

COMMITTEE T

*Counter-Terrorism Measures in Belgium:
A Short Assessment of the Situation in light of the visit of the UN
Special Rapporteur on the promotion and protection of human rights
and fundamental freedoms while countering terrorism*

Brussels, May 2018

About the COMMITTEE T

Created in 2005, the « Comité de vigilance en matière de lutte contre le terrorisme (Committee T)¹ arose out of a civil society initiative, deriving from a general concern as to the growing number of counter-terrorism measures having a potential detrimental impact on human rights and fundamental freedoms of Belgian or other country citizens. Two major legislative activity may be pinned out: in 2003, in the aftermath of the attacks perpetrated in the United States in September 2001, and in 2015-2016, following the attacks in France and Belgium.

While reaffirming the legitimacy of counter-terrorism measures, the Committee T is driven by the necessity to preserve the Rule of Law, and the fundamental freedoms it encompasses, in the legislative process and its enforcement. Therefore, the Committee has for purpose to insist on the fact that even though the majority of fundamental freedoms are not absolute, their limitation must be necessary and justified, and must, as much as possible, remain the exception. Moreover, the Committee is against the increasing transfer of power from the judiciary to the executive branch of power, as of the transfer of power from the investigative judge to the prosecutor and the police. This is because this transfer is not accompanied with the same guarantees in terms of protection of fundamental rights of the citizens.

The Committee therefore aims at providing a critical analysis of counter-terrorism measures and their human rights impact. It ensures the visibility of its work by the production of an annual report. The last report dates from April 2017.

¹ The Committee T is composed of organisations and individual members. The organisations are the following: The Federation of Lawyers for Democracy, the International Observatory of Prisons (Belgian Section) (OIP), the Dutch and French sections of the League for human rights, the National Coordinator for Peace and Democracy Action (CNAPD), the Solidarity Collective against Exclusion (CSCE) and Brussels-Secular. The individual members are the following: Julie Adyns (Jurist), Dounia Alamat (Lawyer, Federation of Lawyers for Democracy), Laurent Arnauts (Lawyer), Georges-Henri Beauthier (Lawyer), Mathieu Beys (Jurist, League for human rights), Mpela Biembongo (Jurist, Committee T Coordinator), Mathieu Bietlot (Philosopher and Political Specialist, Brussels-Secular), Marie Berquin (Lawyer, OIP), Joke Callewaert (Lawyer), Montserrat Carreras (Amnesty International Belgium), Maria Luisa Cesoni (Professor at the Catholic University of Louvain-La-Neuve), Nicolas Cohen (Lawyer, OIP), Claude Debrulle (Administrator, League for human rights), Eefje De Kroon (Coordinator, League for human rights), Jan Fermon (Lawyer), Manuel Lambert (Jurist, League for human rights), Samuel Legros (CNAPD), Arnaud Lismond (CSCE), Christophe Marchand (Lawyer), Delphine Paci (Lawyer), Louise Reyntjens (Jurist, Phd Student at the Catholic University of Leuven), Olivia Venet (Lawyer, League for human rights).

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Executive Summary

Over the past 15 years, the Belgian Government has proactively engaged in the enactment of various legislations and measures aiming at fighting against terrorism. While the goal is legitimate, its process poses serious concern relating to the human rights and fundamental freedoms of the citizens. In that vein, this document has the purpose of providing some insights as to what are considered to be the most prominent issues in Belgium in the field of counter-terrorism, knowing that Belgium has already violated multiple human rights and that the Belgian Constitutional Court already cancelled several legislations in the field of terrorism. This was notably addressed in the last Committee T report of 2017.²

The first aspect that is analysed here is the lack of a proper human rights monitoring body in Belgium. Indeed, even though it has constituted several organisations dealing with specific aspects of human rights, several shortcomings have been depicted. On top of interrogations as to their independence and impartiality, none of them is currently competent to monitor all human rights related issues in the field of counter-terrorism. This is because of their limited mandate, which does not provide sufficient room to cover the entire spectrum of the human rights impact of counter-terrorism measures. As it is argued below, the format of the institutions is not the major concern. What is crucial is for the Government to establish a human rights monitoring system which would also enable to monitor human rights in the field of terrorism.

Another important subject is the one of the conditions of detention in Belgian prisons, especially for what concerns terrorists convicted. When an individual is suspected of or convicted for a terrorist offence, the latter will automatically face solitary confinement and will be applied a strict regime notably regarding working and visiting rights. The penitentiary administration has settled an observatory regime to depict possible radicalization for which penitentiary agents are responsible. The last matter of concern relates to the possibilities for early release, which are also much more limited in case of a terrorist convictions than for other convictions.

Concerns are also present in the field of Asylum Law. Indeed, the spate of recent terrorist attacks in many of our European countries has inspired fear in the population. Governments are struggling with the proper response to this threat. Because terrorism is perceived as a threat mainly emanating from abroad, migration law has increasingly been relied on to counter the threat. This trend is noticeable in Belgium as well. Over the past few years, new legislations have been implemented and existing legislations have been adapted.³ In that vein, three main concerns can be highlighted: the refusal of entry on the territory for reasons of national security, the ending of residence and expulsion for reasons of national security and, lastly, the deprivation of nationality for reasons of national security.

The last problematic topic that will be exposed here relates to the question of Foreign Terrorist Fighters and returnees. The Committee is aware of the complexity of the subject. However, because those notions have been used in a very generic way, concerns are raised regarding the potential inclusion of

² See Appendix No. 1.

³ A.P. SCHMID, *Links Between Terrorism and Migration: An Exploration*, *Terrorism and Counter-Terrorism Studies*, 2016, available at: <http://icct.nl/publication/links-between-terrorism-and-migration-an-exploration/>.

a large number of people who now systematically face detention upon return, without a proper identification of their degree of participation in a conflict. The far-reaching definitions of the notions as well as the legal basis justifying the detention and prosecution of returnees seems to potentially violate the principle of legality as enshrined in Article 7 ECHR. Besides, the way the situation of Belgian children still in conflict zones (or even upon return) is handled is very preoccupying.

The Belgian Prime Minister, Charles Michel, stated in 2015 that *“equality, separation of church and state, freedom of expression, tolerance and respect for others... These are and must remain the untouchable foundations of our democracy [...] We shall fight the enemies of freedom with respect for the rule of law, adversarial procedures, presumption of innocence and the right to defence”*.⁴ It is our duty to make sure that the Government abides by its own principle, which are also the foundations of our democratic society and of the Rule of Law.

⁴ C. MICHEL (PRIME MINISTER OF BELGIUM), *Fight against terrorism, the measures taken by the federal government and the speech of the Prime Minister*, 19 November 2015, available at: <http://premier.be/en/fight-against-terrorism-measures-taken-federal-government-and-speech-prime-minister>.

Issues Related to Counter-Terrorism Measures in Belgium

1. The Lack of proper human rights monitoring bodies in Belgium

1.1. The Lack of a National Human Rights Institution⁵

Numerous international human rights monitoring bodies recommended that Belgium establish a National Human Rights Institution (NHRI) in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).⁶ Among others, the UN Committee on Economic, Social and Cultural Rights,⁷ the UN Committee on the Elimination of Discrimination against Women,⁸ the UN Committee against Torture,⁹ the UN Committee on the Elimination of Racial Discrimination,¹⁰ the UN Committee on the Rights of Persons with Disabilities,¹¹ and the Council of Europe Commissioner for Human Rights¹² all made similar recommendations. Furthermore, Belgium has several times committed itself to establish such a NHRI, both at national¹³ and international¹⁴ levels.

Despite all of those commitments and recommendations, Belgium still lacks a National Human Rights Institution to monitor the respect of human rights in Belgium, transmit and implement international norms at the domestic level and to transfer human rights expertise to regional and global human rights bodies. Such an institution would play a central and essential role in the framework of counter-terrorism measures.

⁵ Hereinafter, "NHRI".

⁶ As approved by the General Assembly of the United Nations in GA, *National Institutions for the Promotion and Protection of Human Rights*, 20 December 1993, A/RES/48/134.

