Report on Belgian remedies

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Abstract

Our report intends to examine the influence of the legal supervision exercised by the Council of Europe on the Belgian prison services. Belgium is characterised by the weakness of its own national judicial (both judiciary and administrative) control over its prisons. This poor control can be explained by the refusal by the administrative Courts to exert control over the prison administration and the division of competences between judicial and administrative order. This weakness is also considerably reinforced by Belgium's failure to ratify the Optional Protocol which implies a lack of independence for the Central Committee for surveillance that is the main Belgian organ responsible for the internal control over prisons. Therefore, control over Belgian prisons is more and more exercised by the Council of Europe and in particular the European Court of Human Rights, the Committee of Ministers and the Committee for the Prevention of Torture, which have extended the scope of their supervision to cover suicides, illegal detention, healthcare and insanity.

Introduction

When addressing human rights, prison sociologists exclusively focus on legal practices and prison law implementation. They tend to ignore the systemic nature of legal systems and the oversight exerted by international bodies, international regulations and their impact on national prison laws. The bulk of research in prison sociology has instead been concerned with highlighting the contradictions between the authoritarian and arbitrary structure of prison and the principles of law, the effects of judicialisation on prison life and the increase of the prison population. Sociologist scholars have also shown that appeals lodged by prisoners and prisoner advocacy groups have refocused prison relationships on the question of the exercise of rights[1] and the legitimacy of violence against inmates particularly in terms of discipline, confinement and transfers[2], as well as the persisting ineffectiveness of law in prison. The latter is perceived as being the product both of the weakness of prison law, although it has been progressively – and quite considerably – reinforced[3] and of the anti-democratic vocation of prison, seen as patently incompatible with human rights. Lastly, it has been emphasised that the legal appeals lodged by advocacy groups with a view to improving detention conditions[4] or promoting the exercise of rights have had the adverse effect

[1] Jacobs, J.B. (1997) 'The Prisoners' Rights Movement and Its Impact', in: Marquart, J.W. and Sorensen, J.R. (Eds.), *Correctional contexts. Contemporary and classical readings*. Los Angeles: Roxbury, pp. 231-247.

[2] Belbot, B. (1997) 'Prisoner Classification Litigation', in: Marquart, J. W. and Sorensen, J. R. (Eds.), *Correctional Contexts, Contemporary and Classical Readings*. Roxbury: Los Angeles, pp. 272-280; Crouch, B. and Marquart, J. 'Resolving the Paradox of Reform : Litigation, Prisoner Violence, and Perceptions of Risk', in: Marquart, J. and Sorensen, J. (Eds.), *Correctional Contexts. Contemporary and Classical Readings*. Los Angeles: Roxbury Publishing, pp. 258-271.

[3] Herzog-Evans, M. (2012) *Droit pénitentiaire*. Paris : Dalloz.

[4] Jacobs, J. B. (1997) *op. cit.*

This publication has been produced with the financial support of the Criminal Justice Programme of the European Union. The contents of this publication are the sole responsibility of the University of Florence and can in no way be taken to reflect the views of the European Commission.

of legitimising and encouraging extensive recourse to imprisonment[5] whilst not making a strong impact on prison conditions, and has in fact been counteracted by the prison services in the form of a 'disciplinary governance' backlash[6].

There are in our opinion two main pitfalls to this sociological approach to prison: firstly, it underestimates the historical role played by international organisations and the content of the regulations they issue; secondly, it addresses litigation increase and judicialisation on a strictly national, actionalist and occupational level (with observation generally focusing on occupational groups, associations and detainees). Yet, a number of international bodies such as the UN, the Council of Europe and even the European Union, created after World War II to ensure compliance with human rights standards and to prevent inhumane and degrading treatments, tend to produce a monitoring of States based on increasingly numerous and influential regulations, standards, recommendations, and even condemnations[7]. The purpose of this monitoring is to govern and oversee correctional facilities, and international institutions, and to ensure that they are effective in domestic law. In particular, the judicial oversight exercised by the ECHR, the judicial organ of the Council of Europe, has significantly increased over time notably thanks to the evolution of its structure and jurisdiction towards a constitutional court and an increasing cooperation with the other organs of the Council of Europe, the Committee of Ministers, the Parliamentary Assembly and the Committee for the Prevention of Torture[8]. More precisely, ECHR rulings regarding prisons have been mainly based on the violation of three articles of the European Convention on Human Rights (: articles 2, 3, and 5) and have made demands on these member states with regard to vulnerable prisoners, death and health in custody, prison conditions and coercive or disciplinary measures.

In order not to fall in the aforementioned pitfalls[9], we shall essentially draw upon legal analysis and literature, whilst endeavouring to maintain a socio-legal compass. This paper intends to examine the influence of the legal supervision exercised by the Council of Europe and its organisations at the national level. Yet state reactions to these European interventions have remained relatively understudied to date. As mentioned above, relevant scholarly research has been mainly preoccupied either with the scope and validity of criticisms raised against given states or with the specific structure and operations of the institutions that raise criticisms in the first place. Much less is known about the nature of reactions from the states concerned, the forces that determine them, and their respective influence on the effectiveness of criticisms and subsequent censures. Regarding the development of this European control over penal and prison policies, we question whether the establishment and strengthening of the relationship between the control of prisons ensured by the European organs of control has contributed to the shaping of prison policies and the creation of a monitoring system based on human rights, which has forced national prison administrations to develop political, legal and organisational responses. Indeed, this 'panopticon' based on human rights seems to be inverted in the sense that the supervision exerted by the European judicial and institutional bodies over prison administrations is influenced by the complaints launched by prisoners and NGOs. In other words, our main question shall be: is there any evidence in addition to the constant multifaceted supervision of prisoners (as in the hypothesis of Foucault, 1975), that

[5] Gottschalk, M. (2006) *The Prison and the gallows: the politics of mass incarceration in America*. New York: Cambridge University Press; Schoenfeld, H. (2010) 'Mass incarceration and the paradox of prison conditions litigation'. *Law and Society Review*, 44 (3-4): 731-768.
[6] Herzog-Evans, M. (2012) *op. cit.* However reasons for this backlash are also to be found in the punitive policies of the 'Sarkozy era'.
[7] Bond, M. (2011) *The Council of Europe: structure, history and issues in European politics*. New York: Routledge.
[8] Van Zyl-Smit, D. and Snacken, S. (2009) *Principles of European prison law and policy: penology and human rights.* Oxford, Oxford University Press.
[9] See e.g. Herzog-Evans, M. (2012) *op. cit.*.

national Ministers of Justice and prison administrations are now also monitored and supervised by the European bodies?

In order to answer this question, we shall focus on important European jurisdictions such as Belgium and the Netherlands since they embody the European diversity in terms of level of condemnations pronounced by the Strasbourg Court (Belgium having been condemned by pilot judgments while the Netherlands has rarely been condemned and is in fact considered by the European Court as being a model for its preventive remedies), of funding and influence on the Council of Europe (Belgium has litle influence and the Netherlands is a medium contributor), of the main European legal traditions (Roman-law for Belgium and a mix of German and Roman-law for the Netherlands). As such, the Netherlands and Belgium can be considered as being diverse enough cases stdies. In order to study the concrete impact of the legal control exercised by European bodies on these countries, we shall rely on a socio-legal analysis of the Council of Europe's Recommendations, Prison Rules and ECHR rulings and their regulations, and the concrete impacts of those norms and case-law on Belgian and Dutch prison policies.

I. The ECtHR jurisprudence pronounced against Belgium

1. Main complaints covered by the ECtHR

1.1. The development of death and suicide prevention in custody through the right to life (article 2)

The right to life constitutes one of the most important rights recognised by article 2 of the European Convention on Human Rights of 1950. The ECtHR's main priority is wider systemic issues rather than individual cases[10]. This is also true with regard to article 2 which is considered by the ECtHR as being '*one of the basic values of the democratic societies making up the Council of Europe*'[11]. Accordingly, when faced with potential breaches of this provision, the Court must subject violation allegations to the utmost careful scrutiny[12].

The jurisprudence on the right to life has developed in seven fields amongst which the prevention of deaths in prison in relation to healthcare, to prison suicide and homicides in prison, where sick or injured prisoners have been denied adequate medical care. The right to life is considered by the ECHR as being a priority that imposes not only a negative obligation not to endanger citizens' lives and to refrain from the intentional and unlawful taking of life, but also positive obligations which oblige the State to protect human life by way of screening, and preventive measures, and step actions[13].

In this respect, states like France and the UK condemned by the ECHR on the basis of article 2 and the Recommendation 98(7) of the Committee of Ministers of the Council of Europe have been obliged to develop and sustain death and suicide prevention policies within its prisons by establishing special procedure based on risk detection and risk management[14]. More precisely, the

[10] Leach, P. (2013) 'No longer offering fine mantras to a parched child? The European Court's developing approach', in: Føllesdal, A., Peters, B. and Ulfstein, G., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*. Cambridge: Cambridge University Press, p.165.
[11] ECHR, 20 December 2004, *Makaratzis v. Greece* , n° 50385/99, § 56.
[12] ECHR, 6 July 2005, *Nachova and Others v. Bulgaria* , n°43577/98 and 43579/98.
[13] Cliquennois, G., and Champetier, B. (2013) 'A new risk management for prisoners in France: The emergence of a death-avoidance approach'. *Theoretical Criminology*, 17(3): 397-415.
[14] *Ibid.* see also Cliquennois, G. (2010) 'Preventing suicide in French prisons'. *British Journal of Criminology* 50(6): 1023-1040. For the UK see ECHR, 3 April 2001, *Keenan v. United Kingdom*, n° 27229/95.

Court requires from member States that in the case of a suicide risk that is known or must be known due to the prisoner's behaviour and/or to his personal and psychiatric history, they shall take all appropriate precautionary measures to detect and prevent this suicide by using risk calculation along with preventive measures adapted to this risk, and inter alia, constant supervision, placement in a completely bare cell and/or in an adequate block, removal of belts, shoe-laces, and other blunt objects[15] which could be used to commit suicide. The Court also requires that they should pay special attention to any sign of self-harm threat[16]. For its part, Belgium was also found in violation of article 2 in *De Donder and De Clippele v. Belgium* (2012) for not having sufficiently considered suicide risk factors in the case of a mentally ill person interned several times, but '*at the time of his suicide detained in an ordinary prison environment even as he was suffering from a mental disorder*'.[17] This ruling fits within the Court's progressive jurisprudence on the obligation of detecting and preventing suicide risk for prison authorities.

In the same manner, the ECtHR requires prison authorities to establish and to put in place sufficient screening procedures for newly arrived prisoners with the aim of detecting high risk profiles: '*the Court considers that it is self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision*'[18]. While The UK and France have effectively replied to these obligations by putting in place suicide and homicide risk detection and management[19], Belgium has not responded yet to this obligation.

1.2. The development of healthcare policies in prison through the prohibition of torture and inhuman treatment (article 3)

Article 3 of the Convention recognises one of the most fundamental values of democratic society and constitutes a priority for the European Court in its prioritisation and selection policy. Even in the most difficult of circumstances, such as the fight against terrorism or crime, and no matter what the victims's behaviour is, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

In terms of human rights and particularly of the legality of detention and of inhuman and degrading treatment, the right to health is also an especially important matter in the monitoring of detention conditions. In effect, both the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules (EPR) of 2006 which follow Recommendation 98(7) of the Council of Europe concerning healthcare in prison[20] require the establishment of a medical service within prisons, this in close collaboration with outside medical and hospital facilities operating under the authority of Health Ministries[21]. The ECtHR and the CPT have both gradually come to exercise *external* control over the creation of healthcare services which should be independent from prison authorities. The *internal* control of healthcare in prison settings as exercised by medical services directly connected to national healthcare services is thus arguably reinforced by the external control exercised by European bodies.

[15] ECHR, *Keenan v. United Kingdom, op. cit.,* § 88.
[16] *Ibid.*
[17] ECHR, 6 December 2011, *De Donder and De Clippel v. Belgium*, n° 8595/06, §78.
[18] *Ibid*., §62.
[19] Cliquennois, G. and Champetier, B. (2015) *The development of a risk management approach to conditional release, healthcare and deaths in custody by the Council of Europe*. CARR Discussion Paper, London School of Economics, forthcoming.
[20] Resolution 98(7) of the Committee of Ministers concerning the ethical and organisational aspects of healthcare in prison.
[21] Rule 40.1 of the EPR.

This European principle has been transcribed in the 2005 Belgian Prison Act, which now states that prisoners shall have access to quality healthcare that meets the standards defined by the general health system, this in close collaboration with external health structures (article 88). In conformity with the EPR, the Belgian Prison Act – in a similar vein to a French 1994 Public Health Act – requires that prisoners whose health require a medical examination that cannot be conducted in prison be transferred to a health facility (article 93). A Belgian circular released by prison authorities was published as a response to this obligation resulting from the EPR to create psychiatric services closely connected to psychiatric services provided as part of the general mental health network. The so-called '1800' circular of 7 June 2007 relating to the healthcare teams of psychiatric sections in Belgium prisons and social welfare facilities under the Ministry of Justice recommended the hiring of qualified personnel (psychiatrists, coordinating psychologists, occupational therapists…) which would remain independent from other prison staffers in order to maintain a 'scission between care and expertise'. It also asked for the creation of an Ethics Committee in order to ensure this independence. Studies pertaining to the implementation of the 1800 circular in several prison and social welfare facilities have however highlighted its weak effectiveness, the dependence of the mental health sections toward prison authorities and the circumventions of the principle of separation between care and expertise within these psychiatric sections[22].

In 1993, the CPT had already noted violations of the European Convention on Human Rights in these psychiatric sections, called in Belgium 'psychiatric annexes'. These included problematic transfers of patients to disciplinary blocks[23], the complete lack of say of medical supervisors on admissions and discharges[24], and the recurrent shortage of healthcare personnel attached to the annexes. These observations were shared by the Commissioner for Human Rights of the Council of Europe[25]. In light of these observations, the UN Human Rights Committee has asked the Belgian state to put an end to the psychiatric 'annexe' system, since they de facto constitute detention settings for mentally-ill people.[26] In a number of recent rulings the European Court of Human Rights has made up for this lack of supervision by reinforcing its pressure onto Belgian authorities to radically reform its national prison system.

One of such rulings was *Claes v. Belgium* (2013), wherein the Court held that the applicant's continuous detention in a prison's psychiatric wing for more than 15 years without adequate care (absence of appropriate treatment since several medical reports have pointed out that the applicant was increasing his suffering due to the lack of prospects of reclassification, the inexistence of monitoring and his non-understanding of his problems) constituted a degrading treatment resulting in a violation of article 3[27]. Belgian prison authorities were blamed for not having provided sufficient onsite medical supervision or offered an alternative by reinforcing ties between the prison services and appropriate healthcare structures. The '*unsuitability of psychiatric wings for the*

[22] Cartuyvels, Y., Champetier, B. and Wywekens, A. (2010) *Soigner ou punir ? Une approche critique de la défense sociale en Belgique*. Bruxelles : Publications de l'Université Saint-Louis Bruxelles.
[23] Lantin's psychiatric wing, CPT report of 1993.
[24] *Ibid.*
[25] Commissioner for human rights- Council of Europe. Visit in Belgium, 15-19 December 2008 (ref. CommDH (2009)14).
[26] United Nations Human Rights Committee (CCPR). Consideration of the report submitted by Belgium under the International Covenant on Civil and Political Rights (Draft concluding observations, November 2010).
[27] ECHR, 10 January 2013, *Claes v. Belgium*, n° 43418/09, §100 -102; ECtHR, 6 December 2011, *De Donder and De Clippel v. Belgium*; ECHR, 10 January 2013, *Duffort v. Belgium*; ECHR, 10 April 2013, *Sweenen v. Belgium*; ECHR, 9 January 2014, *Lankaster v. Belgium*; ECHR, 9 January 2014, *Van Meroye v. Belgium*, ; ECHR, 9 January 2014, *Plaisier v. Belgium*; ECHR, 9 January 2014, *Oukili v. Belgium*; ECHR, 9 January 2014, *Moreels v. Belgium*.

detention of persons with mental health problems, staff shortages, the poor standard of care, the dilapidated state of premises, overcrowding in prisons and a structural shortage of places in psychiatric facilities outside prison' was more broadly denounced.[28] This ECHR jurisprudence raised the more general question of the structural supervision of mentally ill offenders in need of medical treatment.

