"An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU"
JLS/D3/2007/01

Belgium

1. Introduction

The Belgian criminal procedure bears a strong resemblance to that of France. Except for some minor modifications, the current Belgian Code is still based on the Napoleonic Code d'Instruction Criminelle (1808). However, despite these common features, the criminal procedure in Belgium is not an exact copy of the French, especially with regard to pre-trial detention. Since 1990, pre-trial detention has no longer been dealt with in the Code of Criminal Procedure, but in a special Statute on Detention on Remand (SDR). This Statute was a response to the decisions of the European Court of Human Rights in the case Lamy vs. Belgium (access to criminal files)[1], Bouamar vs. Belgium (detention of minors)[2] and Pauwels vs. Belgium[3].

Criminal proceedings in Belgium are divided into two stages: the pre-trial stage (inquisitorial) and the trial stage (more adversarial). In the pre-trial phase, the following courts are competent: 1) the investigating judge (juge d'instruction), the judicial council of the court in first instance (chambre du conseil), and the chamber of indictment of the court of appeal (chambre des mises en accusation). Coercive custodial measures that can be applied in the pre-trial stage consist of arrest (arrêt), and detention on remand or preventive detention (détention préventive). Crime investigation is part of the task of the judicial police (police judiciaire). Article 9 of the CCP lists the persons invested with this authority, the most important being the police, the public prosecutor, and the investigating judge (juge d'instruction criminelle). In accordance with Article 279 of the CCP, they perform their tasks under the disciplinary supervision of the head of the Public Ministry, the Procureur Général at the Court of Appeal. The head of the investigations is the public prosecutor. He decides what action is to be taken after receiving the initial police report of the offense, and may decide to prosecute or to drop the case at any stage. In complex cases, or when coercive measures are necessary, the investigation is conducted by the investigating judge.

During the pre-trial stage of the proceedings, the following courts have special competences: the investigating judge, and the courts of investigation, which consist of the judicial council (chambre du conseil: first instance) and the chamber of indictment (chambre des mises en accusation: appeal). During the pre-trial stage, the investigating judge plays a central role. He is a judge of the court in first instance and is specially appointed for the purposes of the pre-trial investigation. His task is to lead the preliminary judicial investigation, but he may also perform judicial duties, such as issuing the warrant of arrest.

The various competences of the judicial council include periodic checks with respect to the continuation of detention on remand. The chamber of indictment, a chamber of the court of appeal, functions as an appellate court with respect to the decisions of the investigating judge and the decisions of the judicial council.

The type of coercive measures that can be imposed on the offender, such as detention on remand, as well as the moment at which they can be imposed, depend on the type of offense and the (length of the) penalty with which they are punishable. As do the penal codes of France and Luxembourg, the Belgian Penal Code divides offenses into three categories: petty offenses ("contraventions", "overtredingen"), punishable with custodial sentences of 7 days or less; more serious offenses ("délits", "wanbedrijven"), punishable with custodial sentences of between 8 days and 5 years; and most serious offenses ("crimes", "misdaden"), punishable with custodial sentences of 5 years or more.

This report will thoroughly discuss the pre-trial stage, with the objective of providing an analysis of the minimum standards in pre-trial detention and the grounds for regular review in Belgium. The 2nd paragraph will deal with empirical background information, followed by the legal basis

[1] ECtHR, Lamy vs. Belgium, 30 March 1989, Publ. E.C.H.R. serie A, vol. 151. See: W. Vandeputte, *De voorlopige hechtenis in België getoetst aan artikel 5 EVRM*, www.law.KuLeuven.be/jura.

[2] ECtHR, Bouamar vs. Belgium, 29 February 1988, Publ. E.C.H.R. serie A. vol. 129.

[3] ECtHR, Pauwels vs. Belgium, 26 May 1988, Publ. E.C.H.R. serie A. vol. 135.

(scope and notion of pre-trial detention) in paragraph 3. The 4th and 5th paragraphs concern the grounds for detention and other prerequisites, and grounds for review of pre-trial detention respectively. Paragraph 6 discusses the length of pre-trial detention, whilst other relevant aspects in relation to pre-trial detention will be treated in paragraph 7. Paragraph 8 will focus on the system of pre-trial detention regarding vulnerable groups. Finally, paragraph 9 will provide a summary of the above-mentioned paragraphs.

2. Empirical background information

Statistics on the numbers involved in the prison population, pre-trial detention / remand imprisonment, etc. in Belgium are provided by various sources. In this paragraph, attention will be paid to data from international sources: the Council of Europe's SPACE 1, International Centre for Prison Studies of King's College London, and data from the Ministry of Justice of Belgium. The data will be stated, after which the statistics will be explained and compared.

Tables 1 to 5 are based on SPACE 1 (*Annual Penal Statistics*)[4] from the Council of Europe. The numbers relate to the 1st of September 2006 (stock). They include the entire prison population, not only those held in penal institutions. No measures (legislative or otherwise) directly influencing the trends in the number of prisoners have been taken during the course of the last 12 months.

The statistics in tables 6 to 8 are derived from the International Center for Prison Studies (ICPS). Every year, this centre publishes the "World Pre-trial / Remand Imprisonment List"[5] and the "World Female Imprisonment List". The final table presents the evolution of the prison population between March 1997 and March 2008, and is based on data published by the Belgian Ministry of Justice.

Data from the Council of Europe Annual Penal Statistics, SPACE 1, Survey 2006[6]

Table 1, Belgium and its prisoners in general

Population 2006, annual estimates (thousands)	10,430.
Total number of prisoners (including pre-trial detainees)	9,971
Prison population rate per 100,000 inhabitants	95.6
Total capacity of penal institutions / prisons	8,457
Prison density per 100 places	117.9

Table 2, Special groups of prisoners

Prisoners under 18 years old	33 (0.3%)
Of which: number of juveniles in pre-trial detention	Not available
Prisoners from 18 to under 21 years old	480 (4.8%)
Number of female prisoners (including pre-trial detainees)	440 (4.4% of the total prison population)
Of which: number of female prisoners in pre-trial detention	Not available
Number of foreign prisoners (including pre-trial detainees)	4,148 (41.6%)
Of which: percentage of foreign pre-trial detainees	1,677 (40.4%)
Percentage of European prisoners (as a part of foreign prisoners)	Not available

[4] http://www.coe.int/t/e/legal_affairs/legal_cooperation/prisons_and_alternatives/Statistics_SPACE_I/List_Space_I.asp#TopOfPage

[5] http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf

[6] 23 January 2008, PC-CP (2007)9 rev3, by M.F. Aebi, N. Delgrande: University of Lausanne, Switzerland.