⁷ CESCR, *Observations finales concernant le quatrième rapport périodique de la Belgique*, 23 December 2013, E/C.12/BEL/CO/4, § 8, available at: <file:///C:/Users/LDH/Downloads/G1440182.pdf>.

⁸ CEDAW, *Concluding observations on the seventh periodic report of Belgium*, 14 November 2014, CEDAW/C/BEL/CO/7, § 13, available at: [file:///C:/Users/LDH/Downloads/N1462684%20\(1\).pdf](file:///C:/Users/LDH/Downloads/N1462684%20(1).pdf).

⁹ CAT, *Concluding observations on the third periodic report of Belgium*, 3 January 2014, CAT/C/BEL/CO/3, § 9, available at: http://bdf.belgium.be/resource/static/files/import/cat_rapport/2014-01-03-cat-concluding-observations-en_1.pdf.

¹⁰ CERD, *Observations finales concernant les seizième à dix-neuvième rapport périodique de la Belgique*, 14 March 2014, CERD/C/BEL/CO/16-19, § 7, available at: <file:///C:/Users/LDH/Downloads/G1441679.pdf>.

¹¹ CRPD, *Concluding observations on the initial report of Belgium*, 28 October 2014, CRPD/C/BEL/CO/1, § 49, available at: <file:///C:/Users/LDH/Downloads/G1419288.pdf>.

¹² T. HAMMARBERG, *Rapport du Commissaire aux droits de l'homme du Conseil de l'Europe faisant suite à sa visite en Belgique du 15 au 19 décembre 2008*, 17 June 2009, CommDH(2009)14, §§ 10 et 56.

¹³ GOUVERNEMENT FEDERAL, *Accord de gouvernement*, 10 October 2014, p. 227, available at: http://www.premier.be/sites/default/files/articles/Accord_de_Gouvernement_-_Regeerakkoord.pdf; CHAMBRE DES REPRESENTANTS DE Belgique, *Note de politique générale. Egalité des chances*, 21 December 2012, DOC 53 2586/013, p. 32, available at: http://www.ioellemilquet.be/wp-content/uploads/2013/01/te_le_charger_la_note_de_politique_ge_ne_rale_-_egalite_des_chances-21.pdf.

¹⁴ HRC, *Report of the Working Group on the Universal Periodic Review – Belgium*, 11 April 2016, A/HRC/32/8, pt. 138-21 – 138-52, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/073/99/PDF/G1607399.pdf?OpenElement>.

1.2. The Lack of a monitoring body specialized in the protection of human rights in counter-terrorism measures

Belgium also lacks monitoring bodies whose competences and prerogatives cover specifically the respect of human rights in counter-terrorism measures.

In 2009, NGOs managed to push the Federal Parliament to proceed to an evaluation of existing legislations in the field of terrorism to assess their compatibility with the respect of human rights,¹⁵ as recommended by the Council of Europe Commissioner for Human Rights.¹⁶ However, this evaluation never came to a conclusion (due to the fall of the Federal Government) nor was it followed by any effects. It is urgent that such parliamentary work resumes quickly.

1.2.1. *The Inadequacy of other existing monitoring bodies*

Other existing monitoring bodies might have competence over some aspects of counter-terrorism measures. However, on one hand, none of them has a sufficiently large mandate, and on the other hand, they all raise questions regarding their competence, work and ethics.

Following are a few illustrations of such concerns:

1.2.1.1. *The Standing Police Monitoring Committee*

For instance, the Standing Police Monitoring Committee (Committee P) was created to provide the Federal Parliament with an external body responsible for monitoring the police. Through inspection inquiries and examination of complaints, the Committee P provides a picture of the current work of the police and is deemed to act as a watchdog by monitoring the work of the police forces on behalf of the Federal Parliament and citizens.¹⁷

Although it describes itself as an independent institution, Committee P is criticized by many international bodies for its lack of independence and objectivity, particularly with regard to the composition of its Investigation Service. This department is composed of police officers, coming from different services, who are in charge of monitoring the work of active police officers. In this context, the UN Committee against Torture has long been advocating that Belgium should take "*adequate measures to ensure the independence of Committee P through its reorganization*".¹⁸ Similar recommendations were made by the UN Human Rights Committee: the Committee "*remains concerned by the doubts that persist as to the independence, objectivity and transparency of Committee*

¹⁵ CHAMBRE DES REPRESENTANTS DE Belgique, *Rapport fait au nom de la Commission de la Justice par Mme Clotide Nyssens*, 16 December 2009, Session 2009/2010, DOC 52 2128/007, pp. 73 et suiv., available at: <http://www.lachambre.be/FLWB/pdf/52/2128/52K2128007.pdf>.

¹⁶ T. HAMMARBERG, *Rapport du Commissaire aux droits de l'homme du Conseil de l'Europe faisant suite à sa visite en Belgique du 15 au 19 décembre 2008*, Strasbourg, 17 June 2009, CommDH(2009)14, § 144, available at: http://www.mensenrechten.be/pdf/CommDH%282009%2914F_Belgique-final.pdf.

¹⁷ See: STANDING POLICE MONITORING COMMITTEE, available at: <http://comitep.be/>.

¹⁸ CAT, *op. cit.*, § 13, available at: http://bdf.belgium.be/resource/static/files/import/cat_rapport/2014-01-03-cat-concluding-observations-en_1.pdf; CAT, *Concluding Observations of the Committee against torture: Belgium*, 19 January 2009, CAT/C/BEL/CO/2, § 11, available at: <file:///C:/Users/LDH/Downloads/G0940325.pdf>.

P and as to its ability transparently to deal with complaints against police officers".¹⁹ More recently, its independence was again put into question by the UN Human Rights Council.²⁰

1.2.1.2. The General Inspectorate of the Federal Police and the Local Police

The General Inspectorate of the Federal Police and the Local Police (AIG) is a governmental department which is under the authority of Ministers of Home Affairs and Justice.²¹ It is a monitoring body of police services under the Executive branch of power and it has an administrative monitoring mission.

AIG is also criticized and seen as "not truly independent"²² as Ministers of Home Affairs and Justice decide on the policy to be followed by the AIG. Furthermore, AIG investigators are actually officers seconded from their regular police services,²³ where they subsequently may return to.²⁴

1.2.1.3. The Prison Oversight Central Committee and the Prison Surveillance Commissions

Belgium signed the Optional Protocol to the UN Convention against Torture (OPCAT),²⁵ but never ratified it, despite numerous commitments to do so, both at national²⁶ and international²⁷ levels. When a State ratifies the OPCAT, its main obligation is to set up an independent National Preventive Mechanism (NPM) to undertake regular visits to places of detention and formulate recommendations to the authorities.

Belgium aims to ratify the OPCAT following the adoption of a 25 December 2016 law²⁸ reforming the

¹⁹ HR COMMITTEE, *Draft concluding observations of the Human Rights Committee, Belgium*, 16 November 2010, CCPR/C/BEL/CO/5, §15, available at: <http://undocs.org/en/CCPR/C/BEL/CO/5>. See also: ECRI, *Rapport de la Commission européenne contre le racisme et l'intolérance sur la Belgique* (quatrième cycle de monitoring), 26 May 2009, p. 46, n° 170, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Belgium/BEL-CbC-V-2014-001-FRE.pdf>.

²⁰ HRC, *Draft report of the Working Group on the Universal Periodic Review – Belgium*, Geneva, 3 February 2016, A/HRC/WG.6/24/L.6, pt. 140.23 - 140.24, available at: https://www.upr-info.org/sites/default/files/document/belgium/session_24_-_january_2016/a_hrc_wg.6_24_l.6_0.pdf.

²¹ See: ALGEMENE INSPECTIE – INSPECTION GENERALE, available at: <http://www.aigpol.be/en/index.html>.

²² M. BEYS, *Quels droits face à la police ? Manuel juridique et pratique*, Jeunesse & Droit Editions – Couleur Livres Editions, Liège-Bruxelles, 2014, p. 523.

²³ Article 4 § 3 of the Law of 15 May 2007 on general inspection and gathering diverse dispositions related to the status of certain members of police services, published on 15 June 2007 (entered into force on 15 June 2007).