The Belgian authorities partly responded to the Court by increasing the number of medical staff in prisons and psychiatric wings, by increasing the capacity of psychiatric institutions reserved for offenders, and by launching the construction of three psychiatric units for medium-risk mentally ill defenders (Zelzate, Bierbeek et Rekem) along with two psychiatric detention centres for high-risk mentally ill offenders in Ghent and in the vicinity of Antwerp.[29]

1.3. The broader access to conditional release request and the judicial review for long and life sentences through the right to legal detention

The third article on which the Court has relied to condemn Belgium is article 5 of the Convention which aims at protecting individuals from all arbitrary forms of deprivation of liberty [30]. In *Aerts* (1998), *De Donder and De Clippel* (2011, 8595/06), *Claes* (10 January 2013, 43418/09), *Dufoort* (10 January 2013, 43653/09), *L.B.* (22 October 2012, 22831 /08), *Swennen* (10 January 2013, 53448110), *Oukili* (9 January 2014, 43663/09), *Plaisier* (9 janvier 2014, 28785/ 11), *Yan Meroye* (9 January 2014, 330/09), *Saadouni* (9 January 2014, 50658/09), *Moreels* (9 January 2014, 43717/09), *Gelaude* (9 January 2014, 43733/09), *Lankester* (9 January 2014, 22283110), *Caryn* (9 January 2014, 43687/09), *Smits and others* - (3 February 2015, 49484/11, 53703/ 11, 4710/ 12, 15969/12, 49863/ 12 et 70761 / 12), *Vandervelde and Soussi* against Belgium and the Netherlands (3 February 2015, 49861/ 12 et 49870/ 12), and on the basis of subparagraph e) of paragraph 1 in article 5 and of numerous CPT reports, the Court has ruled that the imprisonment or continued detention of a mentally ill person[31] in the psychiatric wing of a prison was illegal and irregular, as this detention took place in inappropriate conditions, making deficient '*the relationship between the aim of detention and the conditions in which it took place*'.[32]

On the basis of article 5§1e), the ECHR therefore requires a relationship between the motive put forward to justify the deprivation of liberty and the prison conditions. On this basis, mentally ill prisoners must be transferred to a hospital, a clinic or another appropriate facility where their symptoms can be treated.

Likewise, and also on the basis of article 5 (§4), the ECHR has considered that in order for detention to be legal, the Member State had to ensure consistency between the offence committed and the reason for which the offender was sent to prison[33]. Clearly influenced by English law, the Court has distinguished two separate phases within each prison sentence: the first phase aims at

[28] ECHR, 10 January 2013, *Claes v. Belgium*, n°43418/09, §98.
[29] Belgian Senate, Session 2006-2007, 20 March 2007, legislative document n° 3-2094/3, Justice Commission Report, M. Mahoux.
[30] ECHR, 4 April 2000, *Witold Litwa v. Poland*, n° 26629/95 and ECHR, 2 March 1987, *Weeks v. United Kingdom*, n° 9787/82.
[31] According to the ECHR, an individual may be considered as being mentally ill, and consequently be deprived of his liberty, if his mental illness has been established conclusively, and if his disorder is serious enough to make internment a legitimate option. Internment cannot be validly extended if the disorder does not persist (ECHR, 24 October 1979, *Winterwerp v. Netherlands*; ECHR, 5 October 2000, *Varbanov c. Bulgaria*).
[32] ECHR, 10 January 2013, *Claes v. Belgium*, §120.
[33] ECHR, 25 October 1990, *Thynne, Wilson and Gunnell v. the UK*, n° 11787/85, 11978/86.

punishing the offender; the second phase relates to the risk that he or she poses to society[34]. As soon as this second phase of the sentence begins, Member States are obligated to regularly evaluate the risks raised by prisoners[35]. It is on this basis that the Court has ruled against Belgium in *Van Droogenbroeck,* and has considered that the lack of regular evaluation rendered the applicant detention illegal – even though he had committed numerous theft offences. According to the Court, the authorities should at least have made regular assessments of the prisoner's personality, which they had not[36]. It is noteworthy that the European Probation Rules (CM/Rec(2010)1) likewise recommend that offenders should regularly be risk assessed (art. 66-71).
In Claes case, the Court also found violations of article 5§4 due to the absence of a satisfactory response from the courts (Chamber of Social Defence and courts seized in chambers) to the applicant's request that it be found it a place in a suitable institution or be paroled.

Belgian authorities have partially replied to this obligation by developing and using risk management assessment more and more regularly, followed by a review of the case[37].

2. Quasi-pilot judgment against Belgium: Development of prison policies coping with poor conditions of detention and content of material and procedural obligations imposed by the ECtHR on the Belgian State

Belgium has been recently held in violation of article 3 by the ECtHR through a quasi pilot-judgment in *Vasilescu v. Belgium*[38] and its for inhuman and degrading treatment, for the deplorable detention conditions during the applicant's confinement. As a result of prison overcrowding, the applicant claimed he had had to sleep on the floor on a mattress. Mr. Vasilescu spent a total of 60 days in a cell in Merksplas which lacked the availability of a toilet and running water. In both prisons, the applicant claimed they had been deprived of adequate medical care for his back condition and had been subjected to discrimination related to prison conditions and early release. The Strasbourg Court stressed that the problem of prison overcrowding in Belgium, and the subsequent issues of unhygienic and outdated prison institutions, were structural in nature and did not concern Mr. Vasilescu's personal situation alone. The Court followed the reasoning of the CPT concerning the issue of overcrowding which concluded, on more than one occasion, that the adverse effects of overcrowding cause inhuman and degrading detention conditions. In such circumstances, all services and activities within a prison are affected, especially minimum requirements in terms of hygiene and health conditions. Consequently, in such settings, the overall quality of life is lowered and the level of overcrowding can be of such a nature that it breaches Article 3. The Strasbourg recommended that Belgium envisaged the adoption of general measures guaranteeing prison conditions compatible with article 3 of the Convention along with an effective legal remedy which would put an end to the alleged violation or allow would imptove their detention conditions.

The current Belgian government has vowed to replace short prison sentences with alternative sanctions and to tackle the issue of prison overcrowding not only by increasing prison capacity but also in combination with other measures. What these other measures shall consist of has not yet been defined. However, in his policy statement of the current Belgian Minister of Justice has stated that there was indeed a need to build more detention infrastructure.

[34] *Ibid*. and ECHR, *Weeks v. the UK, op. cit*
[35] *Ibid*.
[36] ECHR, 24 June 1982, *Van Droogenbroeck v. Belgium*.
[37] Cliquennois, G. and Champetier, B. (2015) *op.cit.*
[38] ECtHR in *Vasilescu v. Belgium*, 25 November 2014, application no 64682/12.

3. Effectiveness or ineffectiveness of ECtHR rulings (follow-up, role notably held by NGOs in this follow-up)

Several judgments have been particularly followed up by the Committee of Ministers, in particular *De Donder and de Clippel*, *L.B.*, *Claes*, *Swennen* and *Dufoort* cases. Two Action plans[39] and a revised Action Plan[40] have been launched and adopted by the Belgian State as response to the general measures decided by the Strasbourg Court against it.

Contrary to certain countries such as the UK, Russia and Germany, any NGOs insure in Belgium a follow-up through comments addressed to the Committee of Ministers of the Council of Europe.

4. Impact of ECtHR decisions on Ministry of Justice/prison administration (through official reactions to condemnations and follow-up insured by the Committee of Ministers such as refusal, rejection, conflicting relations, curve, acceptance, friendly relations and settlements), national jurisprudence and legislation

In *De Donder and de Clippel*, *L.B.*, *Claes*, *Swennen* and *Dufoort*, Belgian authorities have accepted to cooperate by delivering action plans and a revised action plan. However, these responses remain extremely thin and seem to not comply with the requirements imposed by the Court.

5. Impact of ECtHR judgments on national prison administration decisions and policies (endorsed especially by the prison legal department).

Following the *De Donder and de Clippel* case mentioned above, an action plan and a revised action plan were adopted by the Belgian authorities to respond to the obligations imposed by the ECtHR on it[41]. The Belgian authorities report in these plans the adoption of several measures supposed to reduce the risk of suicide in prison such as the establishment of a suicide warning system and the development of training and activities for prison staff in order to raise their awareness and enable better responsiveness towards individuals at risk of suicide[42]. Furthermore, Belgian authorities have underlined the reinforcement of the procedural guarantees of prison procedure so that a mentally ill offender always benefits from the assistance of a barrister[43]. The 12 January 2005 prison act provides in its article 167 (which came into force on 1 September 2011),

[39] Action Plan - Communication from Belgium concerning the case of Donder et De Clippel against Belgium (Application n° 8595/06)- DH-DD(2012)1038F, Committee of Ministers of the Council of Europe, 8 November 2012; Action Plan (with additional documents) - Communication from Belgium concerning the L.B. (L.B/, Claes, Swennen and Dufoort cases) grouping cases against Belgium (application n° 22831/08), DH-DD(2014)208F, Committee of Ministers of the Council of Europe, 11 February 2014.

[40] Revised action report, Communication from Belgium concerning the case of De Donder and De Clippel against Belgium (Application No. 8595/06), DH-DD(2015)336, Committee of Ministers of the Council of Europe, 25 March 2015.

[41] Action Plan - Communication from Belgium concerning the case of Donder et De Clippel against Belgium (Application n° 8595/06)- DH-DD(2012)1038F, Committee of Ministers of the Council of Europe, 8 November 2012.

[42] Revised action report, Communication from Belgium concerning the case of De Donder and De Clippel against Belgium (Application No. 8595/06), DH-DD(2015)336, Committee of Ministers of the Council of Europe, 25 March 2015, p. 2.

[43] *Ibid.*

for disciplinary sanctions, more procedural safeguards, by requiring that each mentally ill offender must be assisted by a barrister during the disciplinary proceedings[44].

As part of this action plan, a suicide warning system has been set up by the Belgian prison administration in different prisons on March 1, 2010 and is effective since June 2010. Prison officials hold an important role since they can directly take prisoners to the competent authorities (prison governors, psychosocial service, healthcare team) and security measures can be decided[45]. For instance, the warning system set up in the prison of Ghent involves the establishment of a contact point for suicide prevention (Zelfmoordpreventie - ZMP) made up of staff from different prison services (prison officers, prison management, psychosocial service, medical service ...) and the provision of a multidisciplinary team composed of specialists. A prevention policy has been developed so that each staff member can be aware of suicidal behaviors and suicidal risk. When a prison officer observed a sign, he notifies the ZMP responsible for conducting a risk assessment which shall give its opinion to the prison governor (risk, safety measures taken, maintenance or installation of protection elements and a care package) so that it can take the necessary measures. The prisoner is then oriented towards an appropriate service team (healthcare team, psychosocial service center for mental healthcare, ...). The prison of Ghent has also put in place a procedure "following a suicide attempt ', it is directed towards the protection of the person and includes daily contact with a psychiatrist[46].

In addition, following a workshop on suicide in prison, the Belgian prison administration has decided that all prisons should establish a procedure based on information and monitoring of suicidal inmates. These systems are put in place and vary according to the structure of the facility and the nature of the prison population. Prison staff has been sensitized to the problem of suicide and its prevention through the establishment of basic and continual training. More precisely, a training course entitled "Suicide Prevention in Prisons" has become part of the initial training of all prison officers. The goal of this training is to make easier the identification of those at risk of suicide, to assess the urgency and suicidal danger, to transmit the information to that of law and to provide primary care. This training consisting initially of 7 hours has been extended to 11 hours as of January 2013. This training is also available as continuous training. In December 2014, there were 209 staff members who have followed this training on a voluntary basis. In addition, training courses on suicide were organized at the request of prisons. Thus, a specific training was organized for the prison of Ghent (suicide prevention, technical dialogue, risk assessment, ...) in 2010, 2011, 2012 and 2013. The prison of Turnhout also organized training in suicide prevention for its employees. The same training is also planned for the prisons of Beveren and Ypres. In addition, specific training for medical staff working in prison is currently under review. Finally, a symposium entitled "Suicide in daring talk" was organized in June 2012 with the objective to sensitize professionals working in prison to the problem of suicide.

Regarding the specific problem of mentally ill offenders denounced by the ECtHR in *Donder and de Clippel*, Belgium has established a healthcare system which is is in progress. This system allows better and faster orientation internees in accordance with their care needs. Moreover, the healthcare coordinators were set up, responsible for developing this healthcare system circuits and ensuring smooth operation. Healthcare coordinators are precisely the go-between the decision-making in terms of internment and psychiatric institutions. They help the services involved in the orientation of internees (mentally ill offenders) to finding suitable facilities as needed. Multidisciplinary healthcare teams were also created in 2007 in the psychiatric annexes and are

[44] *Ibid*., p. 4.
[45] *Ibid*., p. 3.
[46] *Ibid*., p. 4.

made up of a psychiatrist, psychologist, social counsellor, psychiatric nurse, occupational therapist, a physiotherapist and an educator. The adoption of the 2007act on internment has been also conceived as a response to the ECtHR ruling although this law has never been implemented and effective. The goal of that legislation was to make the internee's file more comprehensive, allowing a better approach to the problem at any time and to ensure better monitoring of the internee (mentally ill offender) and also a much finer adjustment of the measure to the changing situation. A reform of mental health has been underway since 2011. As part of it, the Plan for Internment aims, as far as possible, to gradually remove the mentally ill offenders from prisons to outpatient care facilities in order to offer them the necessary care and prepare them for social integration[47]. Today, the former law of 1964 on offenders and recidivists is expected to be replaced by the 5 May 2014 Act on the internment of persons which will come into force by 1 January 2016[48]. The Act of 5 May 2014 on the internment of people limits the conditions under which an interned person being released may be recalled in a closed type institution and strengthens the judicial review. Article 59 of Law 2014 lists indeed exhaustively the cases in which a release decision may be revoked at the request of prosecutors and cases where a provisional arrest may be ordered. 2 The person detained immediately placed in an institution is designated by the Chamber of social protection (Article 60) and the arrest must also be confirmed by the Chamber within 7 days following the imprisonment (Article 65)[49].

Lastly, new psychiatric institutions for internees have been built in Ghent and Antwerp, which host 450 mentally ill offenders. The institution of Ghent has begun to accommodate new internees on 1 January 2014, while that of Antwerp has opened its doors in 2015. The creation of these new spaces in psychiatric institutions is supposed to provide better conditions for mentally ill offenders internees.

An action plan was also decided on behalf of the Committee of Ministers of the Council of Europe regarding the psychiatric system for mental ill offenders in Belgium following LB cases (*LB*, *Claes*, *Swennen* and *Dufoort*) which were grouped together[50].
Rearding the repetitive violation of article 5.1, The Federal Public Health and the Federal Department of Justice are working on the development of statistic and qualitative data on mentally ill offenders (internees) and their mapping, care supply offered to internees and care needs in this area. On this basis, the authorities may apply a new vision and approach to care needs of current and partners of the external institutions that can accommodate the internees outside the prison system. This will allow the Belgian government to better define targeting actions and to improve the care provided by the institutions in charge of internees. Furthermore, a reflection mixing the aforementioned institutions is underway. It is intended to define courses of action to provide better support to mentally ill offenders and to adapt and adjust care to their pathology and to, as far as possible, decide in a better manner on their reclassification and reintegration[51].
Regarding the violation of article 5.4 in *Claes* case, Belgian authorities highlighted that recent decisions delivered by civil courts (see below) show that there are effective remedies in Belgium used by interned allowing firstly a change in the management of internees and secondly, compensation for internees having been put in jail inadequatly.

