attaquée. L'absence de pouvoir d'instruction est un choix délibéré de la part du législateur. L'examen fait par le Conseil du Contentieux des Etrangers a été jugé tout à fait conforme aux exigences d'un recours effectif par la Cour Constitutionnelle.

Le commissaire recommande de rendre la procédure d'asile plus transparente notamment quant aux décisions de rejet de l'Office des Etrangers ainsi que de conférer au Conseil du Contentieux des Etrangers des pouvoirs étendus en matière d'investigation.

Concernant la remarque du Commissaire sur le manque de transparence à l'égard de la procédure du Conseil, il est à noter que la politique de publication du Conseil s'appuie sur des standards (inter)nationaux, notamment:

- « La recommandation n° R(95) 11 du Comité des Ministres du Conseil de l'Europe aux Etats membres relative à la sélection, au traitement, à la présentation et à l'archivage des décisions judiciaires dans les systèmes de documentation juridique automatisés; »
- pour la jurisprudence, les règles de sélection enregistrées dans la banque de données externe pour la jurisprudence du conseil d'administration Phenix (M.B. 5 octobre 2007) ;
- Les critères de sélection pour la banque de données des jugements de la juridiction ([www.rechtspraak.nl/uitspraken/selectiecriteria](http://www.rechtspraak.nl/uitspraken/selectiecriteria))

En d'autres mots, le Conseil s'appuie sur des critères de sélection scientifiquement étayés qui sont basées sur des standards (inter)nationaux, de même que sur le benchmarking avec la politique de publication et de communication en matière d'arrêts menée par des hautes juridictions administratives.

Le Conseil constate que le modèle choisi par le législateur semble fonctionner. Le défaut d'un pouvoir d'investigation n'empêche pas l'octroi d'une protection juridique et ne retarde pas le fonctionnement juridique.

Les chiffres montrent que, pour l'année 2008, sur les 5090 arrêts de pleine juridiction, seulement 316 sont des arrêts en annulation (299 en français et 17 en néerlandais), ce qui revient à 6,2%. Une annulation est donc seulement nécessaire dans des cas relativement faibles.

## **2. Privation de liberté des migrants et conditions de détention**

### *a. Détention des demandeurs d'asile et des migrants irréguliers*

§76 :

Concernant les détentions des cas dits « Dublin » décidées par l'Office des Etrangers, le gouvernement voudrait souligner que ces détentions ne sont pas systématiques. Ainsi les familles ne sont plus maintenues. Par ailleurs, il serait impossible et ce, pour des raisons de capacité, de maintenir tous les demandeurs d'asile même « Dublin ». Il y a donc un examen au cas par cas.

La dernière phrase du §76 mentionne que « ces détentions, décidées par l'Office des étrangers, ne semblent pas toujours être justifiées, compte tenu du risque réel de fuite ou des garanties de représentation que ces personnes pourraient présenter ».

Les autorités compétentes estiment que le risque réel de fuite existe bel et bien pour les demandeurs d'asile « Dublin » compte tenu des conditions d'accueil différentes existant au sein de l'Union européenne. Le risque réel de fuite existe également pour les demandeurs d'asile représentés par un avocat étant donné qu'en cas de fuite, l'avocat n'a généralement plus de mandat. La représentation devient sans objet.

§77 :

Le rapport du Commissaire indique que « ...*Toutefois une décision de la Cour constitutionnelle de mai 2008 considère que le délai de 15 jours pour introduire un recours devant le CCE était discriminatoire par rapport au délai de 30 jours prévu pour les autres recours. La Cour considère que cette différence de traitement n'est pas raisonnablement justifiée car la loi ne prévoit qu'une seule catégorie de demandeur d'asile* ».

La Cour Constitutionnelle a au contraire confirmé dans son arrêt qu'une différence de traitement se justifiait pour les personnes maintenues afin de ne pas allonger leur maintien. Dès lors, le délai de 15 jours pour introduire un recours au Conseil du Contentieux des Etrangers a été maintenu pour les étrangers qui sont maintenus à la disposition du Gouvernement dans un lieu déterminé.

Le projet de loi mentionné dans le rapport est devenu la loi portant dispositions diverses du 6 mai 2009 (Moniteur belge, 19 mai 2009).

