



**International Convention for
the Protection of All Persons
from Enforced Disappearance**

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Committee on Enforced Disappearances

**Consideration of reports of States parties under
article 29, paragraph 1, of the Convention**

Reports of States parties due in 2012

Belgium*

[8 July 2013]

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Annexes**

** Annexes are on file with the Secretariat and are available for consultation.

I. Introduction

1. The International Convention for the Protection of all Persons from Enforced Disappearance (hereinafter “the Convention”), adopted by the United Nations General Assembly on 20 December 2006 and opened for signature in Paris on 6 February 2007, enshrines the right of all persons not to be subjected to enforced disappearance. It requires States parties to adopt both preventive and punitive measures to ensure compliance with it.
2. Belgium signed the Convention on 6 February 2007. Upon ratification, on 2 June 2011, it made the declarations referred to in articles 31 and 32 of the Convention recognizing the competence of the Committee on Enforced Disappearances (hereinafter “the Committee”) to receive and consider communications from or on behalf of individuals and States.
3. The Convention, which entered into force for Belgium on 2 July 2011, carries two main obligations.
4. First, the provisions of the Convention must be implemented in domestic law. The current state of Belgian law has been analysed for that purpose. It already appears to be in conformity with most of the requirements set out in the Convention. Nevertheless, for it to be fully in conformity, certain amendments to the Criminal Code are in order, particularly with regard to the criminalization of enforced disappearance as a separate offense with no ground for justification, establishment of penalties and the determination of aggravating and mitigating circumstances for the offense. A bill is currently being prepared.
5. Secondly, in accordance with article 29, paragraph 1, of the Convention, Belgium is required to report to the Committee on Enforced Disappearances on the measures taken to implement the Convention. Belgium is doing so through this report which, together with the core document, follows in form and content the guidelines adopted by the Committee (CED/C/2). The report was prepared according to the procedure described in the core document (section II D). It is the outcome of collaboration between federal and federated State entities with competence in the very wide range of areas covered by the Convention. The following thus participated in this exercise: the police authorities and the Aliens Office within the Federal Public Service for the Interior, the Directorate-General for Legislation, Liberties and Fundamental Rights and the Directorate-General for Penitentiary Institutions within the Federal Public Justice Service, along with the international judicial cooperation service within the Federal Public Service for Foreign Affairs, the Directorate-General for Legal Support and Mediation within the Ministry of Defence, the National Institute of Forensics and Criminology, the Flemish Community, the Wallonia-Brussels Federation and the Joint Municipal Commission. Civil society was also involved: the report was submitted to some 20 organizations for comment at a meeting held on 28 June 2013. It was finalized at the end of that meeting, which was attended by representatives of Amnesty International and the Liga voor Mensenrechten.
6. This report provides information about the current state of Belgian law, which, as already noted, is already largely in line with the Convention.
7. It is noted that, after considering the report, the Committee may issue comments and observations in accordance with the provisions of article 29, paragraph 3, and may request additional information under article 29, paragraph 4.
8. Aware of the need to amend its legislation, Belgium undertakes to keep the Committee informed of any developments in the next few months in the crafting of the legislative bill to ensure the full implementation of the provisions of the Convention.

II. General legal framework

A. Constitutional, criminal and administrative provisions regarding the prohibition of enforced disappearance

9. In the current state of Belgian law, enforced disappearance as a crime against humanity is a specific criminal charge (see below, comment under article 5 of the Convention). However, enforced disappearance, as defined in article 2 of the Convention, is not treated as a separate criminal offense. Nevertheless, such an act would in any case be illegal as it would violate fundamental rights enshrined not only in international provisions directly applicable in Belgian law (in particular, the right to liberty and security enshrined in article 9 of the International Covenant on Civil and Political Rights, article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights) and article 6 of the Charter of Fundamental Rights of the European Union), but also in existing national constitutional and criminal provisions. Reference is made in this connection to article 12 of the Constitution and to the criminal provisions cited in the comment under article 2 of the Convention.

B. Other international treaties dealing with enforced disappearance to which the State is a party

10. Belgium has ratified and implemented in its domestic law the Statute of the International Criminal Court, which includes within the jurisdiction of the Court the crimes of enforced disappearance when they constitute crimes against humanity.

11. It may also be usefully noted that Belgium is a party to the main international instruments for the protection of fundamental rights (listed in the core document) whose provisions would be violated by an act of enforced disappearance.

C. Status of the Convention in the domestic legal order, direct enforceability by courts or administrative authorities and application of the provisions of the Convention to all parts of federal States

12. Information about the place of international instruments in the hierarchy of norms and the direct enforceability of their provisions is provided in the core document (paras. 116, 130 and 131).

13. The Convention applies to all federal and federated entities of the Belgian State. It was for this reason that it was ratified only after a joint approval procedure involving the federal and federated authorities competent in the areas concerned.¹

¹ Act of 6 April 2010 approving the International Convention for the Protection of All Persons from Enforced Disappearance, adopted at New York on 20 December 2006, *Moniteur belge* (Official Gazette) (M.B.), 30 April 2006; Decree of the Flemish Parliament of 7 May 2010 approving the International Covenant for the Protection of All Persons from Enforced Disappearance, done at New York on 20 December 2006, M.B., 24 June 2006; Decree of the French Community of 27 May 2010 approving the International Convention for the Protection of All Persons from Enforced Disappearance, adopted at New York on 20 December 2006, M.B., 24 June 2010; Decree of the Walloon Region of 3 June 2010 approving, in matters for which responsibility has been transferred by the French Community, the International Convention for the Protection of All Persons from Enforced Disappearance, adopted at New York on 20 December 2006, M.B., 16 June 2010; Ordinance of the

D. How the domestic laws ensure the non-derogability of the prohibition of enforced disappearance

14. See comments under article 1 of the Convention.

E. Competent authorities

15. The competent authorities for each of the matters covered by the Convention will be identified progressively in the report in the specific comments under each article of the Convention.

F. Examples of judicial decisions or administrative measures in which the provisions of the Convention have been enforced or in which violations of the Convention were identified, and of administrative measures that violated the Convention

16. No judicial decision concerning an enforced disappearance has been reported.

17. No administrative measure of the kind referred to has been reported.

18. Specific information on laws and regulations that give effect to the Convention will be provided in the comments under each article of the Convention.

G. Statistical data on cases of enforced disappearances

19. The State does not have any such statistical data.

III. Specific comments on each article of the Convention

Article 1

A. Legislative and administrative measures to guarantee the non-derogability of the right not to be subjected to enforced disappearance during any state of emergency

20. Belgian law does not allow any derogation from the fundamental rights and freedoms guaranteed by the Constitution — which would be violated by an act of enforced disappearance — in a state of emergency, irrespective of the form such derogation may take.

21. Furthermore, international provisions directly enforceable in Belgian law that would be violated by an act of enforced disappearance cannot be subject to derogation except to a very limited extent and in keeping with particular substantive and procedural conditions (see article 4 of the International Covenant on Civil and Political Rights and article 15 of

Joint Municipal Commission (Brussels-Capital Region) of 25 November 2010 approving the International Convention for the Protection of All Persons from Enforced Disappearance, adopted at New York on 20 December 2006, M.B., 7 December 2010; Decree of the German-speaking Community of 28 March 2011 approving the International Convention for the Protection of All Persons from Enforced Disappearance, adopted at New York on 20 December 2006, M.B., 29 April 2011.

the European Convention on Human Rights).² Belgium has never availed itself of this possibility. Were it to do so, the legislator would then have to establish derogation regimes. These would have to be notified, respectively, to the Secretary-General of the United Nations and to the Secretary-General of the Council of Europe. The necessity and proportionality of the derogation measures adopted could then be subject to international oversight.

22. It should also be noted that in the event of armed conflict, international humanitarian law would be applicable. International humanitarian law prohibits enforced disappearances, lays down very detailed rules regarding detention and imposes several general measures to ensure the traceability of individuals.³

B. Legislation and practices concerning terrorism, emergency situations, national security or other grounds that have had an impact on the effective implementation of the prohibition

23. No legislation or particular practice impairs the effective implementation of the prohibition of enforced disappearance.

24. Belgium has put in place a system for combating terrorism based on a legal framework, an institutional framework and provisions to enhance international cooperation.

25. Since 19 December 2003, it has been able to rely on a number of counter-terrorism provisions. The Terrorist Offences Act,⁴ which incorporates into Belgian law the framework decision of the Council of the European Union of 13 June 2002 on combating terrorism, introduces into the Criminal Code a new section, Iter, on terrorist offences. This has been supplemented by the establishment of four new offences following adoption of the Act of 18 February 2013, which, inter alia, incorporates framework decision 2008/919/JAI of the Council of the European Union of 28 November 2008 amending framework decision 2002/475/JAI of 13 June 2002 on combating terrorism.⁵

26. That being said, persons suspected of having committed terrorist offences are treated in accordance with ordinary law and all the relevant procedural rules are applied to them. Such persons enjoy exactly the same rights as any other accused person during questioning and hearings, including with regard to the possibility of appealing against decisions taken against them. However, in view of the nature of terrorist offences, certain specific methods of investigation used for serious offences are applicable to offences under article 137 of the Criminal Code. None of them may constitute or involve an act of enforced disappearance.

² For a detailed explanation of the conditions for derogations from the European Convention on Human Rights in emergency situations, see the report of the Committee on Legal Affairs and Human Rights of the Council of Europe of 9 April 2009 on “The protection of human rights in emergency situations”, document 11858, <<http://assembly.coe/ASP/Doc/XrefViewHTML.asp?FileID=12260&Language=EN>>>.

³ J.M. Henckaerts & L. Doswald-Beck, *Droit international coutumier*, vol. 1 : Règles, Brussels, Bruylant 2006.

⁴ M.B., 29 December 2003.

⁵ M.B., 4 March 2013.

Article 2

Definition of enforced disappearance in domestic law or, in its absence, provisions that are invoked

27. In the current state of Belgian law, enforced disappearance is treated as a separate offence when it constitutes a crime against humanity. Reference is made in this connection to the comments under article 5 of the Convention.

28. However, in the current state of domestic law, enforced disappearance does not constitute a separate offence under ordinary law.

29. Nevertheless, it may be composed of acts already covered by the Belgian Criminal Code, such as torture (art. 417 ter), inhuman treatment (art. 417 quater) or, as the case may be, abduction and concealment of minors and other vulnerable persons (arts. 428 to 430).⁶ More particularly, enforced disappearance cannot currently be punished on the basis of articles 147, 155, 156 and 157, which concern respectively unlawful and arbitrary detention by public officials, the maintenance by public officials of unlawful and arbitrary detention, the failure of public officials to report such a detention and certain activities on the part of certain public officials that may lead to the concealment of a detained person — such as a refusal to show registers — or to the illegal detention of that person. This last-mentioned offence, covered by article 157 of the Criminal Code, should be stressed, as it partakes, to some extent at least, of the logic of the Convention.

30. In order to bring together into a single unit all the material components of the offence of enforced disappearance, since related offences do not contain them all, or not fully, and taking into account the seriousness of the phenomenon of enforced disappearance, it is planned to amend Belgian law so as to make enforced disappearance a separate offence.⁷

31. Pending the entry into force of this legislative amendment, an act of enforced disappearance may be prosecuted on the basis of the aforementioned provisions.

Article 3

How the State prohibits the conduct defined in article 2 of the Convention and how it prosecutes such conduct when it is committed by non-State entities

32. The acts defined in article 2 of the Convention, if committed by persons or groups acting without the authorization, support or acquiescence of the State, may, as appropriate, constitute acts of torture, inhuman treatment, abduction and concealment of minors or other vulnerable persons. They may then be prosecuted under articles 417 ter, 417 quater, or 428 to 430 of the Criminal Code. In any event, acts of enforced disappearance are violations of individual liberty defined as criminal offences in articles 434 to 438 bis of the Criminal Code.

Article 4

33. See comments under articles 2 and 3 of the Convention.

⁶ As noted by the legislation section of the Council of State after considering the bill to approve the Convention (opinion No. 46/985/2/V of 27 July 2009).

⁷ Indeed, Belgium had stressed the importance of the establishment of a separate offence during the negotiations towards the adoption of the Convention.

34. Belgium will keep the Committee informed of the planned amendment of the Criminal Code and of the stages in the procedure for its adoption.

Article 5

A. Definition of enforced disappearance as a crime against humanity

35. The question of the definition of the crime of enforced disappearance as a crime against humanity arose during the negotiations around the Convention. The negotiators felt that it was important to avoid the snare of multiple definitions of crime against humanity in international law. Some States, including Belgium, wished to proceed by explicitly referring to the Rome Statute of the International Criminal Court (ICC), which was not possible owing to the opposition of certain States not parties to that Statute.⁸ The compromise solution adopted was to refer to applicable international law.

36. The crime of enforced disappearance consequently constitutes a crime against humanity only in cases where the acts committed themselves already constitute crimes against humanity under the relevant rules of international law.

37. Recognition of this offence as an international crime has its origin in customary international law. Its definition was recently codified in article 7 of the ICC Statute, ratified by Belgium on 28 June 2000. It was incorporated into Belgian criminal law in article 136 ter of the Criminal Code, which reproduces the terms of the Statute (and explicitly refers thereto) to define crime against humanity. This may take the form, in particular, of enforced disappearances (see art. 136 ter, 9°, of the Criminal Code, which gives effect in Belgian law to art. 7, para.1 (i), of the Statute).

38. On the question of who may be considered to have committed the offence, it may usefully be noted that crimes against humanity, as defined in article 7 of the ICC Statute, may be committed, to some extent, by non-State agents. Article 7, paragraph 2, specifies that an attack against a civilian population constitutes a crime against humanity when it is perpetrated “in accordance with or in pursuance of the policy of a State or of an organization having such an attack as a goal”.

39. It follows from the foregoing that the crime of enforced disappearance as a crime against humanity is suitably covered by Belgium criminal law. It is not necessary to take any measure to incorporate such a provision into Belgian law.

B. Consequences provided for under domestic law and impact on other articles of the Convention

40. Under article 5 of the Convention, where enforced disappearances constitute crimes against humanity, they should attract the legal consequences provided for under international law.

(a) Article 6 of the Convention: Criminal responsibility

41. Reference should be made to the relevant provisions of the ICC Statute, namely, article 25-3 with regard to article 6, paragraph 1 (a), of the Convention, article 28 with regard to article 6, paragraph 1 (b), and article 33 with regard to article 6, paragraph 2, of the Convention. These provisions reflect codified customary international law.

⁸ Bill to approve the International Convention for the Protection of All Persons from Enforced Disappearance, adopted at New York on 20 December 2006, Senate, Session 2009–2010, legislative document No. 4-1505/1, 13 November 2009, p. 7.

42. Their incorporation into domestic law is ensured by articles 70, 136 ter, 9° and 136 sexies to 136 octies of the Criminal Code. More precisely, articles 136 ter, 9° and 136 sexies cover the different forms of perpetration of and participation in the offence referred to in article 6, paragraph 1 (a), of the Convention; article 136 septies covers superior responsibility referred to in article 6, paragraph 1 (b), of the Convention. Article 136 octies, paragraph 2, covers non-exemption from responsibility on the ground of law or superior order referred to in article 6, paragraph 2, of the Convention.

(b) Article 7: Penalties

43. Applicable international law, referred to in article 5 of the Convention, does not appear to establish any specific standard in the matter of penalties.

44. In domestic law, article 136 quinquies of the Criminal Code stipulates that crimes against humanity, as defined in article 136 ter of that Code, are punishable by life imprisonment. This penalty applies to enforced disappearances constituting crimes against humanity. The court may decide on a lesser penalty on grounds of mitigating circumstances under articles 79 to 85 of the Criminal Code and the Act on mitigating circumstances of 4 October 1867.⁹

(c) Article 8: Statute of limitations

45. Belgium is of the opinion that international criminal law contains a specific customary rule concerning the imprescriptibility of serious violations of international humanitarian law (namely, crimes of genocide, crimes against humanity and war crimes).

46. Reference may also be made to the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, adopted within the Council of Europe on 25 January 1974 and ratified by Belgium on 6 March 2003, the first article of which establishes the principle of the non-applicability of statutory limitation to crimes against humanity.

47. This is enshrined in Belgian criminal law under article 21 of the preliminary section of the Code of Criminal Procedure.

48. Furthermore, article 91 of the Criminal Code stipulates that penalties imposed for serious violations of international humanitarian law are not subject to statutory limitation.

(d) Article 9: Jurisdiction

49. Belgium is of the opinion that the obligation to punish crimes against humanity in national law and to adopt measures to allow them to be prosecuted by domestic courts and tribunals has its source in customary international law. The relevant practice in this regard reveals itself, in particular, through measures adopted by States at national level and acts of international organizations such as resolutions of the General Assembly and the Security Council of the United Nations concerning the criminalization and punishment of crimes against humanity. The underlying reasons for this obligation have been set out in detail by Belgium in the course of proceedings before the International Court of Justice in *the Case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.¹⁰

⁹ M.B., 5 October 1867.

¹⁰ For further details in this connection, see the relevant parts of the written memorial filed on 1 July 2010 by Belgium in the aforementioned case (Memorial of the Kingdom of Belgium, International Court of Justice, *Questions concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*).

50. In addition, paragraph 10 of the preamble to the ICC Statute formally establishes this customary rule by stipulating that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”.