[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*, p. 5.
[50] Action Plan (with additional documents) - Communication from Belgium concerning the L.B. (L.B/, Claes, Swennen and Dufoort cases) grouping cases against Belgium (application n° 22831/08), DH-DD(2014)208F, Committee of Ministers of the Council of Europe, 11 February 2014.
[51] *Ibid.*, p. 5.

II. National legal systems for prisoners' rights protection

The sources of law used in Belgian prison litigation are principally European source of law i.e the 1950 European Convention on Human Rights, and domestic source of law i.e the 2005 Belgian Prison Act and the 1964 Belgian Act on offenders and recidivists.

The legal remedies and other relevant legal tools available for prisoners' rights protection, distinguishing between administrative remedies from judicial remedies, and between preventive[52] and compensatory remedies[53].(see for instance Ananiev and Torregiani ECtHR's decisions). Topics dealt with in the W1 are concerned but the main avenues are: material conditions of detention, access to care and medical release, disciplinary action and security measures. Special attention will be paid to orders the judge can make when overcrowding occurs.

Before taking their case to the ECtHR, applicants must have exhausted domestic remedies. One might have expected, in the aforementioned cases, the Belgian courts to often condemn Belgium on the regular basis of articles 2, 3 and 5 of the ECHR. This has so far not been the case, as the restrictive case law of the Belgian courts indicates.

1. Judicial remedies

1.1. Administrative Courts

The main source of external control in Belgium has until now been the administrative jurisdiction of the Council of State and the administrative courts below that are available in principle for all citizens (and thus for all inmates having an interest, whatever their categories). Administrative Courts have importand powers since they can annul measures of general application enacted by the public administration including of course the prison administration. Occuped during the Napoleonian expansion, Belgium inherited the French structure of the Council of State (Heirbaut and Storme, 2006) which is the highest administrative court. Yet, it is clear that the Councils of State composed of judges appointed for life as well as the human rights groups that intervene on behalf of prisoners do not play equivalent roles as regards the external supervision of places of deprivation of liberty. Unlike its French counterpart, which has considerably extended its control of all measures pertaining to prisons (Da Silva, 2009), the Belgian's Council of State has produced an extremely restrictive case law, rejecting actions for annulment of most rulings on prisons. In order not to jeopardize the functioning of the prison system and not to overlap with the prerogatives and competences of the judiciary power (Flaubert, 1989), the Council of State has defined its sphere of intervention by using the term 'internal measure' as a criterion of administrative litigation. This notion is used by the judge to reject appeals considered as inadmissible on the grounds that the contested measure is a measure governed exclusively by the internal functioning of the administration (Flaubert, 1988; de Beco, 1995).

The highest Belgian administrative court has indeed held, in the landmark De Smedt ruling (2003), that a measure taken to ensure smooth running and order in a prison that might cause

[52] i.e. capable of preventing the continuation of the alleged violation
[53] Action for damage (mainly), mitigation of sentence,

inconveniences to prisoners due to its disciplinary character shall not be the subject of an action for annulment.[54] The area of competence exerted by the Council of State is very tight and narrow. Annulment is only possible if the object of the disciplinary measure is to punish a misconducting prisoner. To extend this case law to interned prisoners, the Council of State has based itself on article 95 of the 'Règlement général des établissements penitentiaries',[55] which states that "unless otherwise provided, this Regulation shall apply to all categories of interned persons". Applying the aforementioned principle, the Council of State held in the Wagner ruling (2003) that a decision taken regarding a person interned in the social defence facility of Paifve that consisted in transferring him from the medical wing to the prison wing cannot be annulled, on the grounds that "the contested measure is not exclusively or mainly aimed at punishing the applicant; it is mainly dictated by the concern of better managing the applicant's behavior as well as protecting other weaker patients from his influence". The contested measure thus actually constitutes a "therapeutic, medical measure, and therefore an internal measure that is not subject to annulment by the Council of State".[56] Likewise, in the Lambrechts ruling (2010), the Council of State established that a disciplinary punishment consisting of nine days in a bare cell and a suspended on television and canteen concerning a prisoner detained in the psychiatric wing of a prison did not justify an action for annulment on the grounds that the penalties provided for by the general prison regulations are applicable to all prisoners regardless of whether or not they are interned "without consideration to the consequences they might have on the (mentally ill) applicant's situation and his ability to understand its meaning".[57] In the case at hand, the Council of State considered that the measure did not aim to "humiliate or demean" the applicant and was merely a "disciplinary punishment" that was not "disproportionate or inappropriate" in light of the prison's rules of conduct.[58]

The Council of State's case law is not limited to the aforementioned internal measure; it also includes the "special safety measures" listed in articles 110 to 115 of the 12 January 2005 Act on prison administration and the legal status of prisoners. These special measures, taken by the director of the facility for a duration of up to seven days, are highly punitive, including placement in a high-security cell without objects, exclusion from group activities, surveillance during the day and the night and the deprivation of objects (article 112). In the Sekkaki ruling (2007), the Council of State held that such measures targeting an interned person whose behavior showed "serious signs of danger to order and security" for a duration of seven days was not subject to an action for annulment, under the grounds that while "it was based on the applicant's behavior", it was nevertheless "taken exclusively with a view toward maintaining order and security in prison".[59] This case law also applies to decisions concerning the placement of prisons in a special security regime under articles 116 to 121 of the 12 January 2005 Prison Act. In the Halimi ruling (2012), the Council of State considered that the placement in a special security regime based on article 116 of the Act of an applicant interened in the psychiatric wing of a prison for several months did not justify an action for annulment. Referring to the landmark De Smedt ruling, the Council of State stressed that while the measure had be taken "on the grounds of the constant threat posed by the applicant", it was an "internal measure", not a "disguised disciplinary punishment".[60]

The Council of State's highly restrictive case law primarily reflects a refusal to exercise actual control over prisons. Unlike the French Council of State, which has extended its supervision to a

[54] Conseil d'Etat, section d'administration, 11 mars 2003, arrêt De Smedt c. Etat belge, 3-4.
[55] Arrêté du 21 mai 1965 portant règlement général des établissements pénitentiaires, M.B. 25 mai 1965.
[56] Conseil d'Etat, section d'administration, 10 octobre 2003, *arrêt Wagner c. Etat belge*, 3-4.
[57] Conseil d'Etat, section d'administration, 10 juillet 2000, *Lambrechts c. Etat Belge*, 4.
[58] Conseil d'Etat, section d'administration, 10 juillet 2000, *Lambrechts c. Etat Belge*, 4-5.
[59] Conseil d'Etat, section d'administration, 31 mars 2007, *Sekkaki c. Etat belge*, 4.
[60] Conseil d'Etat, section d'administration, 6 décembre 2012, *Hilami c. Etat belge*, 9.

considerable number of measures on prisons since the Marie ruling of 17 February 1995,[61] the Belgian Council of State refuses to rule on violations of a subjective right protected by the European Convention of Human Rights. In the Halimi ruling, the Belgian Council of State pointed out to an applicant denouncing a violation of article 3 of the ECHR that "if the applicant considers he is a victim of abuses committed by the prison authorities, it shall be up to him to bring this complaint to the courts that have exclusive jurisdiction over such matters under article 144 of the Constitution",[62] i.e. the judicial courts – not the administrative courts. In the Sekkaki ruling, the Council of State argued that it had "no competence to rule on appeals against decisions taken by the director of a prison".[63]

Among the difficulties that hinder his intervention, three ones in particular should be pointed out. Firstly, the boundary between internal measure and disciplinary sanctions is tenuous and thin, as highlighted the problem of "disguised sanctions". Some lawyers estimate that the censorship exerted by the State Council would be legitimate with regard to internal measures, a minimum when they "have the effect of significant changes in the legal situation of the prisoner"[64]. Then, the granting of a suspension is subject to the existence of a "difficult to repair serious harm" in the absence of immediate suspension of the act (art. 17§2 of the consolidated acts on the Council State). But the tendency to admit the existence of this condition appears more restrictive in recent years[65]. Furthermore, if the decision made by the Council of State has already been executed at the time of the hearing, the inmate will be considered as no longer able to argue for such damage[66]. Finally, the passage of time does not help the detainees. To ensure better protection, a procedure of extreme urgency for interim measures was introduced, exceptionally in 1991[67]. However, this procedure, which requires great diligence on the part of the detainee, has been dismissed under late application[68].

The timidity of the Council of State also reveals the lack of pressure exerted by human rights groups and citizens on this administrative jurisdiction in prison matters. Unlike in other countries such as France and the UK, Belgian human rights groups have low financial and human resources; it has been observed that the latter factor is a condition of the effectiveness of appeals by activist groups (Epp, 1998; McCann, 1994). The Belgian branch of the Observatoire International des Prisons,[69] for instance, is too underfunded to have permanent salaried members, whereas its French counterpart[70] has thirteen, including one jurist specialized in judicial appeals.[71] Likewise, the "prison committee" of the French-speaking section of the Belgian Human Rights League[72] is mainly composed of experts working on a voluntary basis. Unlike groups such as Inquest[73] in the UK, created by families of individuals who died in prison to defend their rights,[74] the Belgian league has difficulty getting in touch with families of prisoners. While the Dutch-speaking section

[61] Conseil d'Etat, 17 février 1995, *Marie c. Etat français*, n° 97754.
[62] Conseil d'Etat, section d'administration, 6 décembre 2012, *Hilami c. Etat belge*, 10. Voyez aussi Conseil d'Etat, section d'administration, 31 mars 2007, *Sekkaki c. Etat belge*, 3.
[63] Conseil d'Etat, section d'administration, 31 mars 2007, *Sekkaki c. Etat belge*, 3.
[64] Andersen R., 2009, *Le Conseil d'Etat et le détenu*, Liber amicorum H.D. Bosly. Loyauté, justice et vérité, Bruxelles, La Charte, p. 4.
[65] Beernaert, M.A., 2012, *Manuel de droit pénitentiaire*, Bruxelles, Anthémis, p. 376.
[66] Council of State, Bamouhammad ruling, n° 216.389, 22 November 2011.
[67] Cuvelier B., 2003, *Le conseil d'Etat et le contentieux pénitentiaire : acte II, Administration Publique*, p. 186.
[68] Council of State, Belkadi ruling, n°147.72, 18 July 2005.
[69] http://www.oipbelgique.be/
[70] http://www.oip.org/
[71] See the report on France.
[72] http://www.liguedh.be/
[73] www.inquest.org.uk
[74] See the report on the UK.

of the Human Rights League[75] has more resources and includes 6 permanent members, its activities also appear to be limited in the prison field, as is suggested by the fact that they have made no appeals before administrative courts or the ECHR, unlike British (Justice and Liberty) and French (OIP) human rights protection groups.

The number of appeals to administrative courts remains overall low. Another likely contributing factor is that these appeals demand considerable amounts of time, and require lawyers to be versed in administrative, prison and adjective law (Dejemeppe, 2012). Lastly, a more structural reason arguably lies in the fact that the unpriviledged background of prisoners works against them in a system where administrative courts favor those who have the necessary social, cultural and economic dispositions (Spire and Weidenfeld, 2011). Due to the combination of these factors, prison authorities have considerable discretion to deal with internal prison matters.

1.2. Civil courts

Prisoners have also access to civil courts if they can argue that they directly suffer from an individual right violation. Substantive proceedings can thus be considered before civil courts, when an inmate is seeking compensation for damage related to a measure that undermines one of his personal rights[76]. However, case law here is very thin: the urgency of the situations experienced almost always leads inmates to seize the President of the interim court, ie court in chambers[77]. In the name of respect for individual rights, the interim judge (of the court in chambers) may well 'order to the State to no longer impose on an inmate security measures or security scheme that does not meet the conditions of the 2005 Prison Act or appearing to be insufficiently justified'[78]. The intervention of the judge requires the infringement of individual rights of the detainee which appears to result from a fault commited by the authority in the exercise of its discretion (art. 584, §1, judicial Code). It is also necessary that there is "urgency" and that through his intervention, the civil judge does not interfere with the laws and principles governing the jurisdiction of the criminal courts. The consideration for speed is fragile: the interim measure is taken provisionally and does not bind on the decision made by the judge on the merits. Furthermore, the judge can check here the legality of the detention but in any case its opportunity which is exclusively controlled by the trial judge[79]. In other words, under the principle of separation of powers, the judge can make positive or negative injunctions to the administrative authority[80] but it can not 'make the work carried out by the administration nor substitute himself to that authority, but he has to demonstrate a manifest error of assessment or an abuse of discretion'[81].

It is in this context that a limited case law has been developed by the interim judge in chambers on detention conditions in prison and on social defense since the eighties[82]. A number of cases

[75] http://www.mensenrechten.be/
[76] Final Court of Appeal, 21 March 1985, *Pasicrisie*, 1987, I, 108.
[77] Berbuto S., Mary Ph., Neve M., 2007, Garantir les droits en prison : droit de plainte et recours judiciaires, Le nouveau droit des peines : statuts juridiques des condamnés et tribunaux de l'application des peines, Bruxelles, Nemesis-Bruylant, p. 139.
[78] Beernaert M. A., 2008, Sanctions disciplinaires versus mesures de sécurité : deux poids, deux mesures dans le droit pénitentiaire, *Journal des Tribunaux*, n°6300, p. 147.
[79] Preumont, M., 2003, 'L'intervention du juge des référés dans les matières pénales', in *Le référé judiciaire*, Bruxelles, éd. du jeune Barreau de Bruxelles, pp. 209-210.
[80] Brussels Civil Court (interim, in chambers), 5 November 2012, 13.
[81] Brussels Civil Court, 26 April 2013, 4.
[82] Preumont, M., 2003, *op. cit.* ; Berbuto S., 2003, Jurisprudence récente en matière d'exécution des peines d'emprisonnement, *Actualité de droit pénal et de procédure pénale*, C.U.P., pp. 125-190 ; Van den Bergue, Y. , 2006, De bevoegdheid van de Raad van State inzake strafuitvoering, *R.A.B.G.*, pp. 913-917.

belonging to specific fields have been considered by the judge in chambers admissible concerning illegal detention, imposition of special security measures, specific individual security system, transfers from one institution to another, strip searches, the refusal to grant or revocation of parole, the absence of transfer of an internee to a social defense facility, isolation for medical reasons (inmates suffering from AIDS) the right to information and the imposition of inhuman and degrading treatment[83] (Preumont 2003, 216-224; Berbuto, 2003; Van Den Berghe, 2006). We can also notice, in several recent decisions, the reference made to the case law of the ECHR concerning Article 3 of the Convention (prohibition of torture and inhuman and degrading treatment), or the reports drafted by the CPT, which tends to emphasize the growing influence of direct or indirect control by the European authorities on Belgian judges.

Regarding social defense and healthcare issues more precisely, the Brussels interim Court of First Instance (County Court in chambers) on 15 June 2011 (NR / 11/604 / C) ordered the Belgian State to implement the decision made by the Social Defense Committee of Ghent on November 8, 2010 within 14 days. The Ghent Social Defence Committee then decided the applicant's placement at the Psychiatric Institute of Zelzate or at the Psychiatric Institute of Bierbeek Rekem, dependent on the State.
In the same sense, the Brussels Court of First Instance on 2 October 2012 (AR / 2011/13959 / A) sentenced a psychiatric institution to proceed to the assignement decision made by the Social Defence Committee of Antwerp on 19 January 2011 within 14 days.