Table 3, Legal status of prison population I

Untried prisoners (no court decision yet reached)	2,543
Convicted prisoners (but not yet sentenced)	Not applicable
Sentenced prisoners who have appealed, or who are within the statutory time limit for doing so	602
Sentenced prisoners (final sentence)	5,799
Other cases[7]	1,027
Total	9,971

Table 4, Legal status of prison population II

Percentage of prisoners not serving a final sentence	41.8%
Rate of prisoners not serving a final sentence per 100,000 inhabitants	40.0
Percentage of untried prisoners (no court decision yet reached)	25.5%
Rate of untried prisoners (no court decision yet reached) per 100,000 inhabitants	24.4

Table 5, Evolution of prison populations between 2000 and 2006[8]

Year	Total number of prisoners (including pre-trial detainees) on 1 September	Prison population rate per 100,000 inhabitants on 1 September
2000	8,671	84.7
2001	8,764	85.4
2002	9,253	90.2
2003	8,688	83.9
2004	Not available	Not available
2005	9,371	89.7
2006	9,971	95.6

Data from the International Centre for Prison Studies (ICPS, King's College London)

Table 6, Prison Brief 2008

Prison population total (including pre-trial detainees / remand prisoners)[9]	10,002 at 17 June, 2008 (National Prison Administration)

[7] The category "Other cases" includes:
- Mentally ill prisoners kept in detention for security reasons;
- Prisoners sentenced under the Law on social protection;
- Aliens handed over to the Aliens Office (illegal aliens held for administrative reasons);
- Wanderers / beggars handed over to the Government;
- Recidivists / habitual offenders handed over to the Government;
- Persons temporarily detained against the revocation of the release on parole;
- Suspension of the release on parole.

[8] Council of Europe Annual Statistics -Space 1-2006, p. 28

[9] http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb

Prison population rate (per 100,000 of national population)	93 based on an estimated national population of 10.71 million in June 2008 (from Eurostat figures)
Pre-trial detainees / remand prisoners (percentage of prison population)	36.10% (17 June, 2008)
Female prisoners (percentage of prison population)	4.5% (17 June, 2008)
Juveniles / minors / young prisoners (percentage of prison population)	0.3% (17 June, 2008 – under 18)
Foreign prisoners (percentage of prison population)	42.1% (17 June, 2008)
Official capacity of prison system	8,422 (17 June, 2008)
Occupancy level (based on official capacity)	118.8% (17 June, 2008)

Table 7, World Pre-trial / Remand Imprisonment List[10]

Prison population according to legal status	
Total number in pre-trial / remand imprisonment	4,438
Date	01 March, 2007
Percentage of total prison population	44.3%
Estimated national population (at date shown)	10.59 million
Pre-trial / remand population rate (per 100,000 of national population)	42

Table 8, World Female Imprisonment List[11]

Female prison population (number of women and girls in penal institutions, including pre-trial detainees / remand prisoners)	406
Date	30 December, 2004
Female prisoners – percentage of the total prison population	4.4

[10] Roy Walmsley, January 2008, http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=World%20Pre-trial&search=search&type=0&month=0&year=0&lang=0&author The List refers to those persons who, in connection with an alleged offense or offenses, are deprived of their liberty following a judicial or other legal process, but have not been definitively sentenced by a court for the offense(s).

[11] Roy Walmsley, August 2006, http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=world+female+imprisonment+list&type=0&month=0&year=0&lang=0&author=&search=Search

Data from the Belgian Ministry of Justice

Table 9, Prison population at 1 March (1997 – 2008)[12]

Year	Accused, not yet convicted	Convicted	Sentenced to internment	Misc.	Total	Electronic Monitoring	% Preventive detention
1997	2,862	4,485	590	219	8,156		35.1
1998	2,773	4,615	622	166	8,176		33.9
1999	2,554	4,580	589	166	7,889	10	32.4
2000	3,023	4,900	640	125	8,688	12	34.8
2001	2,951	4,776	675	142	8,544	22	34.5
2002	3,238	4,497	644	226	8,605	167	37.6
2003	3,680	4,807	718	103	9,308	286	37.5
2004	3,614	4,713	783	135	9,245	278	39.1
2005	3,550	4,830	856	139	9,375	277	37.9
2006	3,530	5,082	862	161	9,635	337	36.6
2007	3,473	5,407	965	163	10,008	612	34.7
2008	3,527	5,193	994	144	9,858	557	35.8

Comparison

For the period 2006 – 2008, tables 1, 6 and 9 give the daily prison population, which varies from 9,635 to 10,430. With a population estimated at 10.43 to 10.71 million people, this means a prison population rate per 100,000 inhabitants of 93 to 95. The latter percentage includes the (released) prisoners placed under electronic monitoring, as well as foreigners detained for administrative reasons. However, this number does not include young people placed in a special institution, or prisoners interned in a psychiatric institution. Compared to the rest of Europe, Belgium with its 93 to 95 detainees per 100,000 inhabitants is well below the average of 147.4 prisoners.

The total prison capacity of Belgium is 8,422 – 8,457 cells, resulting in a prison density per 100 cells of between 114% and 123%. This has led to serious overcrowding, as was also observed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its report of 21 October 2005[13]. One consequence of this overcrowding is that several detainees are locked up together in a single cell, which does not meet the minimum requirements. The CPT also observed that in the prison in Namur, three prisoners were detained in a cell of 9 m^2, which can lead to violence against other prisoners and to poor hygiene. The CPT also encountered overcrowded police cells.

The data contained in tables 4, 6, 7 and 9 on the proportion of pre-trial detainees in the total prison population differs greatly, and varies between 36.6% (Ministry of Justice) and 41.8% (SPACE 1) in 2006 and between 35.8% (Ministry of Justice) and 36.1% (Prison Brief) in 2008. The high percentage of 44.3% mentioned in the World Pre-trial / Remand Imprisonment List differs greatly from the official data provided by the Ministry of Justice, and cannot be confirmed by other sources. One possible explanation for these differences is that some sources do not count certain groups of detainees, such as detainees placed under electronic monitoring, juveniles, foreigners detained for administrative purposes, and detainees sentenced to internment. For example, if the percentage of pre-trial detainees has been calculated on the basis of the prison population, yet reduced by the number of mentally disturbed offenders interned in an institution in accordance with the Act on Internment, then the percentage of preventive detainees of the total prison population does not come to 35.8%, as the Ministry of Justice states for 2008, but amounts to about 43% compared to the poll of the ICPS on 17 June 2008 given in their annual Prison Brief[14]. In that report, the percentage of pre-trial detainees is 36.1% of the total prison population. The difference with the findings of the ICPS in 2007 can be put down to the groups included in the calculations. If

[12] FOD Justitie, Justitie in cijfers 2008, http://just.fgov.be/nl_htm/informatie/statistiek/tableau-nl.html

13 Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 18 au 27 avril 2005, www.cpt.coe.int.

[14] http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=127

the group of detainees (with mental disorders, in the scope of the Act on Internment of persons with a mental disorder) from the Belgian statistics is included for the year 2007, the percentage of pre-trial detainees totals 44.3%. This is precisely the percentage given by the ICPS in September (six months later). Accordingly, depending on the question of whether these groups are included in the total prison population, it is fair to estimate that about 35% to 40% of the prison population is detained preventively. According to the statement by SPACE 1, about 80% of the preventive detainees have not yet been tried. The remaining 20% would be detainees who have already been sentenced, but have appealed, or are within the statutory time limit for doing so.