51. These specific rules concerning the obligation to establish territorial and extraterritorial jurisdiction so as to allow crimes against humanity to be punished do not differ from the provisions contained in article 9 of the Convention. Reference is therefore made to the comments under that article.

(e) Article 11: *aut dedere, aut judicare*

52. As noted under (d) above, the obligation to prosecute persons who have committed crimes against humanity when they are found to be present within the territory of Belgium has its source in customary international law. This rule is identical to that contained in article 11 of the Convention. Reference is therefore made to the comments under that article.

(f) Article 14: Mutual legal assistance in criminal matters

53. Under international law there does not appear to be a specific obligation with regard to mutual legal assistance in the prosecution of crimes against humanity. Reference is therefore made to the general provisions cited under article 14 of the Convention.

(g) Article 15: Assistance to victims

54. There are no specific rules, in international law or in Belgian law, concerning assistance to victims of crimes of enforced disappearances constituting crimes against humanity in particular.

55. Consequently, the general rules in Belgian law concerning assistance to victims apply, as set out in the comments under articles 15 and 24 of the Convention.

Article 6

A. Modes of criminal responsibility (including superior criminal responsibility)

56. This comment will focus exclusively on modes of responsibility associated with an enforced disappearance that does not constitute a crime against humanity. For modes of responsibility associated with an enforced disappearance constituting a crime against humanity, reference is made to the comments under article 5 of the Convention.

57. Articles 51, 66 and 67 of the Criminal Code specify modes of responsibility applicable to all offences, including offences involving acts of enforced disappearance. They cover persons who attempt to commit, commit, order, solicit, are complicit or participate in an offence. These modes correspond to those set out in article 6, paragraph 1, of the Convention.

58. While superior responsibility, as defined in the Convention, does not constitute a separate mode of responsibility for ordinary offences, it is however implemented in

Senegal)), 1 July 2010, pp. 93 to 99 and pp. 102 to 105, available on the website of the International Court of Justice: www.icj-cij.org) and the oral and written replies to the questions put to the parties by members of the Court at the close of the public hearing held on 16 March 2012 (*Questions put to the Parties by Members of the Court at the close of the public hearing held on 16 March 2012: compilation of the oral and written replies and the recent comments on those replies*. See in particular pp. 20 to 48, available on the website of the Court at www.icj.cij.org).

domestic law in two ways. The failing of the superior may constitute either an offence as such under articles 155 and 156 of the Criminal Code or a mode of responsibility through participation and complicity covered by articles 66 and 67 of the Criminal Code. It clearly emerges from Belgian case law that refrainment may constitute punishable participation when the person concerned has a positive duty to act and/or when, by virtue of the circumstances, his or her conscious and intentional refrainment from action constitutes a positive encouragement to the perpetration of an offence or an expression of intent to cooperate directly in its commission by helping to allow it or facilitate it,¹¹ or again when he or she has made the commission of the projected offence materially possible.¹²

59. It is neither necessary nor desirable to establish superior criminal responsibility as a separate mode of responsibility. Were the modes of responsibility enumerated in the Convention to be associated with the crime of enforced disappearance (or related offences), the coherence of Belgian criminal law would be compromised: such an enumeration could lend itself to a dangerous *a contrario* interpretation whereby superior responsibility would be excluded for other crimes under ordinary and international law whose incorporation into Belgian law has not included such an enumeration.

B. Due obedience, superior order as a justifying cause and illegal order

60. In the current state of Belgian law, an order of enforced disappearance would be illegal and would engage the responsibility of the superior who gave it, under the terms, as appropriate, of articles 147, 155, 156 and 257 or article 136 ter of the Criminal Code. In addition, public officials having knowledge of such an order would be required to report it under article 29 of the Code of Criminal Investigation. As for subordinates who have received such an order, they would be obliged to refrain from carrying it out.

61. As for members of the police, this obligation of refrainment is enshrined in article 8 of the Act of 13 May 1999 on the disciplinary statute of members of the police¹³ and in paragraph 46 of the Police Code of Ethics.¹⁴ Where members of the Armed Forces are concerned, the relevant provisions are contained in article 11, paragraph 2, of the Act of 14 January 1975 on disciplinary regulations for the Belgian Armed Forces.¹⁵

62. Concretely, subordinates who refuse to carry out an order on the basis of their status, their code of ethics and the domestic and international legal framework make that decision known to their superior and do not act. If, subsequently, disciplinary or criminal proceedings are initiated against any such subordinate, he or she may plead the existence of exceptional reasons for refusing to obey.

63. If, on the contrary, the subordinate carries out the order of enforced disappearance, he or she may be held responsible and subject to disciplinary measures in accordance with the aforementioned provisions and may be held criminally responsible in accordance with the articles cited in the comment under articles 2 and 5 of the Convention.

64. The subordinate concerned would not be able to justify the offence committed by pleading a superior order. Article 70 of the Criminal Code recognizes the legitimacy of a plea of order of public authority only in cases where such an order is required or authorized

¹¹ Court of Cassation (Cass.), 23 November 1999, *Pasicrisie (Pas.)*, 1999, p. 895; Cass. 26 February 2008, *Pas.*, p. 516; Cass. 17 December 2008, R.D.P. 2009; Cass. 2 September 2009, *Pas.*, 2009, p. 1748.

¹² Cass. 3 March 2009, *Pas.*, 2009, p. 619.

¹³ M.B., 16 June 1999.

¹⁴ Royal Order of 10 May 2006 establishing the Police Code of Ethics, M.B., 30 May 2006.

¹⁵ M.B., 1 February 1975.

by law.¹⁶ However, in the light of the law, in the broad sense, and therefore including directly applicable international provisions,¹⁷ enforced disappearance is clearly prohibited. This line of reasoning remains valid whether or not the enforced disappearance constitutes a crime against humanity, even though, in the latter case, the Criminal Code expressly disallows superior order as a justification (art. 136 octies).

Article 7

A. Criminal penalties

65. With regard to enforced disappearance as a crime against humanity, reference is made to the comments under article 5 of the Convention.

66. As for ordinary offences, and pending the entry into force of a legislative amendment recognizing enforced disappearance as a separate offence, Belgium submits the following information concerning penalties applicable to offences related to that act:

- Torture (Criminal Code, art. 417 ter): 10 to 15 years' imprisonment (15 to 30 years' imprisonment where there are aggravating circumstances);
- Inhuman treatment (Criminal Code, art. 417 quater): 10 to 15 years' imprisonment (15 to 20 years' imprisonment where there are aggravating circumstances);
- Illegal and arbitrary detention by public officials:
 - Criminal Code, art. 147: 3 months' to 3 years' imprisonment, fine of between €50 and €1000 and suspension of the rights listed in articles 31.1, 31.2 and 31.3, paragraph 1, (6 months' to 5 years' imprisonment where there are aggravating circumstances);
 - Criminal Code, art. 155: 1 month's to 1 year's imprisonment;
 - Criminal Code, art. 156: 8 days' to 6 months' imprisonment;
 - Criminal Code, art. 157: 15 days' to 2 years' imprisonment and fine of between €26 and €200;
- Violations of personal freedom by individuals (Criminal Code, arts. 434 to 438 bis): 3 months' to 2 years' imprisonment and fine of between €26 and €200 (6 months' to 5 years' imprisonment and fine of between €50 and €500, the minimum doubled in cases of discriminatory motives, or 5 years' to 10 years' imprisonment where there are aggravating circumstances, minimum increased by 2 years in cases of discriminatory motives).
- Abduction and concealment of vulnerable persons (Criminal Code, arts. 428 to 430): 5 to 10 years' imprisonment (10 to 30 years' imprisonment where there are aggravating circumstances; 2 to 5 years' imprisonment and fine of between €200 and €500 where there are mitigating circumstances).

67. In addition to the aforementioned prison sentences and financial penalties, certain political and civil rights are suspended in accordance with articles 31 to 34 of the Criminal Code.

¹⁶ This requirement has been confirmed by uniform case law (C. Van den Wijngaert, *Strafrecht, strafprocesrecht & internationale strafrecht*, Antwerp, Maklu, 2006, p. 210). See in particular Liège military court, 20 November 1972, *J.T.*, 1973, p. 148; Brussels military court, 18 May 1966, *Rev.Jur. Congo*, 1970, p. 236.

¹⁷ F. Kutuy, *Principes généraux du droit pénal belge: Tome II*, Brussels, Larcier, 2010, p. 437.

68. Once Belgian law has been amended to establish enforced disappearance as a separate offence, specific penalties will be attached thereto. These will be determined in such a way as to maintain the coherence of the existing criminal punishment system and will adopt standards set for the most serious crimes, as required by the Constitution.

B. Maximum penalties provided for under the Criminal Code

69. The penalty laid down for enforced disappearance as a crime against humanity is life imprisonment and lifelong suspension of the civil rights listed in article 31 of the Criminal Code.

70. The maximum penalty that may be handed down, in the current state of Belgian law, for an act of enforced disappearance that does not constitute a crime against humanity is 30 years' imprisonment and lifelong suspension of the civil rights listed in article 31 of the Criminal Code.

C. Mitigating or aggravating circumstances

71. As regards the offences mentioned under A above, the Criminal Code provides for aggravating circumstances based on the status of the offender, the vulnerability of the victim — in accordance with the Act of 26 November 2011 amending and supplementing the Criminal Code to make it a criminal offence to abuse the situation of weakness of individuals and extend the criminal protection of vulnerable persons against ill-treatment¹⁸ — the duration of the offence or the existence of a discriminatory motive.

72. As for the mitigating circumstances specifically established, they are guided by a concern to bring about the prompt liberation of the victim. Moreover, the penalty may be reduced on grounds of mitigating circumstances under articles 79 to 85 of the Criminal Code and the Act of 4 October 1867 on mitigating circumstances.¹⁹

73. Once Belgian law has been amended to establish the act of enforced disappearance as a separate offence, specific aggravating and mitigating circumstances will be defined. These will be established in such a way as to maintain the coherence of the existing criminal punishment system; they will therefore be guided by considerations similar to those mentioned above.

D. Disciplinary sanctions

(a) Police

74. In addition to the criminal punishment mechanisms provided for, misconduct on the part of members of the police may be sanctioned through disciplinary procedures established under the aforementioned Act of 13 May 1999 on the disciplinary statute of members of the police, but also through statutory personnel evaluation procedures.

75. The disciplinary authority does not, in principle, have to wait for the decision of the criminal court to sanction a breach of discipline that may also constitute a criminal offence.²⁰ It is nevertheless bound by the decisions of the criminal court in regard to the existence of the facts and the capacity of the person concerned. For this reason, a disciplinary sanction imposed for facts which the criminal court subsequently considers not to have existed or which were committed by a person who, according to the criminal court,

¹⁸ M.B., 23 January 2012.

¹⁹ M.B., 5 October 1867.

²⁰ Article 417 of the Judicial Code expressly stipulates that “disciplinary action is independent of public prosecution and civil proceedings”.

was of unsound mind at the time, must be withdrawn. Conversely, the decision of the Public Prosecutor not to prosecute or the determination of the criminal court that prosecution is inadmissible because of statutory limitation or termination of public proceedings following payment of a sum of money are not binding on the disciplinary authority.²¹

76. Disciplinary sanctions that may, where appropriate, be imposed on members of the police are spelled out in articles 4 and 5 of the aforementioned Act.

(b) Armed Forces

77. In addition to the criminal punishment mechanisms provided for, misconduct on the part of members of the Armed Forces may be sanctioned through disciplinary procedures in accordance with the aforementioned Act of 14 January 1975 on disciplinary regulations of the Armed Forces, which stipulates in article 9 that military personnel must in all circumstances “refrain from any activity contrary to the Constitution and the laws of the Belgian people”.

78. However, no disciplinary punishment can be imposed on military personnel:

- For facts identical to those for which he or she has been convicted by criminal courts, even if the offence also constitutes a breach of discipline;
- When he or she has been found not guilty of the facts of which he or she is accused by a criminal court.

79. If, on the other hand, a judicial information procedure for the purpose of criminal proceedings has been closed, the case file is transmitted to the commander of the person concerned. In such cases, the military authority evaluates the facts from a disciplinary perspective. If there has been a breach of discipline, the military authority retains the right to impose a disciplinary sanction.

80. Where appropriate, the following statutory measures may be taken against the member of the military concerned:

- Temporary withdrawal of employment as a disciplinary measure;
- Permanent withdrawal of employment through compulsory retirement.

Article 8

A. Application of a statute of limitations to criminal proceedings and penalties

81. According to article 21 of the preliminary section of the Code of Criminal Procedure, the statute of limitations will apply to an ordinary crime after 10 years or, if the crime is not triable on indictment, after 15 years.²² A crime is defined as an offence punishable by at least 5 years’ imprisonment or detention (Criminal Code, arts. 8 to 11). The statute of limitations then starts after 20 years from the date of the ruling or judgment setting the penalty (Criminal Code, art. 91).

²¹ A. Liners & G. Pijil, *Discipline et déontologie, Le manuel de la discipline et de la déontologie des services de police*, Brussels, Politeia, 2012, Part 1 “Discipline”, Chapter 1/2, pp. 1 to 23.

²² Crimes triable on indictment are crimes for which the penalty provided for by law does not exceed 20 years’ imprisonment, together with certain crimes listed exhaustively in the aforementioned Act of 4 October 1867 on mitigating circumstances, which include the offences specified in articles 429, paragraph 5, and 430 of the Criminal Code on the abduction and concealment of vulnerable persons.

82. Criminal prosecution for an offence (*délit*) will be subject to the statute of limitations after 5 years. A *délit* is defined as an offence punishable by between 8 days' and 5 years' imprisonment (Criminal Code, art. 25). In this case, the statute of limitations starts after 5 years from the date of the final decision or judgment or from the date when the judgment handed down by the court of first instance is no longer susceptible of appeal, or after 10 years if the sentence is more than 3 years (Criminal Code, art. 92).

83. These provisions are designed to ensure a balance between the victim's right to effective remedy and the right of the accused person, who is assumed to be innocent, to be tried within a reasonable time guaranteeing, in particular, the reliability of evidence.

84. These norms are applicable to all offences associated with an act of enforced disappearance, covered in the comments under articles 2, 3, and 7 of the Convention.²³

85. The same provisions will also be applicable to an act of enforced disappearance when treated as a separate offence.

B. Non-applicability of statutory limitation to crimes against humanity

87. See comments under article 5 of the Convention.

C. Starting point of statutory limitation

87. In the case of continuous offences, by which is meant offences that seek to establish and maintain criminality, the statute of limitation begins only once the offence has ceased, or, in other words, when the state of criminality comes to an end.²⁴

88. The continuous nature of an offence is never expressly referred to in legislative texts. This is a matter for the determination of the courts.

89. Consequently, once Belgian law has been amended to establish the act of enforced disappearance as a separate offence, it will not be necessary to refer specifically, in the definition of that offence, to its continuous character. First, this will undoubtedly be recognized in judicial decisions.²⁵ Then again, its inclusion in the wording of the offence could lend itself to a dangerous *a contrario* interpretation concerning other existing continuous offences not explicitly defined as such in the Criminal Code, unless all the existing offences concerned were redefined. Mention of the continuous character of the offence of enforced disappearance in the *travaux préparatoires* of the legislative amendment to establish it as a crime would have the advantage both of averting any discussion as to interpretation and of not disrupting the economy of the Criminal Code.

D. How the State party guarantees that no statute of limitations applies for criminal, civil or administrative actions brought by victims seeking the right to an effective remedy

90. Articles 22 et seq. of the preliminary section of the Code of Criminal Procedure recognize that, in certain circumstances, the statute of limitations may be suspended or

²³ Criminal Code, art. 100.

²⁴ M. Franchimont, A. Jacobs, A. Masset, *Manuel de procédure pénale*, 4th edition, Brussels, Larcier, Collection de la Faculté de droit de l'Université de Liège, 2012, p. 131.

²⁵ Indeed, as long ago as 1875, the Belgian Court of Cassation concluded from the continuous character of the offence of abduction that a Belgian court could exercise jurisdiction over that offence once it was continuing in Belgium, even if the abduction had been committed outside the country, for such an offence continues to exist so long as the unlawful situation lasts (Court of Cassation, 6 December 1875, *Pas.*, 1876, I, pp. 42–43).

interrupted in order to safeguard the right of victims to an effective remedy. These grounds apply to all offences associated with an act of enforced disappearance. Similarly, they will be applicable to the offence of enforced disappearance when it has been introduced into the Criminal Code.

91. As for civil action following an offence, this, although governed by specific provisions of the Civil Code, is not subject to any statute of limitations prior to criminal prosecution, as noted in article 26 of the preliminary section of the aforementioned Code of Criminal Procedure. The victim's right to an effective remedy is thus also guaranteed for the purpose of seeking reparation for the injury sustained.

E. Effective remedies sought in relation to the statute of limitations

92. During the term of limitation, the victims of an enforced disappearance may apply to the competent judicial authorities.

93. The indictment division monitors the process of investigation under articles 136 to 136 ter of the Code of Criminal Investigation.

94. If the victims of an offence consider there to be a dysfunction in the processing of that complaint, they may have recourse to the Standing Committee on the Supervision of Police Services (hereinafter "Committee P"),²⁶ the General Inspectorate of the Federal and Local Police²⁷ and the High Council of Justice.²⁸ The first two are independent of the police and allow legal, transparent monitoring, both preventively and ex post. As for the High Council of Justice, it independently receives and processes complaints regarding the functioning of the judiciary. If the complaint is founded, the Council proposes a solution to the competent authorities, makes a recommendation with a view to improving the operation of the justice system or initiates a special investigation or an audit. Its duties and responsibilities include the obligation to report to the competent Crown Prosecutor a crime or an offence of which it has knowledge and the possibility, when it finds that a member of the judiciary, the court registry or the prosecutor's office has failed in the duties incumbent upon him or her, to request the competent disciplinary authorities to consider whether there are grounds for setting in motion a disciplinary procedure.