The Court of Appeal of Liège rendered a judgment on July 13, 2012 (2012RF / 143) related to an internee who had brought a complaint before the judge of Liège to get his transfer to the social defense facility ‘Les Marronniers’.The judge ordered the Belgian State to transfer and the Walloon Region to welcome him ‘when a place becomes available’. The Court of Appeal confirmed this judgment.

On 5 November 2012, the Brussels Court of Appeal delivered a judgment (2012 / RF / 214) concerning an internee detained in the psychiatric wing of Lantin prison who had brought an application against the Belgian State, asking the Court to order his transfer to the social defense facility ‘Les marronniers’ (pursuant to the decision made by the Social Protection Committee). The Belgian state has cited intervention in the Walloon Region, which the establishment of social defense ‘Les Marroniers’. The primary Judge upheld the applicant's request and ordered the Belgian State to transfer him to the social defense facility ‘Les Marronniers’, and obliged the Walloon Region, on which ‘Les Marronniers’ depends, to host him for under pain of penalty. The Court of appeal also granted the applicant's request by condemning the Belgian State to transfer the internee to the social protection facility "Les Marronniers" as soon as space becomes available. However, the Court of Appeal held that the Walloon Region could not be condemned.

The interim Brussels Court of Appeal (in chambers) on 10 January 2013 (2012KR122) was indeed seized by an internee detained in a psychiatric wing in order to make the Belgian State condemn and ordered to transfer him to the social defense facility of Paifve under decision made by the Social Protection Committee. At first instance, his application was rejected, the judge considering that the urgency was lacking. The applicant appealed this decision and the Brussels Court of Appeal, after asking an opinion to a doctor, said that the circumstances in which the applicant found require his immediate transfer to the social defense facility of Paifve.

[83] *Ibid*., pp. 216-224.

On 19 April 2013, the judgement delivered by the Brussels civil Court (RA 2011/5872 / A) was the judicial reponse to an application initiated by an internee to get a declaration by which his detention conditions was considered to be irregular and to order the Belgian State to offer him a specialized treatment for people with deviant sexual behavior in the month of the judgment. The civil court gave right to the applicant and ordered the Belgian State to provide the applicant with a specialized treatment for his sexual deviance within one month of the judgment. A penalty of € 5,000 per month late would be otherwise imposed by the state.

In a 3 May 2013 judgment, the Brussels civil court ordered the Minister of Justice to pay a monthly penalty payment of 5 000 euro to a person interned in a psychiatric wing unless the healthcare he required was immediatly provided to him. This decision, made on the grounds of a breach of article 5 of the ECHR and of article 23 of the Belgian Constitution protecting the right to life in conformity with human dignity, could blaze a trail for judicial oversight by the courts[84].

The President of the court of first instance of Brussels, acting in chambers on July 16, 2013 (RG13/488 / C) condemned the Belgian state to make available to the applicant a psychiatrist for a half hour a week and a psychologist for 2 half an hour once a week to provide him the prescribed psychotherapy, to ensure the administration of psychoactive substances Pharmaceutical necessary and make possible prescribed therapeutic activities.

The Turnhout Civil Court of First Instance ordered on January 13, 2014 (12/2211 / A) the Belgian State to pay compensation of € 7,500 based in particular on the rulings delivered by the European Court of human rights in L. B., Claes Dufoort and Swennen cases.

This Belgian judicial review has been condemned by the ECtHR for its lack of effectiveness. In its judgment in Van Meroye c. Belgium in January 2014, the Court notes indeed the position taken by the president of the court of Turnhout, which explains that ‘the power of control exerted by interim judge over the current conditions of detention was completly marginal and he could only intervene whether the support and healtcarecare were totally absent’. The Court emphasized that "the research of an appropriate place of detention cannot be reduced to a prima facie review without serious consideration for the reality of the situation" and that no example of such a decision referred appears to have led to this type of control in the judicial district concerned. Consequently, the Vourt believes that ‘under such conditions, it (the Court) saw no any means available to the applicant to obtain efficient measures and reparation from the interim relief judge of the situation he denounced’ and concludes to the ineffectiveness of application for interim measures[85].

In conclusion and as for the Council of State, we cannot claim that the judicial review by the civil court of the legality of detention is inexistent. Marked by the constraints mentioned above, this control remains nevertheless very limited as opportunities remain low for the detainee to fight the decisions made by the prison administration in an unequal power relationship.

1.3. Penal Courts

We can also evoke the jurisdiction of the criminal court when prisoners are victims of an offense. But again, facing an unequal power relationship, prisoners regularly give up starting a fight they can judge lost before[86]. A very recent decision of the Criminal Court of Nivelles of 13 January 2014 seems to constitute an exception to this rule. The Court indeed condemned the prison governor,

[84] An internee obtains the condemnation of the Belgian State, *Justice en ligne*, 6 May 2013.
[85] CEDH, 9 Janvier 2014, *Van Meroye c. Belgique*, § 104-109.
[86] Berbuto S et al., *op. cit.*, p. 136.

some deputy governors and several members of the prison staff for ill-treatment committed against a detainee on the basis of Article 417quinquies the Penal Code (degrading treatment) and 398 of the Criminal Code (intentional injury)[87].

2. Legal remedies covered by the 2005 Belgian Prison Act

2.1. Legal remedies: institutional and procedural aspects

The United Nations and subsequently the Council of Europe have introduced oversight of detention and confinement facilities to end human rights violations in these places and prevent future such occurrences, particularly infringements of the right to dignity and cruel, inhuman and degrading treatments. These international organizations have introduced the principle of legality of detention and its execution, which necessarily requires legal control of the conformity of detention with international and national law (Rule 7.2 of the UN's Standard Minimum Rules for the Treatment of Prisoners). To this end, the 1955 UN Standard Minimum Rules have granted prisoners the right to make complaints (Rule 36.1.), not only to prison authorities and in particular to the director of their institution but also to the inspector of prisons (Rule 36.2) and to a higher authority endowed with the power to investigate and put an end to the infringement (Rule 36.3). Thus, in an extreme event such as the death of a prisoner, an investigation into the causes of death must be conducted, and a report must be provided either directly upon the initiative of the prison administration or upon the request of the prisoner's relatives or anyone aware of the case (see the European Convention for the Prevention of Torture). The 2006 European Prison Rules (EPR), which were largely inspired by the UN Standard Minimum Rules, have directly taken up this right to make complaints (Rule 70), forcing prison authorities to provide reasons for rejecting a prisoner's complaint and to give them the right to appeal to an independent authority (Rule 70.3). To this end, the EPR granted to any prisoner a right to access to legal advice (Rule 23.1.), and a right to consult a lawyer of his choice on any point of law (Rule 23.2).

The 12 January 2005 Belgian Prison Act on principles regarding prison administration and the prisoners' legal status[88] incorporates the handling of complaints introduced in the European Prison Rules. The mode of complaints applied by the Belgian Prison Act is clearly inspired by the EPR and by the Deutch model. This principle is implemented thanks to a structure that oversees detention conditions, set up as a result of the law. The Act thus states that the Supervisory Committee, which is in charge of monitoring prisons and social welfare facilities, must create a sub-committee for the handling of complaints, headed by a magistrate and made up of two other members (article 28). This Complaints Committee is in charge of examining the complaints made by prisoners (article 148) whatever their status. Additionally, the Central Prison Monitoring Council created as a result of the same Act was tasked with setting up a competent Appeals Committee to examine appeals lodged against Complaints Committee rulings (article 159). The Complaints Committee also gives rulings on some appeals relating to transfers, in cases where prison authorities have refused to examine the complaint lodged by the prisoner (article 165).

The Prison Act of 12 January 2005 therefore enshrines indeed a right of complaint before an internal organ to the Supervisory Committee. It recognizes thereby the importance of a right Lieven Dupont, the author of the 1997 draft of the Prison Act 1997, already stressed that it was an indispensable condition to guarantee the rights of detainees in an institutional context "in which the

[87] Nivelles Penal Court, 3[d] chamber, 13 January 2014.
[88] Loi de principe du 12 janvier 2005 concernant l'administration des établissements pénitentiaires ainsi que le statut juridique des détenus, M.B. 1 février 2005.

individual legal interests may be subordinated to the interests of the institution and to the primacy security and order" (Draft of the Prison Act 1997: 36).

2.2. Maps of complaints and effectiveness of the remedies

However, Title VIII of the 2005 Belgian Prison Act and its provisions on the right of complaint and their treatment by the above bodies have still not came into force, which notably limit the possibilities of appeal against security measures, since the State Council declared itself incompetent to rule on applications related to specific security measures based exclusively on safety considerations and prudence[89]. One of the reasons for the ineffectiveness of this right to complaint lies in the fact that a number of royal decrees implementing the 2005 Prison Act have still not entered into force. Additionally, these complaints are not forwarded to politicians, since the Central Prison Monitoring Council, which is in charge of passing on their contents in its annual report to the Justice Department, has for some time suspended its activities for reasons including the lack of a secretariat. These remedies are consequently totally ineffective.

III. Soft law and National Human Rights and non-jurisdictional Structures and authorities (such as ombudsmen, human rights commissions and equality bodies)

The weakness of the independent external oversight of Belgian prisons can be seen as the result of three combined factors: the very weak effectiveness of the right to file complaints granted to prisoners and the lack of independence of the external oversight mechanisms set up as a result of the 12 January 2005 prison act. External soft control is consequently mainly exercised by the Committee for the Prevention of Torture.

1. Complaints brought before the Supervisory Committees

One of the main factors hindering the effectiveness of external oversight of prisons in Belgium is that unlike many other European countries including France, Italy, the UK and Germany, Belgium has not ratified the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 18 December 2012, which provides for the strengthening of national oversight mechanisms by independent bodies.[90] In effect, the Optional Protocol, which implements articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 26 June 1987, introduces several fundamental principles. First, it establishes that the UN's Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment can visit Member States detention facilities with unrestricted access, except on "urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited (…)" (article 14). The objective is to protect people deprived of their liberty against torture and other cruel, inhuman or degrading treatment (article 1). In order to facilitate the visits of the Subcommittee, the Optional Protocol mentions that States must commit to cooperating with the Subcommittee, by providing unrestricted access to places of detention and putting at the Subcommittee's disposal various sources of

[89] Mary P. (2013) *Enjeux contemporains de la prison*, Bruxelles, Publications de l'Université Saint-Louis Bruxelles, p. 100.

[90] During the fourty-first session of the Committee against Torture held in Geneva on 12 November 2008, the Belgian delegation stated that "this adherence, has on the technical front, come up against the implementation of a national mechanism for the prevention of torture. Before this optional protocol can be ratified, all the authorities concerned must reach an agreement on the structure, composition, remit and financing of this mechanism".

information necessary for the reinforcement of the protection of persons deprived of liberty against torture and other cruel, inhuman or degrading treatment (article 14).

The Protocol also states that "independent national preventive mechanisms" must be established at the latest one year after the ratification of the Protocol (article 17). These national prevention bodies are "visiting bodies" (article 3), placed under the helm of the UN's Subcommittee on prevention (article 11), must be functionally independent and given adequate resources by the States (article 18). Additionally, according to rule 29 of the UN's Standard Minimum Rules and rules 9 and 93.1 of the 2006 European Prison Rules, places of detention must be regularly visited by qualified individuals, recruited by an authority that is distinct from that directly in charge of managing detention, and whose reports must be made public. Prison authorities are also required to conduct inspections of the facilities they manage (rule 9 of the 2006 EPR).

These requirements are clearly not met in Belgium, where the main oversight bodies – the Central Prison Monitoring Council and the Supervisory Committees – established as a result of the 12 January 2005 Prison Act are not functionally independent and are dramatically underfunded (Federal Ombudsman 2010 Report, p. 44). In Belgium, the authority to monitor prisons and social welfare facilities was entrusted by a 4 April 2003 decree to "supervisory committees", designed to replace and professionalize the former administrative committees (Mary, 2013, 76). The decree also provides for the creation of the "Prison Monitoring Council" to replace the former Higher Prison Policy Council whose mandate expired in June 2002. The decree, which anticipated the final draft of the 12 January 2005 Prison Act, however differed from the initial bill prepared by the "Dupont Commission" on the essential point of the functional independence of the new organs visés à l'égard du Ministre de la Justice (Mary, 2013, p. 76). Where the Dupont Commission laid emphasis on the creation of independent external oversight bodies, the 2003 Royal Decree put the Central Prison Monitoring Council under the authority of the "Federal Public Service Justice" (art. 130), and established that this body could be presided by the Belgian Ministry of Justice whenever he or she attends Council meetings (art. 135§2). Regarding the supervisory committees, the decree states that they will oversee everything pertaining to the treatment of prisoners "on behalf of the Minister of Justice" (art. 131) and that in the event of a dispute between a prison director and a Supervisory Committee, the Ministry of Justice is in charge of settling the dispute on the basis of opinions given by the Central Prison Monitoring Council and prison authorities (art. 137§2). As Mary rightly points out, the 2003 decree "casts serious doubt on the actual independence of such supervisory bodies" (Mary, 2013, 77). This dependence toward the Minister of Justice is a characteristic feature that was enshrined in the 12 January 2005 Prison Act, in dispositions relating to the introduction of the Supervisory Committees (art. 27) and of the Central Prison Monitoring Council (art. 21) (Laurent, 2012).

In this context, how does external oversight of detention by national authorities work in practice? This is where the Supervisory Committees come into play. While they can in principle have access to prisons at any given time, in practice they visit the facilities in their jurisdiction once a week. On these occasions, they inspect the disciplinary cells and audition prisoners who have submitted a complaint (Funck, 2012). However, unlike the French Controller-General of Places of Deprivation of Liberty, a position that was created as a direct result of the ratification of the Optional Protocol to the 2002 UN Convention,[91] the Supervisory Committees are composed of non-professional members – citizens accompanied by three notables – a doctor, a lawyer and a judge. Expertise is thus provided by individuals who, unlike those who work directly for the Controller-General in France, are unpaid and the monitoring of prisons as it occurs, essentially in the form of visits, is not

necessarily conducive to critical analysis. The Controller-General, on the other hand, publically and regularly denounces the human rights violations of French prison authorities (Rapports d'activité du Contrôleur Général des lieux privatifs de liberté, 2008, 2009, 2010, 2011 et 2012).

Some informal complaints have since been lodged before these Supervisory Committees. Part of their mission is indeed to receive some informal complaints brought by prisoners before them. More precisely, the Commissioner of the month designated in each supervisory committee to visit the prisons to which they are competent, at least once per week can decide on these complaints. Such complaints have also been filed and processed by the Supervisory Committees: essentially regarding the transfer of prisoners, the prison regime (isolation regime, specific regime as individual regime for security reasons…), the disciplinary system (disproportionate sanctions), sentence adjustments, the lack of activities and prison jobs and training, decisions considered as arbitrary (in the field of prison regime, visits, furloughts, prison leaves, conditional release…) and non transparent, authoritarian behaviors from the prison governance and from certain prison officers (and sometimes bad and dregrading treatments such as in the prisons of Merkplas and Termonde), racist slurs, excessive surveillance, unjustified refusals of requests to work, stolen objects, the bad quality of food, hygiene problems (foam, mattresses, no sheets…), and inadequate or inexistent healthcare, psychiatric, psychologic and medical treatments (overdoses) due to the lack of medical staff and prison overcrowding[92].

More specifically, some supervisory committees have highlighted the structural problems such as prison overcrowding and unsanitary conditions[93], and the difficulties proper to the more general organization of the prison system as a lack of budgetary resources and training for prison officers[94]. That is why these complaint mechanisms remain limited in the responses given there (handling complaints, when it exists, usually consists of their informal resolution through collaboration and meetings between the Commissioner of the month, the prisoner and local management of the prison[95]) especially as the supervisory committees are too few[96] and are experiencing recurring problems including logistical, material, human financial and vocational training shortages[97] (see above), as well as important difficulties such as ccasional cooperation with the prison and medical authorities (held by medical secrecy) sometimes reluctant to cooperate[98].