Only SPACE 1 and the Prison Brief 2007 provide any further information on the percentage of foreign prisoners and, in particular, the percentage of preventive detained foreigners within the total prison population. According to these sources, the percentage of foreigners in the total prison population varies from 41.6% (SPACE 1) to 42.1% (Prison Brief 2007). Of this 41.6%, 40.4% (n=1677) relates to preventive detention according to SPACE 1. Proportionally too, the percentage of foreign prisoners within the total number of preventive detainees is extremely high. According to the statement of SPACE 1, on 1 September, 3,145 persons were in preventive detention, of whom 1,677 (53%) were foreigners. There was no available data with regard to the nationality of these foreigners. Similarly, there is little information available about the percentage of women and minors within the total prison population, and the pre-trial prison population in particular. The only sources containing information on these subjects are SPACE 1, the Prison Brief 2007, and the World Female Imprisonment List. According to these sources, the percentage of females in the total prison population is 4.4% to 4.5%, and that of minors under 18 years of age is 0.3%. More specific data about the number of pre-trial detained persons among the female and minor detainees is not available.

Thus, we may conclude that – whatever source is used as a basis – the percentage of detainees in preventive detention is high. In 1990, the legislator attempted to halt the increase in pre-trial detention by introducing a special act on pre-trial detention that provided new alternatives for pre-trial detention.[15] Nevertheless, since 1990, the percentage of pre-trial detentions has not dropped, but has in fact risen.[16]

3. Legal basis: scope and notion of pre-trial or detention on remand

3.1 Pre-trial detention with respect to other forms of deprivation of liberty

An important condition with respect to all forms of deprivation of liberty is Article 12 of the Constitution, which states that "Individual freedom is guaranteed. No one can be prosecuted except in the cases provided for by law, and in the form prescribed by law. Except in the case of *flagrante delicto*, no-one can be arrested except by a motivated judge's order that must be served at the moment of arrest or at the latest within twenty-four hours."

Belgian law has various possibilities for depriving people of their liberty with a preventive purpose, such as arrest for public drunkenness under the provisions of Article 1, paragraph 2 Decree on public drunkenness, or the arrest of a foreigner with the intention of deportation (Article 27, paragraph 2 of the Aliens Act). Other examples include administrative detention, deprivation of liberty of mentally disturbed persons, and the internment of mentally ill offenders.[17]

The administrative detention means that, pursuant to Article 31 of the Police Function Act 1992, persons are deprived of their liberty for a maximum of twelve hours, unless the detention is changed to a judicial arrest (criminal arrest), in which case the detention may last for twenty-four hours from the moment of arrest. The reasons the police may have for administrative detention can include: 1) obstructing the police in the exercise of their task; 2) disrupting public order or safety.

The deprivation of liberty of mentally ill persons is laid out in the Act on the Protection of persons with a mental disorder, and can be recommended by the police court if so required, either because the disturbed person is placing his own health and safety in serious danger, or he is forming a serious threat to the life or integrity of others (Article 17). This act is also applicable to

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[15] Wet van 20 juli 1990 betreffende de voorlopige hechtenis, BS 14 August 1990.

[16] A. Raes & S. Snacken, *The future of remand custody in Belgium,* The Howard Journal vol. 43 no. 5, December 2004.

[17] E. Cape e.a., *Suspects in Europe, Procedural rights at the investigative stage of the criminal process in the European Union*, Antwerp: Intersentia, 2007, p. 36.

minors: in such a case, only the juvenile court or the juvenile court judge is competent to impose the measure. The ill person can be admitted to a psychiatric hospital for observation, for no longer than forty days. If, after observation, a longer stay in the institution is required, the judge can recommend a prolonged stay in the institution for a maximum period of two years (Article 13). If required, this period can be extended continually by two years, if the condition of the ill person so requires.

Unlike the deprivation of liberty based on the Act on the Protection of persons with a mental disorder, the measure for internment is intended for persons with a mental disorder who have committed a criminal offense. They can be deprived of their liberty pursuant to the Act on the Internment of persons with a mental disorder, with the intention both of protecting society and the interned person by providing that person with the care required by his condition, with the objective of his reintegration into society (Article 2, Act on the Internment). The judge can impose the measure of internment if the committed offense is punishable by a prison sentence and there is a danger, with respect to the disturbed offender, that he will commit offenses again as a consequence of his mental disorder (Article 18, Act on the Internment). Internment takes place in the psychiatric department of a prison, an institution or a department for the protection of society, run by the federal government, or an institution run by a private organization. Internment is for an indefinite period. Definitive release can take place after a conditional release of two years (Article 72 in conjunction with Article 54, Act on the Internment).

In the past, the internment system in Belgium has been heavily criticized. On the one hand, society needed protection from dangerous, mentally disturbed offenders while on the other hand, the offenders needed treatment. However, the material and financial means, as well as the staff essential for the adequate fulfilment of this task, were not available. Most offenders were held in normal prisons or in an institution for social defence without the required therapeutic help.[18] In 1997, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) rapped Belgium over the knuckles for instances of abuse in various institutions for internees. Upon a following visit, it turned out that only two of the five institutions had taken measures to satisfy the given recommendations. The Belgian State was found guilty of violating the ban on torture of Article 3 of the ECHR.[19] The Act on Internment was changed in April 2007. Since then, internees have been the responsibility of the Minister for Public Health: therefore, internees can no longer be placed in normal prisons.

3.2 Detention on remand

The Statute on Detention on Remand distinguishes the following three categories of detention on remand: judicial arrest; the order to bring the suspect in for questioning; and the deprivation of liberty, based on the warrant of detention. The first case is a brief deprivation of liberty (police custody). The warrant of detention issued by the investigating judge entails a longer period of deprivation of liberty that is subject to strict judicial control. In practice, the term pre-trial detention (preventive detention or detention on remand) often means only the latter form of deprivation of liberty.[20]

Pre-trial detention in a broad sense – that is, arrest, the order to bring someone in for questioning and the warrant of detention – are not regulated in the Code of Criminal Procedure, but in the Statute on Detention on Remand. According to the literature, pre-trial detention only actually takes place when a warrant of detention is issued. The pre-trial detention of military personnel and minors is not included in the Act on Pre-trial Detention, but in separate acts. Pre-trial detention of military personnel is not discussed further here, as it is rarely applied in practice. Neither are rules about compensation in the event of unlawful ("onrechtmatige") or unnecessary ("onwerkdadige") detention included in the Act on Pre-trial Detention, but in a separate Act of 13 March 1973 dealing with inappropriate pre-trial detention.[21]

3.3 Legal basis: scope and notion of detention on remand

[18] F. Bussche, *Humanisering van de interneringspraktijk eindelijk in zicht?,* UVV Info Woonplaats: cel 322 bus 2: January 2007, p. 30.

[19] F. Bussche, *Humanisering van de interneringspraktijk eindelijk in zicht?,* UVV Info Woonplaats: cel 322 bus 2: January 2007, p. 33.

[20] R. Declercq, *Beginselen van strafrechtspleging,* Mechelen: Kluwer, 2003, p. 382.

[21] B.S. 10 April 1973.

Pre-trial detention is a deprivation of liberty in the scope of an investigation in criminal cases, and violates the right to personal liberty as specified in Article 12 of the Constitution. The presumption of innocence always applies to accused persons. In accordance with Article 16 of the SDR, pre-trial detention may therefore not be recommended as a means to coerce a confession from a person or to punish a person. Pre-trial detention is always of a temporary nature. Although there is no legal maximum duration, an accused person must always be taken to court within a reasonable time. This is a consequence of Article 5, paragraph 3 of the ECHR.