95. Lastly, it is also always possible for a complainant to seek redress from the European Court of Human Rights, subject to the admissibility criteria governing applications. It is to be noted in this connection that the condition concerning the exhaustion of domestic remedies is interpreted flexibly by the Court.²⁹

²⁶ Established under the Organization Act on the monitoring of police and intelligence services and the coordinating body for threat analysis of 18 July 1991, M.B., 26 July 1991; site of the Standing Committee: www.comitep.be.

²⁷ Established and put in place under the Act of 7 December 1998 on a two-level integrated police force, the Royal Order of 20 July 2001 on the functioning and staffing of the General Inspectorate of the Federal and Local Police (M.B., 18 August 2001) the Act of 13 May 1999 on the disciplinary statute of members of the police (M.B., 16 June 1999), and the Royal Order of 30 March 2001 on the legal position of police personnel (M.B., 31 March 2001); site of the General Inspectorate of the Federal and Local Police: www.aigpol.be.

²⁸ Constitution, article 151, paragraph 2; Judicial Code, Book I, Title VI, Chapter V bis.

²⁹ Council of Europe/European Court of Human Rights, Practical Guide on Admissibility Criteria 2011, available at: http://echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

Article 9

A. Measures taken to establish jurisdiction in the cases contemplated under paragraphs 1 and 2

96. Current Belgian law already covers the grounds for jurisdiction set out in article 9, paragraphs 1 and 2, of the Convention. Article 3 of the Criminal Code establishes the territorial jurisdiction of Belgian courts, while Chapter II of the preliminary section of the Code of Criminal Procedure provides for several forms of extraterritorial jurisdiction. Ratification of the Convention has given particular weight to the provisions of article 12 bis of that preliminary section under which: “Belgian courts shall also exercise jurisdiction over offences committed outside the territory of the Kingdom and covered by a rule of international treaty or customary law or a rule of law derived from the European Union binding upon Belgium, where such a rule requires it in any way to submit the case to its competent authorities for the purposes of prosecution”. This article provides for the criminal proceedings directly called for by the rule laid down in article 9, paragraph 2, of the Convention.

B. Legal provisions, including any treaties, concerning mutual judicial assistance that apply to ensure jurisdiction for acts of enforced disappearances

97. See the comments under this article in section A and under article 14 of the Convention.

C. Cases involving the offence of enforced disappearance in which mutual legal assistance was requested by or from the reporting State party

98. The International Criminal Cooperation Service has not had to deal with any case of enforced disappearance. For that reason, there are no examples of extraditions granted or denied.

Article 10

Domestic legal provisions concerning, in particular, the custody of that person or other precautionary measures to ensure his/her presence; his/her right to consular assistance

99. The Pretrial Detention Act of 20 July 1999³⁰ (hereinafter “Pretrial Detention Act”) provides for the arrest of a person caught in the act of committing a crime (in flagrante delicto), and likewise the arrest, upon the decision of the Crown Prosecutor, of a person who may be considered for serious reasons to be guilty of a crime or offence. The form and duration of custody and of the rights of the person concerned during this procedure are precisely determined.

100. With regard in particular to the right of foreign detainees to contact their consular authorities, this is established and regulated by article 69 of the Act of 12 January 2005 on the principles of prison administration and the legal status of detainees³¹ (hereinafter “Principles Act”), articles 28 and 29 of the Royal Order of 8 April 2012 establishing the date of entry into force and implementation of various provisions of parts III and V of the

³⁰ M.B., 14 August 1990.

³¹ M.B., 1 February 2005.

Act of 12 January 2005 on the principles of prison administration and the legal status of detainees.³²

Article 11

A. Legal framework which enables national courts to exercise universal jurisdiction over the offence of enforced disappearance

101. See comments under article 9 of the Convention, section A. Article 12 bis of the preliminary section of the Code of Criminal Procedure, referred to therein, provides for public prosecution as a direct consequence of the rule laid down in article 11 of the Convention.

B. Competent authorities for the implementation of the various aspects of article 11

102. The authorities concerned are, on the one hand, those concerned with extradition procedures (see comments under article 13, D, and article 16, C (a)), and, on the other, the authorities having criminal jurisdiction (see comments under article 9 of the Convention, A).

C. Fair trial and standards of evidence

103. Once it has been established that the Belgian courts have jurisdiction over an offence, Belgian law guarantees a fair trial for the accused person (see following comment) and does not permit any difference of treatment during the procedure, including in matters of evidence (preliminary section of the Code of Criminal Procedure, art. 14).

D. Measures to ensure the right to a fair trial at all stages of the proceedings

104. It is to be recalled that Belgium recognizes the primacy of international law over domestic law and the direct enforceability of a large part of the provisions contained in the international instruments for the protection of fundamental rights to which it is a party.

105. Belgium guarantees the right to a fair trial enshrined in articles 14 and 15 of the International Covenant on Civil and Political Rights, article 6 of the European Convention on Human Rights and articles 47 to 50 of the Charter of Fundamental Rights of the European Union, in all its aspects, whether expressly included in the wording of those provisions or established by case law.

106. Belgian law thus recognizes the equality of all before the law, the right of access to an independent, impartial tribunal, the public character of hearings, the presumption of innocence, respect for the rights of the defence, the principle of the legality of offences and penalties, the obligation to give reasons for decisions, the right of appeal in criminal matters and the principle of *non bis in idem*.

107. Rather than report on all the relevant provisions of domestic law, Belgium will stress one of the most recent related developments represented by the Act of 13 August 2011 amending the Code of Criminal Investigation and the Pretrial Detention Act of 20 July 1990 in order to grant rights to all persons on trial and all persons deprived of liberty,

³² M.B., 21 April 2011.

including the right to counsel and to legal assistance.³³ The provisions of this Act reflect the case law of the European Court of Human Rights, particularly in the case of *Salduz v. Turkey*.³⁴

E. Competent authorities to investigate and prosecute persons accused of enforced disappearance

108. Belgian law offers two separate mechanisms for investigation: information and judicial investigation.

109. The purpose of the information procedure is to identify offences, offenders and evidence. It may be undertaken both reactively — where a report or complaint has been made — and proactively. It is carried out under the supervision and authority of the Crown Prosecutor (Code of Criminal Investigation, arts. 8 and 28 bis; Policing Act of 5 of August 1992,³⁵ art. 15).

110. Judicial investigation is a procedure whose sole purpose is to identify those who have committed offences and to obtain evidence. It is carried out under the supervision and authority of an investigating judge who assumes responsibility for it (Code of Criminal Investigation, arts. 55 and 56). Forcible measures, such as searches, obligation to testify and pretrial detention, may be carried out only within the framework of a judicial investigation.

111. Judicial investigation may be a logical outcome or next stage in the information procedure. Prosecution through direct summons by the Public Prosecutor for offences and crimes triable on indictment may nevertheless be based on information alone if, in the light of the evidence gathered, judicial investigation does not appear necessary.

112. Public prosecution is the preserve of the Public Prosecution Service,³⁶ even when the accused person is a member of the military.³⁷ The only distinctive feature of this situation is that, if the judicial information procedure is closed, the file is transmitted to the commanding officer of the person concerned, who may then launch an internal investigation to be included in the person's disciplinary or assessment file.

Article 12

A. Process followed and mechanisms used by the relevant authorities to classify and establish the facts relating to an enforced disappearance

113. The ministerial circular of 20 February 2002 (revised on 20 April 2003) sets out in detail the measures to be taken by the police services contacted following a disappearance,

³³ M.B., 5 September 2011. See also circular No. 8/2011 of the College of Public Prosecutors attached to the Courts of Appeal (Circular concerning the organization of legal assistance commencing with the first hearing in Belgian criminal proceedings).

³⁴ European Court of Human Rights, decision *Salduz v. Turkey*, 27 November 2008.

³⁵ M.B., 22 December 1992.

³⁶ With regard more particularly to the public prosecution of serious violations of international humanitarian law, the Judicial Code assigns exclusive jurisdiction to the Federal Prosecutor's Office (art. 144 quater).

³⁷ Subject to the provisions of the Act of 10 April 2003 regulating the abolition of military courts in peacetime and of their maintenance in wartime, M.B., 1 January 2004. For a comment on this reform, see H.D. Bosly and Th. Moreau, "Les tribunaux militaires en Belgique", in E. Lambert Abdelgawad (dir.), *Juridictions militaires et tribunaux d'exception en mutation*, Paris, Editions des archives contemporaines, 2007, p. 33 et seq.

including reporting to the Disappeared Persons Unit (see below, F), and by the notified duty and on-call judges.³⁸

B. Mechanisms available to individuals who allege that a person has been subjected to enforced disappearance

114. Belgian law provides for the right to report an offence, lodge a complaint and bring criminal indemnification proceedings. Reporting an offence is not only a right (Code of Criminal Investigation, art. 63), but also, in some cases, a duty (Code of Criminal Investigation, arts. 29 and 615; Criminal Code, art. 156).

C. Access of any complainant to independent and impartial authorities, including information on any discriminatory barriers to the equal access of all persons before the law, and any rules or practices preventing harassment or re-traumatization of victims

115. In the performance of their duties, the police and judicial authorities are required to comply with the spirit of equality and non-discrimination guaranteed by the Constitution (arts. 10 and 11), as by other instruments of international law like the European Convention on Human Rights. Moreover, this is one of the fundamental values within the European Union. Accordingly, compliance with this standard may be monitored not only by national authorities but also by international courts such as the European Court of Human Rights.

116. This is also true of the principles of independence and impartiality. Where the courts are concerned, these are general principles of law, entrenched in article 151, paragraph 1, of the Constitution, and an essential component of the right to a fair hearing enshrined in article 14 of the International Covenant on Civil and Political Rights, article 6 of the European Convention on Human Rights and article 47 of the Charter of Fundamental Rights all the European Union. Where the Public Prosecution Service is concerned, they are entrenched in the aforementioned article of the Constitution and highlighted in the “Guide pour les magistrats: principes, valeurs et qualités”, published by the High Council of Justice in 2012.³⁹ Where the police are concerned, these principles are laid down in their Code of Ethics.⁴⁰

117. A person alleging a violation of the principles of impartiality, equality and non-discrimination in the treatment of his or her complaint may have recourse to Standing Committee P, the General Inspectorate of the Federal and Local Police or the High Council of Justice. For detailed information as to their responsibilities, reference is made to the comments under article 8 of the Convention, E. The person concerned may also seek assistance from the Centre for Equal Opportunity and Action to Combat Racism.

³⁸ Ministerial directive of 20 February 2002 concerning the search for disappeared persons, in Circular No. COL 9/2002 of the College of Public Prosecutors attached to the Appeals Courts, pp. 13 to 18, 23, 30 to 39, 54 to 65, 78 to 85, and 89 to 90.

³⁹ “Judges are required to discharge their judicial duties independently, without outside influence (...) Judges must also remain independent in the performance of their judicial duties, including with regard to their colleagues and pressure groups of every kind” (p. 1).

⁴⁰ Article 22 of the Code stipulates that “police officers shall avoid any act or attitude that would call into question the presumption of impartiality. They shall guard against any arbitrariness in their actions by ensuring, in particular, in their way of acting or by virtue of those towards whom their action is directed, that they do not impair the impartiality that citizens have the right to expect of them. In investigations, they shall show objectivity and shall gather evidence both for the prosecution and for the defence”. (Royal Order of 10 May 2006 on the Police Code of Ethics, M.B., 30 May 2006).

118. As for the care of victims, the comments under articles 15 and 24 of the Convention provide information about the measures taken to offer shelter and support. It should be emphasized here that, in each judicial district, there is a legal advice centre comprising a service whose function it is to help victims, if need be, to overcome the consequences of the offence; it may also extend psychosocial or practical assistance to them and provide them with necessary information.

D. Remedies available to the complainant when the competent authorities refuse to investigate his/her case

119. The Public Prosecution Service determines what action should be taken on a report or complaint:⁴¹ this will usually take the form of the laying of an information, unless the report or complaint appears unfounded from the outset, in which case it will be declared closed by a reasoned decision.

120. If, however, the complainant brings criminal indemnification proceedings before an investigating judge, the judge is required to investigate and report to the judges' council chamber. The investigating judge's jurisdiction is limited to the investigation procedure whereby the judge concerned prepares the decision of the judges' council chamber.

E. Mechanisms for the protection of the complainants, their representatives, witnesses and other persons participating in the investigation, prosecution and trial, against any kind of intimidation or ill-treatment

121. Generally speaking, intimidation and ill-treatment are criminal offences. A victim of intimidation or ill-treatment may therefore report that fact in accordance with the provisions referred to under B.

122. More particularly, it should be made clear that the Code of Criminal Investigation provides for a number of measures for the protection of persons involved in the investigation (arts. 75 bis, 86 bis, 102 et seq.).⁴² In addition, several provisions of criminal law and criminal procedure contribute to the prevention and penalization of action detrimental to the workings of justice, such as improper use of information during the investigation procedure (Criminal Code, art. 460 ter), violation of the secrecy of information or investigation (Code of Criminal Investigation, art. 28 quinquies and 57, paragraph 1), the destruction of documents in the public sector (Criminal Code, arts. 241 and 242), falsification of public documents (Criminal Code, arts. 194 to 197) or false testimony (Criminal Code, arts. 215 and 216).

F. Statistical data on the number of complaints of enforced disappearance submitted to the domestic authorities and information on any office within police forces, prosecutorial or other relevant offices specifically trained to start investigations on cases of enforced disappearance

123. There is no record of any complaint of enforced disappearance as defined in article 2 of the Convention.

⁴¹ For further information regarding the principle of the usefulness of prosecution, reference is made to the written replies of Belgium to the list of issues to be taken up in connection with the consideration of its second periodic report to the Committee against Torture, CAT/BEL/Q/2/Add.1, paras. 201 to 206.

⁴² The protection of victims under Belgian law is guided by article 8 of the framework decision of the Council of the European Union of 15 March 2001 on the standing of victims in criminal proceedings (Official Gazette, L 82, 22 March 2001).

124. In Belgium, there is no specialized office for enforced disappearances as defined in article 2 of the Convention. There is, however, a “Disappeared Persons Unit” within the Federal Police which provides support on request from the local police when a disappearance is deemed “worrying” (according to the case involved), particularly in terms of such criteria as: minors under the age of 13, mental or physical disability, vital need for medication, person who may be put in danger, unusual behaviour, abduction (not by a parent), dementia/Alzheimer’s, suicidal persons, etc.).⁴³ That being said, the causes of the disappearance are taken into account only to understand the context in which it occurred and help in searches, but the unit does not, strictly speaking, have a specific function in cases of possible enforced disappearance nor the capacity to start a specific investigation in that connection. Its purpose is to find the disappeared person and its work comes to an end when the person has been found.

125. The Disappeared Persons Unit notes that persons reported missing in Belgium are sometimes being held in prison (or in a police cell), either in Belgium or abroad. In the former case, this can be learned immediately from police information systems; in the latter case, transmission of information depends on cooperation with the State concerned.

G. Access of the competent authorities to places of detention

126. The Code of Criminal Investigation ensures that the authorities responsible for information and investigation have the means to carry out their work, including, as required by the Convention, unrestricted access to official places of detention (art. 611), as well as access to private places (arts. 28 septies, 36, 46 quinquies, 47, 87, 88 and 89 ter).

H. Measures provided by law to remove suspects from any posts where they would be in a position to influence the investigations or threaten persons involved in the investigations

127. Impartiality requires that the laying of an information or an investigation cannot be directed or carried out by a member of the police force, the Public Prosecution Service or an investigating judge who is himself or herself suspected of the offence in question.

128. As is explained in the comment under C above, impartiality is a well-established general principle of law whose non-observance may be sanctioned by national bodies, through criminal and disciplinary measures, and by international bodies.

129. In the case of the police, article 23 of the aforementioned Code of Ethics explicitly bars the involvement of police officers in cases in which they have a personal interest.

130. As for judges and public prosecutors, articles 828 and 832 of the Judicial Code provide for grounds for recusal in order to safeguard not only impartiality but also the appearance of impartiality. Article 831 of that Code requires that judges, in particular, who are concerned by a case should recuse themselves.

⁴³ Reference is made in this connection to the ministerial circular mentioned under A.

Article 13

A. National legislation which makes enforced disappearance an extraditable offence in all treaties with all States, extradition treaties that include enforced disappearance as an extraditable offence and possible obstacles in the implementation of those treaties

131. Enforced disappearance is not expressly provided for as an extraditable offence in the treaties in force. It is implicitly covered, however. A sentence threshold applies for multilateral extradition treaties, in particular the European Extradition Convention of 13 December 1957 of the Council of Europe, and more recent bilateral extradition conventions. Any offence punishable by a minimum sentence of 1 year's imprisonment or for which a sentence of a minimum term of 4 months' imprisonment has been handed down is in principle extraditable.⁴⁴

132. The earliest extradition treaties, dating from the late nineteenth and early twentieth centuries, containing an exhaustive list of extraditable offences. In so far as more recent offences, such as participation in a criminal organization, trafficking in human beings, money laundering, corruption and hence also enforced disappearance, are not included in these lists, they are as a matter of principle not extraditable.