²⁴ M. BEYS, *op. cit.*

²⁵ As approved by the General Assembly of the United Nations in GA, *Resolution adopted by the General Assembly. Optional Protocol to the Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199.

²⁶ CONSEIL DES MINISTRES, *Assentiment au protocole relatif à la convention contre la torture et autres traitements cruels, inhumains ou dégradants*, 22 February 2018, available at: file:///C:/Users/LDH/Downloads/Presscenter.org_Assentiment_au_protocole_relatif_a_la_convention_contre_la_torture_et_autres_traitements_cruels_inhumains_ou_degradants_90997_fr.pdf; GOUVERNEMENT FEDERAL, *Accord de gouvernement du 10 octobre 2014*, p. 124, available at: http://www.premier.be/sites/default/files/articles/accord_de_gouvernement_-_Regeerakkoord.pdf.

²⁷ HRC, *Report of the Working Group on the Universal Periodic Review – Belgium*, *op. cit.*, pt. 138-2 – 138-17.

²⁸ Law of 25 December 2016 modifying the legal status of detainees and the surveillance of prisons and gathering diverse dispositions in the field of justice, also called « loi pot-pourri 4 », published on 30 December 2016 (entered into force on 9 January 2017).

existing prison surveillance system and giving the Prison Oversight Central Committee²⁹ and the Prison Surveillance Commissions³⁰ the mission to monitor places of deprivation of liberty.

However, this law has been heavily criticised both by NGOs³¹, academics³² and official bodies, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)³³ and Prison Surveillance Commissions themselves.³⁴ Indeed, it is far from the OPCAT standards and could lead to problematic conflict of interest at several levels. Besides, knowing that Belgium signed the OPCAT in 2005, and therefore had 13 years to set up a proper surveillance mechanism, it wouldn't be acceptable that the Belgian state refers to Article 24 of the protocol to delay its obligations from 3 to 5 years. This should not be an option.

The Prison Oversight Central Committee and the Prison Surveillance Commissions lack the necessary means required to tackle issues related to the treatment of detainees faced with a terrorism related conviction (solitary confinement, D-RAD:EX regime, etc.) and to monitor the respect of human rights of such detainees.

1.2.1.4. Other existing bodies

Other pertinent bodies have a mandate that could cover part of the numerous issues that arise in the framework of counter-terrorism measures, such as the Privacy Commission,³⁵ the Standing Intelligence Agencies Review Committee (Committee I),³⁶ the Federal Ombudsmen,³⁷ UNIA,³⁸ etc.

However, even if several of them monitor adequately the respect of HR in the framework of their mandate,³⁹ none of them have a sufficiently broad mandate to include all issues regarding the respect of human rights in counter-terrorism measures, nor enjoy the necessary independence required to accomplish such a mission.

²⁹ See: CONSEIL CENTRAL DE SURVEILLANCE PEINITENTIAIRE, available at: <http://www.ccsp-ctrg.be/fr>.

³⁰ CONSEIL CENTRAL DE SURVEILLANCE PEINITENTIAIRE, *Présentation des Commissions de surveillance*, available at: <http://www.ccsp-ctrg.be/fr/commissions>.

³¹ LIGUE DES DROITS DE L'HOMME, *Le vote au parlement de la loi Pot-Pourri IV : un manquée de ratifier le protocole contre la torture*, available at: <http://www.liguedh.be/6-le-vote-au-parlement-de-la-loi-pot-pourri-iv-une-occasion-manquee-de-ratifier-le-protocole-contre-la-torture/>.

³² O. NEDERLANDT, « La surveillance des prisons et le droit de plainte des détenus : jusqu'où ira le bénévolat ? », *Journal des Tribunaux*, 23 September 2017, n° 6698, p. 541.

³³ CPT, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017 (CPT/Inf (2018))*, Strasbourg, 8 March 2018, n°8, §§ 101-102.

³⁴ O. NEDERLANDT, *op. cit.*, p. 554.

³⁵ See: COMMISSION FOR THE PROTECTION OF PRIVACY, available at: <https://www.privacycommission.be/en>.

³⁶ See: BELGIAN STANDING INTELLIGENCE AGENCIES REVIEW COMMITTEE, available at: <http://www.comiteri.be/index.php/en/>.

³⁷ See: LE MEDIATEUR FEDERAL, available at: <http://www.federaalombudsman.be/fr/homepage>.

³⁸ See: UNIA, available at: <https://www.unia.be/en>. Regarding this body, see the interesting following report : UNIA, *Mesures et climat – Conséquences post-attentats*, June 2017, available at: https://www.unia.be/files/TERAD_Fr.pdf.

³⁹ See for exemple, UNIA, *Mesures et climat - Conséquences post-attentats*, June 2017, available at: https://www.unia.be/files/TERAD_Fr.pdf.

1.3. Recommendations

The Belgian Government should, as it has committed itself numerously to do so, set up a NHRI in conformity with the Paris Principles. It should also ratify the OPCAT and set up a NPM in line with international standards. And, finally, the Federal Parliament should resume the evaluation of its legislative corpus to assess the respect of human rights in the framework of counter-terrorism measures.

If the Belgian State does not set up a NHRI that would have a proper mandate regarding the respect of human rights in the framework of counter-terrorism measures, it should create an *ad hoc* body suited to do so, properly financed, with the necessary independence and legal basis.

2. The Conditions of Detention of Detainees

2.1. The general conditions of detention in Belgium

The general conditions of detention in Belgium have been heavily criticized over the years by national NGO's (*Observatoire international des prisons*, *Ligue des droits de l'homme*, and others), by some of the Surveillance Commissions (volunteers from civil society who have access to all places and people in a given penitentiary), the European committee for the prevention of torture (CPT)⁴⁰ and the European Court of Human rights.⁴¹

We must remind the reader that the scope of “terrorist” crimes in Belgian legislation is extremely wide. It covers ordinary criminal offenses committed with a terrorist purpose. But it also covers many legal behaviours as soon as they are perpetrated with the purpose of helping or joining a terrorist group. For example, the simple fact of preparing a travel to Syria to join a “terrorist labelled” organisation is enough to get caught, put into custody and sentenced to 10 years of prison⁴². This is to say that the “terrorist” label can be applied to very different behaviour, and thus, to very different profile of detainees. Moreover, a certain number of detainees will fall into the scope of a “terrorist” detention not because they are suspected of or have been convicted for such crimes but because they have been identified as such by the penitentiary administration in relation with the Secret services and Federal police.

Additionally, Article 6 of the Law of 3 August 2016 regarding diverse provisions on the fight against terrorism⁴³ suppressed the usual applicable criteria to issue an arrest warrant for terrorist offences punished of more than 5 years imprisonment. Those criteria were notably: the presence of a risk of repeat offence, the risk for running away, the risk of collusion with third people, etc.. This provision illicitly limits the freedom of appreciation of the investigative judge regarding the application of the preventive detention for certain categories of offences, namely, terrorist offences. This is done without objective, relevant and clear criteria justifying such distinction. Finally, it goes in violation with the necessity to interpret any deprivation of liberty restrictively and the necessity to cautiously control their constitutionality.

2.2. The conditions of detention of “terrorist” detainees

2.2.1. *Solitary confinement*

Detainees suspected of or convicted for acts of terrorism or radicalization have been subjected to special conditions of detention for many years. To date, the only improvement regarding their

⁴⁰ See: CPT, available at: <https://www.coe.int/en/web/cpt/belgium>.

⁴¹ ECHR, *Bamouhamad v. Belgium*, 17 November 2015, no.47687/13 (violation of Articles 3 and 13 ECHR); ECHR, *Vasilescu v. Belgium*, 25 November 2014, no.64682/12 (violation of Article 3); ECHR, *W.D v. Belgium – Pilot Judgment*. 6 September 2016, no. 73548/13 (violation of Articles 3, 5§§, 5§4 and 13).

⁴² Article 140sexies of the Belgian Criminal Code.