Pre-trial detention in a narrow sense (the warrant of detention) can be preceded by the arrest and by the order for a person to be brought in for questioning. The purpose of the arrest is to place the suspect at the disposal of the public prosecutor or investigating judge after a criminal offense has been committed. The order to bring a person in for questioning is a well-founded order from the investigating judge, with the intention of compelling a witness or suspect in need of prompting to appear for questioning before the investigating judge.

For arrests, Belgian law makes a distinction between the arrest of a person caught in *flagrante delicto* and the arrest of a person not caught in the act. The arrest of a person caught in *flagrante delicto* can be performed by a citizen, as well as a police officer. The citizen must report the suspect to the police immediately. The police must place the suspect at the disposal of the public prosecutor or investigating judge. Once the police officer has made an arrest, he reports this to the public prosecutor immediately. The public prosecutor is responsible for the investigation in criminal cases and decides on instituting criminal proceedings. It is he who presents the cases to the judge in first instance. If the offense is the object of a judicial investigation, the investigating judge is notified (Article 1, SDR).

The decision to deprive a person of his liberty, who was not caught in *flagrante delicto*, is taken by the public prosecutor. If the suspect attempts to escape or evade the supervision of a police officer, custodial measures may be taken. This means that officers may arrest the suspect, but that the public prosecutor must be informed as soon as possible.

The deprivation of liberty connected to the arrest may last no longer than twenty-four hours. For capture in *flagrante delicto*, the period of twenty-four hours starts at the moment the suspect is no longer at liberty to come and go as a consequence of the actions of the police. If arrested by a citizen, the twenty-four hours start at the moment the report is made to the police (Article 1, 2-3, SDR). If the suspect was not caught in *flagrante delicto*, the period starts at the moment the suspect is notified of the decision of the public prosecutor to deprive him of his liberty. If the police deprive the suspect of his liberty to prevent him from evading supervision while waiting for the decision of the public prosecutor, the period of twenty-four hours starts at the moment the person is no longer at liberty to come and go (Article 2, 5, SDR).

The period of twenty-four hours must be applied strictly, as exceeding the period makes the arrest unlawful. Pursuant to Articles 147 and 434 of the Penal Code, this even results in a criminal offense. In addition, the transgression also means the investigating judge loses the right to issue an order to bring a person in for questioning, or a warrant of detention. Neither does the law give the arrested person any specific rights. For instance, the arrested person does not have the right to notify an acquaintance or to contact a lawyer.

The legal regulations are unclear about the question of the offenses for which the police can carry out an arrest. The wording of Articles 1 and 2 of the SDR suggests that police arrest is possible for all crimes and offenses. This is broader than the deprivation of liberty based on the warrant of detention that includes a condition that the offense concerned must be punishable by a prison sentence of at least one year. However, the parliamentary preparation shows that the arrest must be restricted to cases in which a warrant of detention can be issued: i.e. it must concern an offense to which a penalty is attached of a prison sentence of at least one year (Article 16, SDR).[22]

If a person is caught in the act of committing an offense or a crime, the suspect can be detained without detailed conditions being specified. If a person is not caught in the act, the person can be put at the disposal of the judge and detained for a maximum of twenty-four hours only if there are serious indications of guilt.[23] Serious indications of guilt are not indisputable facts. It is sufficient, but also necessary that there is serious information against the person, well-founded reasons, that reasonably result in considering that this person is implicated in the offenses and that the measure

[22] C. van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht*, Antwerp: Maklu, 2006, p. 1010.

[23] W. Bruggeman, *De aanhouding,* Antwerp: Maklu, 2006, p. 18.

of deprivation of liberty is justified by the necessity of tracing the truth.[24] Furthermore, Article 2 of the SDR stipulates that this decision can be taken only by the public prosecutor, although if the accused person tries to escape or evade the supervision of the police, the police can also decide to detain the accused person, pending the decision of the public prosecutor. Articles 2 and 5 of the SDR stipulate further that police custody must end as soon as the measure is no longer necessary and, as stated, may not last longer than twenty-four hours.

The second phase in the procedure of detention on remand in a broad sense is the order to bring someone in for questioning. The order to bring someone in for questioning can be issued after the person has been arrested by the police. But it is not necessary for the person to first be arrested by the police before an order is issued to bring the person in for questioning. A person can comply voluntarily with the order to be brought in for questioning, or otherwise pressure can be exerted.[25] The investigating judge must question the accused person within twenty-four hours of servicing the order to bring him in for questioning (Article 5, SDR). This period is in accordance with Article 5, paragraph 3 of the ECHR.[26] The order for bringing in for questioning is usually served at the moment of deprivation of liberty. If a person is first arrested by the police, the order must be served within twenty-four hours, counting from the effective deprivation of liberty (Article 7, SDR). Thus it is possible that if a person is arrested, he is served the order for bringing in for questioning after twenty-four hours have passed, and that within another twenty-four hours the investigating judge questions the accused person. The accused person thus appears before the investigating judge after a total of forty-eight hours. However, the requirement of Article 12 of the Constitution has been satisfied, as it only specifies that the service must occur within twenty-four hours of arrest. If the order for bringing in for questioning is not served within twenty-four hours of the deprivation of liberty, the accused person must be released (Article 8, SDR). The order for bringing in for questioning cannot be issued on a person who is already at the disposal of the investigating judge.[27] This is to prevent misuse of the order, which would result in artificial and unlawful extensions of the period of twenty-four hours.[28] There must be serious indications of guilt of a crime or offense (Article 3, SDR). The order for bringing in for questioning may be employed for any offense and any crime, as its objective is to make a suspect or a witness available for questioning and not to deprive the person of liberty for a lengthy period of time.[29]

The actual detention on remand in the narrow sense starts with the investigating judge issuing a warrant of detention. The order must be served within twenty-four hours of the moment of arrest, or within twenty-four hours of the service of the order for bringing in for questioning (Article 18, 1, SDR). This means that an accused person can never be deprived of his liberty for more than forty-eight hours, before being placed under a warrant of detention.

Whether the investigating judge can proceed to issue a warrant of detention depends on a number of conditions. The first condition is that it must concern an offense that is punishable by a prison sentence of at least one year. Moreover, the warrant is only possible "in case of an absolute necessity for public safety" (Article 16, 1, SDR). The significance of this is discussed more extensively in paragraph 4.

The warrant of detention is valid for five days, counting from the moment of execution. Within that period, after receiving the report of the investigating judge and having heard the public prosecutor, the accused person and his counsel, the judicial council of the Court of First Instance decides whether the pre-trial detention must be maintained (Article 21, 1, SDR). The judicial council checks whether the legal conditions for detention on remand have been satisfied, and whether the pre-trial detention should be continued in the light of the provisions of Article 16, SDR. The judicial council can improve, supplement or modify the warrant. Irreparable nullities, such as detention based on an irregular investigation act, cannot be repaired by the judicial council.[30] If a decision is made to maintain the pre-trial detention, this decision remains valid for

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[24] Just a suspicion (and not a formal accusation) expressed by the victim of theft, without confirmation by other precisely corresponding information does not form a serious indication of guilt (corr. Neufchâteau, 30 May 1988, *J. Proc.*, n 132, 24 June 1988, 30).

[25] R. Declercq & R. Verstraeten eds., *Voorlopige hechtenis De wet van 20 juli 1990,* Leuven: Acco, 1991, p. 40.