Yet, overall, prisoners seldom exercise their right to make complaints. In 2007, for instance, only 37 complaints were filed in the judicial district of Ghent, and 83 in Termonde (Laurent, 2012).

2. Complaints before the Federal Ombudsman

The Belgian Federal Ombudsman has tended to stand in for the Central Prison Monitoring Council by collecting and addressing complaints lodged by prisoners but this has so far not proved effective (De Jemeppe, 2012). The Federal Ombudsman was established by the Belgian Act of 22 March 1995 as amended by the Act of 11 February 2004 (Belgian Official Gazette of 29 March 2004) and the the Act of 23 May 2007 (Belgian Official Gazette of 20 June 2007).The main tasks carried out by the Federal Ombudsman are indeed to review citizens' complaints regarding acts or operation of

[92] 2005 Report drafted and released by the Central Monitoring Council, 2005, pp. 9 et 10 ; 2006 report, pp. 11-14 ; report, pp. 7-13 ; 2008-2010 report, pp. 19-21, 24- 29, 31-32, 36, 38-42, 44.
[93] 2008-2010 Report drafted and released by the Central Monitoring Council, pp. 19 and 24.
[94] 2005 Report drafted and released by the Central Monitoring Council, p. 8; 2008-2010 report, p. 22.
[95] See the 2005 report of the Central Monitoring Council, pp. 7-8.
[96] 2008-2010 report of Central Monitoring Council, p. 50.
[97] See for instance the 2005 report of the Central Monitoring Council, p. 5 ; its 2006 report, pp. 5-9 ; its 2007 report, p. 1, 3-5 ; and its 2008-2010 report, pp. 15-17.
[98] 2008-2010 report of Central Monitoring Council, pp. 16 et 38.

federal administrative authorities; to conduct investigations on the functioning of federal administrative services (at the request of the House of Representatives) and to prepare recommendations and reports for the parliament[99] to strengthen its existing control[100].

In this context, the Federal Ombudsman has replaced, albeit in a very limited way, some failing supervisory committees by collecting a small number of complaints brought by prisoners in order to address them. In response to these complaints, the Federal Ombudsman pointed thus essentially a lack of independence of external oversight of Belgian prisons (2010 report, pp. 44-46), the violation of a number of fundamental rights (2007 report, pp. 71-72) and the fact that many provisions of the 12 January 2005 Prison Act have yet to come into force (2010 report, pp. 46-47). According to the Federal Ombudsman, this situation creates a legal insecurity that can be detrimental to the fundamental rights of prisoners, particularly in matters of family (2007 report, pp. 70-71) and discipline (2010 report, pp. 47-48).

The Federal Ombdusman mainly addresses the question of children whose mother is detained, and follows the EPR (rule 36) in recommending prison authorities to "adopt specific instructions concerning the accomodation of children who accompany their imprisoned parent, as regards the infrastructure standards that the facility must meet as well as the living conditions for the child in prison" (2011 report p. 145). The Ombudsman also criticized the bad effects of prison overcrowding and degrading prison conditions (2002 report, p. 57; 2009 report, p. 40). As such, it recommends closing the cell section of the prison of Merksplas because of overcrowding and poor prison conditions there (2011 report, p. 152). It also recommends expanding the use of telephone (2008 report, p. 93), ensuring the implementation of rehabilitation plans for the preparation of parole (2005 report, pp. 46-48; 2006 report, pp. 70-71) and meeting legal deadlines for decisions on prison leaves and furloughs (2012 report, pp. 49-50) that have to be motivated (2004 report, pp. 38-39). The Ombudsman finally order prison authorities to provide healthcare equivalent to that available outside prison (2009 report, p. 51 and 2013 report, pp. 35-50), including internees serving time in prison in breach of the duty of lawfulness of detention (Article 5 of the European Convention on human rights) and the prohibition of inhuman and degrading treatment as held by article 3 of the European Convention on Human Rights (2013 report, pp. 35-40). This is why the Ombudsman requires the prison administration to transfer the entire population of internees to specific facilities offering appropriate care (2000 report, pp. 64-65; 2006 report, p. 72; 2013 report, p. 40) within reasonable time (2002 report, pp. 58-59).

3. Complaints brought before the Belgian Parliament

As in France, there is minimal monitoring from the Parliament, taking the form of occasional parliamentary visits to places of detention. These are generally meant for MPs to collect information in order to have a minimal degree of control over prison authorities and to legislate adequately. Still, the impact of this visting right is extremely limited due to the obligation of obtaining prior authorization from the Ministry of Justice, which warns the facilities concerned ahead of visits. These visits, which are the only form of control exercised by representatives of legislative power, are therefore never unplanned. MPs can admittedly gather information through other sources, such as lawyers, prison visitors or private organizations working in places of detention, but this information is largely filtered and its reliability is often considered doubtful (Brotcorne, 2012). Another means of getting information consists in asking questions in Parliament,

[99] Le médiateur fédéral a été institué par la loi du 22 mars 1995 modifiée par la loi du 11 février 2004, Moniteur Belge du 29 mars 2004 et par la Loi du 23 mai 2007, Moniteur Belge du 20 juin 2007.
[100] Report from the Federal Ombudsman, 2000, p. 55.

which forces the Minister of Justice to give information on the situation of prisons. These parliamentary questions, which deal with subjects including lack of supervision and healthcare staff[101] and violence in prison,[102] constitute a form of political control of the Ministry of Justice, but they remain unfrequent. Some informal complaints can be brought by prisoners in touch with parliamentaries before the Belgian Parliament. However, in reality, this kind of informal complaint is nearly inexistent.

The weakness of this type of control is striking in the light of other methods developed by some OPCAT signatory countries such as the UK, which has recourse to an ombudsman[103] to address complaints by prisoners, particularly those pertaining to article 2 and 3 of the European Convention on Human Rights.

IV. Other sources

1. CPT reports

The European Committee for the Prevention of Torture (CPT) has recently shed a harsh light on the situation in Belgium. In its 2012 report,[104] the CPT first criticizes the fact that seven years after the 2005 Prison Act was enacted, several of its provisions have yet to enter into force, particularly those pertaining to "living conditions in prisons and healthcare" and to "order, security and recourse to coercion" (p. 33), including article 118 of the 2005 Act, which gives prisoners a right to appeal decisions taken by the director-general in these matters (p. 33). The CPT also notes that provisions relating to "complaints", particularly those pertaining to the complaints committees and to the mediation duties of the supervisory committees have not been implemented either (p. 33). Regarding these points, the CPT recommends Belgian authorities to enact implementing Royal Decrees as soon as possible (p. 33).

The CPT's report is also critical regarding the preventive mechanisms against torture and degrading and inhumane treatment set up by the Belgian authorities which are absolutely not independent and totally dependent on the Ministry of Justice. Although Belgium is part of the Council of Europe, the requirements in terms of independence of the preventive are indeed clearly not met in this country where the main monitoring bodies - the Central Monitoring Council for prison supervision and the monitoring committees - do not meet the criteria of functional independence and sufficient resources affected to its functioning, as indicated by the CPT.The CPT emphasizes the lack of administrative, logistical and budgetary support and the fact that members of Supervisory Committees and of the Central Prison Monitoring Council work on a voluntary basis, thereby denouncing a situation of precariousness that has led the Central Prison Monitoring Council to submit its resignation to the Minister of Justice in May 2012 (p. 33). Considering the weakness of the existing monitoring system, the CPT recommends Belgium to ratify the 2002 Optional Protocol to the United Nations Convention against Torture as soon as possible and to establish a "national preventive mechanism" (p. 34). Regarding this, the CPT also suggests replacing the existing system

[101] Question n°5-1703 Chambre des représentants ; Question n°5-2172 Sénat.
[102] Questions n°52-375, 52-79, 52-164, 52-31, 52-378, 52-930, 52-950, 53-440, 53-201 Chambre des Représentants.

[104] Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 23 au 27 avril 2012. CPT/Inf (2012) 36.

by a Detention Committee "D", whose independence would be guaranteed by its affiliation to legislative instead of executive power as is currently the case (p. 34).

In 1993, the CPT had already noted violations of the European Convention on Human Rights in these psychiatric sections, called in Belgium "psychiatric annexes". These included problematic transfers of patients to disciplinary blocks;[105] the complete lack of say of medical supervisors on admissions and discharges;[106] the recurrent shortage of healthcare personnel attached to the annexes,[107] most specifically psychiatrists,[108] psychiatric nurses,[109] psychologists and occupational therapists;[110] the absence of opportunities for patients to contact doctors[111] and the lack of updates to patients' medical files for several years.[112]

2. UN-committees reports

The Committee against UN torture has also denounced the lack of independence of the Belgian preventive mechanisms against torture and inhumane and degrading treatment as well as their lack of funding and humn resources[113]. In this manner, the right to complaint normally enshrined to prisoners is totally ineffective according to the UN reports due to 'the lack of control and systematic, effective and independent inspection of all places of detention'[114].

The observations related to the dramatic shortage of healthcare personnel and the inadequacy of the infrastructure, were shared by the UN Committee against Torture,[115] the Commissioner for Human Rights of the Council of Europe[116] and in Belgium by the Central Prison Monitoring Council.[117] In light of these observations, the UN Human Rights Committee has asked the Belgian state to put an end to the psychiatric annex system, as in practice they constitute places of detention of mentally-ill people.[118]

3. Reports of NGOs and national commissions of human rights

3.1. The Federal Ombudsman

The Federal Ombudsman's 2010 annual report essentially notes the lack of independence of external oversight of Belgian prisons, and the fact that many provisions of the 12 January 2005

[105] Annexe de Lantin, Rapport 1993 du CPT.
[106] *Ibid.*
[107] Rapports 1993, 1997, 2009 du CPT.
[108] Annexe de Lantin, Rapports 1993 et 2009 du CPT ; Etablissement de défense sociale de Paifve, Rapport 1997 du CPT ; Annexe de Mons, Rapport 1997 du CPT.
[109] *Ibid.*
[110] *Ibid.*
[111] Annexe de Mons, Rapport 1997 du CPT.
[112] Etablissements de défense sociale de Paifve et des Marronniers, Rapport 1997 du CPT.
[113] UN Committee against Torture, Final Observations of the third periodical report on Belgium, 2013.
[114] *Ibid.*, p. 2.
[115] Comité contre la torture des Nations Unies (CAT). Observations finales relatives à la Belgique (CAT/C/BEL/CO/2, 21 novembre 2008).
[116] Commissaire des Droits de l'Homme du Conseil de l'Europe (CommDH). Visite en Belgique des 15-19 décembre 2008 (réf. CommDH (2009)14).
[117] Conseil Supérieur de Surveillance (CCSP). *Rapport 2008-2010*.
[118] United Nations Human Rights Committee (CCPR). Consideration of the report submitted by Belgium under the International Covenant on Civil and Political Rights (Draft concluding observations, November 2010).

Prison Act have yet to come into force. According to the Federal Ombudsman, this situation creates a legal insecurity that can be detrimental to the fundamental rights of prisoners, particularly in matters of family and discipline (2010 report, pp. 46-48). For its part, the 2011 annual report mainly addresses the question of children whose mother is detained, and follows the EPR (rule 36) in recommending prison authorities to "adopt specific instructions concerning the accomodation of children who accompany their imprisoned parent, as regards the infrastructure standards that the facility must meet as well as the living conditions for the child in prison" (p. 145). The report also recommends closing the detention section of the Merksplas prison, due to bad conditions (p. 152). In the 2012 annual report, the Federal Ombudsman recommended prison authorities to make decisions on prison leaves within the legal time limits (p. 50), as in the 2009 annual report, and to provide healthcare equivalent to that available outside prison (p. 51).

In particular, the Belgian Federal Ombudsman has denounced in its reports the working conditions of the Supervisory Committees which are far from ideal, as exemplified by the absence of Supervisory Committee visits in facilities including the Bruges Prison Complex (2010 Federal Ombudsman Report, p. 45). Many Supervisory Committee members lose motivation as a result of the stumbling blocks they face when exercising their duties. Not only do they still not have the authority to address complaints from prisoners despite the provisions of the 2005 Belgian Act (see above), but their highly time-consuming mission is also made even more difficult by the reluctance of some prisons to work with them (2010 Federal Ombudsman Report, p. 45).

Ultimately, the inability of the Belgian state to reform healthcare structures in prison and particularly psychiatric annexes reveals the weakness of national external oversight and its lack of independence, as the Belgian Federal Ombudsman points out: "In the absence of external, independent supervision, there is a real danger that the individual interest of the detainees will give way to the interests of the institutions and to the primacy of order, security
and internal rules (…) As the Minister for Justice is vested with the powers to appoint the supervisory authorities, to define their operating rules and to allocate their means and resources, the executive branch controls the degree of supervision exercised in the prisons".[119]

3.2. NGOs

The OIP (Observatoire international des prisons) has drafted a report denouncing the poor remedies available for prisoners.

4. Government responses to the reports

Faced with these various breaches, the response given by the Belgian authorities remain unconvincing. In most of the responses sent to the UN and CPT reports, the government avoids adopting real measures that could take really into account their critics. Thus, concerning the problem of the lack of independence of the Central Supervisory Council, the Government merely emphasized that 'it is likely that the issue of the independence of the Central Supervisory Council has to be tackled soon'[120]. Regarding the lack of funding and human resources compromising the functioning of both the monitoring committees and the Central Supervisory Council, the Belgian authorities oppose that corrective action has been taken[121], but without specifying them[122]. As

[119] 2010 Federal Ombudsman report, pp 51-52.
[120] Réponse du Gouvernement de la Belgique au rapport du CPT relatif à sa visite du 23 au 27 avril 2012, p. 18.
[121] Réponse du Gouvernement de la Belgique au rapport du CPT relatif à sa visite du 23 au 27 avril 2012, p. 18.
[122] *Ibid.*

regards the absence of monitoring committee in some prisons (such as Bruges), it 'is not the fact of the Belgian authorities', the Belgian government considering that every effort has been made to establish a committee without success[123]. In the same manner, he CPT's proposal to introduce a prison committee "D"does not necessarily meet the specificities of the 'Belgian institutional landscape'[124] according to the Belgian government that would prefer to create a National Commission of Human Rights in the future[125]. Lastly, the non-ratification by Belgium of the Optional Protocol to the United Nations Convention (OPCAT) is explained by the Belgian authorities as an effect of the Belgian institutional architecture. In the same time, the Belgian Government displays its intention to proceed to this ratification but without precising any deadline and timeline[126].
Concerning the delay of the effectiveness of the 2005 Prison Act and the absence of the right to complaint for prisoners, the Belgian government has stated that the entry into force of the various provisions of the 2005 Prison Act would continue gradually over time without giving any additional precision[127].

Belgian authorities have tried to respond to the lack of healthcare in prisons pointed out by the CPT and the UN Committee against Torture through a reorganization and strengthening of medical facilities, a development of health programs and computerization of medical data[128].

5. Other relevant sources, including – if available – public petitions by prisoners, surveys in prison, and academic literature dealing with prison life and complaints in prison.

Public petitions by prisons do not exist in Belgium. The academic literature dealing with prison life and complaints in prison has already been mentioned above.

Conclusion

Belgium constitutes an excellent case study to assess the influence of Council of Europe organs in that it has yet to ratify the 2002 Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment requiring the creation of independent national supervision bodies. This non-ratification has resulted in the lack of independence of the supervisory committees, which exercise little control over Belgian prisons. In addition to this weak external oversight, there have been very little appeals to Belgian administrative courts as the Council of State refuses to exercise actual control in prison matters, due to a restrictive case law and the lack of pressure from human rights protection groups.