⁴³ Law regarding diverse provisions on the fight against terrorism, adopted on 3 August 2016, published on 11 August 2016 (entered into force on 21 August 2016).

conditions of detention has been the enactment of the Belgian Law on the Solitary confinement regime,⁴⁴ which entered into force in December 2006. Even though the improvements brought about by such regime are highly questionable, at least the law now requires a hearing of the detainees every 2 months, in the presence of a lawyer. Additionally, the detainees must be granted access to the reasons justifying the solitary confinement regime, and a medical assessment regarding the risk of pursuing said regime must be made.

Since the terrorist attack in Paris in January 2015, the general policy regarding this group of detainees has strengthened tremendously. The General Director of penitentiary administration, by confidential notes and directives, created a specific regime⁴⁵ under which they are systematically placed into solitary confinement. For example, even though the Law of 12 January 2005 on penitential administration provides that solitary confinement can be applied only after an individualized analysis by the prison staff is conducted, it now appears that anyone detained on the basis of any terrorist related offence will be put into solitary confinement.⁴⁶

2.2.2. Enhanced observation of detainees

Once isolated, they are put under a very careful observation. The penitentiary staff is required to report on:⁴⁷

- Appearances, prayers, eating habits, night rhythm, occupations, the taking of medication or drugs, impulsivity, likelihood of being indoctrinated, need for adventure, mood, bizarre behaviour, equipment and books in cell, status amongst other prisoners, contacts with fellow prisoners and topics of discussion;
- Attitude toward the staff: is the detainee docile, rebellious, polite, demanding, arrogant, what are his contacts with the imam;
- Does he feel frustrated, feel injustice, reject Western values, try to hide his faith in radical Islam;
- Signs of disengagement: shows up with staff, distances itself from activities in Syria, collaborates with the authorities, no longer supports the idea that violence is necessary to achieve its goal.

Their access to phone, letters and visits is strictly controlled. Quite often, every contact with a brother or a girlfriend is denied without any motivation or opportunity to challenge this decision. In several prisons, they are strip-searched after each visit they get. Most of the time, the detainees, humiliated

⁴⁴ Articles 116 and following of the Law of 12 January 2005 establishing the principles on the penitential administration and on the legal status of detainees, published on 1 February 2005 (entered into force on 1 November 2005).

⁴⁵ FEDERAL OVERHEIDSDIENST JUSTITIE, *Instructions spécifiques extrémisme*, 9 June 2017, 10 p. (Appendix no. 4).

⁴⁶ CVT SINT-GILLIS, *Rapport annuel. Commission de surveillance de la prison de Saint-Gilles*, 2017, p. 28 available at: http://www.cvsp-ctrg.be/fr/system/files/cds_prison_st_gilles_rapport_fr_2017.pdf. See also: HUMAN RIGHTS WATCH, *Sources d'inquiétude. Les réponses antiterroristes de la Belgique aux attaques de Paris et de Bruxelles*, November 2016, available at: https://www.hrw.org/sites/default/files/report_pdf/belgium1116fr_web.pdf.

⁴⁷ FEDERAL OVERHEIDSDIENST JUSTITIE, *Instructions spécifiques extrémisme*, 9 June 2017, 10 p. (Appendix no. 4); SERVICE PUBLIC FEDERAL JUSTICE, *Annexe 3: Instructions particulières extrémisme. Fiche d'évaluation trimestrielle*, 3 p. (Appendix no. 3); SERVICE PUBLIC FEDERAL JUSTICE, *Annexe 2: Instructions particulières extrémisme. Fiche d'observation*, 2 p. (Appendix no. 2).

by this practice, do not complain to anyone. A regime deriving from common law is applied to them for any request for leave.

2.2.3. *Increased difficulty for possible liberation*

There are two categories of convicted detainees depending on the sentence: three years and less on the one hand, more than three years on the other.

For those sentenced to three years and less, it is the administration who provides the rules to decide when they can be released anticipatively. The general rule is that, if a “regular” detainee has the right to stay in Belgium and has an address, he/she can be detained with an electronic bracelet, monitoring his/her movements and allowing for timeframes to leave home for work, job searching, etc. Yet, detainees convicted for any kind of terrorist activity do not have access to electronic surveillance. Even if they have a family and a job outside, and even if they were not put in custody before trial, as soon as they are convicted, they have to come to prison and will not leave after the very last day of their sentence. These rules do not appear in the law but in circulars. Hence, they are not subject to parliamentary control and judicial review is extraordinarily complicated.

For those sentenced to more than three years, their release can only be given by a Court, the *Tribunal de l'application des peines*. It could be assumed that the control by an independent judge would be helpful but, in practice, the judges are extremely reluctant to any kind of anticipated release when there is a “terrorist” label on the detainee. Also, the penitentiary administration, which collects information and is supposed to provide specific analysis on those detainees,⁴⁸ refuses to communicate such information to the Court.

Moreover, two autonomous sections of 20 places have been set up in 2016 in the prisons of Hasselt and Ittre, to accommodate the most "radicalized" prisoners. These sections are called **D-RAD: EX**. Only certain prisoners, at the discretion of the penitentiary management, have access to a discussion group with a psychologist. They have very little access to work, and when it is the case, they can only work from their cell. They can go to a gymnasium but only at a ratio of five at a time. The work is drastically limited, as are the visiting rights and telephone access. At Ittre, the courtyard is tiny and fenced. No "de-radicalization" program is associated with the placement in this section. In Hasselt, detainees have access to the ordinary courtyard and may receive visits from a "disengagement" specialist.

2.3. Recommendations

During his latest visits, the CPT did not enter the D-RAD:Ex sections. It would therefore be very valuable if the Special Rapporteur could program a visit in the D-RAD:EX sections of Ittre and Hasselt.

⁴⁸ FEDERAL OVERHEIDSDIENST JUSTITIE, *op. cit.*

3. The use of immigration law for countering terrorism in Belgium

In the field of Asylum Law, it is important to note that very few legislations use the explicit term of “countering terrorism”. They more generally refer to “national security”. Yet, it is undeniable that the following legislative amendments/initiatives were taken with the specific objective of counter-terrorism measures.

3.1. Refusal of entry on the territory for reasons of national security

Generally speaking, refusing entry without considering whether the refusal might violate Article 3 ECHR is in itself a violation of multiple principles (Article 3 ECHR, principle of *non-refoulement*,⁴⁹ Article 9 EU Return Directive 2008/115/EC). This is a tendency that might lead to other, more specific, violations.

Among those, mention should be made of Directive 2004/38/EC, analyzed in conjunction with the Belgian Immigration Act.⁵⁰ According to this Act, entry can be refused on the basis of national security or public order.⁵¹ Article 27, §2 EU Directive 2004/38/EC clearly states that, when measures are taken on the basis of national security or public order (such as expulsion), they shall only be based on the “*personal conduct of the individual*” and must represent “*a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*”.⁵² However, Article 3, 7° of the Belgian Immigration Act only mentions the general concepts of national security and public order, without specifying them, therefore breaching Directive 2004/38/EC.

This leads to an additional problem, this time with regard to Article 8 ECHR (right to private and family life). According to the text of the ECHR, as well as the case-law of the ECtHR, a legal basis must be provided in national legislation in order to restrict a right enshrined in the Convention. Moreover, in order to fulfill this condition, “*domestic law must be accessible and foreseeable, in the sense of being sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled the resort to measures affecting their rights under the Convention.*”⁵³ Since the concepts of “national security” and “public order” are insufficiently clear, such a legal basis is absent. Even though some EU Directives preambles indicate that a conviction of a serious crime or the supporting of organizations with links to terrorist organizations could fall under the notions of national security/public order,⁵⁴ the case law of the ECJ gives the main discretionary power to fill out these concepts to Member States (nevertheless stressing that the

⁴⁹ Article 33 Geneva Convention related to the status of refugees, signed in Geneva on 28 July 1951 (entered into force on 22 April 1954).

⁵⁰ Law of 15 December 1980 on the access to the territory, the residence, the establishment and the removal of strangers, published on 31 December 1980 (entered into force on 1 July 1981) (hereinafter: “Belgian Immigration Act”).

⁵¹ Article 3, 7° Belgian Immigration Act.

⁵² Article 27 Directive 2004/38/EC.