§78 :

En Belgique, il n'existe pas de procédure accélérée stricto sensu. Dans le cas d'une procédure à la frontière, le dossier est examiné de la même manière et est jugé sur base des mêmes fondements. Si nécessaire, le Commissariat Général aux Réfugiés et Apatrides organise plus qu'une audition, une enquête complémentaire est effectuée. Si l'enquête complémentaire ne peut être réalisée durant le temps imparti pour le maintien, le Commissariat Général aux Réfugiés et Apatrides le signale à la ministre qui peut autoriser le demandeur d'asile à entrer sur le territoire. Ce sont les délais qui sont accélérés mais pas la procédure.

§80 :

La durée moyenne de détention est de 23 jours et non de 30. Le délai maximum de 8 mois ne concerne que les cas d'ordre public. La loi prévoit le principe d'une durée de maintien maximale de 5 mois qui peut être portée à 8 mois pour les cas d'ordre public. En ce qui concerne le calcul de la durée, si l'intéressé s'oppose à son rapatriement, un nouveau délai prend cours. La Cour européenne des droits de l'homme n'a pas contesté cette pratique dans son arrêt du 2.juin 2005.

En ce qui concerne la remarque des associations qui ont fait état d'une certaine opacité des statistiques et du peu d'informations disponibles concernant les centres de rétention, il est à noter que 24 ONG sont agréées et peuvent avoir accès aux centres fermés

§81 :

Des précisions sont apportées à ce paragraphe : en ce qui concerne les familles maintenues à la frontière, la Ministre compétente a toujours précisé que le projet qu'elle mettait en place pour mettre fin à la détention des familles avec enfants en centre fermé, ne concernerait que les familles présentes sur le territoire. Cette distinction a été faite pour des raisons juridiques liées à l'application de la Convention de Chicago et afin d'éviter que des enfants ne soient utilisés pour « entrer » sur le territoire. Il faut également veiller à ce que les enfants, victimes de la traite des êtres humains ne soient pas utilisés à de telles fins, comme ce fut le cas dans un passé récent.

b. *Conditions matérielles de détention*

§83 et recommandation n°17:

Le Commissaire recommande « *de rendre conforme aux standards européens le centre «INAD» notamment en donnant accès à un lieu de promenade à l'extérieur* ».

Les travaux pour la construction du nouveau centre à la frontière ont débuté au printemps 2009. Ni les demandeurs d'asile déboutés ni les personnes en séjour irrégulier ne sont maintenus dans le centre INAD. Ce centre est situé dans l'enceinte même de l'aéroport et les consignes de sécurité dépendent donc de la police fédérale de l'aéroport de Bruxelles national. Les avocats, le centre pour l'égalité des chances, les ministres des cultes et les familles ont accès et peuvent rencontrer les personnes maintenues au centre INAD dans un local de la Police fédérale. Dès que les personnes maintenues en vue de leur refoulement au centre INAD demandent l'asile, celles-ci sont immédiatement transférées vers un autre centre.

§85 et recommandation n°18 :

Les avocats peuvent venir et accéder au centre 127 même si ce centre est situé dans une zone militaire (Melsbroeck). Le centre facilite et organise les contacts avec la famille. L'Office des Etrangers est étonné du constat de violence, car le centre 127 est l'un des centres où des faits de violence n'ont pas été constatés.

§87 et recommandation n°19 :

En ce qui concerne une qualité de soins pour les étrangers maintenus qui soit comparable à celle disponible à l'extérieur, le gouvernement belge tient à préciser que chaque centre est doté d'un service médical. Chaque étranger peut en outre faire appel à son propre médecin comme le prévoit l'arrêté du 02/08/2002. Le recours aux anxiolytiques n'est nullement imposé. C'est uniquement à la demande du résident. Si l'étranger souhaite consulter un spécialiste, les délais d'attente sont plus longs. Les étrangers ne pouvant être maintenus pour des raisons médicales sévères, sont libérés.

*c. Isolement, régime différencié et procédure de plaintes*

§89 et recommandation n°20 :

Concernant la phrase suivante du rapport : « *A la différence de l'isolement disciplinaire, cette décision ne se fonde pas sur des critères précis et la durée du placement n'est pas déterminée* », les précisions suivantes sont apportées : le régime différencié ne s'apparente pas au régime disciplinaire. Il faut préciser que le régime différencié nécessite une prise en charge individuelle et un traitement prioritaire tant au niveau médical et psychologique qu'au niveau du dossier administratif. La durée du placement en régime différencié dépend donc de l'évolution du cas et une évaluation est faite en permanence par le centre. L'intéressé peut soit réintégrer l'aile ou décider, en accord avec le centre, de rester en régime différencié. Il peut également, sur avis du psychiatre, être placé dans une institution psychiatrique.