As a result of this, oversight of Belgian prisons is mainly carried out by various Council of Europe organs: the European Court of Human Rights, the Committee for the Prevention of Torture and the Council of Ministers. This European oversight is increasingly tight, particularly regarding suicide and the detention of mentally ill individuals. Despite the weakness of the appeals brought before the

[123] Réponse du Gouvernement de la Belgique au rapport du CPT relatif à sa visite en Belgique du 28 septembre au 7 octobre 2009, CPT/Inf (2011) 7, p. 46.
[124] Réponse du Gouvernement de la Belgique au rapport du CPT relatif à sa visite en Belgique du 23 au 27 avril 2012, p. 19.
[125] *Ibid.*
[126] Réponse du Gouvernement de la Belgique au rapport du CPT relatif à sa visite du 23 au 27 avril 2012, pp. 18-19.
[127] Réponse du Gouvernement de la Belgique au rapport du CPT relatif à sa visite du 23 au 27 avril 2012, p. 18.
[128] Rapport intérimaire du Gouvernement belge en réponse au rapport du CPT relatif à sa visite du 14 au 23 novembre 1993, CPT/Inf (95)6, pp. 49-50 ; Rapport intérimaire du Gouvernement belge en réponse au rapport du CPT relatif à sa visite du 31 août au 12 septembre 1997, CPT/Inf (99)6, pp. 57-59.

ECHR, Belgium is subject to the Court's case law obtained by human rights groups and other countries such as the UK and France. Rulings against Belgium have relied on European case laws established in these countries thanks to national groups. Considering this interdependence between the legal systems, it appears necessary to refrain from focusing on a single country when dealing with prison matters and to introduce a comparative dimension (Schwartz, 2010); assessing the evolution of national prison structures requires investigating international organizations as well.

Prison Litigation Network

Funded by the Criminal Justice Programme of the European Union

Belgium - Annex to the national report: empirical research findings

I. Objective of the research

This memorandum summarises the results of the empirical study conducted in addition to the research report pertaining to Belgium in the *Prison Litigation Network's Workstream* 2. It thus follows on from a first examination of regulatory provisions and mechanisms put in place to ensure a court ruling or an institutional response to the violation of the rights and freedoms of prisoners. Drawing on interviews with field actors and professionals, this document proposes to examine the effectiveness with which these rights and freedoms are ensured in Belgium. It also aims to assess the conditions enabling these rights to be applied through means of legal redress.

The guidelines drafted with all the partners of the project are combined in a common work document and define the three priorities of this empirical study, which will, in part, structure this research memorandum:

- The use of the law by practitioners and prisoners
- The means of access to legal redress
- Communication and impact of the legal decisions rendered – in particular on everyday prison life

II. Research methodology

Although the guidelines cited hereinabove give a good overview of the way in which the research was carried out for this empirical part of the European programme, further details are nonetheless necessary.

1. Status of the data

The scope of this study being restricted, the findings described hereinafter may be modestly qualified as "exploratory". In accordance with the guidelines, a limited number of people were contacted for a research interview. These interviews provided in-depth and highly detailed input, creating a corpus of approximately one hundred pages.

2. Sampling

This study is qualitative, and as such the sampling cannot in any way be construed to aim for representativeness. At the start of this study, a small diversification target was

thus set up. Three types of variables were used[1]: (1) general sociological variables (age and gender); (2) institutional variables (people from different types of institutions and organisations) and (3) variable pertaining to involvement in the issue of prisoner rights (people involved exclusively or non-exclusively in this field).

It is important to specify here that the respondents were mainly interviewed in the Brussels region, for three reasons: (1) Belgium is reasonably small; (2) the Brussels region is bilingual and is the region that numbers the most prisoners; (3) most NGOs and Institutions that are active in the field of prisoner rights, or who are interested in the issue, are headquartered in this region. It is also worth pointing out that there is a limited number of NGOs dedicated to the prison issue in Belgium, both in the French- and Flemish-speaking parts of the country.

Given these specifics and considering the people who accepted to speak to us (acceptance being a crucial aspect that takes us further from the initial target), our actual sample is as follows and is satisfactorily diverse for a study of this size.

- A woman involved directly in an NGO that is exclusively dedicated to the defence of prisoner rights;
- A man, a lawyer, working in highly varied legal fields;
- A man working for an NGO that defends prisoner rights, among other social considerations;
- A woman, a lawyer, specialised in criminal law and in sentence application law;
- A man, a lawyer, particularly involved in sentence application law[2];
- A man, a judge, ruling on the grounds of criminal matters, and who was previously an investigative judge;
- A woman working for a semi-public organisation that is exclusively dedicated to prison issues.

For reasons pertaining to access restriction, feasibility or diary, it was impossible to meet the prisoners or prison administration personnel, even though their input would have certainly helped elucidate a number of queries.

3. Data collection method

The recommended method being that of semi-directive interviews, the meetings were set up with the help of an interview guide that was common to all *Prison Litigation Network* research teams. Most interviews were recorded except one, for detailed minutes were drafted. Transcripts were made of all the other interviews. Considering the sensitive nature of the field being explored and the details provided on certain ongoing cases, some of our interviewees preferred to remain anonymous. We will therefore not reveal the identity of any of our respondents and will not append to this report the transcripts or minutes of the interviews. This practice is particularly commonplace in criminology[3].

[1] For diversification purposes, the variables aim only to differentiate the interviewees, and not to define working hypotheses that would then need to be verified. No feedback will thus be given based on these parameters.
[2] The recording is faulty at certain points of the interview, but most points discussed are audible.
[3] See for instance Lesley NOAKS, Emma WINCUP, *Criminological Resarch. Understanding Qualitative Methods*, London, Sage Publications, 2004, p. 48.

The interviews went relatively well and highlight a real desire to talk openly about the topic at hand. The end purpose of the interviews was always well understood, and any prompting during the interview was clearly seen as being part of the research framework, as defined at a prior time. The interview guide was well designed, as it required no modification during the data collection phase.

4. Data analysis method

The relatively low number of people interviewed and the informative nature of such interviews led us to analyse the data collated using a simple theme-based method. This type of analysis meant we did not require any data analysis software (such as N-Vivo or Maxqda), which works on the basis of an epistemology deriving from the grounded theory, which is irrelevant for informative material. Each interview was thus analysed in light of the topics that emerged during stage 1 of *Workstream* 2, which are partly indicated in the interview guide. The guide's logic and chronology were nonetheless not respected, given that the respondents themselves suggested specific topic-based structures and organisations that we wished to use as reference. Once each individual interview had been analysed (particularly by mapping the topics addressed and the relations between them), all results were pooled for cross-analysis of the data. This last stage of the research was helpful in highlighting convergences and divergences present in all the material collated.

Lastly, considering the deadlines of the general research calendar, the interviews and their analysis were not conducted by the same person. Julianne LAFFINEUR, temporary researcher at the UCL, funded by the *Prison Litigation Network* programme and busy 50% of her time on its various aspects for six months, collated all the data, i.e. personally conducted all the interviews one-on-one with the respondents. She also transcribed these interviews in Word. The analysis was then carried out by Marie-Sophie DEVRESSE, promoter of the research and lecturer at the UCL. Both researchers remained in touch after the departure of Ms LAFFINEUR from UCL, which facilitated work on the content of this report where necessary. The report was first drafted in French and then translated into English. All quotes in italic placed in inverted commas in this document are translations of the literal transcriptions of excerpts from the recorded interviews.

III. Use of the law by practitioners and prisoners

An important point about Belgium, already mentioned in the introductory paragraphs of this document, is that although there are a number of NGOs active in prisons[4], only a handful is exclusively or incidentally dedicated to the issue of the *right* of prisoners and its implementation, in the strict sense of the word. These NGOs are few and far between (OIP, Ligue des droits de l'Homme, Liga voor mensenrechten, Centre D'action Laïque, Réseau Détention et Alternatives, Amnesty International…) and fewer than 50 people in the country are involved in cases pertaining directly to the rights of prisoners. They practically all know each other personally, having all been required to work together at some point, and to different levels, on a case. As

[4] For the French-speaking sector, see the directory of the Concertation des Associations Actives en Prison (CAAP), http://www.caap.be/index.php/document/caap (viewed on 2 April 2016). For the Flemish-speaking sector, see the page of the Flemish government on Welzijn en samenleving http://www4.vlaanderen.be/wvg/welzijnensamenleving/hulpaangedetineerden/Paginas/inhoud.aspx (viewed on 2 April 2016).

is frequent in Belgium, one does nonetheless observe a certain distance between French- and Flemish-speaking actors[5].

As regards the mobilisation of the law, we are therefore faced with a double lever that is admittedly not specific to Belgium. The first is the traditional lever of lawyers working on these cases in a professional context, with some lawyers organising themselves into networks or organisations (e.g. avocats.be). The second is that of the few NGOs and bodies mentioned above which, in some limited cases (1) help to take to court the causes deemed significant, yet without being able to start legal proceedings themselves (we will come back to this), and (2) will commit to an objective dispute with a view to attacking norms or rules before the Council of State (*Conseil d'Etat*) or Constitutional Court (*Cour Constitutionnelle*) because they are viewed as problematic in terms of norm hierarchy or respect of fundamental rights (we will come back to this point also). These NGOs and organisations also work to raise awareness of the cause and lobby to this end.

The sections below will address, in no particular order, the points of view expressed by our respondent lawyers and NGO members on the Belgian situation as regards the mobilisation of the law on prison matters, although certain views may be nuanced considering the background of the interviewees.

1. Identification of the wronged subjective right or "going from the fact to making a case"

The practitioners we met indicated that, when they are given facts, their first step is logically to carry out a legal analysis, i.e. identify the right that was wronged and the origin of this wrong. When faced with incidental events or with administrative decisions, the strategies to set up a case or a line of defence may vary, particularly as regards the bodies before which the case will be brought and the legal norms to be invoked (ECHR, Prison Principles Act etc.). One lawyer tells us that his strategy is "*to launch several procedures at the same time*".

Most often, the simple threat of a procedure seems to produce the desired effects, in particular when this threat is supported by a renowned NGO. Our lawyer respondents indicate that it is often when they go to sum up a case that the decision they were questioning is suddenly annulled.

Violations reported in Belgium cover a broad spectrum of incidents, but mostly concern the same types of facts and decisions. They also refer more generally to detention conditions. As regards facts, there are reports of violence, humiliation, pressure, abuse, thefts etc. As regards decisions, they mostly pertain to disciplinary sanctions (e.g. various deprivations, removal to a bare cell), application of specific regimes (e.g. specific security regimes, such as that known as "terrorists"), repeated transfers, failures in care for the prisoners' health, delays in case processing, refusal to grant leave and vacation requests, refusal to grant specific measures or release etc. As regards detention conditions, these mainly concern overcrowding (very recent VASILESCU judgment obtained by the ECHR), hygiene, food and promiscuity in common living spaces.

[5] This distancing in the prison field is, for the most part, a result of the State's structure, in which "person-related" fields, such as assisting a prisoner, are the responsibility of communities rather than the Federal State.

Other prisoner situations are also brought to our attention. Certain prisoners have a general behaviour that is deemed problematic, and since such prisoners are labelled as unruly or dissenting or have a good following, they are the subject of strict handling by the prison administration (sometimes even under the direct supervision of the minister). Their entire prison life is organised around exception and restriction. In such cases, the role of the lawyer is to highlight and question that which our interviewees term the "*bad faith*" of the prison administration in the daily management of these particular prisoners. In some of the cases reported, the excessive application of these special treatments has led lawyers and NGOs alike to denounce these handlings as paramount to torture.

The subjective rights wronged thus refer to violations of various national and international legal and regulatory texts. Most often, the texts called upon are the Constitution, the Prison Principles Act, the legal status of prisoners[6], and the European Convention of Human Rights[7].

As regards international bodies, NGOs with a lobbying action have highlighted the fact that, among the questions recently put to Belgium by the United Nations concerning fundamental rights, the most significant concerned prisoner rights, in particular prison surveillance mechanisms (reference to the OPCAT, not ratified by Belgium, is constant), the issue of prison overcrowding, and the imprisonment of people suffering from mental disorders.

2. Building a case, or "collating the relevant elements"

Beyond the law, each case must obviously be based on a set of convincing factual elements or administrative documents. This is the most complex part of legal defence, particularly considering the impossible access to the custodial setting and the timeframe of the legal process, which, when stretched out, often leads to the disappearance of evidence. Additionally, the assistance of prison management in investigations is very variable. In the words of one lawyer, prison administration "*is very sparing in the information it communicates*". All interviewees agree that they expect no assistance from either the prison administration or the Minister and his cabinet, even when rights violation is blatant and the human situations are extreme. "*When we call them or we write to them to draw their attention to a situation affecting a client, there is never any response. It is extremely complicated*", indicates one lawyer. "*The prison administration never admits to any responsibility, even in the most blatant cases*", adds another lawyer. Additionally, some of the evidence required to build a case may represent a cost that the prisoner cannot afford, or may simply be completely out of reach (e.g. getting an outside doctor to record injuries).

This is where the importance of lawyers working with one another and with NGOs really comes into its own. Above and beyond the elements of the case they are working on, the legal practitioners highlight the importance of creating a more general "*corpus*" on the operation and state of Belgian prisons. This corpus is produced in particular by bodies publishing annual reports on the state of prisons

[6] Law of 12 January 2005, "Loi de principes concernant l'administration pénitentiaire ainsi que le statut juridique des détenus (Law of principles pertaining to the prison administration and the legal status of prisoners)", *Moniteur Belge*, 01.02.2005, pp. 2815-2850, referred to as the "Prison Principles Act" in this document.

[7] For an overview of legal texts governing prison law, see section I. of M.-A. BEERNAERT, *Manuel de droit pénitentiaire*, Limal, Anthemis, 2012.

and the (non) respect of imprisonment rights, such as the Ligue des Droits de l'Homme, the Belgian section of the Observation International des Prisons, the Local Prisons Monitoring Commissions or the Central Prisons Supervisory Council etc. (vivid criticism is regularly sent to the latter because it has stopped publishing its annual report[8]).

In this regards, the networks that legal practitioners belong to appear to constitute a significant resource. Discussions about good practices as well as the communication of legal redress results are regular, even though the latter is often conducted informally. As one lawyer states, "*It is true that it is a small world. Decisions get round. If one lawyer gets a good decision, he will email it to all his contacts. [Same thing] if he sees a loophole*". Another lawyer indicates, "*It is one of the only fields in which lawyers are so close to one another as compared to, say, criminal law, where it is every man for himself*". It is worth noting here that a number of lawyers are part of militant associations, which are few in number but very closely connected. We are repeatedly told that this "*is not a neutral field*", as not all lawyers want to get involved in these kinds of disputes, which are complex, sensitive, unpopular and often financially unprofitable. As one lawyer sums it up, "*we enjoy the spotlights of criminal cases, but the shadows of prisons are much less appealing*".

In this interview exercise, the attitude of members of local prisons monitoring commissions, prison visitors and chaplains, is criticised. Their positioning is often questioned, in so far as, although they have access to the inside of prisons (meaning they have particularly important information), they most often refuse to provide evidence or certificates pertaining to facts that take place inside the prisons they are connected with. This refusal, often justified by their specific mandate, is interpreted by those who take cases to court, despite their dissatisfaction, as a desire to keep good relations with prison management and to work in a non-conflictual environment, even though activism in this field, as far as lawyers and NGOs are concerned, would necessarily pre-suppose conflict and an ability to deal with it. Similar criticism is formulated against prison doctors, who are often not forthcoming when required to provide medical certificates supporting evidence of bodily injuries sustained. That said, the respondents also highlight some good interpersonal contact, but the role and actions of the Monitoring Commissions and the Central Prisons Supervisory Council receive the most vivid criticism in terms of networking.