⁵³ ECHR, *C.G. and others v. Bulgaria*, 24 April 2008, no.1365/07, §39.

⁵⁴ Directive 2003/86/EC, 14th consideration; Directive 2003/109/EC, 8th consideration; Directive 2016/801/EC, 36th consideration.

concepts must be interpreted restrictively in Union-Context since refusing EU-citizens entry constitutes a limitation of the free movement of persons).⁵⁵

Besides the lack of legal basis, the measure seems to lack proportionality as well, considering the law provides no balancing exercise between the seriousness of the threat the individual presents for national security and the ties he or she has with Belgium (Article 8 ECHR).

Because the criteria on which the difference in treatment is based are unclear and disproportionate, Article 8 ECHR is put in jeopardy.

3.2. Expulsion for reasons of national security

Exercising its right of controlling the entry and expulsion of non-nationals⁵⁶ in order to protect public order and national security, Belgium adopted the law of 24 February 2017, amending the Belgian Immigration Act.⁵⁷ This amendment brought a number of changes. These changes, including the ones discussed below, are currently being challenged before the Belgian Constitutional Court.

3.2.1. *New categories of aliens*

Among those changes, three categories of aliens were introduced by the law of February 2017, each of which accompanied by a specific regime. In brief, the Minister can end the residence of aliens, both third country nationals as Union-citizens (and their family), either for general, serious or compelling reasons of public order or national security. This decision will depend on the category of alien concerned. For example, a Union citizen who has resided in Belgium for the past 10 years might only be expelled in cases of compelling reasons for public order or national security, whereas a long-term non-EU resident could be expelled via the lower threshold, i.e. for serious reasons. In sum, the stronger the title of residence one enjoys, the more protected they become against expulsion for national security.

It must be noted that before this new legislation, an exception was created for aliens who were born in Belgium or who arrived here before the age of twelve; they could never be expelled. With the 2017 amendment, these former exceptions were abolished. From then on, they became classified under the second category (ending of residence for serious reasons of public order or national security).

3.2.2. *Lack of definition*

The biggest problem with the new legislation lies in its lack of definition of “national security” (and “public order”) and what constitutes “serious” or “compelling” reasons of national security (public

⁵⁵ ECJ, 28 October 1975, C-36/75, ECLI:EU:C:1975:137.

⁵⁶ ECHR, *Mubilanzila Mayeka en Kaniki Mitunga v. Belgium*, 12 October 2006, no. 13178/03, § 81; ECHR, *Moustaquim v. Belgium*, 18 February 1991, no. 12313/86, § 43; ECHR, *Abdulaziz, Cabales en Balkandali v. United Kingdom*, 28 May 1985, nrs. 9214/80, 9473/81 and 9474/81, § 67.

⁵⁷ See the title of the legislative amendment: “Act amending the law of 15 December 1980 on the access to the territory, the residence, the establishment and the removal of strangers, with the aim of protecting public order and strengthening national security” (translated by us).

order). The legislation adopts the wording of Article 27, §2 Directive 2004/38/EC (see Section I),⁵⁸ but adds nothing more. Moreover, as mentioned under Section I, the case-law of the ECJ on “public order” and “national security” refers back to the discretionary power of Member States when determining the exact content of these concepts.

Lastly, the parliamentary preparations explicitly confirmed this lack of definition by stating that the Immigration authorities’ great discretionary powers must be compensated for by extra safeguards in order to balance the lack of definition. The extra safeguards are, in their first part, an exact replica of the definition of Article 27, §2 Directive 2004/38/EC (based on the “*personal conduct of the individual*” and must represent “*a genuine, present and sufficiently threat affecting one of the fundamental interests of society*”). In their second part, an assessment of the actual conduct of the individual, its age and the existence of ties with the country of residence/origin is provided for.⁵⁹

3.2.2.1. Article 8 ECHR

Considering the lack of definition given to these concepts, certain human rights are put in jeopardy, the first being, once again, Article 8 ECHR. According to the ECHR and the ECtHR, the first condition for restricting fundamental rights is having a legal basis. Because the concept of “national security” (and public order) are too vague and, consequently, the appreciation powers of the Immigration authorities is too broad, such legal basis is absent as it does not fulfill the criteria of accessibility and foreseeability.

3.2.2.2. Prohibition of discrimination

The potential violation of the prohibition of discrimination lays on the fact that a difference in treatment exists between third country nationals and the rest of the population. Even in the case where both would be considered as equally “dangerous” from the perspective of national security, the latter category would not be subjected to the ending of their residence and to expulsion. Yet, from the perspective of national security, these are comparable categories as it is the individual itself that poses a threat, not his/her nationality. The response for the difference in treatment seems to lie in the prohibition of expelling a country’s own nationals (Article 3, prot. 4 ECHR). The adequacy of the measure, *i.e.* it being capable of protecting national security, or the proportionality of the measure, can be called into question as well. This last step is coupled with a lack of judicial control as the Immigration authorities’ instance of appeal has no jurisdiction to evaluate the proportionality of the decision itself.

3.2.3. Abolition of the suspensive appeal

With the 2017 amendment, the automatic suspensive effect of the appeal for decisions of the Immigration authorities (Article 39/79 Belgian Immigration Act) is no longer applied in cases where the

⁵⁸ See Articles 20-22 Belgian Immigration Act.

⁵⁹ Article 23 Belgian Immigration Act; Draft of the Act amending the law of 15 December 1980 on access to the territory, the residence, the establishment and the removal of strangers, with the aim of protecting public order and strengthening national security, 21 December 2016, p. 26, available at: <http://www.lachambre.be/FLWB/PDF/54/2215/54K2215001.pdf>.

expulsion decision mentions the presence of “compelling reasons of national security”. To obtain a suspension, the individual will have to launch a procedure of “extremely pressing necessity”, which was deemed insufficient according to the ECtHR because of its utmost complexity and the possibility that the suspension is nevertheless refused.⁶⁰ This, in the end, might put Article 13 ECHR (right to an effective remedy) in jeopardy.

Additionally, as no concrete guidance is given in the parliamentary preparations concerning the concept of “compelling reasons of national security”, coupled with the discretionary power in the hand of the Immigration authorities to decide in which category (“regular” or “compelling”) an individual should fall, the question of discrimination might also be raised. Indeed, there is no objective difference in treatment between these two categories, and hence no objective reasons on the basis of which an individual will be deprived of the suspensive appeal. Besides, such measure might not be proportionate with the objective pursued - being able to intervene faster and more efficiently against those aliens posing a threat to society – as less far-reaching methods, such as the shortening of time limits, were already available.

Lastly, an effective judicial control is all the more necessary for persons who are suspected of terrorist activities. They bear a great risk of being treated contrary to Article 3 ECHR once sent back to their home country.

3.2.4. *Presumption of innocence*

Normally, if someone is suspected of having committed a terrorist offence (or any other offence), they are to appear before a judge and are presumed innocent until the opposite is proven. If the former is not the case, they are exonerated. In the case of aliens, this presumption of innocence is put in jeopardy by the possibility that is given to the Immigration authorities to expel aliens on the basis of presumptions which are not (yet) proven, without the protection of an automatic suspensive appeal. Moreover, the former protection of the Commission for Advise for Aliens⁶¹ – a body which consisted of, among others, a judge – was also squashed, where this used to be obligatory for expulsion of most aliens. These possibilities were all created under the motto of being able to act swiftly and protecting national security. Objectives which might be reached by other, less far-reaching means.

3.3. Deprivation of nationality

The relevant legal instrument here is the Belgian Nationality Act. This Act already provided the possibility to strip someone of their Belgian nationality since 1919, but was only rarely applied. The legal basis on which somebody could be deprived of their nationality was the serious short falling of their responsibilities as a Belgian. Committing a terrorist attack or being involved in terrorist activities would have fallen (and still does) under this definition.

⁶⁰ ECHR, *V.M. and others v. Belgium*, 17 November 2016, no.60125/11, §123.

⁶¹ This commission gave non-binding advice when an expulsion was considered, with particular attention given to the personal situation of the individual involved, the facts he or she is charged with, the personal conduct of the individual, their family situation, the ties with Belgium and their home country, etc.