133. An act of enforced disappearance may be extraditable if it is denoted under one or more existing offences. Evaluation of double criminality is an abstract exercise. It is enough for facts to be punishable under Belgian law and for them to meet a minimum level of criminality, irrespective of how they are denoted.

B. Examples of cooperation among States in which the Convention was used as a basis for extradition and cases where the State granted the extradition of a person alleged to have committed any of the offences referred to above

134. No example of extradition based on the Convention has been reported.

C. Political offence

135. Not applicable.

D. Authority that decides on a request for extradition and the criteria on which the decision is based

136. The authority competent to decide on a request for extradition is the Federal Public Justice Service.

137. The basic criteria for each extradition are as follows:

- The sentence threshold (see A above);
- Double criminality;
- The non-applicability of statutory limitation to public prosecution under Belgian law and under foreign law;
- The facts do not constitute a political or related offence;
- The human rights clause (art. 2 bis of the Extraditions Act of 15 March 1874, *Moniteur belge*, 17 March 1874, corresponding to articles 2, 3, 6 and 14 of the European Convention on Human Rights). In very exceptional circumstances, article

⁴⁴ Article 2 of the European Extradition Convention.

8 of the European Convention on Human Rights may also be an obstacle to extradition.

Article 14

A. Treaty or provision on mutual legal assistance applicable to enforced disappearance

138. Inter-State mutual legal assistance may be based on multilateral treaties⁴⁵ or bilateral treaties⁴⁶ or be an ad hoc arrangement. In the absence of a useful specific treaty, the Act of 9 December 2004 on international mutual legal assistance in criminal matters, amending article 90 ter of the Code of Criminal Investigation,⁴⁷ serves as a basis for the broadest possible mutual legal assistance, subject to reciprocity. States may agree to cooperate in a criminal case, including in a case of enforced disappearance.

B. Specific examples of such mutual assistance

139. To date, no application of this article has been reported for acts characterized as enforced disappearance.

Article 15

A. Any new agreement that the State party has entered into or amended in order to provide mutual assistance to victims of enforced disappearance and in the search for their whereabouts

140. No agreement has been concluded for the specific purpose of mutual assistance to victims of enforced disappearance in particular.

⁴⁵ European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959 and Additional Protocols (1978 and 2001).

⁴⁶ Convention of 12 June 1970 on extradition and mutual legal assistance in criminal matters between the Kingdom of Belgium and the People's Democratic Republic of Algeria; Treaty on mutual legal assistance in criminal matters between the Government of the Kingdom of Belgium and the Government of Canada of 11 January 1996; Convention on mutual legal assistance in criminal matters between the Government of the Kingdom of Belgium and the Government of Hong Kong, Special Administrative Region of the People's Republic of China, of 20 September 2004; Convention of 7 July 1997 between the Kingdom of Belgium and the Kingdom of Morocco on mutual legal assistance in criminal matters; Convention of 12 November 2005 between the Government of the Kingdom of Belgium and the Government of the Kingdom of Thailand on mutual legal assistance in criminal matters; Convention of 27 April 1989 between the Kingdom of Belgium and of the Republic of Tunisia on extradition and mutual legal assistance in criminal matters; Convention of 28 January 1988 between the Kingdom of Belgium and the United States of America on mutual legal assistance in criminal matters, supplemented and amended by the instrument referred to in article 3, paragraph 2, of the Agreement between the European Union and the United States of America on mutual legal assistance, signed on 25 June 2003 (concerning the implementation of the Convention between the Kingdom of Belgium and the United States of America on mutual legal assistance in criminal matters, signed on 28 January 1988); Convention on mutual legal assistance in criminal matters between the Kingdom of Belgium and the Republic of Korea of 17 January 2007. Most of the earliest bilateral extradition conventions (late nineteenth and early twentieth centuries) contain one or more provisions on mutual legal assistance. In view of the exhaustive list of extraditable offences, mutual legal assistance is also in principle limited to such offences (cf. A above).

⁴⁷ M.B., 24 December 2004.

141. Reference is made to the general comments on international cooperation in criminal matters under article 14 of the Convention and also to the relevant facts regarding all disappearances provided in the comment under article 24 of the Convention. The measures of support and assistance to victims described include appropriate international mutual assistance in cases of enforced disappearance through reporting, contacts during the investigation, reactions in cases where the missing person is located and cooperation with organizations assisting the families and friends of the missing person.⁴⁸ Information on disappearances is thus centralized and circulated in accordance with the wish expressed by the international community in article 15 of the Convention.⁴⁹

B. Cases in which this kind of cooperation has been granted and measures taken for that purpose

142. No example of cooperation regarding facts said to be related to an enforced disappearance has been reported.

Article 16

A. Domestic legislation with regard to such prohibition, including, in addition to enforced disappearance, the risk of other forms of serious harm to life and personal integrity

143. Before ratifying the Convention, Belgium was already bound by the principle of non-refoulement under the terms of the international instruments to which it is a party, namely: the Convention relating to the Status of Refugees of 28 July 1951 (art. 33), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (art. 3), the European Convention on Human Rights (art. 3), the Dublin Regulation (preamble paragraph 2), the Charter of Fundamental Rights of the European Union (arts. 18 and 19) and to the Treaty on the Functioning of the European Union (art. 78, para. 1).

144. The prohibition against transferring a person under Belgian jurisdiction to another State when there are substantial grounds for believing that that person will be exposed to a real risk of harm, particularly to life or physical integrity, applies in time of peace as in time of armed conflict, regardless of the legal basis, the form (extradition, refoulement, transfer, etc.) and the modes of transfer.⁵⁰ This is an international standard which takes precedence over domestic law and whose direct applicability is not open to doubt.

⁴⁸ Ministerial director of 20 February 2002 concerning the search for missing persons in Circular No. COL 9/2002 of the College of Public Prosecutors attached to the Courts of Appeal, pp. 60 to 65 and 127 to 129.

⁴⁹ The *travaux préparatoires* of the Convention show that article 15 of the Convention was drafted with that end in view and inspired by the functioning of the Central Information Agency regulated by articles 136 to 141 of the Fourth Geneva Convention of 1949 and articles 32, 33 and 34 of the Protocol Additional to the Geneva Conventions (Protocol I) of 1977 (O. de Frouville, "La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées: Les enjeux juridiques d'une négociation exemplaire", *Droits fondamentaux No. 6*, January 2007 (available at: www.droits-fondamentaux.org/spip.php?article119, p. 60).

⁵⁰ Indeed, the Extradition Act of 15 March 1874 expressly includes this prohibition in article 2 bis. Similarly, the Aliens Office will implement an expulsion measure only if the expulsion does not violate the rights enshrined in the Convention relating to the Status of Refugees, amended by the Protocol of 31 January 1967, the Convention relating to the Status of Stateless Persons, treaties on extradition and transit, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading

B. Possible impact of legislation and practices concerning terrorism, emergency situations, national security or other grounds that the State may have adopted

145. Not applicable.

C. Authority that determines the extradition, expulsion, removal or refoulement of a person, criteria applied and procedure followed**(a) Extraditions**

146. Extraditions are always preceded by a request for extradition. Before a decision is taken concerning extradition (in the form of a ministerial order), the accused or convicted person is heard prior to it being decided whether or not to seek an opinion before the indictment division. The central authority responsible for international cooperation in criminal matters then reviews the file (in the light of the various criteria mentioned in the comment under article 13 of the Convention) before the Minister of Justice finally decides whether or not to grant the extradition.⁵¹

(b) Removals

147. After considering the facts presented by the alien and the foreseeable consequences of his or her expulsion to the receiving country, and having regard to the general situation in that country and circumstances relevant to the case of the person concerned, the Minister or the Minister's delegate may decide to remove the alien. It is always checked that the alien does not run the risk of being transferred by the country responsible for the asylum application under the Dublin Regulation to a country where his or her life and physical integrity are threatened. Moreover, when he or she has the necessary papers to enter and stay in the third country, the asylum seeker has a choice of border.

148. The Minister or the Minister's delegate takes into account the opinion of the competent authorities, such as the General Commissariat for Refugees and Stateless Persons, when the alien is seeking asylum, and the judicial authorities both when deciding to take a decision on removal and when deciding to implement the removal.

149. The Aliens Litigation Council considers allegations of violation of fundamental rights, including in an emergency.⁵² When examining damage that would not readily be repaired in the event of expulsion, the Aliens Mitigation Council checks the likelihood and accuracy of such claims. The damage no longer has to be individualized but can apply to a category of persons. Consequently, in each case there will now be a preliminary examination of the risks and reasons invoked by the alien, a shared burden of proof and due

Treatment or Punishment, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987, European Community law, including the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders and the Convention of 19 June 1990 implementing the Schengen Agreement, international conventions an asylum, in particular Council Regulation (CE) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, and international conventions and agreements on the readmission of foreign nationals.

⁵¹ For further details, see the comments of Belgium in its third report to the Committee against Torture (CAT/C/BEL/3), received on 25 July 2012, paragraphs 59 and 60.

⁵² Concerning the suspensory effect of an emergency appeal against removal, see the comments of Belgium in its reports to the Committee against Torture: CAT/C/BEL/3, paragraph 135, CAT/C/BEL/CO/2, paragraph 9, and CAT/C/BEL/Q/2/Add. 1, questions 5 and 12.

regard for the special vulnerability of aliens. Moreover, procedural safeguards must be observed.

D. Training received by officers dealing with the expulsion, return or extradition of foreigners

150. See comments under article 23 of the Convention.

Article 17

A. Fundamental right to individual liberty, exceptions allowed and safeguards against secret detention

151. Under Belgian law, there is no prohibition against secret or unofficial detention, but there is a right to liberty and safety for all persons under Belgian jurisdiction or in Belgian territory. This norm is enshrined in various international instruments for the protection of fundamental rights ratified by Belgium and in article 12 of the Constitution. Exceptions to individual liberty are allowed only where provided by law. Moreover, by precisely determining the conditions and the ways in which deprivation of liberty is allowed and by penalizing any violation of those provisions, Belgian law ensures that deprivation of liberty is an official and visible measure.

152. The legal forms of deprivation of liberty in Belgian territory are as follows; administrative arrest, provisional arrest of an individual caught in flagrante delicto in order to bring him or her before a competent judge, pretrial detention, judicial detention after conviction, detention for medical reasons by judicial decision, administrative detention of undocumented aliens and placement of young people in closed facilities.

153. In all cases, Belgian law guards against secret detention by requiring that all persons deprived of liberty are held in officially recognized, regulated and supervised places.⁵³

154. Furthermore, article 159 of the Criminal Code engages the criminal responsibility of public officials who have held or caused to be held a person outside places determined by the Government or by public authority. The Code of Criminal Investigation requires all persons having knowledge of such a situation to report it (art. 615).

155. The information requested by the Committee will be provided below concerning each of the aforementioned forms of deprivation of liberty. Particulars will also be given concerning situations in which the Belgian authorities are empowered to detain persons outside the national territory.

B. Administrative arrest, judicial arrest, pretrial detention and judicial detention

(a) Competent authorities and conditions

156. Administrative arrest is an administrative measure for the maintenance of public order, security and peace. It is based on article 133 of the new Municipal Act of 24 June

⁵³ Code of Criminal Investigation, art. 603 et seq., 615 and 616; Royal Order of 14 September 2007 on minimum standards for the establishment and use by the police of places of detention, M.B., 16 October 2007; Code of Criminal Investigation, art. 603 et seq.; Royal Order of 21 May 1965 on the general regulation of penitentiary institutions, M.B., 25 May 1965, art. 7, 132 and 138 quater; art. 14 of the Act of 1 July 1964 on social protection in regard to abnormal persons and habitual offenders, M.B., 17 July 1964. Where young people are concerned, see for example article 18, paragraph 1, of the Decree of the French Community of 4 March 1991 on assistance to young people.

1988⁵⁴ and is regulated by articles 31 to 33 of the aforementioned Policing Act. This Act sets out for the guidance of the authorities the conditions and procedures for such an arrest. Every person subject to administrative arrest receives: (i) an individual statement of his or her rights, usually in oral form, informing him or her of the reasons for deprivation of liberty, the maximum duration thereof, the material procedure for confinement to a cell and the possibility of the use of force in the event of non-cooperation; and (ii) a more general statement of rights in written form, which is currently available in 50 languages and dialects.

157. Persons subject to judicial arrest can thereby be placed at the disposal of the judicial authority. Such an arrest must be motivated by serious grounds for believing a person to be guilty of a crime or an offence.

158. Arrest in cases of flagrante delicto by the Crown Prosecutor is based on article 40 of the Code of Criminal Investigation. Such an arrest by any person vested with public authority or any individual is authorized by article 1 of the aforementioned Pretrial Detention Act.

159. Under article 2 of that Act, apart from cases of flagrante delicto regulated by article 1, the decision to arrest a person must be taken by the Crown Prosecutor, without prejudice to the interim protection measures to be taken by members of the police to prevent the arrested person from escaping.

160. All persons subject to judicial arrest receive a written statement of their rights, which is currently available in 49 languages and dialects.⁵⁵

161. Pretrial detention is based on an order of arrest issued at the discretion of the investigating judge in compliance with the substantive and formal conditions established by the Pretrial Detention Act.

162. Judicial detention is the only measure that serves a punitive purpose; it therefore follows the conviction. Its conditions are mainly governed by the aforementioned Principles Act.

(b) Registers

163. In accordance with the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and Committee P, it is already a requirement of Belgian law that any deprivation of liberty must be recorded in official registers (Policing Act, 33 bis; Code of Criminal Investigation, arts. 607 to 610).

164. Where the police are concerned, the degree of detail required by Belgian law in the matter of registers of persons deprived of liberty is greater than that laid down by the Convention in paragraph 3 of article 17.⁵⁶ The register must record the chronological sequence of the deprivation of liberty and contain all information relevant to the application of this measure. Pending the adoption of the Royal Order to establish the exact content of registers, conditions of use and data protection measures, steps have nevertheless been

⁵⁴ M.B., 3 September 1988.

⁵⁵ See site of the Federal Public Justice Service at: http://justice.belgium.fr/themes_et_dossiers/services_du_spf/telecharger_des_documents/declaration_de_droits/2/.

⁵⁶ For further information, see the information provided by Belgium to the Committee against Torture: CAT/C/BEL/2/Add.1, paras, 213 to 215.

taken to ensure conformity of practice on the part of police units.⁵⁷ The General Directorate of the Federal Administrative Police has thus provided all local and federal police services with a detailed model register, listing in particular all the information stipulated in article 17, paragraph 3, of the Convention. The instructions given to the police services emphasize the importance of properly, systematically and conscientiously maintaining the registers, irrespective of whether the deprivation of liberty results from an administrative arrest or a judicial arrest. They also require that information be provided as to the personnel concerned and that senior officers in each unit regularly check that registers are being maintained.

165. Where prisons are concerned, Belgian prison regulations stipulate that a prison file must be established for each detainee, containing all official documents relating to the detainee. The judicial authorities may ask to have access to it in accordance with the procedure prescribed by law. The medical data of the detainee are not included in the register; they are recorded in the personal medical record of the detainee, which is governed by the Act of 22 August 2002 on the rights of patients⁵⁸ and by prison regulations.

(c) Outside contacts

166. The aforementioned Pretrial Detention Act and Principles Act ensure that detainees have the right to maintain outside contacts. All detainees (convicted, awaiting trial, under temporary detention) have the right to have contacts with the outside world within limits set by or in accordance with the law. They may thus correspond by mail with people outside, use the telephone, have contacts with their counsel and, in the case of aliens, with their diplomatic and consular authorities, and receive visits from their families and other persons having a legitimate interest in them (Pretrial Detention Act, art. 20; Principles Act, arts. 53 to 70; Royal Order of 8 April 2012 setting the date of entry into force and implementation of various provisions of Titles III and V of the Act of 12 January 2005 on the principles of prison administration and the legal status of detainees,⁵⁹ arts. 12 to 29).

(d) Remedies

167. The judges' council chamber reviews the legality, lawfulness and necessity of pretrial detention on the first appearance of the detainee. Subsequently, it does no more than reassess the need for it (arts. 21 and 22 of the aforementioned Pretrial Detention Act). The decisions of the judges' council chamber are susceptible of appeal before the indictment division (arts. 30 and 31 of the same Act). As for the sentence of deprivation of liberty handed down by a court of first instance, it is susceptible of appeal in accordance, as the case may be, with articles 199 et seq. or article 355 of the Code of Criminal Investigation.

168. As regards the remedies available to other persons, it is to be noted that any individual who suspects that a person has been unlawfully deprived of liberty, and hence that an offence has been committed, may (and in certain cases must) report it, lodge a complaint and, if he or she has sustained injury because of that offence, bring criminal indemnification proceedings, as explained in the comment under article 12 of the Convention, B.

⁵⁷ For further information, see the information provided by Belgium to the Committee against Torture: CAT/C/BEL/3, received on 25 July 2012, paras. 111 and 112.

⁵⁸ M.B., 26 September 2002.

⁵⁹ M.B., 21 April 2011.