§90 et recommandation n°21 :

En ce qui concerne la Commission des plaintes, un nouvel arrêté a été adopté le 23 janvier 2009 (Moniteur belge 27janvier 2009). Le secrétariat de la Commission des plaintes dépend désormais du Président de la Commission et non de la Présidente du Comité de direction du Service Public Fédéral Intérieur.

*d. Accès à la traduction, l'information et l'aide juridique*

§91 :

Concernant la traduction : il est toujours possible de faire appel à un interprète, si besoin par téléphone. Pour des questions d'ordre pratique ou relatives à la vie quotidienne, le personnel a parfois recours à d'autres résidents pour interpréter. Les informations importantes et déterminantes sont toujours traduites par un interprète professionnel.

§93 et recommandation n°22 :

Pour les permanences juridiques de première ligne dans les centres fermés, l'Office des Etrangers est favorable à l'organisation d'une telle permanence par les barreaux et le SPF Justice étudie également cette problématique au sein d'un groupe de travail sur l'aide juridique.

### **3. Recours effectif contre la mesure de détention ou d'éloignement**

§95 :

En ce qui concerne le délai pour introduire un recours en extrême urgence auprès du Conseil du Contentieux des Etrangers, une nouvelle disposition légale prévoit qu'il sera étendu de 24 heures à 5 jours calendriers.

En effet, en vertu de la loi portant dispositions diverses du 6 mai 2009, publiée au Moniteur belge du 19 mai 2009, le délai de 24 heures n'a plus cours.

§97 :

«Le Commissaire appelle à ne pas poursuivre les passagers ayant protesté pacifiquement contre ces opérations ». Ni la police fédérale, ni l'Office des Etrangers n'ont intenté de recours contre ces passagers.

### **4. Structures ouvertes pour les familles avec enfant(s) et les mineurs séparés**

§99 à 101 :

De manière générale, il est observé que les coaches et la police sont toujours présents lors de l'entrée des familles dans les structures ouvertes. Les coaches se chargent de leur expliquer les raisons de leur placement.

§102 :

Une précision devrait être apportée concernant la présence des coaches. Celle-ci est limitée afin de préserver l'intimité de la famille. Les coaches ne sont pas présents en permanence et ne vivent pas avec la famille. Il est projeté d'augmenter le nombre d'hébergements ainsi que le nombre de coaches en fonction des besoins.

Par ailleurs, les familles ne sont pas assignées à résidence dans les maisons. Elles sont maintenues à la disposition du gouvernement. Elles disposent d'une liberté de circuler à condition que l'un des deux parents soit présent dans le logement.

L'arrêté royal annoncé dans le rapport a été pris le 14 mai 2009 Il fixe le régime et les règles applicables aux lieux d'hébergement au sens de l'article 74/8 §1, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge ,27 mai 2009).Cet arrêté royal organise plus précisément ces maisons et justifie la privation de liberté. Comme le stipule le chapitre VII concernant le retour de la famille ou le transfert dans un centre fermé en cas de non-coopération au retour effectif .la famille est informée de la possibilité d'être maintenue dans un centre fermé.

§103 :

Le gouvernement belge tient à attirer l'attention sur certains points :

L'utilisation du terme « *mineur étranger non accompagné* », est préférable à celle de « *mineur séparé* » dans la mesure où il s'agit là d'une dénomination qui a reçu une définition précise dans la législation nationale et internationale. Il paraît dès lors indiqué de remplacer dans l'ensemble du texte, les mots « *mineurs séparés* » par « *mineurs étrangers non accompagnés* » (MENA).

Quant à la 'détention', il convient de préciser les éléments suivants :

Les « mineurs étrangers non accompagnés » (MENA) qui arrivent à la frontière sans satisfaire aux conditions d'entrée, ne sont effectivement plus maintenus à la frontière dans des centres fermés depuis l'entrée en vigueur le 7 mai 2007 de la loi "accueil" du 12 janvier 2007. Ils sont désormais accueillis dans des « Centres d'Observation et d'Orientation » qui sont des structures ouvertes et sécurisés avec un statut extraterritorial. Les enfants et les jeunes y sont protégés et y restent de 15 à 20 jours maximum. Après ce délai, ils sont d'office admis sur le territoire et envoyés dans des structures spécialisées selon leur profil.