3. Use of the ECHR judgments

The concept of Human rights is naturally at the heart of court cases since, as highlighted by one lawyer "*the penal logic is, by its very essence, incompatible with that of human rights, and they can therefore only go head-to-head*". ECHR case-law is therefore "*referred to continuously*", indicates one lawyer. "*Our conclusions refer to them constantly, even though we know that it is not necessarily followed up*". "*They are a strong argument*", indicates one member of an NGO. But, another respondent states that "*the national judge is distrustful and does not necessarily like being brought face-to-face with ECHR case-law (…) If we arrive with4-5 pages of conclusions on ECHR case-law, he will tend to say 'Oh come on, what is all this, just explain it to me in concrete terms' (…) As though it only concerned exceptional*

[8] The last published report dates from 2010, see http://justice.belgium.be/fr/themes_et_dossiers/prisons/surveillance_et_conseil/conseil_central_de_surveillance_penitentiaire_et_commissions_de_surveillance (viewed on 2 April 2016).

cases". Unsurprisingly, ECHR case-law is also one of the main levers, for NGOs, to initiate dialogue with political spheres and serves as the basis for a number of working reports and memoranda. We would like to indicate here that the judgments are used independently of the States involved. In this regard, networks are set up with specialised lawyers and university researchers who work in this field, but communication on this topic is far from being systematic, and neither is there a structured initiative to broadcast significant judgments.

4. Use of case-law from other European countries

Our research material unequivocally highlights great ignorance of the decisions rendered in other European countries, a fact that is well summarised by one lawyer: "*It is complicated to handle all this on a national level, so…*". Once again, it appears that nothing is in place to share experience and practices across borders.

IV. Access to judicial remedies

After examining the various legal and administrative remedies accessible to prisoners, we will review the difficulties encountered by the practitioners in their access to such remedies.

1. Legal remedies available under Belgian law

While the Prison Principles Act organises, according to its section VIII, a system of complaints that provides for legal remedies and a procedure applicable to the prison system, the delay of entry into force of these provisions means legal practitioners must rely on common law tools. This particular situation of multiple authorities is the subject of the most vicious criticisms from all our respondents. "*That is where the problem comes from: on the one hand, there are strategies to be put in place, but you need to know the law on your fingertips. And when I say 'know the law', I'm not talking only about the law applicable to prisoner rights! To be effective in prisoner rights, you have to be competent in public and administrative law, judicial law, civil law, sometimes even criminal law because we'll occasionally need to file a complaint against someone, employment law because we're also dealing with social welfare centres… On top of all that, we have to deal with questions that are highly specific to each field. When I talk to a specialist, I always get told 'pff, there's no clear-cut answer to that question*. (…) *You practically need an army behind you*".

The common law means that are used are thus quite varied[9]. It is worth noting here the recent entry into force of a special procedure before the sentence enforcement court pertaining to healthcare, which is the subject of vivid criticism. Let us briefly review the various means of redress that are called upon most often.

a) Civil means

Using civil law means that the lawyer must demonstrate that the administration is at fault in the way in which the prisoner is treated and accommodated in prison, and must request the cessation of the problematic situation and/or request compensation on the basis of the damage caused. This action for damages aims to question the liability of the Belgian state, in the context of a common law civil

[9] A judge indicates, for instance, that some lawyers may plead detention conditions before the Council Chamber, with a view to request the release of their clients held confined awaiting trial. This example shows how each legal « space» can be used to assert the rights of prisoners to a decent treatment.

procedure pertaining to improper conditions of detention. One situation that is encountered relatively frequently, considering the frequent supervisory personnel strikes in Belgium (minimum service is not in place, which has led in the past to police violence, which in turn led to successful cases) is to request that the State restore "normal" detention conditions, which suffered from the work stoppage of the prison agents, and ask compensation for the harm suffered during such work stoppage.

b) Criminal means

In this case, a prisoner files a complaint and a claim for criminal indemnification before an investigative judge, with a view to referring the case to the correctional court and obtaining the conviction, for instance, of a member of staff who inflicted violence or degrading treatments. In such cases, the legal authorities, in particular the public prosecutor's department, must demonstrate at least a slight interest in this type of approach. Our respondents rue the fact that these cases are often not viewed as priority, for various reasons that would need to be investigated further.

c) The interim relief judge

This court refers to back to the classic procedure. In urgent matters, the president of the district court is required to render a summary judgment, i.e. to take urgent and provisional measures pending a judgment to be rendered at a later time. Conditions for interim measures are the urgency of the matter, the provisional nature of the decision, and the fact that such decision cannot prejudice the case. Our respondents state that this type of redress is the means they use the most often in order to oppose the imposing of a measure in detention. It thus applies to great variety of situations. One lawyer further states that it is difficult to take a case to the Brussels interim relief judge when an application for legal assistance must be made, since it is time-consuming and is not always granted because a number of arguments will be made to avoid granting it.

d) Administrative means

The challenge here is to try to contest administrative decisions taken against the prisoner and to request their annulment. The Council of State is the body competent to receive these appeals. This means of redress is nonetheless described by our respondents as being relatively limited, whose chances of success are quite low. Indeed, in a number of cases, the Council of State considers that the decision questioned does not represent an administrative act but rather a measure of order for which it is not competent. This attitude is less frequent in disciplinary cases than in other fields since, as highlighted by J. DETIENNE and V. SERON[10], "the Council of State, under the pressure not only of the doctrinal criticism but also of international conventions, has changed dramatically since the Kazuyuki Takigawa judgment[11]. Faced with the prison administration's desire to consider all individual decisions of a disciplinary nature as an internal order measure, the Council of State was required to specify what was to be considered as an internal order measure[12]". That said, this clarification does not seem to be applied systematically, and these redress means remain uncertain.

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[10] Jean DETIENNE and V. SERON, « Politique pénitentiaire en Belgique », *in* P. J. P. Tak & M. Jendly, *La protection des droits fondamentaux des détenus en droit national et international,* Nijmegen, Wolf Legal Publishers, pp 239-265 (p. 263).
[11] E.C., decision of 10 April 1981.
[12] E.C., decision of 21 December 2001, party Rachid WADEH.

It appears that a recent example impressed itself upon the minds of some of our interviewees, several of whom recounted the same story of a lawyer defending an unfairly sanctioned prisoner and who managed to convince the judge that the prison's director was not of sufficiently highly ranked in terms of administrative law to be allowed to exact sanctions. He was successful before the Council of State. It should be noted here that the information serving as basis for this argument was very hard to access…

e) The (new) competence of the Judge for the enforcement of health-related sentences

This specific means of redress is a particular expertise of the judge for the enforcement of sentences. Since the implementation in late 2014 of articles 72 to 80 of the law on the external legal status[13], the judge for the application of sentences "can grant provisional release to the prisoner for medical reasons, where it is established that said prisoner is terminally ill or that his detention has become incompatible with his state of health". We will not go into any further detail as to the conditions under which such release can be granted, or on the procedure in required. We mention it here however, since several of our interviewees mentioned this new procedure.

Indeed, according to our respondents, this new provisional release procedure for health reasons seems relatively inefficient when compared with the adversarial procedure that existed previously. The procedure now requires several opinions, including that of the prison's doctor and that of the general doctor, who is responsible for all prison institutions. The lawyer, however, does not receive a copy of these medical opinions, which demonstrates a certain lack of transparency. Additionally, the lawyer no longer has the right to a hearing. The president of the court for the enforcement of sentences takes his decision on evidence only, without hearing the interested party, which leads us to believe that the prisoners have lost a lot of their possibility for action in this field.

2. Legal redress means considered as part of the work carried out by the Local Prisons Monitoring Commissions and the Central Prisons Supervisory Council

Without going into detail about the implementation, role and composition of the local prison monitoring commissions, which are clearly explained in the report pertaining to Belgium, it is important to highlight that their action, which is volunteer and non-judicial, nonetheless enables prisoners to give account of the violation of their rights and to bring such information to the attention of third parties outside the prison administration.

The system put in place is relatively simple and operates in two ways: a reactive and a proactive mode. On the one hand, the prisoner can address a "complaint form" to the commission (form that, most often, contains only the contact details of the prisoner and is posted in a letter box present in each wing of the prison) in order to

[13] Law of 17 May 2006 "relative au statut juridique externe des personnes condamnées à une peine privative de liberté et aux droits reconnus à la victime dans le cadre des modalités d'exécution de la peine (pertaining to the external legal status of persons condemned to a sentence of deprivation of freedom and to the rights acknowledged to the victim in the context of the sentence execution conditions)", *Moniteur Belge*, 15 June 2006, pp. 30455-30477.

meet a member of this commission and directly put to him the grievances in question during a visit to the cell, or in a different room. A member of the commission in charge of a Brussels prison (approx. 800 prisoners) estimates the number of complaints at 60-70 every month, which leads prisoners to have to wait several days before meeting a commission member. On the other hand, a more proactive action is put in place, in particular by the person designated, within the commission, as "commissioner of the month". This commissioner can move about at will throughout the prison, including the solitary confinement cells and the cells of prisoners subjected to a specific regime. They collate statements from the prisoners who have not been able to, or who have not wished to, use the letterbox system. Additionally, during their visits, the commissioners of the month can see with their own eyes any infringements of prisoner rights and can talk to them about it, and even put in place a more structured awareness approach as to the general situation in the prison. Whereas previously, the commission members had access to the prison records in their paper form, the move to a computerised system means that they no longer have access to the files, leading to a significant loss of information[14].

Even if they receive real complaints, the members of the commissions nonetheless define their work as more of a mediation mission with the prison management to advance a given situation. The results of this mediation are variable depending on the quality of the relationship with the management and the latter's commitment in the process (in certain cases, monthly meetings are organised, with minutes, but this is not always the case). They also indicate that an important part of their work is to listen to grievances, which seems to address a gap in a context where management, personnel, social workers, doctors, psychiatrists and psychologists are overworked. Beyond this listening, the commissions work on consigning and reporting, with names, on all the facts and incidents recounted, as well as any follow-up changes made. They must also draft an annual report that outlines the situation within their assigned prison, considering the elements of the Prison Principles Act, be they implemented or not. These reports, as well as that drafted by the Central Prisons Supervisory Council, summarise the major challenges specific to the various local situations, and aim to serve as basis for dialogue with the Justice Minister (prison monitoring is actually carried out officially in his name) in order to, not only inform him, but also to drive him to take the necessary steps to remedy the issues encountered.

It is clear that the process to feedback the information does not support the "individual" nature of remedies possible, even though the mediation work completed with the prison management team on a local level is sometimes successful as regards specific claims made by prisoners. As already stated, the role the commissions play is often condemned by lawyers and NGO militants when the question of prisoners' "right to complaint" is at stake. Criticism is first of all aimed at the difficult working relationship with certain members of the various prison monitoring commissions, which include former judges, doctors, lawyers and simple laymen (most often retired), whose "consensual" culture is at odds with the much more contentious and dissenting militancy of NGOs. That said, every year, a local

[14] Discussions on this topic with the Director General of prison institutions came to a compromise that enables the printing of documents for which the prisoner has expressly given his approval. This system nonetheless requires a certain transparency that may prejudice the prisoner, and additionally requires that the registry staff be available for such printing, which is only feasible during office hours that do not always match with commission visiting times.

Brussels-based commission decides to publicly communicate its annual report, even though this is not included in their protocol of action.

Next, we would like to recall that if the Prison Principles Act is one day implemented in this regard, these commissions will most likely play the role of "complaints commissions", with more power than they have now[15]. This leaves everyone sceptical, even their own members and the members of the Central Prisons Supervisory Council. Be that as it may, as things stand, one of its members tells us "*we are a body without power, we just provide advice*" and goes on to say that "*we are not a very effective remedy, but we're better than nothing*". Another member will add "*we are there to frighten them, and cross fingers that it boosts them a little*".

Additionally, the fact that a number of commission members are not legal practitioners and have imperfect or no knowledge of sentence execution law is seen by most lawyers as a problem, both in their relationship with prisoners (they are sometimes incapable of answering questions pertaining to the violation of their rights) and their general assessment of the legal remedies available to solve the issues observed. Moreover, where they can very clearly identify rights violation, the volunteer commitments and tasks they already undertake are likely to hinder their further involvement in legal proceedings: "*The commission members already draft their reports and visit the prisons (…), to ask that they begin to get involved in legal proceedings is not an option (…) Or else, there should be real professional training in the sector and proper remuneration*", indicates one commission member.

One of the specifics characterising the operation of the supervisory councils is that they are extremely variable from one prison to another, and are highly dependent on the personality of each commission member and their initial training. It also depends on the personality and training of the prison management, bearing in mind that no specific training on the work of the commissions is dispensed by the SPF Justice. One of the consequences is that the local commissions have very little contact with one another.

Lastly, when prison administration inertia is deemed too problematic by the commission members, the latter sometimes encourage the prisoners to get in touch with a lawyer, and sometimes contact one directly on their behalf to report on the situation to hand. This kind of approach has given rise to veritable disputes with prison management, who interpreted this approach as an unacceptable breach of the supervisory assignment the commissions are supposed to be carrying out, to the point of considering their action "*as the work of the enemy, to whom we should give the least possible amount of information and with whom we should speak as little as possible*". It should be noted nonetheless that, in disciplinary matters, when certain commission members observe illegal sanctions, they continue to directly contact the lawyers where possible, in particular considering the urgency of such cases. Conversely, some lawyers have been known to contact commission members in order to obtain further information on a given situation when preparing a case. Furthermore, distrust of prison managers is mutual insofar as the commissions complain that the letterboxes are often "forced" or "visited" and that some complaints forms never reach them.

3. Hurdles in the application of means of redress

[15] Subject to ratification of the Optional Protocol to the Convention against Torture (OPCAT) that should split monitoring and complaints competence.

Our interview corpus highlights several types of obstacles that practitioners encounter in the exercise of means of redress. To introduce this point, nothing seems more appropriate than the words of a member of an NGO, who states that "*generally speaking, one could say that theoretical and legal redress means do exist [in Belgium] but the effectiveness of these means is very, very, very limited, and it is therefore quite difficult and complicated to implement them*".

a) Difficult access for individuals

"*We can only act in the most blatant situations*", says one lawyer. The number of violations is so high that, as well as the difficulties inherent to bringing the cases to justice, the tendency is to focus on significant cases where violations are clear and where chances of success seem possible. This may be why one lawyer tells us that "*8 times out of 10*", she is successful in summary proceedings. Additionally, certain cases seem more arguable than others, particularly when objectivation is possible or particular areas of expertise are involved: for instance, a case of breach of health rights supported by medical certificates will have more chance of success than trying to contest the vision or arguments supporting a refusal to grant leave or conditional release. It is clear that there is a form of implicit selection of cases brought to court.

The fact that the cases concern prisoners does not appear to adversely affect the contact with the lawyers or NGOs working to defend their rights, whether this contact is initiated by the prisoner himself or by his friends and family. The lawyers do not appear to be hindered in these contacts (although the detention conditions of their clients are a different matter) and can visit their clients every day in prison until 9 pm. What is more, word-of-mouth between prisoners as to the name and contact details of lawyers who agree to take on prison complaints seems to work reasonably well, especially considering the small size of the country and the small number of lawyers working on this type of dispute resolution. For prisoners, apart from potential reprisals, the most immediate problem they have to overcome is the financial aspect of hiring a lawyer.

Our respondents do speak of difficulties in having access a lawyer, but highlight more specifically the issue of balance of forces in the legal procedure. As one lawyer states, "*the problem is that [prison life] is propitious to abuse. And it is a public body that is violating the law*". Another says that, "*it is exhausting because the system is seriously hindered [by the redress cases] and it is hard to convince lawyers to fight so hard*".