(e) Supervisory authorities

169. Places of detention may be inspected by various authorities authorized by law, as follows: visits by the Committee for the Prevention of Torture to places of detention, visits by Committee P, checks and investigations by the internal police supervisory services and by the General Inspectorate of the Police, visits by the investigating judge and the burgomaster (Code of Criminal Investigation, arts. 610 to 612), members of the Chamber of Representatives and the Senate, prosecutors, members of the Central Council for the Supervision of Prisons, members of the Facility Supervision Commission, members of the Prison Administration, etc. (Royal Decree of 21 May 1965 on the general regulation of prison facilities,⁶⁰ arts. 6 to 8 and 128 et seq.). These inspections have a preventive function (and to have a dissuasive effect upon the arbitrary deprivation of liberty) and may also lead to punishment if due cause is found.

170. Moreover, on the occasion of its initial universal periodic review in May 2011, Belgium undertook to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment and to set up a national human rights institution in accordance with the Paris Principles.

(f) Complaints

171. Upon the entry into force of articles 23, 27 and 147 to 166 of the aforementioned Principles Act, decisions on conditions of detention will be susceptible, at first instance, of complaint to the Director-General of Prison Administration or of recourse to the Complaints Commission established within a Supervisory Commission and, on appeal, of recourse to a Commission of Appeal established within the Central Council. In the meantime, such decisions may be susceptible of recourse to the Council of State and the ordinary courts.⁶¹

C. Detention on medical grounds by judicial decision**(a) Competent authorities and conditions**

172. The Act of 1 July 1964 on social protection in regard to abnormal persons and habitual offenders⁶² stipulates that: (i) accused persons who may by law be placed under pretrial detention or against whom an order of arrest has already been issued may be kept under the observation of investigating judges where there are reasons for believing that they are in a state of dementia, serious mental disorder or mental retardation causing them to have no control over their actions (arts. 1 to 6); and (ii) accused persons in the aforementioned state may be interned by investigating judges and trial courts (arts. 7 to 10).⁶³

⁶⁰ M.B., 25 May 1965.

⁶¹ This question has already been addressed in the written replies of the Government of Belgium to the list of issues (CCPR/C/BEL/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Belgium (CCPR/C/BEL/5), CCPR/C/BEL/Q/5/Add.1, reply to paragraph 14 in the list of issues, paras. 117 et seq.

⁶² M.B., 17 July 1964.

⁶³ The Act of 21 April 2007 on the internment of persons suffering from a mental disorder (M.B., 13 July 2007), due to enter into force on 1 January 2015, will partially abrogate the Social Protection Act mentioned here.

(b) Registers, outside contacts and complaints

173. The rules applicable to persons interned in prison facilities are the same as those applicable to other detainees (see above, B, b, c and f).

(c) Remedies

174. Remedies are available against decisions to place under observation or intern and against decisions rejecting an application for release (arts. 4, 8, 19 bis and 19 ter of the aforementioned Social Protection Act).

(d) Supervisory authorities

175. For internment facilities under the authority of the Minister of Justice (prison, social protection facility, social protection section), the supervisory authorities are the same as for prisons. In addition, there are social protection commissions to which members of the Public Prosecution Service are assigned.

176. For other places of detention, the Committee for the Prevention of Torture and the social protection commissions have effective competence.

D. Administrative detention of unlawful aliens**(a) Competent authorities and conditions**

177. Foreign citizens are no longer placed in the transit zones of airports.

178. If, at a border, a foreigner does not meet the requirements for admission to and sojourn in Belgian territory, as laid down in article 3 of the Act of 15 December 1980 on admission to the territory, sojourn, settlement and removal of aliens,⁶⁴ he or she will be subject to *refoulement*. The decision to this effect must be reasoned. It will be immediately put into effect if a flight is available⁶⁵ unless the alien lodges an appeal against that decision before the Aliens Litigation Council and an appeal before the judges' council chamber — which may order his or her release — against the decision to hold him or her with a view to expulsion.

179. Upon notification of the decision taken by the judicial authorities to release the foreign citizen, he or she is released. This does not mean, however, that he or she is legally entitled to stay in the country. If, after a review of the specific situation of the person concerned, that person is found to fall short of the requirements for admission and sojourn, he or she may, under article 7 of the aforementioned Act, be ordered to leave the territory within 30 days or less according to the circumstances (according to whether, for instance, the person's presence in Belgian territory represents a threat to public order or if there is a risk that the person will abscond).

180. The alien will then have the possibility of returning to his or her country of origin by his or her own means or with the help of a non-governmental organization, like for example the International Organization for Migration, which offers voluntary return programmes.⁶⁶

⁶⁴ M.B., 31 December 1980.

⁶⁵ If there is no flight directly available, the person concerned will be placed in a transit centre until such time as a flight is available.

⁶⁶ The Belgian State gives its support to the voluntary return programmes offered by the Red Cross and the International Organization for Migration. The circular of 17 November 2006 relating to this cooperation was approved by the Ministers of the Interior and Social Integration.

181. When the person concerned does not voluntarily comply with the order to leave the territory and is intercepted in Belgian territory after the deadline laid down in the order to leave the territory, the decision may be taken to detain the person with a view to expulsion. He or she may then be held in a closed facility or placed under house arrest for the time strictly necessary for implementation of the expulsion measure. The person concerned may then lodge an appeal with the Aliens Litigation Council.

182. When unlawful aliens or unsuccessful asylum-seekers do not leave the territory on their own initiative, they may be held in a closed facility with a view to expulsion. The maximum period of detention is defined by law in article 7 of the relevant Act. Aliens may be detained for up to two months renewable for further periods of two months if:

- The procedures for expulsion have been initiated within seven working days from the day that the third-country citizen was placed under detention;
- They are pursued with due diligence; and
- There still remains a possibility of effectively expelling the alien within a reasonable period of time.

183. After a 2-month extension, the Minister may decide to extend the detention by a further month. After 5 months' detention, the third-country national must be released. Where so required by considerations of public order or national security, the period of the alien's detention may be further extended by the Minister for 1 month. The total period of detention can never exceed 8 months. The average period of detention in a closed facility in Belgium with a view to expulsion is 30 days.

184. Conditions of detention are as follows:

(i) Where the third-country national is held in a closed facility, the applicable provisions are those of the Royal Order of 2 August 2002 establishing the regime and operating rules applicable to places located in Belgian territory, managed by the Aliens Office, where an alien is held, remains at the disposal of the Government or is confined, pursuant to the provisions referred to in article 74/8, paragraph 1, of the aforementioned Act of 15 December 1980;⁶⁷

(ii) Where the third-country national accompanied by a minor child is held in an accommodation facility (specialized closed facility), the applicable provisions are those of the Royal Order of 14 May 2009 establishing the regime and operating rules applicable to accommodation facilities within the meaning of article 74/8, paragraph 1, of the aforementioned Act of 15 December 1980.⁶⁸ The accommodation facility is regarded as equivalent to a border facility within the meaning of article 74/8, paragraph 2, of the aforementioned Act, in order to guarantee the application of the Chicago Convention of 7 December 1944 (refoulement), where families do not meet the conditions for entry. These accommodation facilities enable families to benefit from infrastructure suited to their needs. Children can live there with their parents or persons exercising parental authority over them, together with minors forming part of the family and relatives to the second degree, without having to share the accommodation with other families or adults.

185. In conclusion, a deprivation of liberty measure can be taken against aliens in pursuance of articles 7, 8 bis, paragraphs 4, 25, 27, 29, paragraphs 2, 51/5, paragraph 1 (2)

⁶⁷ M.B., 12 September 2002.

⁶⁸ M.B., 27 May 2009.

and paragraphs 3 (4), 52 bis, paragraphs 4, 54, 57/32, paragraphs 2 (2), and 74/6 or article 74/5 of the aforementioned Act.

186. Detention is not a systematic practice, however. Recourse is had to it as a last resort except in cases where the person concerned may represent a danger to public order or national security or does not meet the conditions for entry laid down in articles 2 and 3 of the aforementioned Act. Apart from such cases, a decision to place an alien under detention with a view to expulsion is taken only in cases where the person concerned fails to cooperate. Furthermore, articles 7, 8 bis, paragraph 4, 27, paragraph 3, and 74/9, paragraph 3, of the aforementioned Act of 15 December 1980 stipulate that only in cases where less coercive methods have been unsuccessful is an alien who has been ordered to leave the territory placed under detention with a view to expulsion. Article 74/14 of that Act stipulates that the expulsion decision sets a time limit of 30 days to leave the territory.

(b) Registers

187. As required by the aforementioned Royal Order of 2 August 2002, each closed facility keeps a register that records changes in the situation of the detained aliens (date of the detention decision, visits, appeals, date of expulsion or release, etc.). In addition, the medical service of each closed facility keeps medical records on detained aliens. Lastly, all aliens whose presence in Belgian territory is known to the Aliens Office are assigned a national number which is used to record changes in their situation.

(c) Outside contacts

188. Aliens under detention have access, in particular, to consular,⁶⁹ legal⁷⁰ and medical assistance.⁷¹

⁶⁹ Aliens have a right to free telephone calls to their diplomatic or consular authorities using the telephone placed at their disposal. They also have the right to receive daily visits from the diplomatic or consular representatives of their States of nationality, carried out in pursuance of their consular functions of assisting their nationals, issuing passports and appropriate documents for them to return to their country of origin or communicating with them, in accordance with article 5 (d) and (e) and article 36 of the Vienna Convention on Consular Relations of 24 April 1963.

⁷⁰ Upon their arrival in a closed facility, inmates receive information sheets on legal assistance and on the possible appointment of free counsel for persons without financial resources. This information is available in a large number of languages and on audio DVD. This is done so that a lawyer can inform residents of a closed facility of their situation and of existing legal procedures and assist and/or represent them in initiating them. Aliens have access to first-line and second-line legal assistance, as covered by articles 508/1 to 508/23 of the Judicial Code. The right to legal assistance is clearly established, as is the existence of flexible arrangements for lawyers to have access to the facilities and contact their clients. The staff of the facility ensure that inmates are able to call on the legal aid office. The practical organization of legal assistance is under the responsibility the director of the facility, in consultation with local bar associations. Aliens may also be assisted by counsel of their choosing, but in such cases they must bear the expenses.

The aforementioned Royal Order provides for the widest possible opportunities for contacts between inmates and their counsel.

⁷¹ As regards medical care, all persons held in closed facilities are seen by a doctor at least at the beginning and at the end of their detention. Medical assistance in closed facilities is provided for under articles 52 to 61 of the aforementioned Royal Order. In addition, emergency care can be provided at any moment during their stay in a closed facility, pursuant to article 53 of that same Royal Order.

The medical service of the closed facility makes a report if aliens sustain injury in attempting to escape or on account of their aggressive behaviour. The doctor of the facility makes a report

189. These are not the only contacts that they may have with the outside world. They are also ensured of the right to privacy and to family life.⁷²

(d) Remedies

190. Articles 71 to 74 of the aforementioned Act of 15 December 1980 determine the remedies that may be sought from the judiciary by aliens subject to deprivation of liberty measures and that are naturally applicable to third-country nationals as covered by those provisions.

191. During the first four months of detention, third-country nationals may lodge an appeal against such measures by petitioning the judges' council chamber of the criminal court of their place of residence in the Kingdom or of the place where they were found.

192. Where the period of detention is extended for a second time, the Minister must within five working days of the extension make an application to the judges' council chamber of the place of residence of the alien in the Kingdom or the place where he or she was found in order for it to decide on the lawfulness of the extension. In the absence of such application to the judges' council chamber within the set time limit, the alien's liberty must be restored.

(e) Supervisory authorities

193. Other parties have access to the closed facilities and may, where appropriate, make recommendations: see article 42 of the aforementioned Royal Order of 2 August 2002 for members of the Chamber of Representatives and the Senate, article 43 of the same Order for the provincial governor and the burgomaster of the place where the facility is located, article 44 of the same Order for representatives of the Office of the United Nations High Commissioner for Refugees, the European Commission of Human Rights, the Committee for the Prevention of Torture, the Centre for Equal Opportunity and Action to Combat Racism, the Aliens Mitigation Council, the General Commissariat for Refugees and Stateless Persons and the United Nations Committee against Torture, as well as for the Delegate-General for Children's Rights and the Kinderrechten-commissaris. The Minister or the Director-General may also grant the right to visit one or more closed facilities and other institutions for so long and under such conditions as he/she may determine (art. 45). Currently, 25 non-governmental organizations enjoy this right. They thereby exercise indirect supervision. Lastly, under article 11, paragraph 2, of the Act of 22 March 1995 establishing federal mediators,⁷³ the Federal Mediator may, in the performance of his/her duties, make on-site inspections (including in detention centres) and hear all persons concerned.

194. Generally speaking, visits by third parties and organizations is authorized where there is evidence of legitimate interest, provided that there is no ground for believing that the visit may endanger the security and proper conduct of the facility or that the moral integrity of the alien may be at risk. It is explicitly stipulated that the inmate may refuse any

whenever anyone sustains an injury in the facility and/or after each unsuccessful attempt at repatriation, in accordance with article 61/1 of that same Royal Order.

Furthermore, article 61 thereof provides for the possibility of suspending execution of the expulsion measure or liberty deprivation measure in cases of medical objections.

⁷² Family visits are organized in compliance with the provisions of articles 8 and 9 of the European Convention on Human Rights. Aliens may receive private visits if they so desire, the only restriction being that non-family visits are subject to the authorization of the Aliens Office. On the occasion of visits, the identity of visitors is noted in the register.

⁷³ M.B., 7 April 1995.

visit. However, he or she cannot refuse a visit from the diplomatic and consular representative carried out in accordance with an administrative procedure.

(f) Complaints

195. Upon their arrival at the facility, inmates are informed of the possibility of lodging a complaint regarding the way in which it is run, the independent body responsible for dealing with such complaints and the procedure to be followed (information sheet in several languages and by way of the social service). In addition, inmates are regularly questioned about the information provided and its comprehensibility.

196. Aliens may lodge a complaint with the Complaints Commission regarding the running of the facility where they have been placed, as provided for by the Ministerial Order of 23 January 2009 concerning the rules of procedure and operation of the Commission and the permanent Secretariat.⁷⁴ They may also lodge a complaint with the authorities against the police services responsible for their removal and subsequently, if need be, with the European Court of Human Rights.

E. Placement of young people in closed facilities by judicial decision

197. The legal framework for the placement of young people in closed facilities is formed by a large number of instruments pertaining partly to federal and partly to community legislation.⁷⁵

⁷⁴ M.B., 27 January 2009.

⁷⁵ The International Convention on the Rights of the Child of 20 November 1989, ratified by Belgium on 16 December 1991; the Act of 18 April 1965 on youth protection, the care of juvenile offenders and reparation of the resulting damage (M.B., 15 April 1965; the Decree of the French Community of 4 March 1991 on assistance to the young (M.B., 19 June 1991); the Order of the Executive Branch of the French Community of 10 May 1991 setting up the French Community's group of open and closed public institutions for youth protection (M.B., 25 September 1991); the Order of the Government of the French Community of 18 May 1993 setting the conditions under which compulsory schooling may be ensured in the French Community's group of open and closed public institutions for youth protection (M.B., 1 September 1993); the Order of the Government of the French Community of 12 July 1996 establishing the membership of the multidisciplinary team of open and closed public institutions for youth protection and laying down the section headings of the medical and psychological report and social study required for young people entrusted to the group of such institutions (M.B., 14 December 1996); the Order of the Government of the French Community of 21 March 1997 regulating isolation procedures in public institutions for youth protection, establishing mechanisms to monitor those procedures and setting standards applicable to isolation quarters (M.B., 17 July 1997); the Order of the Government of the French Community of 15 May 1997 establishing the code of ethics for assistance to the young (M.B., 15 October 1997) the Order of the Governments of the French Community of 25 May 1999 establishing the general regulations of the group of public institutions for youth protection (M.B., 22 October 1999); the Order of the Government of the French Community of 14 May 2009 on public institutions for youth protection (M.B., 8 October 2009); the Act of 1 March 2002 on the temporary placement of juvenile offenders (M.B., 1 March 2002); the Royal Order of 22 April 2010 establishing in Saint-Hubert the federal closed facility for juvenile offenders (M.B., 29 April 2010); the memorandum of understanding of 30 April 2010 between the federal State, the German-Speaking Community and the French Community concerning the education sections of the Saint-Hubert federal closed facility designated for the placement of juvenile offenders (M.B., 3 June 2010); the Decree of the Flemish Community of 7 May 2004 on the standing of minors benefiting from comprehensive assistance to the young (M.B., 10 October 2004); and to the Decree of the German-Speaking Community of 19 May 2008 on assistance to the young and for the implementation of youth protection measures (M.B., 1 October 2008).

(a) Competent authorities and conditions

198. Minors are referred to the Public Prosecution Service when their educational situation so requires or when they have committed an offence. The Public Prosecution Service may decide to refer to them to the juvenile court. Under the terms of articles 37, paragraphs 1 and 2, of the Decree of the Flemish Community of 7 March 2008 on special assistance to the young and articles 37, paragraph 1 (1) to (6), of the Act of 8 April 1965 on youth protection, the care of juvenile offenders and reparation of the resulting damage, the juvenile court determines whether it is appropriate for the young person concerned to be placed in a community institution.

199. Minors have the right to be assisted by counsel each time they appear before the juvenile magistrate. They also have the right to be heard before the juvenile magistrate takes a decision and each time that a new decision is taken.

200. In each juvenile placement decision, the juvenile magistrate must specify how long the placement is to last. The magistrate does so either in the court order (temporary measure) or in the judgment (final measure).