Seules les personnes pour lesquelles il existe un doute quant à la minorité invoquée, peuvent être maintenues dans un centre fermé en attendant le résultat de l'examen en vue de la détermination de l'âge. Ce doute n'est émis qu'à l'égard des personnes qui paraissent être âgées de 18 ans et plus.

Quant aux procédures mises en place pour déterminer l'âge, il convient de préciser que l'examen pour déterminer l'âge, doit avoir lieu dans les trois jours ouvrables de l'arrivée de l'étranger à la frontière. Lorsque cet examen ne peut avoir lieu dans ce délai, en raison de circonstances imprévues, celui-ci peut être prolongé exceptionnellement de trois jours ouvrables (il ne peut être de plusieurs semaines). Si l'examen en vue de déterminer l'âge, conclut à la minorité du jeune, celui-ci quitte aussitôt le centre fermé.

Par ailleurs, il importe de rappeler que la procédure prévoit d'une part, un avis d'expert remis sur base de 3 radios (poignet, clavicule, dentition) et d'autre part, la prise en compte éventuelle de documents tels que passeport, acte de naissance, jugement, etc ainsi que de tout autre élément probant. Un travail d'harmonisation avec les parquets concernés est par ailleurs en cours.

Quant à la suggestion de professionnalisation des tuteurs, nous sommes d'avis que le lien de « tuteur à pupille » est un lien de filiation qu'il nous semble peu indiqué de professionnaliser.

Par ailleurs, parallèlement à la formation de base pour tuteur nouvellement agréé, le service des Tutelles organise une formation continue pour les tuteurs expérimentés (en 2007 : 5 séances d'intervention par tuteur ; en 2008 : 5 jours par tuteur consacrés à l'approche du mineur et au travail en réseau). En outre, les tutelles sont réparties entre des personnes agréées exerçant ou ayant exercé une profession de nature à constituer une base utile pour l'exercice des missions de tuteurs tel que assistants sociaux, avocats, enseignants ou encore tuteur employé au sein d'organisation etc. Enfin, 80% des tutelles sont réparties parmi les tuteurs ayant en charge plus de 9 tutelles.

## **5. Régularisation**

§ 104 - 108 :

La ministre de la Politique de Migration et d'Asile vient d'ajouter un critère de régularisation aux critères existants, et qui vise les familles d'anciens demandeurs d'asile avec des enfants scolarisés.

## **IV. Mesures contre la discrimination, le racisme et la violence à l'égard des femmes**

### **3. Discrimination fondée sur la langue**

§123 :

La problématique de la loi sur l'emploi des langues s'inscrit dans un cadre présenté comme suit:

La loi sur l'emploi des langues est d'ordre public et l'un des éléments-clé de la structure constitutionnelle et politique de la Belgique, qui par une série de réformes a évolué d'un État unitaire vers une fédération multilingue. La structure de l'État belge est basée sur un certain nombre d'équilibres mutuels, non modifiables unilatéralement, destinés à permettre aux deux grandes communautés du pays de vivre ensemble (parité entre les deux communautés dans les organes fédéraux, lois de majorité spéciale, cadre linguistique pour les

administrations bilingues, unilinguisme légal de principe dans chaque région de langue néerlandaise, française et allemande).

§124 :

Concernant la Convention-cadre sur la protection des minorités, la Belgique rappelle la teneur de sa réserve:

*“Le Royaume de Belgique déclare que la Convention-Cadre s’applique sans préjudice des dispositions, garanties ou principes constitutionnels et sans préjudice des normes législatives qui régissent actuellement l’emploi des langues. Le Royaume de Belgique déclare que la notion de minorité nationale sera définie par la conférence interministérielle de politique étrangère.”*

La Conférence interministérielle de politique étrangère s’est penchée sur cette question sans être parvenue à un consensus.