All the content of our interviews is organised around this double issue: opaque context and inequality of arms. We note that a number of difficulties encountered by the lawyers stems from their clients' lack of financial means, who therefore rely very heavily on legal aid. The following point of view seems to summarise that of all lawyers met in the context of this *Prison Litigation Network* project: "*Prison cases are worse than not being paid. The lawyer is the one who funds the case! There are long hours of work, a high level of legal technicity and [complex] procedures, for which you'll get paid 400 euros in legal aid and you'll have worked, I don't know… 100 hours… Even if there may be interesting professional consequences, it is the kind of work that does not get done in good conditions. Really, really not*". Another, slightly older, defender adds, "*It's practically a hobby, funded by another, more lucrative, side of our activity as lawyer. The terrible thing is that the system actually relies on it*".

This difficulty is all the more problematic than the legal practitioners we met tell us that the prison administration often instructs very good lawyers who conduct an in-depth analysis of the complaint, burdening the case as much as possible, opposite lawyers who are very often appointed as part of legal aid services. The arms are therefore not at all equal and the question of legal aid thus becomes central to the issue: the prisoners are not equal among themselves either, in terms of material means and combativeness. Indeed, their experience appears to play an essential role in the process: there are those who have the personal financial resources and those who, in the words of one lawyer, are "*clever [because they quickly get to] know which lawyer will do what [while] others will stay in dire straits because they don't understand anything*". This type of comment highlights the lack of voluntarist policy in terms of prisoners' equal opportunities and equal means before the law.

b) Difficult access of NGOs to subjective disputes

One major legal hurdle is the non-recognition, for NGOs, of the interest in bringing proceedings on behalf of prisoners. Collective action with collective interest is inconceivable in Belgium. In the past, complaints brought to court for poor detention conditions in Belgium (two cases concerned French-speaking prisons) did not pass the Court of Cassation, even though they had got through the barrier of trial judges who had recognised the interest of right of action. The Court of Cassation deemed that an NGO had no direct interest in any such action and could not cite the violation of a right to bring civil action, insofar as it does not directly represent the victim. Prisoners alone may act and complain of their detention conditions, without the support of an NGO. Recent advances for unaccompanied minors, and where an interest in acting was acknowledged for NGO "Défense des Enfants International" may however provide a loophole in the matter.

Additionally, the practice of a third party intervention seems underdeveloped in Belgium, even though the Human Rights League acted in 2015 in the HUTCHISON vs. United Kingdom and in the MURSIC vs. Croatia decisions. But as indicated by one NGO member, often "*opportunity makes thieves*", and it is more a question of seizing opportunities than making it a prime form of action and being proactive. "*It is a question of means too, because they are sometimes quite technical cases and you need time, information, etc. We have limited staff and our volunteers already have their plates full with other tasks*". Yet, in certain cases brought by the prisoners and their legal counsel, and which are viewed as "significant causes", some NGOs have been known to support them in making their case and drafting the legal arguments.

c) Prison administration strategies

Most of our respondents gave us multiple examples of strategies used by the prison administration with a view to reacting to or anticipating a complaint. For instance, when a prisoner initiates court proceedings to end improper detention conditions, he is often quickly moved to another cell or transferred to another prison in order to fictitiously end the problematic situation and, above all, to act so that the case suddenly becomes groundless and no conviction can be handed down.

In other words, although the prison administration assuredly manages the day-to-day lives of the prisoners, its ability to adapt and respond quickly to a situation is a veritable obstacle to the legal recognition of rights in prison.

c) The lack of judges' awareness of prison issues

Judges' awareness of prison issues is depicted as very low. The training of judges and investigative judges, even on criminal issues, does not provide for any specific training on prison issues and its current contradictions. Most judges have never set foot in prison, and the few experiments conducted in this matter were enlightening, particularly as regards their plain ignorance of the reality of detention conditions in Belgium. This is especially surprising considering that their job regularly results in imprisonments[16]. One nuance is nonetheless important to point out as regards social defence: the situation of prisoners has been brought to the media's attention so regularly these past few years that it now seems impossible to ignore the issues encountered (including, in particular, their continued detention). Our respondents say that they have observed a significant improvement in the attitude of judges in this regard.

Yet, the positioning of judges (particular investigative and trial judges) receives harsh criticism from our respondents, who denounce a certain weakness when it comes to taking prison disputes seriously. In the words of one lawyer, "*[there is] a certain amount of resistance from the judges to point the finger at the prison administration, which is a huge machine where responsibilities are spread out and which never admits to anything*". Additionally, the idea of moving the sentence enforcement court to within the prison institutions creates a certain amount of scepticism as regards the collusion that could come into being between the judges and the prison directors. Two of our interviewees nonetheless observed that, these past few years, the Service Public Fédéral Justice (federal public justice service) particularly "*ill-treated the judges*" (finances crisis, sick leave of prison staff that disrupted transfers for trial, review of the pension regime etc.), which may have contributed to reducing the reticence in questioning the liability of the prison administration.

c) Difficulties related to multiple timescales

When it comes to asserting the rights of prisoners who live in poor conditions, one of the major difficulties highlighted by our respondents concerns the management of the multiple timescales that come into play. The prisoner is usually in a situation of urgency, even if this can be questioned – and often is. This is the case particularly when a disciplinary sanction is applied, such as the transfer to a bare cell, which requires an immediate decision, or in the case of major health issues. Additionally, the actual detention situation places the prisoner in a very specific relationship with time, which leads him to consider even the smallest thing as fundamental. Lawyers are in a different time continuum, as they must not only carry out their legal profession and handle multiple client cases, but they are also dependent on various priorities related to the procedure and the case preparation. Yet, this not only requires time to listen, understand and conduct a legal analysis, but also depends on information that must sometimes be sent through by third parties, including prison administration civil servants or service providers acting on its behalf and who are not always very conscientious. Lastly, added to these three timescales (prisoner/lawyer/administration) is that incurred by the operation of the various jurisdictions and bodies before which the case is brought. This timescale is variable

[16] Thus, in 2012, the president of the Brussels court of first instance, with 22 investigation judges, went to the Forest prison, a Brussels prison that is particularly dilapidated and in which over-crowding and the living conditions of prisoners have been reported countless times. The press reports and interviews published at the time unambiguously highlight the judges' lack of awareness of the institution's state.http://www.lalibre.be/actu/belgique/des-juges-en-visite-a-la-prison-51b8e864e4b0de6db9c61768 (viewed on 2 April 2016).

depending on the nature of the jurisdiction/body and the type of procedure being considered—and the significant backlog of cases.

When one considers that emergency interim proceedings can take several months and that a compensation procedure against the Belgian State can last over 5 years, it is easy to see how this time dimension of legal actions is a major concern for legal practitioners. One of our interviewees states, "*For the time being, at the Brussels court of appeal, [tort claims against the Belgian state] will be processed in 2020 or 2021 [even though] they can be already be judged. If all goes well, the prisoner will have already left prison by then!*".

d) The sometimes counter-productive nature of the law

One of our respondents points out that, as regards "rights", the reasoning is not necessarily the most appropriate to manage certain detention-related issues. Even though the law provides for the regulation of the external status of prisoners, i.e. fewer arbitrary actions by administrative bodies, the facts indicate that such arbitrariness could sometimes in fact benefit the prisoner. Thus, the courts are sometimes more prudent than the administration when they adjust sentences. Their operation and related procedures are also often slower and more burdensome. "*Before, the administration reasoned not in terms of law but in terms of management*", says one member of an NGO. This means that a decision of interim release could be effective very quickly where a prison was overcrowded, simply to facilitate internal management. With the court, myriad elements are taken into account, including the point of view of the victim, the proposed solution etc. which means that, in extreme cases, a decision of interim release can be refused repeatedly where it would previously have been conceivable.

Additionally, as we have already highlighted, our interviewees, who are discouraged by the general inertia in the implementation of the Prison Principles Act, put the importance of the law into perspective when political will is non-existent or when it does not go far enough. One judge tells us that, "*If the law does not provide for sanctions in the event of non-respect of certain guarantees, what does that say of the 'guarantees'?*". This is all the more important that, as highlighted by one lawyer, the prisoner "*needs to be supported by a network that has no relation to law*" to live out his detention.

e) As regards "objective" means of redress

Questioning the constitutionality or the legality of legal and regulatory texts is one of the main aspects of the work carried out by NGOs involved in prison issues, and requires little further comment. Our corpus highlights the few difficulties encountered, mainly financial and human resources. Additionally, Belgium being as it is, it does not appear too complicated for NGOs to have direct contact with members of the administration, parliament, and even members of the government. A member of an NGO indicates however that their lobbying action is "*time-consuming and unproductive*". During the interviews, relationships are cordial and the speeches by elected representatives or managers appear voluntaristic. "*Sometimes we will have good discussions, we meet with highly intelligent people or people who are very aware of the situation, who tell us of their desire to make things change. Unfortunately, in the field, there is very, very little change* (…) *[The current minister] had very interesting ideas as regards prison policy, ideas that move in the right direction. But once again, we can only observe that the texts submitted to the*

parliament go against these ideas. (…) Prison is a pretty disheartening topic". The general economic and social context and the unpopular field are not encouraging, but, as highlighted by one lawyer, even with brave political positions, progress is far from obvious. The problem is that it is a question of taking on an elaborate system that is dysfunctional at every level, and whose structure needs to be comprehensively overhauled.

Although some cases should take precedence in this field, cases pertaining to employment law seem to be the most promising. Indeed, the position of Belgium is an issue as regards employment law in prison and the right to social welfare. Belgian law excludes prisoners from work contracts and from compensation for work incapacity. One respondent informed us that the NGO he works for has decided to concentrate on this particular field, which is less subject to popular controversy than detention conditions, and which can find support from other types of social achievements.

V. Impact of court decisions

Despite explicitly asking our respondents a number of questions about the impact of court decisions, this field is the weak link in our research results. The respondents have little to say, despite our insistence. Admittedly, the impact of ECHR legal decisions and judgments is mentioned, but remains relatively marginal in the responses gleaned.

An NGO member highlights the significance of the BOUAMAR vs. Belgium decision, which dates back to 1988. The fact that this decision is quite old means its impact over the long term is measurable. The decision concerned the imprisonment of children and, according to this respondent, it has been used as a weapon by lawyers and NGOs to change the situation in Belgium on this matter. He clearly states that it is only in the coming years that we will be able to assess the impact of the recent decisions VASILESCU and BAMOUHAMMAD, despite the victory they represented for militants campaigning for the rights of prisoners. That being said, concerning the BAMOUHAMMAD judgment, the actual progress of the case demonstrates extreme resistance from the Belgian state at every stage of the process, and ultimately, resistance when it came to acknowledging the result of the legal redress means and the content of the ECHR decision (multiple theoretical and complex legal arguments, appeals, slowness etc.).

For their part, the recent construction of social defence institutions for people suffering from mental disorders in prison and the modification of the social defence law are mentioned several times by our respondents in that they are a direct consequence of the proliferation of legal decisions in the field, and the many interventions of the CPT condemning the disastrous state of psychiatric wards in Belgian prisons.

Our respondents indicate that the application of decisions rendered by the ECHR by the Belgian authorities does not seem to constitute a priority action driver for Belgian NGOs. Even if they are in regular contact with political authorities, their discussions rarely address the issue of receiving and transposing the European and legal decision into national law.

As to the effect of the legal decisions that the lawyers occasionally obtain in their favour, they often seem to believe that, above and beyond that specific case, their

worth is above all symbolic and sometimes contribute to sparking a form of respect as regards their work as lawyers. "*The next time we go into a prison, they say, that one, he actually achieved something so tread carefully*", says one lawyer. That lawyer had, incidentally, put in an impressive number of working hours on a case "*about a disciplinary decision that had been taken in four minutes*". Success is therefore not to be found in efficiency, and is seen as barely efficient beyond the case at hand, but is noticeable more in effectiveness, in the need to assert a right and to work so that, despite everything, it is applied.

VI. Conclusions

Although we met lawyers who were particularly active in the prisoner rights field, in our civil law culture where the centre of gravity for all law-related matters seems to be the responsibility of the legislator (at least on a formal level), i.e. the parliament and the government, legal activism addresses more clearly the legislator than the courts. In the prison field, we therefore notice the importance of lobbying in parliament in relation to what is expected from a jurisdictional point of view, even if such lobbying, as we have seen, cannot be qualified as substantial or terribly efficient. Considering that the majority of decisions pertaining to prison life are taken on an administrative level[17] and are governed by a normative framework based on royal and ministerial regulations, circulars and/or decisions, the lawyers are often faced with norms whose justiciability is controversial. Additionally, such regulations are not always published or communicated, and their legal status does not always enable their questioning before a judge. The lawyers and NGOs must therefore address multiple authorities and the people who defend the rights of prisoners, both in practice and on a militant level, are hindered by a double obstacle: the 2005 Prison Principles Act[18] is still not applied in its entirety (in particular as regards the rights of complaint authorities) and there is no unique jurisdictional competence that could render a decision in all prison-related issues, as is the case with the Aliens Litigation Council or the family courts single judge.

One of our respondents, a lawyer, qualifies prisoner rights law as "*a vast magma that requires that we dive into a number of practice areas because we touch on civil procedures [even though we are criminal lawyers] (…) and administrative procedures [like before] the Council of State in disciplinary matters*". This piecemeal breakdown complicates the dialogue between the players involved in the dispute: those who know prison law well have a lesser knowledge of civil and administrative procedures, while the jurisdictions handling these matters have little knowledge of real life in prison and its regulatory framework. The image that comes out of all this research is the need to be a "*resourceful*" lawyer. "*It is complex, not standard. We switch from one law to another, one court to the next*". Few legal practitioners have knowledge of everything, which leads this same respondent to say that "*it requires a lot of work, (…) those who are efficient in this field are few and far between (…) because it requires an incredible investment compared with what the lawyer will get out of it, since we are mostly talking about legal aid cases*". Another lawyer, speaking of an issue raised in administrative law on a complex case, further adds that, "*you sometimes have to spend hours researching fields that are not your own*".

[17] Even more so given that the sentence application judge, established in the "loi du 17 mai 2006 instaurant des tribunaux de l'application des peines (law of 17 May 2006 establishing sentence application courts)" (*Moniteur Belge* dated 15.06.2006, pp. 30477-30487) is still not implemented

[18] Law of 12 January 2005, law of principles pertaining to the prison administration, *op. cit*.

In the same vein, such piecemeal breakdown also places judges in an uncomfortable position that fosters a defensive attitude on their part. When one of our respondents explains that, although leave and temporary absence requests today represent a real subjective right that a prisoner has right to if he fulfils certain conditions, judges seem unwilling to acknowledge it, particularly so that the dispute does not move into their sphere— the administration likely to transfer its own liability to the judicial power. We would like to point out that this hypothetical refusal of "unauthorised" widening of court jurisdiction to cover prison disputes may be surprising at a time when the law on the external legal status of prisoners[19], whose purpose is precisely to organise the broadening court jurisdiction of sentence adjustments, is slow in its implementation.

Above and beyond this organisational and procedural difficulty that seems to be specific to this type of dispute and heavily burdens the work of those who aim to defend the rights of prisoners, it is plainly apparent that the general condition of the prisons themselves and the structural issues make up the major obstacle in acknowledging the rights of prisoners. Some decisions are rendered on multiple cases, but the move to generalise their results, left to its own devices, is excessively slow. In the words of one lawyer, in prison "*the effectiveness of rights without means and the effectiveness of rights without policies, without cultural, social and training policies, mean absolutely nothing*". In a context where the most elementary conditions for a decent life are not met in prison, the major risks are to see standards drop as regards what is acceptable, to produce an acclimatisation to impossible living conditions, and to tolerate that cases be void of social integration prospects, thus encouraging continued imprisonment. This would gradually contribute to making judges and citizens view a "normal" situation as disgraceful, and complicate even further lawyers' and NGOs' establishment of evidence showing that the Belgian situation is, in many ways, still very concerning.

[19] Law of 17 March 2006 pertaining to external legal status, *op. cit.*