[26] ECtHR no. 5348/72, X vs. Belgium, 8 July 1974, Rec. Dec, 1974, no. 46, p. 62.

[27] C. van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht*, Antwerp: Maklu, 2006, p. 1013.

[28] R. Declercq & R. Verstraeten eds., *Voorlopige hechtenis De wet van 20 juli 1990,* Leuven: Acco, 1991, p. 41.

[29] R. Verstraeten, *Handboek strafvordering,* Antwerp: Maklu, 2006.

[30] C. van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht*, Antwerp: Maklu, 2006, p. 834.

one month (Article 21, 6, SDR).

A special form of detention on remand is the "immediate arrest" ("onmiddellijke aanhouding ter terechtzitting"), based on the fact that a sentencing judgment can be applied only at the moment it becomes final. If the convicted person appeals the judgment, it cannot be enforced. Accused persons already in preventive detention, in accordance with the Statute on Detention on Remand at the time of judgment, remain detained, in principle, unless the time that the person has been in detention is equal to or longer than the punishment imposed, or he is acquitted, or sentenced to a suspended sentence or a fine (Article 33, 1, SDR). However, defendants who were not detained at the moment of judgment can be placed under detention on remand immediately upon the demand of the Public Prosecution Service, if sentenced to a non-suspended sentence of at least one year. However, this is possible only if the court can state that there is good reason to fear that the convicted person would try to avoid enforcement of the punishment, and that the general conditions for detention on remand have been fulfilled (Article 33, 2, SDR).

4. Grounds for detention and other prerequisites

As stated earlier, only when the warrant of detention on demand has been issued, is there actually a question of pre-trial detention. A number of material and formal conditions must be satisfied before such a warrant can be issued to an accused person. The material conditions are set out in Article 16 of the SDR.

First of all, there must be serious indications of guilt of a crime or offense. The evidence for this must be obtained in a lawful manner in order to be used as evidence.[31] The warrant must state the actual circumstances of the case and the circumstances of the accused person that justify the pre-trial detention in accordance with Article 16, 1 of the SDR. If this notification is missing, the accused person must be released. The warrant must also state the charge (Article 16, 5, SDR).

A second material condition is that it must be an offense punishable with a prison sentence of at least one year (Article 16, 1, SDR).

The third material condition is that the preventive detention is absolutely necessary for public safety (Article 16, paragraph 1, VHW). A distinction is made according to the gravity of the offenses. For offenses punishable by a prison sentence of more than fifteen years, the investigating judge can suffice with the declaration that pre-trial detention is absolutely necessary for public safety. For offenses punishable with a maximum sentence of less than fifteen years, the detention can be recommended only if at least one of the four additional reasons listed in the act is present, namely if there is a serious risk:

- of the accused person committing new crimes or offenses if released, or
- of the accused person trying to avoid appearing in court (risk of flight), or
- of the accused person trying to do away with evidence, or
- of the accused person trying to consult with third parties (danger of interference with witnesses).

Besides the material conditions, the act also includes three formal conditions that must be satisfied before the warrant of detention on remand can be issued. The first formal condition concerns the questioning by the investigating judge (personally) and the hearing of the remarks concerning the charges that form the basis of the accusation and that can result in the issuing of the warrant of detention (Article 16, 2, SDR). The objective here is to evaluate whether this is absolutely necessary to ensure public safety. This examination takes place without the presence of a counsel. If this examination is not performed, the accused person must be released.

The second formal condition is that the warrant must be supported by reasons. The objective here is to prevent arbitrariness by the investigating judge and to motivate him to issue a warrant only if this is absolutely necessary. Article 16, 5 of the SDR elaborates on the precise wording of the warrant. It must contain the following points:

- The charge for which the warrant of detention is being issued, the applicable legal provision that determines whether it is a crime or an offense, and the existence of serious indications of guilt.
- The actual circumstances of the case and the circumstances, including those of the

[31] R. Declercq & R. Verstraeten eds., *Voorlopige hechtenis De wet van 20 juli 1990,* Leuven: Acco, 1991, p. 98.

accused person himself, that justify pre-trial detention within the meaning of Article 16, paragraph 1 of the SDR.

- For offenses punishable by a prison sentence of fifteen years or more, the judge must state circumstances that make the detention on remand absolutely necessary for public safety in this specific case.
- For offenses punishable by a shorter sentence, but that satisfy the threshold of one year of prison sentence, the judge must also say why, in this concrete case, there is a risk of recidivism, risk of flight, risk of misappropriation, or a risk of interfering with witnesses.
- The judge must sign the warrant of detention on remand and mark it with his seal. Failing this, the accused person must be released (Article 16, paragraph 6, SDR).
- Finally, obligatory preceding examination of the accused person must be stated.

The last formal condition is that the warrant must be served on the accused person within twenty-four hours. These twenty-four hours must be calculated as from the effective deprivation of liberty or, if the accused person was first arrested on the basis of bringing in for questioning, as from the serving of the order to bring the person in for questioning (Article 18, paragraph 1, SDR). When the warrant is served, the accused person also receives a copy of the report of the questioning by the investigating judge and of the reports of the questioning by the police. (If the statutory period is not adhered to, the accused person must be released (Article 18, paragraph 2, SDR).) The period of twenty-four hours within which the warrant must be served, after the deprivation of liberty, does not appear to be in violation of Article 5, paragraph 2 of the ECHR, as evidenced in the judgment by the ECtHR of 24 May 1971.[32]

Despite these guarantees from the SDR, the problem remains the following (as argued by Fermon, Verbruggen and De Decker): "Their practical view is seriously undermined by the absence of legal assistance in the interview held by the investigating judge, and the impossibility of contacting a defence lawyer prior to this interview. Many suspects find it hard to assess the exact role of the judge and the difference between that judge and the rest of the machinery of law enforcement, which a suspect at this stage is likely to approach with profound distrust. The combination of time restraints, routine and the fear that omissions would invalidate the warrants, results in arrest warrants often becoming standardized forms with formal and stereotypical clauses, in which little effort is made to go into the details of the specific circumstances".[33] Another problem is that a person under judicial arrest cannot demand that a "trusted person" be informed of the arrest.

5. The grounds for review of detention on remand

It is not possible to appeal against the decision of the investigating judge to issue a warrant of detention. This applies both to the public prosecutor who demands a warrant of detention (Article 17, SDR) and the accused person (Article 19, SDR). If the warrant of detention is granted, the judicial council will rule within five days on whether the pre-trial detention will remain in force. Both the accused person and the public prosecutor can appeal against decisions of the judicial council re the preservation of the pre-trial detention (Article 30, SDR). An appeal is made to the chamber of indictment within twenty-four hours, counted as from the day of the decision (for the public prosecutor), or as from the service (for the accused person) (Article 30, paragraph 2, SDR). This chamber must make a judgment within fifteen days. If not, the accused person must be released (Article 30, paragraph 3, SDR). The decision of the chamber of indictment constitutes entitlement to deprivation of liberty of one month for crimes that can be punished as offenses, and three months for crimes that cannot be punished as offenses[34] (Article 30, paragraph 4, SDR).

A further appeal against the decision of the chamber of indictment can be made to the Court of

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[32] ECtHR no. 4502/70, Rec. D, 1972, no. 38, p. 82.