201. Article 38 of the aforementioned Decree of the Flemish Community of 7 March 2008, article 16, paragraph 2, and 18, paragraph 1, of the Decree of the French Community of 4 March 1991 on assistance to the young, article 17, paragraph 1 (14) of the Decree of the German-speaking Community of 19 May 2008 on assistance to the young and for the implementation of youth protection measures stipulate that a minor can be placed in a closed facility only in pursuance of a court decision; under the aforementioned Youth Protection Act of 8 April 1965, the court in question is the juvenile court (art. 36).

202. Similarly, article 13 of the Decree of the Flemish Community of 7 May 2004 on the standing of minors benefiting from comprehensive assistance to the young stipulates that, unless otherwise required by a judicial decision, minors cannot be separated from their parents against their will.

(b) Registers

203. Information concerning minors under placement orders is stored primarily in the population records held in each public institution for youth protection and in the information, guidance and coordination unit attached to the General Directorate for Assistance to the Young.

204. Access thereto is regulated by article 17, paragraphs 2 and 3, of the aforementioned Decree of the French Community of 4 March 1991 and by articles 5, 6, 7 and 38 of the aforementioned Decree of the Flemish Community of 7 March 2008.

205. Article 7, paragraph 1, of the Code of Ethics for Assistance to the Young stipulates that, unless otherwise provided in its article 12, no personal, medical, family, educational, occupational, social, economic, ethnic, religious or philosophical information concerning a recipient of assistance may be disclosed. It may be transmitted only to persons bound by professional secrecy provided that such communication is made necessary for the purposes of the assistance offered, and provided that the recipient of the assistance and, where appropriate, his or her legal representatives are duly informed beforehand.

(e) Outside contacts

206. Article 12, paragraph 1 (1), of the aforementioned Decree of the French Community of 4 March 1991 and article 39 of the aforementioned Decree of the Flemish Community of 7 March 2008 stipulate that any minor subject to placement under a measure taken by a placement authority has the right to communicate with any person of his or her choosing;

any minor placed in a public institution for youth protection by virtue of a judicial decision is notified upon being taken into care of his or her right to communicate with counsel.

207. Article 14 of the aforementioned Decree of the Flemish Community of 7 May 2004 stipulates that, if the youth assistance services separate a minor from his or her parent or guardian, the minor has the right to inform and to be in regular, direct personal contact with that person, unless it is contrary to the minor's interest or to a judicial decision.

(d) Remedies

208. Article 58 of the aforementioned Act of 8 April 1965 stipulates that the decisions of the juvenile court are subject to appeal and challenge. A minor may lodge an appeal against any decision of the juvenile magistrate and against a court order or judgment, but also, for example, against a ban on visits to a parent or guardian.

(e) Supervisory authorities

209. Institutions of the Flemish Community may be inspected by the agency Zorginspectie (care inspectorate) on request (of the Minister), as was the case in spring 2012, by the adviser of the social service of the office of legal assistance for minors, at regular intervals, by the competent magistrate or social service or by the Commissariat for Children's Rights at the request of the young person concerned.⁷⁶ In addition, an internally autonomous agency (AAI; like the Jongerenwelzijn agency) has responsibility for internally monitoring its business processes and its activities, also in community institutions. It is required to review, in particular, the effective and efficient operation of services. The internal oversight service of the Flemish Community is responsible for monitoring the internal monitoring systems of the AAIs.⁷⁷

210. The institutions of the French Community are regularly visited by the adviser or director of the youth assistance office.⁷⁸

211. All community institutions may also be monitored by the European Committee for the Prevention of Torture. Such was the case in 2001, when the public institution for youth protection in Braine-le-Château was visited, and in 2005, when the De Grubbe farm centre for the temporary placement of minors in Everberg was visited.

(f) Complaints

212. In the Flemish Community, each minor placed in a community institution or in a closed facility (Everberg) has the right to complain about the content and procedures of youth assistance and about living conditions under the youth assistance scheme. He or she also may complain about non-observance of the rights listed in the Decree on the standing of minors benefiting from comprehensive youth assistance.

213. Complaints are handled in accordance with the provisions applicable to community institutions. Where such institutions are concerned, the applicable instruments are the

⁷⁶ Order of the Flemish Government of 26 March 2004 establishing the internally autonomous agency Zorninspectie (M.B., 6 May 2004); article 46 of the Decree of the Flemish Community of 7 March 2008 on special assistance for young people (M.B., 15 April 2008); article 37, paragraph 2 (1.8) and 74 of the aforementioned Youth Protection Act of 8 April 1965 and the Decree of the Flemish Community of 15 July 1997 establishing a Commissariat for Children's Rights and creating the position of Commissioner for Children's Rights (M.B., 7 October 1997).

⁷⁷ Framework Decree of the Flemish Community of 18 July 2003 on administrative policy (M.B., 22 August 2003).

⁷⁸ Article 13 of the aforementioned Decree of the French Community of 4 March 1991.

Decree of 1 June 2001 granting a right of complaint against public administrations and circular VR 2005/20, “betreffende de leidraad voor de organisatie van het klachtenmanagement, ter uitvoering van het decreet van 1 juni 2001 houdende toekenning van een klachtrecht ten aanzien van de bestuursinstellingen”. The Jongerenwelzijn agency has transposed the decree and the related circular in the form of its own internal complaints procedure. This is the applicable procedure for complaints about these services proposed by the various bodies, including community institutions. A hotline, JO-lijn, has been set up for the Jongerenwelzijn agency. This hotline service deals with complaints from minors or their parents, particularly in respect of services within community institutions. During the processing of each complaint concerning the Jongerenwelzijn agency, and hence also complaints about the JO-lijn itself, complainants are informed that they may, if they so desire, have recourse to the Flemish Mediator (cf. the requirement under article 11 of the Decree granting a right of complaint against public administrations). The Mediator can conduct an independent investigation into the response of the JO-lijn service of the Jongerenwelzijn agency in the case of a specific complaint.

214. In the French Community, minors may have recourse, in matters concerning their placement conditions, to their section officer and to the chief of the educational team, to the director of the public institution for youth protection or his or her representative (the education officer), to the General Directorate for Youth Assistance, to the Delegate-General for Children’s Rights, to their counsel and to the juvenile legal assistance service.

F. Maritime piracy

215. The Act of 30 December 2009 on action to combat maritime piracy, amending the Judicial Code,⁷⁹ and the Judicial Code as thereby amended⁸⁰ create a new offence of maritime piracy, with appropriate penalties, and authorize commanders of Belgian warships or military protection teams on board merchant ships to arrest and detain alleged pirates with a view to prosecution by Belgian or foreign judicial authorities.

216. When a Belgian warship takes part in a counter-piracy operation, a temporary detention facility for the alleged pirates is set up on board, pending their being handed over to the judicial authorities or their release. Persons deprived of liberty are treated humanely in all circumstances and have the right to personal respect and respect for their honour, convictions and religious practices. Their rights include the right to a sufficient quantity of adequate food and drinking water. Medical assistance is provided immediately and they can expect to be given immediate access to a lawyer via videoconference or by telephone in the event of prosecution in Belgium.

217. The Federal Public Prosecution Service frequently goes on board ships participating in counter-piracy operations and has access to temporary detention facilities.

G. Administrative detention in connection with a military operation abroad

218. In the directives given to Belgian forces engaged in operations abroad, the Ministry of Defence includes obligations under Belgian law and international texts, primarily the Geneva Conventions and their Additional Protocols.

219. Whenever a person is detained during a military operation, a detailed report must be made thereon to the higher authorities. The procedures regarding the treatment of detained persons explicitly refer to information to be transmitted to outside parties, in particular the International Committee of the Red Cross.

⁷⁹ M.B., 14 January 2010.

⁸⁰ M.B., 14 January 2010.

220. So far as possible, legal advisers are fielded in support of the military command. They are thus able to draw the attention of commanding officers to any act or procedure in breach of the standards of international and/or national law.

221. Furthermore, procedures to be followed in connection with detention, release, transfer and contacts to be made with diplomatic or local authorities are detailed in practical guidelines drafted both at international operational command level (e.g. European Union, North Atlantic Treaty Organization) and at Belgian Chief of Staff level, in agreement with the Belgian operation order.

Article 18

A. Legislation guaranteeing the right of third parties to access information

222. The access of third parties to information that may prevent the enforced disappearance of a person deprived of liberty is guaranteed.

223. In cases of administrative arrest, the aforementioned Policing Act stipulates, in its articles 33, that the administrative police officer who carries out the measure of deprivation of liberty shall so inform his superior officer at the earliest opportunity. Article 33 quater adds that “any person subject to administrative arrest may ask for a trusted person to be notified”.

224. In cases of arrest in flagrante delicto, the aforementioned Pretrial Detention Act requires the judicial police officer to so inform the Crown Prosecutor immediately (arts. 1, 4). Article 2 bis of that Act stipulates that all persons deprived of liberty have the right to communicate confidentially with a lawyer — or, failing that, with the duty officer of the bar association or, failing that, with the president of the bar association or the president’s delegate — and to have a trusted person notified of their arrest.

225. Articles 53 to 70 of the aforementioned Principles Act and articles 12 to 29 of the Royal Order of 8 April 2012 setting the date of entry into force and implementation of various provisions of Titles III and V of the Principles Act⁸¹ regulate the contacts of detainees with the outside world.⁸²

⁸¹ M.B., 21 April 2011.

⁸² In the particular eventuality covered by article 18, paragraph 1 (g) of the Convention, it should be noted that the Act of 12 January 2005 is very explicit. It stipulates, in its article 95, that “when a detainee dies or is in danger of dying, the director shall ensure that his or her cohabitating spouse, legal cohabitating partner, next of kin, common-law partner and, where appropriate, guardian or provisional administrator and the representative designated by the detainee are notified immediately”. Pending the entry into force of this provision, the procedure to be followed in the event of death is laid down in the Royal Order of 21 May 1965 on of the general regulation of penitentiary institutions (arts. 45 and 113) and in the Ministerial Order of 12 July 1971 on general instructions for penitentiary institutions (arts. 201 to 205). When a death occurs in a penitentiary facility, the director makes a declaration of death in accordance with the provisions of the Civil Code and notifies the burgomaster of the municipality of residence of the deceased person in order for the next of kin to be informed. Chaplains, Islamic advisers and moral counsellors are also notified in addition, if the deceased person had been accused of or charged with an offence, the director notifies the judicial authorities of the death. The body is placed in a mortuary after a doctor has recorded the death and noted the cause. An inventory of the personal effects, objects and papers left by the deceased person is established by the prison director for communication to his or her heirs and successors. The same procedure is followed for all kinds of death.

226. Belgian law thus gives greater attention to the right of persons deprived of liberty to notify than to that of third parties to be notified.⁸³ This right seems then to suggest a perspective different from that of article 18 of the Convention and to have, at first sight, a more limited scope, since the information is given to certain public officials and to a trusted person and not to “any person with a legitimate interest in this information”, as required by the Convention.

227. Nevertheless, the aforementioned provisions are to be considered in conjunction with the fact that the places of deprivation of liberty are supervised by legally designated authorities⁸⁴ and that any person with a legitimate interest may seek essential information concerning the detention either from the detainee’s counsel — who can provide such information while respecting the detainee’s privacy — or directly from the detainee, who has the right to outside contacts (see comments under article 17 of the Convention). The purpose to be served by article 18, as shown by the *travaux préparatoires* and as commented on by jurists, is thus fulfilled.⁸⁵

228. The same reasoning is valid for aliens under detention since they freely maintain contacts with their counsel and with their families (see comments under article 17 of the Convention).

229. The balance thus struck between informing the detained person’s relatives and respecting his or her privacy⁸⁶ brings to mind article 36 of the Vienna Convention on Consular Relations, which provides for the activation of consular protection at the request of the person deprived of liberty.

230. If a person with a legitimate interest does not obtain the desired information through the above-mentioned mechanisms, he or she retains the possibility of doing so by being

⁸³ In the case of administrative detention, however, the right to notify a third party lies with the detainee and the right to be notified rests with the administrative police officer (see above).

⁸⁴ The degree of detail of the information available to third parties is even, in some situations, more demanding than is required by the Convention. Thus, when a detainee is placed under a special individual security regime, the Principles Act requires that the placement decision and its implementation, as well as any subsequent change, be recorded in a central register and in a local register in which detainees may record comments as to their state and situation and to which the persons or authorities responsible for the supervision and inspection of prisons or enforcement of sentences or measures of deprivation of liberty have access (art. 118, para. 6). In addition, detainees receive at least one visit a week from the director and a medical officer, who check their condition and see whether they have any complaints or comments to make (art. 118, para. 5). Similarly, article 121 of the Principles Act stipulates that, when a measure of direct coercion is exercised against a detainee, this must be recorded in a special register, with a statement of the circumstances that led to the security measure, the date that it was taken and its duration, which is kept at the disposal of the chairperson of the supervisory commission, the current commissioner and other supervisory bodies. The supervisory authorities also have access to special prison registers containing the director’s decisions for which reasons are not to be communicated to detainees pursuant to article 8, paragraph 1 (1), of the Principles Act (Royal Order of 28 December 2006 on prison administration and the legal standing of detainees, M.B., 4 January 2007, art. 3, para. 4).

⁸⁵ Reports of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, E/CN.4/2005/66, para. 92, and E/CN.4/2006/57, paras. 17 and 136; and M. Pollard, “A lighter shade of black? ‘Secret detention’ and the UN Disappearances Convention”, in G. Gilbert, F. Hampson, C. Sandoval, *The Delivery of Human Rights – Essays in Honour of Professor Sir Nigel Rodley*, Abingdon, Routledge, 2011, pp. 153–154.

⁸⁶ This aspect was a source of concern from the beginning of the negotiations on the Convention (O. de Frouville, *op. cit.*, pp. 69 and 70).

recognized as an injured party or as a claimant for criminal indemnification in accordance with the procedures described in the comment under article 24 of the Convention.

B. Any restrictions

231. Restrictions that may be imposed on notification of the trusted person and on the general communication of the person deprived of liberty under the terms of articles 2 bis, paragraphs 3 and 20, of the aforementioned Pretrial Detention Act, article 33 quater of the aforementioned Policing Act⁸⁷ and articles 53 to 70 of the aforementioned Principles Act are in line with the exceptions allowed by article 20, paragraph 1, of the Convention.⁸⁸

232. It should be made clear that if a suspect arrested in the course of a counter-piracy operation wishes to exercise the right to notify a trusted person, the provision that will be systematically applied will be that contained in article 2 bis, paragraph 3 (2), of the aforementioned Pretrial Detention Act, which allows such communication to be postponed for so long as is needed to protect the interests of the investigation or until the time of the suspect's arrival in Belgium. The agreement of the investigating judge must be obtained in this connection. The latter is required to take a reasoned decision (risk of disappearance of evidence, risk of collusion, risk of evasion of justice).

C. Legislation to ensure protection of persons who request access to information and who are involved in the investigation

233. Persons likely to request information concerning an individual's deprivation of liberty are protected, just like all individuals, from intimidation and acts of violence sanctioned by the Criminal Code. As for the protection of persons involved in the investigation, reference may be made to the comments under article 12 of the Convention, E.

Article 19

A. Procedures to obtain, use and store genetic data on medical information

234. Identification by genetic analysis in criminal proceedings in Belgium is governed by the Act of 22 March 1999 on the identification procedure using DNA analysis in criminal proceedings (hereinafter "DNA Act"),⁸⁹ implemented under the Royal Order of 4 February 2002.⁹⁰ The sole purpose of this Act is to compare DNA profiles of human cell samples discovered at the place of a crime or taken from individuals who may be involved in an

⁸⁷ Article 33 quater responds to the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment as follows: "The right of persons detained by the police to inform relatives or third parties of their situation must, as a matter of principle, be guaranteed from the very beginning of their detention. The Committee for the Prevention of Torture of course recognizes that the exercise of this right may be subject to certain exceptions, intended to protect the legitimate interests of police investigation. However, such exceptions must be clearly defined and strictly limited in time and the use of such exceptions must be surrounded by appropriate safeguards (for example, any delay in informing a relative or third party must be recorded in writing with the reasons for such delay and subject to the approval of a higher police officer having no link with the case in question or of a prosecutor)."

⁸⁸ See Royal Order of 21 May 1964 on the general regulation of penitentiary institutions, art. 92.

⁸⁹ M.B., 20 May 1999. This Act was amended by the Act of 7 November 2011 which has, however, not yet entered into force.

⁹⁰ M.B., 30 March 2002.

offence (victim, suspect) so as to be able to identify directly or indirectly the persons concerned.

235. Nine genetic analysis laboratories approved by the King can analyse and establish the genetic profile of biological traces relating to an offence.

236. The law stipulates that only segments of non-coding DNA, i.e. not containing information linked to an individual, can be used to establish a genetic profile in accordance with requirements concerning the protection of privacy (see below).

237. In the interests of information, an investigating judge may order the taking of a reference sample from an individual if the fact for which he or she is being held corresponds to an offence carrying a penalty of 5 or more years of imprisonment. Only in such cases, a buccal sample (saliva) or hair bulb sample (hair plucked out) may be taken by the judicial police officer assisting the Crown Prosecutor.