In 2012, the first major change came about. The conviction for certain terrorist crimes was explicitly added to the list on the basis of which nationality can be deprived. However, a time-limit was included: only at the latest 10 years after somebody acquired Belgian nationality, could they be deprived of it.

In 2015, after the Charlie Hebdo attacks in Paris, the possibility to deprive someone of their nationality was again expanded by including *all* possible terrorist convictions of more than five years. Considering the Belgian Criminal Code, a five year conviction is not very high, as the sentences for terrorist crimes only start at three years imprisonment at the minimum (which only include damage to buildings or infrastructure, not physical victims). The time-limitation of 10 years was also abolished, broadening the applicability of this measure considerably.

The *ratione personae* has always remained the same: only persons who acquired Belgian citizenship from a parent or from their birth in Belgium are excluded from the possibility to be stripped of their Belgian citizenship. Also, those who only possess a single nationality, that is only the Belgian one, cannot be stripped of their citizenship as this would render them stateless.

A judge, both civil and criminal, is the only authority to rule on this matter.

3.3.1. Article 8 ECHR

The Belgian Constitutional Court rejected a possible infringement of Article 8 ECHR in her judgment of 7 February 2018, because it considered that there is no direct link between the deprivation of Belgian nationality and extradition. Indeed, the possible breach of Article 8 would be a result from the extradition, not from the deprivation of nationality itself. Even if deportation, be it expulsion, is systematically applied in practice whenever someone is stripped from their (Belgian) nationality, it follows from the case law of the ECtHR that only in “very exceptional circumstances” the right to family and private life will take precedence over the legitimate goal of the deportation/expulsion.⁶²

3.3.2. The prohibition of discrimination

Only certain categories of people can be deprived of nationality, depending on the way they acquired the Belgian nationality. Hence, an individual who was born in Belgium and whom parents were also born in Belgium and had their principal residence in Belgium at least 5 years during the 10 years preceding the birth will be considered as having greater ties with Belgium than the individual being born in Belgium but who became a Belgian national only after their parents acquired the Belgian nationality during their minority. This seems to justify the difference in treatment between the two categories, and in the way nationality will be deprived. Yet, according to the ECtHR in *Genovese v. Malta*, when it comes to the acquisition of citizenship, no distinction can be tolerated between children

⁶² ECHR, *Trabelsi v. Belgium*, 4 September 2014, no.140/10, § 169; ECHR, *Čalovskis v. Latvia*, 24 July 2014, no.22205/13, §147; ECHR, *Shakurov v. Russia*, 5 June 2012, no. 55822/10, §§ 196 and 202; ECHR, *Babar Ahmad and others v. United Kingdom*, 10 April 2012, nrs. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 252.

on the basis of the status of their parents.⁶³ On the basis of this case-law, it can be argued that the above mentioned distinction is discriminatory.

Citizenship deprivation is used to counter terrorism, as is demonstrated by the name of the Act of 2015 ('For the reinforcement of the fight against terrorism'). It is generally accepted that the fight against terrorism constitutes a legitimate aim. However, is there a legitimate aim to install such differences? Depriving someone of their nationality allows States to expel/extradite former nationals who they deem a threat. Without this, States would find themselves obstructed by the prohibition to deport nationals, as embedded in Article 3, protocol 4 ECHR.

As a next step in the discrimination reasoning, one may call into question the effectiveness of such measure to protect national security. First of all, as the Belgian Constitutional Court made clear, expulsion/extradition is not an automatic consequence of the deprivation measure. The individual may – in theory – still remain on the Belgian territory. Secondly, even if this was systematically applied, would this – in a Schengen-zone with no internal borders – really prevent them from re-entering the territory? Lastly, because the individual is usually already “removed” from society because of his imprisonment, the question of the added value of this measure arises.

The proportionality of the measure can also be put into question, and this, because of the lapse of time between the deprivation measure and the conferral of citizenship. Before the legislative amendment of 2015, this was only possible until 10 years after the requiring of citizenship. With the 2015 amendment, this time-limit was abolished. In this regard it is important to mention the ECJ *Rottman* ruling, where the Court stressed the importance of “*the lapse of time between the naturalization decision and withdrawal decision.*” We may call into question the proportionality of this measure, especially with having regard to the French Constitutional Court who stated that the time limit “*could not further be extended [over 15 years] without breaching the equality between persons who are born French and persons who become French.*” Having no time-limit at all, such as in Belgium, risks being evaluated disproportionate.

3.4. Recommendations

In light of what precedes, it seems important that the Belgian Government rectifies the situation where the administration, the Immigration authorities, can immediately expel an individual without any form of effective judicial control, putting in jeopardy the most fundamental and absolute prohibition of torture. This is because neither the Immigration authorities' Instance of Appeal (considering the suspensive appeal was abolished in the context of national security), nor the Commission for Advice for aliens (considering their preliminary advice was abolished as well), provide for such control. Although the latter was not a judicial body, it at least included a judge who gave advice.

Besides, it is necessary for the Government to provide more concrete guidelines on how the concept of “national security” (and “public order”) are to be fulfilled, to satisfy the principle of legality.

⁶³ ECHR (4th section), *Genovese v. Malta*, 11 October 2011, no.53124/09. According to the Court, “*the applicant was in an analogous situation to other children with a father of Maltese nationality and a mother of foreign nationality. The only distinguishing factor, which rendered him ineligible to acquire citizenship, was the fact that he had been born out of wedlock.*”

Finally, it is deemed appropriate for the Government to (re)evaluate the usefulness of certain measures, in the sense of assessing the balance between their impact on the individual subjected to them (which can be very far-reaching) and the actual protection of society provided by them.

4. The Treatment of Foreign Terrorist Fighters and of Returnees

4.1. Political Discourse

The question of Foreign Terrorist Fighters⁶⁴ and returnees is a recurring question in the political and public discourse. However, a recent declaration of the Minister for Internal Affairs, Jan Jambon, raises concerns as to whether this topic will be handled adequately and in conformity with human rights standards. Indeed, the latter, in a Parliamentary Commission of 28 February 2018, openly stated that “[i]t is neither in the interest of Belgium, nor in the one of our national security that those persons come back to Belgium”.⁶⁵ He further added that no proactive actions have been undertaken regarding their return, except for what concerns minors below the age of 10.⁶⁶ This goes in conjunction with declarations made by the Prime Minister Charles Michel in November 2015, where he stated that “*jihadists returning to our country belong in prison*”.⁶⁷

The underlying problem does not arise out of the (legitimate) goal to counter-terrorism and to properly deal with individuals who committed terrorist offences as prohibited by the Belgian Criminal Code. The issue here, lies on the vagueness of the definition of FTF and returnees, the conflation between proper jihadists who committed or had/have the intention to commit terrorist offence(s), and all other individuals present in a conflict zone, and the lack of transparency and legal clarity in the way their situation is handled.

4.2. The principle of legality and definitional Issues

4.2.1. *The Principle of Legality and the Belgian Criminal Code*

The notions of Foreign Terrorist Fighters and Returnees is not defined in the Belgian Criminal Code. Yet, the basis for prosecution/detention of FTFs/returnees may be found in Article 140*sexies* that prohibits to travel to conflict zones in order to commit a terrorist offence. To be against the law, the travel must be done with the intention to commit one of the offences criminalized under Articles 137, 140 to 140*quinquies*, and 141.

However, Article 140*sexies* does not respect the condition of necessity. In that vein, the Belgian *Conseil d'État* held that the Government “*does not [provide] for situations that would be criminalized on the basis of Article 140 of the Belgian Criminal Code⁶⁸ but which would be under Article 140*sexies* of the*

⁶⁴ Hereinafter “FTF”.

⁶⁵ CHAMBRE DES REPRESENTANTS DE BELGIQUE, *Commission de l'Intérieur, des Affaires générales et de la Fonction publique du 28 Février 2018. Compte rendu intégral*, 28 February 2018, p. 55, available at: <https://www.lachambre.be/doc/CCRI/pdf/54/ic830.pdf>.