[33] J.Fermon, F. Verbruggen and S. De Decker, "The investigative stage of the criminal process in Belgium", in: E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds), *Suspects in Europe*, Intersentia, Antwerp-Oxford, 2007, p. 37-38.

[34] Crimes to which Article 2 of the act on mitigating circumstances does not apply are generally crimes punishable by a prison sentence greater than twenty years. They can be judged with a "peine correctionelle", that is, as if they were "délits", or serious offenses.

Cassation. This must be done within twenty-four hours of the day on which the decision was served to the accused person (Article 31, SDR). The Court of Cassation must deliver a judgment within fifteen days. Failing this, the accused person is released (Article 31, paragraph 4, SDR).

In Belgium, there is no legal maximum for the duration of pre-trial detention. In the event of prolonged deprivation of liberty, following six months of deprivation of liberty, the accused person can request an appearance in a public hearing (Article 24, SDR) if no punishment greater than fifteen years can be imposed after his case has been heard by the judicial council of the competent court. For crimes punishable by a heavier sentence, this is possible only after one year of deprivation of liberty. Until then, all hearings take place in closed sessions.

As long as the judicial inquiry continues, the judicial council decides from month to month whether the pre-trial detention may be preserved (Article 22, SDR). For crimes that cannot be punished by a correctional punishment, this occurs every three months (Article 22, paragraph 2, SDR). In that case, the judicial council no longer considers the lawfulness of the warrant of detention, but simply checks whether preserving the pre-trial detention is necessary, in the light of the circumstances of the moment. A further requirement is that the serious indications of guilt and other reasons (from Article 16, paragraph 1, SDR) that existed at the moment of arrest remain valid.

Since Article 136 of the CCP was changed in 1998 and 2005, all cases are automatically referred to the chamber of indictment of the Court of Appeal after six months (Article 136*ter*, CCP), except for crimes that cannot be punished by a correctional punishment. This check can also be carried out for crimes that can be referred to the correctional court, but then only at the request of the accused person (Article 136*ter*, paragraph 2, CCP). This provision was introduced to strengthen the judicial control of pre-trial detention.

If the investigating judge has completed his investigation, he hands over his file to the public prosecutor. If the latter does not demand any further investigative action, he demands that the judicial council organize the dispensation of justice (Article 127, CCP). At that moment, the judicial council decides whether to dismiss the case, refer it to the correctional or police court, or refer it to the court of assizes. Furthermore, the judicial council decides on the continuation of pre-trial detention (Article 26, SDR). This concludes the (three) monthly checks by the judicial council. The accused person can submit a request for release to the sentencing court to which he has been referred (Article 27, paragraph 1, SDR).

6. Length of detention on remand

As previously mentioned, Belgian law has no maximum duration for pre-trial detention. Pre-trial detention may be maintained for as long as is necessary: in other words, for as long as the serious indications of guilt and the reasons of Article 16, paragraph 1 of the SDR remain in existence. At the various moments of judicial review, a check must also be carried out, to see whether the continuation of the pre-trial detention is reasonably justified. This stems from Article 5, paragraph 3 of the ECHR, which stipulates that the pre-trial detention may not last for an unreasonably long time. In the case Lelièvre vs. Belgium, the ECHR stated that the applicant's continued detention was justified by the existence of plausible reasons to consider him a suspect. However, it believed that the Belgian courts had never seriously examined the question of alternatives to his detention, notwithstanding the proposals that had been put forward in that respect by the applicant. Consequently, the authorities had not provided "relevant and sufficient" reasons to justify maintaining the applicant in pre-trial detention for seven years, ten months and eight days. The Court noted in particular that almost two years had passed between the transmission of the investigation file and the opening of the trial. It therefore concluded that there had been a violation of Article 5, paragraph 3 of the ECHR.[35]

There is little information available about the duration of detention on remand in practice. A study by the Nationaal Instituut voor Criminalistiek en Criminologie dating from 2004 reports that, in the period from 1996 to May 2001, the average duration of detention on remand fluctuated at around eighty days. Most detentions had rather short periods of detention on remand (less than three months). Approximately four out of ten (38.9%) had a duration of less than one month, and almost

[35] ECtHR, 8 November 2007, no. 11287/03.

two out of ten (18.8%) detentions were between one and two months. Globally, 70% of the detentions had a period of remand detention of less than three months. However, this research also shows that remand detentions of more than one year are no exception. Of the remand prisoners who were confined but not definitely convicted (i.e. persons convicted in first instance, but awaiting a judgement after appeal), 14% had already been in remand detention for more than one year. Of the category of prisoners who were confined as pre-trial detainees, remaining contiguously in detention with the status of not definitively convicted, this percentage was no less than 20.7%.[36]

7. Other relevant aspects

Several elements regarding pre-trial detention have already been discussed in the previous paragraphs. This paragraph will discuss a number of relevant questions remaining, such as whether the time spent in pre-trial detention will be taken into account, whether there is a mechanism for compensation if the accused is not sentenced, whether there are alternatives to pre-trial detention and the practice regarding the execution of pre-trial detention.

7.1 Deduction of detention on remand

For the deduction of the time spent in detention on remand from the punishment to be imposed, Article 30 of the Penal Code stipulates that any detention served before the conviction as a result of the crime that led to that conviction is allocated to the duration of the prison sentences (Article 30, Penal Code). In other words: the time spent in pre-trial detention is deducted from the definitive prison sentence. Article 33, paragraph 1 of the SDR also stipulates that the accused person must be released as soon as the duration in detention is equal to the prison sentence imposed, despite any submission of an appeal. However, the law does not have any provisions for the deduction of preventive detention if a punishment is imposed that does not involve the deprivation of liberty. This problem is often circumvented in suspended sentences by splitting this suspended sentence into a suspended part, and a non-suspended part, with the non-suspended part covering the time spent in pre-trial detention.[37] Of course, in the event of punishments that do not involve the deprivation of liberty, the judge is always free to take into account the time spent in preventive detention when determining the severity of the punishment.

7.2 Compensation

In accordance with Article 5, paragraph 5 of the ECHR, any person deprived of his liberty is entitled to compensation. Belgian law provided for this in 1973 by enacting a special law: "Wet betreffende de vergoeding voor onwerkzame voorlopige hechtenis" [Act regarding compensation for inappropriate pre-trial detention].[38] This law distinguishes between compensation for unlawful ("onrechtmatige") detention undergone and compensation for unnecessary ("onwerkdadige") detention.

Unlawful detention occurs when the deprivation of liberty is in violation of Article 5 of the ECHR. The claim for compensation that arises from this is a claim under civil law that must be submitted to the civil courts (Article 27, Act of 1973).

According to Article 28 of the Act of 1973, unnecessary detention occurs when a person is held in pre-trial detention for more than eight days without this being attributable to his personal behaviour. This may, for instance, concern an accused person whose case has been dismissed and who can prove his innocence, or who has been released, or whose case turns out to be statute-barred. This does not actually involve a real compensation, but a compensation allocated in all fairness. The claim is not submitted to the civil court, but is directed in an application to the Minister of Justice. If the Minister refuses to grant the application or he does not decide on it within six months, the application is handled by an administrative commission consisting of two high magistrates and the (vice) dean of the Bar Association.