B. Provisions for the protection of personal data

238. In addition to the secrecy of information and of investigation (Code of Criminal Investigation, arts. 28 quinquies and 57, para. 1), professional secrecy (Criminal Code, art. 458) and the DNA Act referred to in A above, the protection of personal data gathered during an investigation or during deprivation of liberty is guaranteed under article 17 of the International Covenant on Civil and Political Rights, article 8 of the European Convention on Human Rights, article 8 of the Charter of Fundamental Rights of the European Union, article 22 of the Constitution and the Act of 8 December 1992 on the protection of privacy from the processing of personal data.⁹¹ Access to medical data is strictly regulated by the Act of 11 April 1994 on the disclosure of information by the administration⁹² and by the Act of 22 August 2002 on patients' rights.⁹³

239. It is to be noted lastly that there exists a Standing Intelligence Agencies Review Committee⁹⁴ whose mandate includes ex-post monitoring of specific and exceptional data-gathering methods used by the intelligence and security services and the formulation of written opinions addressed to the judicial authorities on the legitimacy of the method of data collection used by those services in criminal proceedings. This Committee is thus vested with jurisdictional power.

C. Genetic databanks

240. Two DNA databanks have been established in connection with the DNA Act referred to under A above in order to manage information obtained through DNA analysis. One is a "forensic" databank and the other a "convicted persons" databank.

241. The "forensic" databank contains genetic profiles established on the basis of litigious traces of human cells. Such data may be used solely for purposes of identification through the establishment of links between profiles based on litigious traces of human cells or between profiles based on litigious traces of human cells and reference profiles.

242. The "convicted persons" databank contains the DNA profiles of persons sentenced without appeal to a prison term or heavier penalty and of persons subject to a final order of detention through having committed one of the offences listed in article 5, paragraph 1, of the DNA Act.

⁹¹ M.B., 13 March 1992.

⁹² M.B., 30 June 1994.

⁹³ M.B., 26 September 2002.

⁹⁴ Site of the Standing Intelligence Agencies Review Committee: www.comiteri.be.

243. In order to protect privacy, the national DNA databank manager does not have access to information serving to identify persons. The DNA Act stipulates that “only the Crown Prosecutor or the investigating judge may have knowledge of the identity of the person to whom the relevant DNA profiles of the DNA databanks relate (art. 4, para. 3)”.

244. The nine approved laboratories transfer the established profiles to the databanks only on the explicit request of the magistrate. Data transfer is then not automatic. In addition, the magistrate is required to make a second application to the experts of the national DNA databanks for registration and comparison with profiles in the magistrate’s case file.

245. The following can be carried out within the DNA databanks:

- Registration and comparison of genetic profiles of traces (simple and complex genetic profiles of a maximum of two persons). These profiles must meet a number of quality criteria for them to show significant matches;
- Registration and comparison of reference genetic profiles of convicted persons.

246. The following cannot be carried out within the DNA databanks:

- Registration of complex profiles of more than two persons;
- Registration of profiles for which the results obtained for the genetic systems analysed are incomplete;
- Registration of reference profiles of suspects, victims, etc. (with the exception of convicted persons).

Article 20

A. Possible restrictions on access by third parties to the information referred to in article 17 of the Convention

247. See comments under article 18 of the Convention, B.

B. Available remedies

248. In cases of administrative detention, article 33 quater of the aforementioned Policing Act does not provide for judicial recourse against the reasoned decision of the administrative police officer not to accede to the request by the person concerned to notify a trusted person. This decision cannot, however, be taken arbitrarily since police action may be subject to several kinds of oversight (internal and external monitoring services). A third party may thus apply to Committee P or the General Inspectorate of the Federal and Local Police regarding information to which that third party has not had access.

249. In cases of judicial detention, article 2 bis of the aforementioned on Pretrial Detention Act does not provide for judicial recourse against the reasoned decision of the Crown Prosecutor or the investigating judge to postpone notification of the trusted person. However, article 20, paragraph 6, of that Act gives the accused person the right to file a request with the investigating judge responsible for deciding on the pretrial detention with a view to amending or lifting any measures that may restrict the detainee’s possibility of communicating with other persons. The procedure is regulated by the provisions of articles 21 to 24, with the possibility of an appeal in accordance with article 30 and of application for judicial review in accordance with article 31.

250. Once articles 23, 27 and 147 to 166 of the aforementioned Principles Act have entered into force, decisions on conditions of detention, including decisions of the prison administration restricting the detainee’s rights to outside contacts, will be susceptible, at first instance, of a complaint to the Director-General of Prison Administration or of

recourse to a Complaints Commission established within a Supervisory Commission and, on appeal, of recourse to an Appeals Commission established within the Central Council. In the meantime, such decisions may be susceptible of recourse to the Council of State and the ordinary courts.⁹⁵

251. While Belgian law does not provide for a specific judicial remedy for third parties seeking access to information referred to in article 18, paragraph 1, of the Convention, it does however ensure that any person who suspects that an offence has been committed has the right to report it, to file a complaint and, if that person has suffered harm because of that offence, to bring criminal indemnification proceedings or to declare himself or herself an injured party.

Article 21

A. Legislative provisions allowing verification of actual release

252. Belgian law ensures actual release, as required by article 21 of the Convention, through a variety of measures such as the recording of the release in the official registers mentioned in the comment under article 17 of the Convention (Code of Criminal Investigation, art. 610), notification thereof and financial assistance, if needed, to enable the detainee to return home (Royal Order of 21 May 1965 on the general regulation of penitentiary institutions,⁹⁶ arts. 119 to 125).

253. As for persons arrested by members of the Belgian Armed Forces under an international warrant, they are, where appropriate, released in accordance with international law and the procedures in force applicable to military operations abroad (United Nations, North Atlantic Treaty Organization, European Union, etc.). The principle of non-refoulement as defined in the comments under article 16 is strictly observed.

B. Competent authorities responsible for supervising the release in accordance with domestic legislation and applicable international law

254. The release of detainees may be supervised by national penitentiary, judicial and, where appropriate, military authorities. It is subject to internal monitoring by higher officers. It may also be subject to outside monitoring by various international institutions whose competence has been recognized by Belgium, like for instance the International Committee of the Red Cross if the detention occurred during an international armed conflict.

Article 22

A. Legislation applicable to the guarantee that any person deprived of his or her liberty or any other person with a legitimate interest be entitled to take proceedings before a court

255. Belgian law guarantees the right of all persons deprived of liberty to bring proceedings to challenge the lawfulness of the decision resulting in said deprivation of liberty. Reference is made in this connection to the comments under article 17 of the Convention.

⁹⁵ This question is already covered in the written replies of the Government of Belgium (CCPR/C/BEL/Q/5/Add.1, para. 117 et seq.).

⁹⁶ M.B., 25 May 1965.

256. This is a right embedded not only in Belgian law but also in international instruments for the protection of fundamental rights to which Belgium is a party, such as the European Convention on Human Rights (arts. 5, 6 and 13).

B. Mechanisms in place to prevent: (i) unlawful deprivation of liberty, (ii) failure to record the deprivation of liberty, and (iii) refusal to provide information on the deprivation of liberty or the provision of inaccurate information, and sanctions laid down

257. Obstruction of justice is punishable by criminal, disciplinary or statutory penalties, as described in the comment under article 7 of the Convention.

258. Public officials who have unlawfully or arbitrarily arrested or caused to be arrested, detained or caused to be detained one or more persons, or who, while having the power to do so, have neglected or refused to put an end to an unlawful detention brought to their knowledge, or who have refused to display their registers as required by the law, are thus held to be criminally responsible under articles 147 and 155 of the Criminal Code.

259. The Code of Criminal Investigation engages the criminal responsibility for arbitrary detention of any guard who omits to record a deprivation of liberty in his or her registers or who refuses either to show the detainee in situations where the law so requires or to display his or her registers (arts. 609 and 618).

Article 23

A. Training programmes

260. The personnel of police services, penitentiary institutions, closed facilities for minors or asylum-seekers and the Belgian Armed Forces remain subject, in the discharge of their duties, to Belgian and international legal norms and consequently to the human rights provisions incorporated therein.

261. These provisions are put into effect in a variety of ways: through a code of ethics, a code of conduct or rules of procedure for some of these personnel, and through initial and continuing training for all personnel, including general and specific, theoretical and practical modules covering the laws and procedures to be observed.

262. These modules do not deal specifically with the Convention. Nevertheless, in learning about the legal framework, personnel also learn about the prohibition of acts constituting, contributing to or which may give rise to an enforced disappearance. The criminal, disciplinary and statutory penalties for failing to comply with those standards are also addressed.

263. Information about the training received by the personnel of police services, closed facilities for minors and asylum seekers and penitentiary institutions has already been provided by Belgium in its reports to the Committee against Torture.⁹⁷ That information remains relevant.

⁹⁷ For the provisions concerning police officers, see the third periodic report of the Government of Belgium to the Committee against Torture, CAT/C/BEL/3, received on 25 July 2012, paragraphs 143 to 145, and the written replies of the Government of Belgium to the list of issues (CCPR/C/BEL/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Belgium (CCPR/C/BEL/5), CCPR/C/BEL/Q/5/Add.1, para. 74 et seq.

For the training given to the personnel responsible for the supervision of detainees, including minors and committed psychiatric patients, and the personnel responsible for the removal of aliens, see the

264. With regard more particularly to the personnel of the Armed Forces, it is to be noted that training in international humanitarian law is provided by the Royal Military Academy to advisers on the law of armed conflict. These officers specializing in the law of armed conflict have been posted at the various command levels. The training given does not deal specifically with the Convention, but issues relating to enforced disappearances are addressed in the context of general training. Training and guidelines in international humanitarian law, human rights and criminal law are also provided by the Directorate-General for Legal Support and Mediation to jurists and military personnel assigned to operations.

B. Duty to report cases of enforced disappearance

265. Article 29 of the Code of Criminal Investigation requires public officials who have knowledge of an offence to report it immediately to the Public Prosecution Service. Crimes or offences found to have been committed within a place of deprivation of liberty may be reported directly through the Crown Prosecutor or indirectly through the Central Anti-Corruption Office.

266. The duty to report such cases is emphasized in the code of ethics, code of conduct and training provided to persons involved in the arrest and custody of persons deprived of liberty (see previous comment).

267. This duty takes particular forms, in accordance for instance with article 2.2, paragraph 2, of the Flemish Government Order establishing the status of personnel in the Flemish Administration services (status of Flemish personnel).⁹⁸

C. Legislation ensuring that orders prescribing, authorizing or encouraging enforced disappearance are prohibited and that persons who refuse to obey such an order will not be punished

268. See comments under article 6 of the Convention, B.

written replies of the Government of Belgium to the list of issues (CAT/C/BEL/Q/2) to be taken up in connection with the consideration of the second periodic report of Belgium (CAT/C/BEL/2), CAT/C/BEL/Q/2/Add.1, question 17, paragraphs 166 to 170.

⁹⁸ “A member of personnel who notes irregularities in the performance of his or her duties, shall immediately so inform a superior. He or she may also directly notify the Internal Audit Service of the Flemish Administration, in accordance with article 34, paragraph 3, of the Framework Decree on administrative policy of the Flemish Community of 18 July 2003 [...]”. The Internal Audit Service may conduct a fraud audit in cases where there is serious evidence of possible irregularities (or criminal offences). When a fraud audit shows that possible offences have been committed, the general administrator of the Internal Audit Service notifies accordingly the Central Anti-Corruption Office.

For the French Community, see opinion 70/06 of the Youth Assistance Ethics Commission, concerning a request from a worker in a public youth protection institution who had witnessed or had knowledge of the physical, moral (pressure) or verbal abuse of a minor; and the French Community Government Order of 22 July 1996 on the status of officials in the services of the Government of the French Community, referring to a Title XI on disciplinary measures for officials failing in their duties.

Article 24

A. Care and assistance to victims and involvement of victims in searches

269. Significant attention is given to victims during criminal proceedings, irrespective of their status. By victim is understood any natural or legal person who has suffered harm as a result of an offence.

270. Inserted into the preliminary section of the Code of Criminal Procedure in the wake of the Belgian “White March” against paedophilia, article 3 bis stipulates that the victims of offences and their next of kin should be treated correctly and conscientiously, provided with all necessary information and, if need be, put in touch with specialized services, in particular court officials.

271. The Belgian system ensures that victims are assisted in several ways: by the police authorities and by the judicial authorities, outside any criminal proceedings as in cases referred to investigating judges, and psychosocial or therapeutic assistance from social assistance services open to victims of offences of every kind under the jurisdiction of the Communities and Regions, the oversight of Committee P and the Standing Intelligence Agencies Review Committee.⁹⁹

272. The assistance and reception of the next of kin of the disappeared person, their involvement in searches and measures to locate the whereabouts of disappeared persons, in particular, are the subject of the ministerial directive of 20 February 2002 already referred to.¹⁰⁰

B. Genetic data

273. Belgian law does not provide for mechanisms for the systematic collection of ante-mortem data related to two the persons disappeared and their relatives. Belgian law does not currently provide for the establishment of a DNA databank for disappeared persons. Consequently, national DNA databanks do not undertake searches in connection with relatives.

C. Rights of victims

274. Information about the rights of victims in the context of criminal proceedings is provided in the core document (para. 132 et seq.). Some of those rights will be highlighted here.

275. First, the right of victims to be informed is guaranteed by various provisions of the Code of Criminal Investigation. Article 3 bis of its preliminary section stipulates, for example, that victims must be informed, in particular, of their right to declare themselves

⁹⁹ All victims may receive care and assistance from the police victims support services and the victims reception services of court and public prosecution officials. See in particular article 63 of the Police Code of Ethics, circular GPI 58 of 4 May 2007 on police assistance to victims in the two-level integrated police force and the joint circular of the Minister of Justice and the College of Public Prosecutors attached to the Courts of Appeal concerning the treatment of victims in public prosecution units and courts, No. COL 16/2012 of 12 November 2012, or again the joint circular of the Minister of Justice, the Minister of the Interior and the College of Public Prosecutors concerning, in cases of judicial action, the respectful treatment of the deceased person, the announcement of death, the payment of last respects and the cleaning of the place of death, No. COL 17/2012 of 12 November 2012.

¹⁰⁰ Ministerial directive of 20 February 2002 on the search for disappeared persons, in Circular No. COL 9/2002 of the College of Public Prosecutors attached to the Courts of Appeal.

injured parties or to bring criminal indemnification proceedings and of the formal procedures to be followed to that end.¹⁰¹

276. Any victim of an injury caused by an offence may bring criminal indemnification proceedings in accordance with articles 53, 54, 63, 65, paragraph 1, 66 and 70 of the Code of Criminal Investigation and thus participate in the proceedings. The victim may also acquire the status of “injured party” in accordance with article 5 bis of the preliminary part of the Code of Criminal Procedure and then be granted specific rights, including that of having access to information at the various stages of the criminal proceedings. Reference is made in this connection to the information provided in the core document (para. 135 et seq.).

277. The right of victims to information is also enshrined in article 182, paragraph 2, article 195, paragraphs 5 and 6, or again article 216 quater, paragraph 1 (5), of the Code of Criminal Investigation.

278. Secondly, the right to obtain reparation is enshrined in article 3 of the preliminary part of the Code of Criminal Procedure and in article 44 of the Criminal Code. As regards reparation for unlawful detention, Belgium is more particularly bound by the requirements of article 5 of the European Convention on Human Rights.

279. Responsibility for reparation may be assumed by the special fund for assisting the victims of intentional acts of violence in cases where it cannot be effectively and adequately ensured by the perpetrator or the party having third person liability, by a social security scheme or private insurance, or by any other means.¹⁰²

280. Overall, Belgian law is in line with framework decision 2001/220/JHA of the Council of the European Union of 15 March 2001 on the standing of victims in criminal proceedings,¹⁰³ with the Council of Europe Convention of 24 November 1983 on compensation for victims of violent crimes and with directive 2004/80 of the Council of the European Union of 24 April 2004 relating to compensation to crime victims.¹⁰⁴

D. Legal regime of missing persons

281. The Civil Code and the Judicial Code provide for two sets of rules in regard to disappeared persons: judicial declaration of death, the rules of which apply to cases where the person’s death is certain (airplane accident, etc.) but for which it is impossible to produce evidence of the death, as required by article 77 of the Civil Code; missing status, which applies to cases where an individual has disappeared, leaving no news to family or friends, who do not know whether the person is alive or dead, and where there is no reason to believe that the person may have died.

282. It follows from the wording of article 2 of the Convention that the rights and obligations referred to in paragraph 6 of article 24 of the Convention in respect of disappeared persons and their relatives will be ensured only in the light of the applicable regime of missing persons.

283. The rules applicable to cases of missing persons are laid down in articles 112 to 125 of the Civil Code and articles 1226 and 1227 of the Judicial Code.

¹⁰¹ See also article 46 of the aforementioned Policing Act.

¹⁰² Article 31 bis of the Act of 1 August 1983 on fiscal and other measures, M.B., 6 August 1985.

¹⁰³ Official Journal L 82, 22 March 2001 (the proposed directive of the European Parliament and Council establishing minimum standards concerning the rights, support and protection of crime victims — not published in the Official Journal — seeks to replace this framework decision).

¹⁰⁴ Official Journal L 261, 6 August 2004.

284. The legislator has divided the legal regime pertaining to missing persons into two very different stages: presumption of absence (Civil Code, arts. 112 to 117) and declaration of absence (Civil Code arts. 118 to 124). Each of these stages corresponds to the passing of a particular period of time from the disappearance of the person (in the case of presumption of absence, three months following disappearance; in the case of declaration of absence, five years from the judicial ruling of presumption of absence or seven years since the last news of the missing person). This period of time must in principle be determined in each case by a ruling handed down by the court of first instance.