§127 :

Concernant l’allégation de discrimination fondée sur la langue relative au code flamand du logement, les autorités flamandes souhaitent compléter l’information donnée par le Commissaire de la manière suivante:

« Ces dernières années, il y a eu, en matière d’accès au logement et aux services publics, des allégations de discrimination fondée sur la langue. L’une d’elles concerne le code flamand du logement, tel qu’il a été modifié le 15 décembre 2006, qui impose aux candidats à un logement social en Flandres de prouver qu’ils sont prêts à apprendre le néerlandais. *La mesure vise à garantir un niveau minimal de compréhension mutuelle entre les locataires, qui ont souvent des origines très diverses. Il s’agit d’une volonté d’acquérir connaissance de base (niveau A.1 du cadre européen commun de référence pour les langues), qui peut être démontré de diverses façons. Les autorités flamandes ont d’ailleurs mis en place des cours de néerlandais gratuits. Le Gouvernement flamand a précisé que la nécessité de faire preuve d’une volonté d’apprendre le néerlandais n’entraînait pas d’obligation de résultat, en l’espèce, à démontrer que l’on a acquis une certaine connaissance du néerlandais. Dans sa décision du 10 juillet 2008, la Cour constitutionnelle a estimé que la condition d’apprentissage de la langue prévue par le décret répond au principe d’égalité, à l’interdiction de discrimination et au droit au logement, ainsi qu’aux dispositions analogues du droit international, et n’était pas disproportionnée à l’objectif visé, à savoir permettre à tout un chacun de vivre dans la dignité. [...] Cependant, la Cour a déclaré que l’engagement d’apprendre le néerlandais ne pouvait pas être exigé des citoyens francophones vivant dans des communes à facilités linguistiques si les citoyens en question souhaitaient se prévaloir de ces facilités. »*

§128 :

Les autorités flamandes tiennent à préciser certains points: elles souhaitent qu’il soit indiqué au début du paragraphe que ce sont des conditions similaires d’apprentissage de la langue qui [...] ont [...] été imposées dans certaines communes flamandes dans le cadre de leur autonomie locale concernant l’achat de terres communales.

Par ailleurs, ce n’est que dans la mesure où elles ont été saisies d’une plainte, que les autorités flamandes se sont opposées à certaines pratiques.

Enfin, elles signalent que malgré les efforts, la situation des patients néerlandophones qui recourent à l’assistance médicale à Bruxelles reste précaire. L’envoi par certains hôpitaux bruxellois d’équipes d’intervention médicale d’urgence dans les communes flamandes autour de Bruxelles, sans qu’au moins un des médecins ou infirmiers maîtrise le néerlandais, peut poser problème.

## **V. Protection des droits des enfants**

§130 :

Le paragraphe 130 constituant l'introduction générale à la protection des enfants, il est opportun de signaler dès l'entame du chapitre que depuis 2000, la Constitution belge dispose que chaque enfant a droit au respect de son intégrité morale, physique, psychique et sexuelle.

### **1. Justice juvénile**

§131 :

Selon les autorités belges compétentes, le nouveau droit de la jeunesse implique une approche restauratrice qui se caractérise par deux aspects :

1° la priorité (dans les mesures) est mise sur l'approche réparatrice, celle-ci accorde davantage d'attention aux faits, aux dommages et à la victime et cherche, via la médiation en réparation et la concertation restauratrice en groupe, des solutions permettant au mineur délinquant d'assumer sa responsabilité et de réparer le dommage, surtout à l'égard de la société. Il s'agit là d'un glissement : ce n'est plus de la protection unilatérale mais ce n'est pas encore une sanction.

2° les critères régissant le placement dans les établissements fermés pour jeunes ont été élargis et rendus plus stricts de sorte qu'en première instance, il y a lieu d'appliquer d'autres mesures moins privatives de liberté pour de nombreux jeunes.

#### *b. Enfermement*

§134 :

Les Communautés française et flamande souhaitent compléter l'information présentée dans ce paragraphe en indiquant qu'il existe des procédures de plainte internes au sein des institutions publiques de protection de la jeunesse et que le Commissaire des droits de l'enfant et les médiateurs communautaires peuvent également recevoir des plaintes.

De plus, la Communauté flamande souligne que l'encadrement des jeunes dans les établissements fermés s'exerce essentiellement à l'égard de groupes et que la vie quotidienne s'organise dans des communautés de 10 jeunes.

Le Décret relatif au statut des mineurs dans l'aide à la jeunesse du 7 mai 2004 (MB 4 octobre 2004) fixe les droits explicites des mineurs qui entrent en contact avec les services dans le cadre de l'aide. Ce n'est qu'exceptionnellement, si le comportement d'un jeune constitue un danger pour lui-même ou pour les autres, qu'il peut faire l'objet d'une mesure d'isolation (placement dans une chambre de sûreté séparée). Les institutions de la Communauté flamande compétentes en matière d'assistance spéciale à la jeunesse disposent bel et bien d'une procédure à suivre dans ce contexte, comme prescrit par l'article 28 §3 de ce décret.