In practice, the notion of inappropriate detention proves to have little meaning. Despite accused

[36] Nationaal Instituut voor Criminalistiek en Criminologie, Presentation at the 4th Annual Conference of the European Society of Criminology, *Pre-trial detention and prison overcrowding in Belgium*, Brussels, 2004, p.5.

[37] With regard to this, see: A. de Nauw, *Een onderzoek naar de toepassing van de voorlopige hechtenis*, Panopticon, 1990, p. 215-219.

[38] B.S. 10 April 1973.

persons being acquitted, it may be that they are not eligible for compensation due to unnecessary detention. In a case in Belgium, the judge ruled that an accused person made himself suspect in a certain situation. Making oneself suspect is, however, an elastic concept used by the court to avoid paying subsequent compensation to an innocent person held in detention. In another case, a person accused of a drug offense did not mention a trip to Brazil, as he believed that the police had nothing to do with this. The man was eventually acquitted, but according to the judge, he had no right to compensation. In this case, the right to remain silent was given as the reason why compensation was not granted for unnecessary detention.[39]

7.3 Alternatives to detention on remand

Until 1990, Belgian law had no alternative to pre-trial detention. Only after the introduction of the Statute on Detention on Remand, did legislation offer two alternatives: 1) freedom under conditions, and 2) release under conditions. The first option is an alternative for pre-trial detention, as the accused person is not deprived of his liberty; while in the second case, the pre-trial detainee can be released under certain conditions.

The criteria under which either alternative can be applied and the conditions involved are identical in both cases. In accordance with the criteria of Article 35, paragraph 1 of the SDR, its application is only possible in those cases where pre-trial detention can be recommended or maintained on the basis of the criteria and reasons of Article 16, paragraph 1 of the SDR.

The conditions that can be imposed for conditional release are not listed explicitly in the law, but are determined by the judge (Article 35, paragraph 3, SDR). The conditions must relate to the circumstances specified in Article 16, paragraph 1 of the SDR: risk of recidivism, risk of flight, risk of misappropriation, or risk of interfering with witnesses. The purpose of the conditions is to neutralize these risks.[40] The only condition mentioned explicitly in the law is the payment of bail (Article 35, paragraph 4, SDR). This security deposit is intended especially in the event of "grave reasons for believing that money or property from the crime have been placed abroad or kept concealed". The judge determines the size of the amount. If the accused person does not appear for a procedural act, or evades the execution of the sentence without legitimate reasons, the sum is forfeited to the state (Article 35, paragraph 4, SDR).

The investigating judge, the judicial council, the chamber of indictment and the sentencing court *ex officio* can order freedom under conditions, or this can be requested by the accused person or the Public Prosecution Service. It is ordered for a maximum of three months; this period can be extended repeatedly (Article 35, paragraph 1, SDR). The supervision of compliance with the conditions can be assigned to the police or officials of the Justitiehuizen [Houses of Justice] service of the Public Prosecution Service. Non-compliance with the conditions means that the accused person can as yet, or once again, be placed in pre-trial detention.

The statistics show that the introduction of alternatives for pre-trial detention has not resulted in a reduction of the percentage of pre-trial detentions in the prisons. A study by An Raes and Sonja Snacken of the Vrije Universiteit of Brussels shows that, while in most cases the public prosecutors requested remand custody from the investigating judge (92%) and that, in the majority of cases, the investigating judge followed this request, 63% resulted in remand custody, 30% in a simple release, and only 8% in freedom under conditions. According to this study, the judge is too quick to rule, in the case of certain accused persons and offenses, that pre-trial detention is the safest measure to protect society. Judges' decisions are influenced by the opinions of organizations such as the police, who are in favour of pre-trial detention. Likewise, judges must make their decisions within twenty-four hours, which places them under enormous work pressure. That is why they often choose the safe way: pre-trial detention. Finally, the many practical problems involved in organizing and monitoring freedom under conditions make it more attractive for judges to choose pre-trial detention for an accused person. The researchers suggest setting up a Court House Service as a possible solution. This service would advise the judge in his choice of alternatives to pre-trial detention. It would have to be established in the court, so the judge could access it directly. The service would ensure that specialists in this field provide advice and that the pressure on judges is reduced.[41]

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[39] R. de Witte, *Zwartboek Justitie Leven in voorlopige vrijheid*, Antwerp: Uitgeverij Houtekiet, 2008, p. 53-156.

[40] C. van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht*, Antwerp: Maklu, 2006, p. 1037.

[41] A. Raes & S. Snacken, *The future of remand custody and its alternatives in Belgium*, The Howard Journal Vol. 43 no.

7.4 Rights of the suspect

According to Article 47bis, 1 a-c CCP, all persons interviewed, whether as a suspect or as a witness, should be informed of the following prior to questioning: 1) they may request that all questions and answers be written down word for word; 2) they may request an additional act of investigation or specified interrogation, and 3) their statements can be used as evidence.

In practice, it is very difficult to check the effectiveness of this right of information, as the interviews are not usually taped, and despite several proposals to allow lawyers to be present at witness interviews, this has still not been adopted by the legislator.[42]

Suspects or accused offenders have the right to remain silent, the right to remain entirely passive, and are under no obligation to co-operate with the judicial authorities. However, as stated by Fermon et al., a lack of co-operation at the pre-trial stage is frequently used as an argument for detaining the suspect or for prolonging the detention on remand.[43]

Article 47bis, 5 CCP enables persons being interviewed to give a written statement in their own language, to have their statements written down in their own language, or to be assisted by a sworn interpreter. However, "the absence of a (polyglot) defence lawyer, during interviews by the police or investigating magistrate, and the lack of audio and video recording, render any effective control of the quality of the translation during investigations at the pre-trial stage impossible".[44]

With respect to the right, as stated in Article 5.2 ECHR, to be informed of the charge and existing evidence, it appears that this right is being met: under normal conditions, suspects do receive copies of the reports of police interviews as well as interviews by the investigating judge. As previously mentioned, they must always receive official notification of the warrant of detention on remand. At the end of the preliminary investigation, they receive a summons containing the charges brought against them. At the end of a judicial inquiry, they are informed in writing of the decision of the investigative chambers with the same information. These documents will state the reasons for the detention and the charges brought against them.

In general, suspects have the right to be assisted by a lawyer, but not before the interview by the investigating judge has taken place, which precedes the issuing of a warrant of detention on remand. In practice, this means that in most of the cases the first contact between the suspect and his lawyer will occur after he has already been detained for about twenty-four hours.

Article 16, paragraph 6 of the SDR guarantees the defendant the right to choose a lawyer. The investigating judge must inform the suspect of this right. If the remand prisoner does not have or has not chosen his own lawyer, the investigating judge must inform the dean of the Bar Association, who will immediately appoint a lawyer. According to Article 216quater CCP, this provision also applies in the event of a similar interrogation by the public prosecutor.

7.5 The execution of detention on remand

On 12 January 2005, the "Basiswet betreffende het gevangeniswezen en de rechtspositie van de gedetineerden" came into force. This Penitentiary Principles Act (PPA) contains the rights of detainees. The law makes an explicit distinction between detainees who have been convicted, and detainees who have not been convicted (definitively). With respect to the latter, Article 10, paragraph 1 stipulates that they must be considered innocent as long as they have not been convicted without appeal. In the treatment of convicted persons, any semblance of their deprivation of liberty having the character of a punishment must be avoided, according to the second paragraph of this article. On the basis of these principles, pre-trial detainees are allotted a separate position in the prison. They must be housed in prisons or departments of prisons that are specifically intended for accused persons (Article 15, PPA), and they must be kept

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5, December 2004, p. 507-517.