285. Over the course of time, the chances of a disappeared person being alive become increasingly slender, making it necessary to change the ways in which the interests involved are to be protected. While the balance is weighted in favour of the disappeared person during the stage of presumption of absence, it is weighted rather in favour of relatives during the stage of declaration of absence.

286. For each stage, the Civil Code determines such public announcements as are required to seek and locate the disappeared person.

(a) Presumption of absence

287. Several mechanisms for the protection of persons presumed missing are provided for by Belgian law.

288. First, the Public Prosecution Service is responsible for protecting their interests and is consulted on all requests concerning them (Civil Code, art. 112, para. 3).

289. Secondly, the justice of the peace appoints a judicial administrator of the property of the person presumed missing (Civil Code, art. 113, para. 1.1) and monitors the management of the person's property interests (annual submission of a management report to the justice of the peace drafted by the judicial administrator; obtaining of a special permit when the administrator needs to intervene in disputes in which his or her interests are in conflict with those of the person presumed missing or when the administrator acts in certain ways to represent or dispose of the property covered by article 115, paragraph 3.1, of the Civil Code. If the person presumed missing exercises a commercial activity, the justice of the peace may decide on the continuation of such activity under such conditions as he or she may determine and may also, for that purpose, request the commercial court to appoint a special administrator (Civil Code, art. 115, para. 3.4). If no judicial administrator is forthcoming, the justice of the peace may also appoint a notary to represent the person presumed missing in the event of division or succession (Civil Code, art. 116, para. 2). If the legislator wishes to ensure special protection for the property rights of the person presumed missing, that person's personal rights remain unchanged. Accordingly, the person's marriage and matrimonial regime remain in place, with the ensuing rights and obligations.

290. Any decision concerning the judicial administrator must be published in summary form in the *Moniteur belge* and in two daily newspapers distributed in the judicial district of the last known domicile in Belgium of the person reported missing or, if that person has never been domiciled in Belgium, of the judicial district of Brussels and in a nationally distributed newspaper (Civil Code, art. 113, para. 3.1). It must be published within 15 days of the decision, failing which the official to whom the omission or delay is attributable would be held responsible, at least if the delay or omission results from collusion (Civil Code, art. 113, para. 2). It will also be notified to the burgomaster of the last known domicile of the missing person to be recorded in the population register (Civil Code, art. 113, *in fine*).

(b) Declaration of absence

291. The decision to declare absence affects both the personal rights and the property rights of the missing person. It takes the place of a certificate of death, is required to provide the same information and produces the effects of death on the date when the decision is recorded in the current civil registry records of the last known domicile of the missing person (Civil Code, art. 121). Thus, even if the missing person reappears, his or her marriage and matrimonial regime remain dissolved (Civil Code, art. 124, para. 2). However, in the latter case, the person will be able to recover his or her property or his or her rightful share of the joint patrimony of the marital partnership or his or her share of the property deemed to be jointly owned were he or she to be the legal cohabitating partner (Civil Code, art. 124, paras. 2 and 3).

292. In view of the interests in play, the legislator has provided for a series of mechanisms to publicize any decision concerning missing persons. Article 119, paragraph 1, of the Civil Code stipulates in particular that requests for a ruling of presumption of absence must be published in summary form in the *Moniteur belge*, in two daily newspapers distributed in the judicial district of the last known domicile in Belgium of the missing person or, if that person has never been domiciled in Belgium, in the judicial district of Brussels and in a nationally distributed newspaper in the language of the procedure. The judge remains authorized to take any measure that he or she deems useful to make the request publicly known (Civil Code, art. 119, para. 2). The court delivers a ruling only one year after the last public communication issued in accordance with article 119 of the Civil Code. This ruling will be published in the manner described above, as laid down in article 119 of the Civil Code (Civil Code, art. 120, paras. 1 and 2). If the person reappears after the decision to declare absence has been handed down and become final, that decision may be rectified in accordance with article 101 of the Civil Code and articles 1383 to 1385 of the Judicial Code. The decision to rectify the previous decision is also published in summary form in the manner stipulated in aforementioned article 119 (Civil Code, art. 123).

293. Under article 40 of the Belgian Code of Private International Law, the Belgian courts are competent to hear any request for a declaration of absence or for a determination of its effects if:

- The disappeared person was Belgian or was usually resident in Belgium at the time of disappearance; or
- The request concerns property of the missing person in Belgium at the time when the request was filed.

294. In accordance with article 41 of the Code of Private International Law, absent status is governed by the law of the person's State of nationality at the time of disappearance or, if such status is not provided for in that law, by the law of the State in whose territory the person usually resided at the time of disappearance. The provisional administration of the missing person's property is governed by the law of the State in whose territory the person usually resided at the time of disappearance or, when that law contains no provision for such administration, by Belgian law.

295. Lastly, it is important to note that a decision on absence taken by a foreign authority may be recognized and produce effects in Belgium provided that it meets the conditions set out in articles 24 (items to be produced for recognition), 25 (grounds for refusing recognition) and 30 (legalization of the decision) of the Code of Private International Law.

E. Associations of victims

296. All persons enjoy right of association under article 27 of the Constitution. In addition, special laws give to associations approved for that purpose by the King the right to assist victims in certain procedures.¹⁰⁵

Article 25**A. Legislation**

297. Several kinds of conduct contributing to the enforced disappearance of a child are classified as offences under the Criminal Code, namely:

- Abduction of a minor (arts. 428 to 430);
- Fraudulent adoption (arts. 391 quater and 391 quinquies);
- Fraudulent activities related to data attesting to the child's identity and to the re-establishment of the child's identity:¹⁰⁶ forgery (arts. 194 and 195)¹⁰⁷ and falsification of a child's civil status records (arts. 361 to 363).

B. Mechanisms in place for the search and identification of disappeared children and procedures to return them to their families of origin

298. The search and identification of disappeared children are governed by the aforementioned ministerial directive of 20 February 2002.¹⁰⁸

C. Procedures guaranteeing the right of disappeared children to have their true identity re-established

299. If the charge of forgery or serious tampering with a record leads to a conviction, the civil status records concerning the child are completely invalidated and must be reconstituted. Reconstitution will automatically be ordered by the correctional court (Code of Criminal Investigation, art. 463). However, the record of a person that has not been established by civil registration can only be reconstituted — or constituted if such a record has never been formally established — by means of a judicial decision to declare civil status, in accordance with the procedural principles set out in article 101 of the Civil Code and articles 1383 to 1385 of the Judicial Code. The decision will serve in lieu of civil status

¹⁰⁵ See article 7 of the Act of 24 November 1997 on action to combat partner violence, M.B., 6 February 1998, and article 3, paragraph 2, of the Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty and on the recognized rights of victims in enforcement of the sentence, and the Policing Act of 5 August 1992, M.B., 15 June 2006.

¹⁰⁶ Civil status records are authentic deeds intended to provide indisputable evidence of a person's status. They are regarded as authoritative until shown to be forgeries. Nevertheless, this presumption of veracity applies only to facts that it is the legal purpose of the deeds to certify. Rules concerning the organization and maintenance of civil status records are rules of public order. Since these rules are matters of public policy, the Public Prosecution Service may act ex officio in all matters of civil registry. Moreover, civil status records are maintained by officials who, in the performance of their duties, are held to a high level of responsibility, subject to civil, criminal and disciplinary sanction in the event of dereliction.

¹⁰⁷ In addition to "criminal" charges of forgery, the Judicial Code also provides for a similar procedure which may be instituted through civil channels (Judicial Code, arts. 895 to 914).

¹⁰⁸ Ministerial directive of 20 April 2002 on the search for disappeared persons, in Circular No. COL 9/2002 of the College of Public Prosecutors attached to the Courts of Appeal.

record once it has been entered in the registers of the current year with a marginal note showing the date when it should have been included.

300. Since this is a matter of public order, the Public Prosecution Service is competent to take action to re-establish — or to establish — the child's civil status record (Judicial Code, art. 138 bis, para. 1).

D. Programmes to assist adults who suspect that they are children of disappeared parents to establish their true identity

301. The Adoption Reform Act of 2003 referred to below stipulates that the competent authorities must be careful to preserve the information they hold concerning the origins of the adopted person in order to enable that person to discover his or her origins and that they must ensure that the adopted person or his or her representative has access to that information and is given appropriate guidance (Civil Code, art. 368-6).

302. If need be, a procedure may be initiated to recognize or establish paternity in accordance with applicable domestic law.

E. Procedures in place to guarantee families their right to search for child victims of enforced disappearances; procedures in place to review and, if necessary, annul adoption of children that originated from an act of enforced disappearance

(a) Adoption

303. The Convention of 29 May 1993 on the Protection of Children and Cooperation in respect of Intercountry Adoption entered into force in Belgium on 1 September 2005. As a result, a whole series of regulations governing adoption were amended in respect of both domestic adoption and intercountry adoption. The founding principles of adoption are as follows: adoption must be on good grounds; and if it concerns a child, the adoption can take place only in the child's best interests and with due regard for the child's fundamental rights under international law (Civil Code, arts. 344-1 and 357).

304. Intercountry adoption requires the agreement of the competent central community authority and usually entails the provision of support from the approved bodies responsible to it, namely, the central community authority of the French Community, het Vlaams Centrum voor Adoptie or Zentrale Behörde der Deutschsprachigen Gemeinschaft für Adoptionen (Civil Code art. 361-3).

305. Any collaboration with a country of origin must first be approved by the competent central community authority, which assesses the procedures for such collaboration.¹⁰⁹

306. In Belgium, there are two kinds of adoption: simple and full.

307. Simple adoption, in which there continue to be links with the biological family, is possible for children and adults alike. It may be terminated for very serious reasons. The application for termination may be made by the adopters, the adopted person or the Crown Prosecutor (Civil Code, arts. 354-1 and 354-2).

308. Full adoption entails the severance of all links with the biological family and is irrevocable.

309. Where a child has reached the age of 12, he or she must consent to be adopted (in cases of domestic adoption) (Civil Code, art. 348-1). Article 358 of the Civil Code extends

¹⁰⁹ For the Flemish Community, for example, see the Decree of the Flemish Community of 20 January 2012 regulating the intercountry adoption of children (M.B., 2 March 2012).

this provision to all adoptions, irrespective of the law applicable to the consent of the adopted person.

(b) Review of adoption

310. The two forms of adoption may be subject to review, but only if there is sufficient evidence to show that the adoption occurred following child abduction, sale or trafficking. The review may be sought by the Public Prosecution Service or by a person belonging to the biological family of the child, up to the third degree of kinship (Civil Code, art. 351).

311. If the review is shown to be founded, the court rules that the adoption shall cease to produce its effects from the time that the operative part of the review decision has been entered in the civil status registers.

312. The *travaux préparatoires* stress the obligation to decide on the review of such an adoption and note at the same time that the competent authorities must take the child's best interests into account in order to provide for his or her future status.¹¹⁰

313. Moreover, under article 66, paragraph 4, of the Belgian Code of International Private Law, the Belgian courts are competent to decide on the review of adoption, on condition that the adopter, one of the adopters or the adopted person is Belgian or usually resident in Belgium at the time of the filing of the application, if the adoption had been established in Belgium or if a judicial decision establishing the adoption had been recognized or declared enforceable in Belgium.

314. In conclusion, the Belgian courts would be competent to decide on the review of an adoption established in Belgium or abroad following an enforced disappearance. The Public Prosecution Service would even be under an obligation to act. Following the adoption review, the competent public authorities would be required to take appropriate measures in respect of the child, as dictated by his or her best interest.

(e) Annulment of adoption

315. Article 349-3 of the Civil Code states that action for annulment cannot be brought against adoption. Article 359-6 of the Civil Code expressly stipulates that an adoption cannot be annulled in Belgium, even if the law of the State where it was established so permits. Similarly, article 366-3 of the Civil Code provides that, without prejudice to article 351, a decision of a foreign authority annulling an adoption cannot produce effects in Belgium.

316. In the *travaux préparatoires* for the Adoption Reform Act of 24 April 2003, the legislator explains that it was found necessary to extend the prohibition to all adoptions, even those established abroad; that the prohibition was designed to strengthen legal security

¹¹⁰ “The Public Prosecution Service is under an obligation to act (...) and once it is established that the child has been abducted, sold or trafficked, the judge has no discretion as to the desirability of deciding on a review (...). It cannot be tolerated that an adoption thus vitiated should continue to exist as a legal act and that the fraud should be accommodated (...). The review nullifies the adoption for the future (*ex nunc*) and has extremely important consequences for the situation of the adopted person. The deciding judge and, more generally, the competent public authorities must see to it that the adopted person is not left completely destitute and must provide for his or her subsequent status (...). At this stage, the authorities clearly have broad discretion as to the measures that they consider necessary in respect of the child, and the child's interests, including the child's fundamental rights under international law, will naturally prevail (...). If the adopters are of good faith, it is not excluded that they may again adopt the child in so far as further adoption may be in the child's interest” (parliamentary document 50 1366/1 pp. 33 to 35).

and to prevent it from being too easy to have second thoughts about the adoption; that instances of fraud had been noted in that connection in practice; and that, however, no obstacle was thereby created to the possibility of reconsidering an adoption obtained by reprehensible means, given that recourse could be had to the review procedure.¹¹¹

F. Cooperation with other States in the search or identification of children of disappeared parents

317. See the comments under article 14 of the Convention.

G. National legislation and procedures that guarantee that in all actions concerning children, whether undertaken by public institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration

318. In Belgium, the best interests of the child have acquired constitutional value (art. 22 bis, para. 4).

319. With regard more particularly to adoption, article 344-1 of the Civil Code stipulates, under basic conditions for adoption, that adoption must be on good grounds and, if it concerns a child, can take place only in the child's best interests and with due regard for the child's fundamental rights under international law.

320. Article 357 of the Civil Code contains a particular provision of international private law according to which, irrespective of the law applicable to the establishment of adoption, the conditions set out in article 344-1 must be observed.

321. In the event of the review of adoption in accordance with the provisions referred to in E above, the *travaux préparatoires* emphasize the obligation for the competent authorities to take the best interests of the child into account in order to provide for his or her subsequent status.¹¹² They refer to a decision of the European Commission on Human Rights in support of a court of law that refused to grant an adoption on account of the fraud on which it was based. Mention is also made of a judgment of the Supreme Court of Israel, which withdrew the child from good-faith adoptive parents on account of a kidnapping at the origin of the adoption. The *travaux préparatoires* explain that those two decisions are cited to illustrate the way in which the interests of the child — all too often equated with those of the adopters — should henceforth be understood.

¹¹¹ Parliamentary document 50 1366/001 p. 46.

¹¹² “The Public Prosecution Service is under an obligation to act (...) and once it is established that the child has been abducted, sold or trafficked, the judge has no discretion as to the desirability of deciding on a review (...). It cannot be tolerated that an adoption thus vitiated should continue to exist as a legal act and that the fraud should be accommodated (...). The review nullifies the adoption for the future (*ex nunc*) and has extremely important consequences for the situation of the adopted person. The deciding judge and, more generally, the competent public authorities must see to it that the adopted person is not left completely destitute and must provide for his or her subsequent status (...). At this stage, the authorities clearly have broad discretion as to the measures that they consider necessary in respect of the child, and the child's interests, including the child's fundamental rights under international law, will naturally prevail (...). If the adopters are of good faith, it is not excluded that they may again adopt the child in so far as further adoption may be in the child's interest” (parliamentary document 50 1366/1 pp. 33 to 35).

H. How children capable of forming their own views have the right to express those views freely in all matters related to enforced disappearance which are affecting them

322. In accordance with article 22bis, paragraph 2, of the Constitution, all children have the right to express their views on any matter of concern to them; their views are taken into consideration, with due regard for their age and judgment.

323. Generally speaking, article 931 of the Judicial Code stipulates that in any procedure affecting a minor capable of forming his or her views, the minor in question may be heard; it also lays down the procedures to be followed in that connection.

324. More particularly, article 56 bis of the aforementioned Youth Protection Act of 8 April 1965 stipulates that the juvenile court must summons persons aged 12 years and over for the purpose of hearings in disputes between persons invested with parental authority in respect of them during discussions of issues concerning the management of their lives, the administration of their property, exercise of visiting rights or designation of the person who, under the supervision of the juvenile court, will exercise the rights pertaining to the parental authority of which the parents or either one of them have been divested and will discharge the related responsibilities. In such cases, the judge has the duty to hear minors aged 12 years and over. Judges may also summon minors under the age of 12 to appear in court if they deem it desirable. This is not, however, an obligation.

325. It should also be noted that article 348.1 of the Civil Code stipulates that any person aged 12 years and over at the time that the decision on adoption is handed down and who is not lacking in understanding, barred or in a state of prolonged immaturity, must consent or have consented to his or her adoption. This provision is applied irrespective of the law applicable to the consent of the adopted person and irrespective of the kind of adoption (simple adoption or full adoption). The hearing of adopted persons aged 12 years and over is also provided for in the procedure. Where a candidate for adoption under the age of 12 is found, upon examination, to be capable of expressing his or her opinion regarding the projected adoption, he or she is also heard by the judge. The lack of consent to his or her adoption by a child aged 12 years and over is a ground for Belgium to refuse to recognize an adoption established abroad.

I. Statistical data on cases of enforced disappearance

326. No such statistics have been compiled by the Belgian authorities.