L'agence "Jongerenwelzijn" a arrêté en 2008 une procédure de plainte accessible à tous les jeunes et à leurs familles bénéficiant d'une aide ou de prestations dans le cadre des décrets ou de la loi fédérale sur la jeunesse. Ces plaintes sont traitées par une équipe qui fait directement rapport au fonctionnaire dirigeant de l'agence. Ces mêmes personnes peuvent directement prendre contact avec le commissaire flamand aux droits de l'enfant ou avec le Médiateur flamand. Par ailleurs, l'Agence pour l'Audit Interne de la Communauté flamande supervise la gestion de l'organisation interne et l'évolution de la qualité des processus de prestation d'aide dans ces établissements.

§138 :

La Communauté flamande tient à préciser que ce genre d'approche réparatrice existe déjà depuis le siècle dernier et a bénéficié, suite à la nouvelle loi sur la jeunesse, d'une importante extension grâce au triplement de l'offre. Les capacités offertes et subsidiées par l'agence "Jongerenwelzijn" sont en mesure de répondre à toutes les demandes.



La Communauté française souligne également que les Services de Prestations Philanthropiques ou Educatives (SPEP) ont été largement renforcés pour mettre en œuvre la médiation et l'offre restauratrice en groupe.

*c. Dessaisissement*

§ 139 :

La création des centres fédéraux fermés de Tongres et Saint-Hubert permettra d'accueillir les jeunes, prévenus ou condamnés, afin que les jeunes ayant fait l'objet d'un dessaisissement, ne soient plus détenus ou placés en détention préventive avec des adultes.

§140 :

Le rapport dénonce, à juste titre, le fait que les mineurs dessaisis et condamnés (ou sous le coup d'un mandat d'arrêt) sont détenus dans les mêmes lieux que les adultes.

Le nouvel article 606 du code d'instruction criminelle (modifié en 2006) va améliorer la situation. Applicable en principe dès l'automne 2009, cette disposition prévoit que les jeunes dessaisis qui sont condamnés ou sous le coup d'un mandat d'arrêt sont détenus dans un « centre fédéral fermé pour mineurs ayant commis un fait qualifié infraction ».

Deux exceptions sont cependant prévues pour les jeunes dessaisis et qui sont âgés de dix-huit ans ou plus. Ces jeunes peuvent être placés en centre pénitentiaire pour adultes si le nombre de places en centre fédéral fermé est insuffisant ou s'ils causent des troubles graves au sein du centre ou s'ils mettent en danger l'intégrité des autres jeunes ou du personnel du centre.

## **2. Châtiments corporels**

§142 :

Il convient de souligner dans le rapport final du Commissaire l'adoption, le 21 octobre 2008, d'une circulaire ministérielle diffusée aux différents ressorts judiciaires du pays et rappelant, expressément, que les châtiments corporels administrés aux enfants sont susceptibles, selon les circonstances, de constituer des coups et blessures et/ou des traitements dégradants (articles 398 et suivants et 417quinquies du Code pénal).

## **VI. Mesures de lutte contre le terrorisme**

§143 et suivants :

Il y a lieu de préciser que les lois relatives à la lutte contre le terrorisme sont une mise en œuvre obligatoire de la décision-cadre du 28 novembre 2008 de l'Union Européenne.

§145 :

Les méthodes particulières de recherche font l'objet d'une loi très restrictive et qui prévoit des conditions strictes de contrôle. Un projet de loi est en cours de finalisation pour répondre à certaines objections de la Cour constitutionnelle.

§146 :

Le Commissaire souligne « *qu'un examen indépendant de l'utilisation et de l'impact de ces banques de données est nécessaire afin de s'assurer de leur caractère nécessaire et proportionné* ».

En réaction à ce commentaire, il convient d'observer que l'utilisation de la banque de données est contrôlée par la Commission pour la protection de la vie privée et le Comité P, qui sont des institutions indépendantes, placées sous l'autorité du Parlement. Cette utilisation est également contrôlée par l'organe de contrôle de la gestion de l'information policière, qui relève de l'exécutif, ainsi que par l'Inspection générale de la police fédérale et de la police locale, qui est un service relevant directement du ministre de l'Intérieur.