⁶⁶ *Ibidem*.

⁶⁷ C. MICHEL (PRIME MINISTER OF BELGIUM), *Fight against terrorism, the measures taken by the federal government and the speech of the Prime Minister*, 19 November 2015, available at: <http://premier.be/en/fight-against-terrorism-measures-taken-federal-government-and-speech-prime-minister>. See also: B. BOUTIN, G. CHAUZAL, et al., *The Foreign Fighters Phenomenon in the European Union. Profiles, Threats & Policies*, ICCT Research Paper, April 2016, p. 27, available at: <https://icct.nl/wp-content/uploads/2016/03/ICCT-Report-Foreign-Fighters-Phenomenon-in-the-EU-1-April-2016-including-AnnexesLinks.pdf>.

⁶⁸ This Article criminalizes the participation in a terrorist activity.

same Code (...).⁶⁹ Yet, the will to punish « at all cost » leads to the danger of the application of an unjustified sentence.

This is even more concerning knowing the uncertainty regarding the constitutive elements of the offence. The material element of the incrimination seems to be lacking as it refers to activities that are not, as such, reprehensible. This leads to a violation of the principle of legality, linked to a high risk of a violation of the presumption of innocence. Indeed, *“the material element of the offence is trivial (to travel, to move from one country to another) and only the intent of the perpetrator at the time of departure will enable to determine whether the committed act is illegal”*.⁷⁰ The offence is hence assimilated to a simple crime of intention, which has however been banished for more than two centuries in Belgian Criminal Law.

This, in turn, may be contrary to the principle of legality as enshrined in Article 7 ECHR, which not only requires for a conduct to be forbidden by law in order to be criminalized, but also prescribes for the necessity of specificity and foreseeability of the law.⁷¹ It is indeed possible to question the ability of an individual to determine, by the wording of the provisions, whether his/her behaviour is wrongful or not.⁷²

As it was highlighted above the Belgian Criminal Code does not provide any definition for Foreign Terrorist Fighters and Returnees. Additionally, documents outside the scope of Criminal Law and which provides for such definition also poses on definitional issues. This is the focus of the next section.

4.2.2. *Vagueness of Definition of the notions of Foreign Terrorist Fighters and Returnees*

As it was stated before, the notions of FTF and Returnees raise concern because of their definitions. For what concerns FTF, the notion has been defined at international level in Resolution 2178 of the Security Council of the United Nations as *“individuals who travel in a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and resolving to address this threat”*.⁷³ However, still nowadays, there is no consensus regarding the notion, leading to definitional disparities even among the Member States of the European Union as the latter has not elaborated a uniform definition.⁷⁴

⁶⁹ Avis du Conseil d'Etat n° 57.127 du 24 mars 2015, pt. 3.5.5. (DOC 54-1198/001, p. 18).

⁷⁰ M-A. Beernaert, Renforcement de l'arsenal législatif anti-terroriste : entre symboles et prévention, *J.T.*, 5 décembre 2015, pp. 833-836.

⁷¹ Article 7 ECHR. See also: ECtHR, *Guide on Article 7 of the European Convention on Human Rights. No punishment without the law: the principle that only the law can define a crime and prescribe a penalty*, 31 December 2017, available at: https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf.

⁷² I. BANTEKAS and L. OETTE, *International human rights. Law and Practice*, Cambridge, CAMBRIDGE UNIVERSITY PRESS, 2016, 2nd ed., p. 727.

⁷³ SC, *Resolution 2178 adopted by the Security Council at its 7272nd meeting, on 24 September 2014, S/RES/2178*, p. 2, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29.

⁷⁴ A. REED and J. POHL, “Disentangling the EU Foreign Fighter Threat: the Case for a Comprehensive Approach”, *RUSI NEWSBRIEF*, February 2017, vol. 37, n°1, p. 1, available at: https://rusi.org/sites/default/files/nb_vol.37_no1_pohl_and_reed.pdf.

In Belgium, the notion of FTF has been defined by scholars as “a Belgian resident, aged 12 or more, that has joined or attempted to join a terrorist organisation abroad”.⁷⁵ Additionally, a Royal Decree⁷⁶ on databases refers to five categories of individuals who are considered to be FTF:⁷⁷

1. Individuals who have travelled to a jihadi conflict zone in order to join a terrorist organisation or to support one, actively or passively;
2. Individuals who have travelled to a conflict zone from Belgium in order to join or support a terrorist group (here, travelling from Belgium is a more specific requirement);
3. Individuals who are travelling to Belgium or who have returned in Belgium after joining a terrorist organisation or supporting one of them;
4. Individuals having been impeached, either voluntarily or involuntarily, to join a jihadi conflict zone with the purpose of joining or supporting a terrorist group;
5. Individuals for whom there are serious indications as to the fact that they have the intention to travel to a jihadi conflict zone with the purpose of joining or supporting a terrorist group.

It is worth noting that it seems to appear from the Royal Decree that only individuals who travelled in a jihadi conflict zone will be labelled as FTF. Hence, even though the abovementioned definition does not seem to limit the scope as regard to the terrorist organisation concerned, it appears from the wording of the Royal Decree that FTF are only individuals who has travelled – or planned to travel – in a jihadi terrorist organisation.

Even though the definition of the Royal Decree is not directly linked to the criminal offences, it nevertheless certainly has an impact on the way the question of FTF is apprehended in Belgium, and as a consequence, on the scope of application of criminal offences. Yet, while the Resolution provides for examples of terrorist activities, it seems from the Royal Decree that any person going or coming back from a conflict zone is automatically a terrorist.

This vagueness can potentially result in the gathering of a large number of individuals who did not, as such, perpetrated terrorist acts or offences. Hence, it tends to assimilates every person who travelled – or planned to travel - to a “jihadi” conflict zone as “Foreign Terrorist Fighters”, even though they are not terrorists as such. Following that understanding, a 14-years-old child could be considered as an FTF by the mere fact that he/she had to follow his/her parents in a conflict zone, instead of being considered as a victim of an armed conflict.⁷⁸

⁷⁵ T. RENARD, R. COOLSAET, *et al.*, *Returnees: Who Are They, Why Are They (Not) Coming Back and How Should We Deal with Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands*, EGMONT PAPER 101, February 2018, p. 19 (footnote n°2), available at: http://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf?type=pdf.

⁷⁶ Royal decree of 21 July 2016 on common Foreign Terrorist Fighters databases and executing certain provisions of section 1bis “the handling of information” of chapter IV of the law on the function of police, published on 22 September 2016 (entered into force on 22 September 2016). See its Article 6, §1.

⁷⁷ FEDERATION WALLONIE BRUXELLES, *Foreign Terrorist Fighters: Elements Introductifs*, December 2016, p. 2, available at: https://extremismes-violents.cfwb.be/index.php?eID=tx_nawsecuredl&u=0&g=0&hash=d2d22544698986c5911a690aa18b920f7f7386b5&file=fileadmin/sites/rar/upload/rar_super_editor/rar_editor/documents/LES_FICHES_THEMA_DU_RESEAU_U_-_FTF.pdf.

⁷⁸ DGDE, *Recommandations du Délégué général aux droits de l’enfant de la Communauté française de Belgique sur la question des mineurs belges présents dans les zones de conflit djihadistes et sur leur éventuel retour en Belgique (returnees)*, 19 avril 2018, 5 p., available at:

Concerning the notion of returnee, Belgium has defined it as “any person who has stayed in areas and territories controlled by terrorist groups and is now back in Europe”.⁷⁹ This leads to the same issue as the one depicted above: to refer to returnees solely as individuals who stayed in a conflict zone seems to be too vague in the sense that it does not take into account the different situations of individuals who stayed in a conflict zone and their degree of participation in terrorist activities. This is even more concerning knowing that this seems to justify the detention of those individuals upon return in Belgium.

4.3. Consequences of the current regime upon return

Upon return, the policy followed by the Belgian Government has been to systematically detain and place returnee in preventive detention, knowing that the investigative judge has now more latitude to take such a decision.⁸⁰ Hence, any person who *stayed* in a “jihadi” conflict zone, no matter he/she has participated in terrorist activities, will face automatic detention. This regime is however slightly different for children, who are normally considered as victims, not as criminals.⁸¹ Yet, this is not systematically the case of teenagers who might face juvenile detention when returning.⁸²

However, in view of what precedes, this approach seems to be disproportionate because, as already stated, it is based on vague and far-reaching definitions that does not allow to clearly depict a wrongful conduct. By doing so, it does not seem to take account of the multitude of situation of the individuals in conflict zones and of their degree of participation in a terrorist activity.

Besides, criminal response might not be an appropriate one knowing that detention can further radicalise individuals⁸³ who are more inclined to it, and that it does not provide the necessary help to individuals faced with illnesses resulting from the conflict, such as PTSD. This latter category is considered to be the majority of returnees, as it is argued that actual threats currently amount to one out of 360 returnees.⁸⁴

4.4. The preoccupying situation of children

The situation of Belgian children still in conflict zones is also preoccupying. Indeed, up to this date, the Government has decided that only children under 10 will be allowed to return in Belgium on an

http://www.dgde.cfwb.be/index.php?eID=tx_nawsecuredl&u=0&g=0&hash=567e9f6ac0f0c784c866159e4c856a0ca32b6867&file=fileadmin/sites/dgde/upload/dgde_super_editor/dgde_editor/documents/actualites/2018_04_19_recommandations_du_DGDE_returnees.pdf. AMNESTY INTERNATIONAL, *Des mesures disproportionnées. L'ampleur grandissant des politiques sécuritaires dans les pays de l'UE est dangereuse*, January 2017, p. 59, available at https://www.amnesty.be/IMG/pdf/eur0153422017_french_full_report-12jan.pdf. See also : HUMAN RIGHTS WATCH, *Sources d'inquiétude. Les réponses antiterroristes de la Belgique aux attaques de Paris et de Bruxelles*, November 2016, p. 31, available at : https://www.hrw.org/sites/default/files/report_pdf/belgium1116fr_web.pdf.

⁷⁹ FEDERATION WALLONIE BRUXELLES, *op. cit.*, p. 5.

⁸⁰ T. RENARD and R. COOLSAET, *op. cit.*, p. 29.

⁸¹ *Ibidem*, p. 37.

⁸² *Ibidem*, p. 38.

⁸³ *Ibidem*, p. 33.

⁸⁴ A. REED and J. POHL, *op. cit.*, p. 3. See also: T. RENARD and R. COOLSAET, *op. cit.*, pp. 15, 17 and 18.

automatic basis. This is, of course, only after the Belgian nationality has been proven, knowing that in Belgium, DNA tests might not be sufficient to prove a Belgian filiation. Adding up to this burden, the Belgian Government has not proactively engaged in the return of the concerned children, leaving it to the families to arrange such return.⁸⁵

This policy has been considered to be contrary to the Belgian obligation regarding the rights of the child as enshrined in the Convention of the Rights of the Child⁸⁶ and its Optional Protocols⁸⁷ to which Belgium is a State Party.⁸⁸ In that respect, and in conformity with Article 38 of the Convention, Belgium should not only passively allow children under the age of 10 to come back on the territory but should proactively engage in such return.⁸⁹ In addition, a discrimination issue may be pointed out as only minors under the age of 10 are automatically allowed to return, without explaining the justification for the exclusion of other minors. It must also be noted that even though minors under the age of 12 are not considered as FTFs, it nevertheless appears that only those aged of 10 are granted automatic return, again leading the concerns regarding a potential discrimination issue.⁹⁰

4.5. Recommendations

We are aware of the complexity of the subject of Foreign Terrorist Fighters and returnees. Investigation abroad and in a conflict zone in order to determine the degree of participation in the terrorist activity is indeed extremely difficult. However, this should not prevent the Government from enacting clear and well-defined laws. It has to keep in mind the principle of legality, but also the fact that, by application of International Law, and more specifically, the law of armed conflicts, not all individuals present in a conflict zone should be considered as “fighters” or “combatants”. Indeed, some of them are also victims.

It should therefore establish clear conditions for classifying certain individuals as “terrorist” fighters and take into account, as much as possible, the diversity of situations of the individuals present in a conflict zone.

⁸⁵ T. RENARD and R. COOLSAET, *op. cit.*, pp. 37 and 38.

⁸⁶ Convention on the Rights of the Child signed in New York on 20 November 1989 (entered into force on 2 September 1990) (ratified by Belgium on in 1991).

⁸⁷ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, signed in New York on 25 May 2000 (entered into force on 12 February 2002) (ratified by Belgium on 6 May 2002); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography signed in New York on 25 May 2000 (entered into force on 18 January 2002) (ratified by Belgium on 17 March 2006); Optional Protocol to the Convention on the Rights of the Child on a communications procedure signed in New York on 19 December 2011 (entered into force on 14 April 2014) (ratified by Belgium on 30 May 2014).

⁸⁸ DGDE, *op. cit.*, p. 1.

⁸⁹ See more specifically Article 38(4) of the Convention on the Rights of the Child. See also Article 39 on the reintegration of children after being involved in an armed conflict. See also: DGDE, *op. cit.*, p. 2.

⁹⁰ Indeed, in their paper, T. Renard and R. Coolsaet reported that minors aged of 12 are not listed as FTFs, but that only those aged of 10 can benefit from automatic return. See in that sense: T. RENARD and R. COOLSAET, *op. cit.*, pp. 19 and 38. See also the Minister of Interior statement regarding the proactive return of minors under the age of 10: CHAMBRE DES REPRESENTANTS DE BELGIQUE, *op. cit.*, p. 55.

The Government should also reassess the concerning situation of children in conflict zones and establish a regime that is consistent with the international human rights obligations of Belgium, namely, with the Convention on the Rights of the Child and its Optional Protocols.

It would also be of added-value for the Government to be more transparent in the way it is dealing with returnees and the legal basis for their automatic detention. Publishing the Circulars on the approach adopted in relation to Foreign Terrorist Fighters⁹¹ (both judiciary and administrative) would be a valuable starting point to understand its approach.

⁹¹ K. GEENS, *Nouvelle circulaire « Foreign Terrorist Fighters »*. *Communiqué de presse*, 27 Août 2015, available at: <https://www.koengeens.be/fr/news/2015/08/27/nouvelle-circulaire-foreign-terrorist-fighters>.

Recommendations

Deriving from the above oversight, here are the recommendations of the Committee T:

1. To invite the Belgian Government to more actively engage in the creation of an NHRI (in conformity with the Paris Principles).
2. To invite the Belgian Government to ratify the OPCAT and to set up a NPM in line with international standards.
3. To invite the Federal Parliament to resume the evaluation of its legislative corpus to assess the respect of human rights in the framework of counter-terrorism measures.
4. To invite the Special Rapporteur to program a visit of the D-Rad-Ex section of the prisons of Ittre and Hasselt.
5. To invite the Belgian Government to rectify the situation where the administration, the Immigration authorities, can immediately expel an individual without any form of effective judicial control.
6. To urge the Government to provide more concrete guidelines on how the concept of “national security” (and “public order”) are to be fulfilled, to satisfy the principle of legality
7. To invite the Government to (re)evaluate the usefulness of certain measures, in the sense of assessing the balance between their impact on the individual subjected to them (which can be very far-reaching) and the actual protection of society provided by them.
8. To specify the regime applied for Foreign Terrorist Fighters and returnees in terms of definitions and applicable law.
9. To invite the Government to reassess the situation of minors present in a conflict zone in light with the Convention of the Rights of the Child and its Optional Protocols and to address the potential discrimination issues that may currently arise among minors.
10. To make the Circulars on the judiciary and administrative approach towards Foreign Terrorist Fighters publicly available.

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APPENDICES

Appendix No. 1: The 2017 Report of the Committee T

Appendix No. 2: Instructions particulières extrémisme - Fiche d'observation

Appendix No. 3: Instructions particulières extrémisme - Fiche d'évaluation trimestrielle

Appendix No. 4: Instructions extrémisme 06 2017 (00000002)

Appendix No. 5: Préau D-RAD-EX