[42] J. Fermon, F. Verbruggen and S. De Decker, "The investigative stage of the criminal process in Belgium", in: E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds), *Suspects in Europe,* Intersentia, Antwerp-Oxford, 2007, p. 43-44.

[43] J. Fermon, F. Verbruggen and S. De Decker, "The investigative stage of the criminal process in Belgium", in: E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds), *Suspects in Europe,* Intersentia, Antwerp-Oxford, 2007, p. 44.

[44] J. Fermon, F. Verbruggen and S. De Decker, "The investigative stage of the criminal process in Belgium", in: E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds), *Suspects in Europe*, Intersentia, Antwerp-Oxford, 2007, p. 45.

separate from convicted prisoners (Article 11, PPA). Every major city has a remand prison intended for remand prisoners. They stay there under a closed, cellular regime. All major remand prisons have a psychiatric unit for mentally ill offenders, as well as a unit for female prisoners. According to Sonja Snacken, most remand prisons are also used for the execution of sentences, either by design (subdivisions inside the prison) or due to prison overcrowding (resulting in sentenced prisoners waiting for their transfer). Accused persons have a right to the facilities required – compatible with order and safety – to best promote their right to defence within the judicial procedure in which they are involved (Article 12, PPA). Barring exceptions provided for by law, the accused person is entitled to withdraw to his room at any time, without prejudicing his right to participate in communal activities. Furthermore, he has the right to receive daily visitors (Articles 52 and 58, PPA). Accused persons also have the right – as long as the duration of the detention makes this feasible and barring exceptions provided for by or on behalf of the law – to complete an unfinished course of study inside or from within the prison, to retrain or take refresher courses, or to follow vocational training or advanced studies (Article 78, paragraph 2, PPA).

The remand prisons and other penitentiary institutions are monitored by both internal and external bodies. The internal monitoring is performed by the two regional directors of the central prison administration. The external inspection is carried out by a Central Supervision Council and several local Supervision Committees. The central council and the local committees consist of a minimum of six members, amongst which are at least one acting judge, one medical doctor and one barrister (Article 20, paragraph 3, PPA).

8. Vulnerable groups

Apart from the provision in Article 15, paragraph 1 of the PPA that provides for the housing of female detainees – and female detainees with children younger than three years – in separate divisions of penitentiary institutions, the law does not make any distinction in the manner of implementation of the (remand) detention of these groups. In contrast, this does occur with minors (younger than 18 years of age).

Minors do not come under the Statute on Detention on Remand, but under the Statute on the Protection of Minors (SPM) of 8 April 1965. They are in principle presumed not to have reached a sufficient level of maturity to be held responsible. Offences committed by minors are - with some exception - dealt with by the juvenile courts, which may only impose protective and educational measures which do not have a penal character. Juveniles between 16 and 18 years old may, nevertheless, be judged, convicted and punished by the ordinary courts when, in the opinion of the juvenile judge, these protective and educational measures are not adequate. With exception of these cases, minors do not come under the Statute on Detention on Remand, but under the Statute on the Protection of Minors (SPM) of 8 April 1965.

This specifies that the juvenile court judge can place the minor delinquent, as a provisional measure, in a closed institution for no more than three months (Article 52quater, SPM) in the phase preceding the handling. To this aim, the following three conditions must be met:

1. There are serious indications of guilt;
2. The person concerned demonstrates behaviour dangerous to himself or to others;
3. There are serious reasons to suspect that the person concerned, if released into freedom again, would commit new crimes or offenses, evade the court, try to do away with evidence, or come to a secret understanding with third parties.

If the regular institutions do not have a place for young people, in accordance with the Act of 1 March 2002[45] regarding the pre-trial placement of minors, accused persons can be transferred to a special centre. This institution is open to boys only, and four conditions must be met:

1. The person concerned must be older than fourteen years at the moment of the offenses and there must be sufficient grave indications of guilt;
2. The offense committed must carry a punishment of imprisonment of five to ten years, or a tougher punishment, or a correctional main prison sentence of one year or more, in the event of recidivism;
3. There must be urgent, serious and special circumstances with regard to the requirements

[45] B.S. 1.III.2002.

of protection of public safety;

4. It must be impossible to admit the minor to a suitable institution, due to a lack of space. Five days after its initial decision, and subsequently on a monthly basis, the juvenile court decides on the withdrawal, change or preservation of the measure. The measure may not be maintained for longer than two months, excluding the first five days (Article 5, Act of 1 March 2002). Appeals must be lodged within forty-eight hours of the decision of the juvenile court (Article 8, Act of 1 March 2002).

The position of foreign remand detainees deserves special attention. As demonstrated by the empirical data in paragraph 2, foreigners are strongly over-represented within the total prison population. In her contribution to the study on foreigners in European prisons of 2007, Sonja Snacken points out that non-Belgian nationals constitute only 9% to 10% of the registered total population in Belgium; nevertheless, their proportion in the average prison is about four times higher. Only 21% of them are second or third generation immigrants who have not acquired Belgian nationality, whereas 75% are foreigners without a legal residence permit.[46] As the absence of a residence permit is seen by many investigating judges as a risk of absconding and a risk of recidivism, this might explain the high percentage of foreigners in detention on remand compared to Belgian citizens. According to Snacken, intercultural misunderstandings also appear to play a role here. At any rate, the explanation cannot be sought in the nature of the punishable offenses committed, for as Snacken's research shows, foreigners are actually under-represented if sentences of more than five years or life internment are taken into account.

The Statute on Detention on Remand and the Penitentiary Principles Act contain no separate provisions for foreign prisoners. This means that foreign (remand) prisoners are detained in the same penitentiary institutions as Belgian nationals, and in principle have access to the same living conditions and facilities as other prisoners. However, as was shown by Snacken in her contribution to the study "Foreigners in European Prisons", daily prison life provides a different, less rosy picture.

9. Summary

Compared to many other EU Member States, the proportion of remand prisoners within the total prison population is high. This applies particularly to foreign offenders. The introduction in 1990 of a separate Statute on Detention on Remand does not appear to have made any significant change to this. The alternatives it offers – freedom and release under conditions – are not used frequently in practice. In fact, after 1990, the percentage of pre-trial detainees even increased. The existing overcrowding in Belgian prisons remains a dire problem.

Preceding preventive detention, an accused person can be held in police custody for a maximum of twenty-four hours. In that period, he does not have the right to legal aid. The subsequent warrant of detention on remand can be issued by the investigating judge only if absolutely necessary with regard to public safety, and if a number of strict material and formal provisions have been met. There is no appeal possible against the service of a warrant of detention on remand. After five days, the judicial council of the court of first instance decides whether or not to continue the detention. This assessment is then repeated monthly. The law does not specify any maximum duration of detention on remand. In practice, remand detentions of longer than one year are not uncommon. The time spent in pre-trial detention is deducted from the punishment if the conviction involves a non-suspended prison sentence. There is no arrangement for deduction of this time from suspended prison sentences and non-custodial sanctions.

Pre-trial detention can also be applied to accused persons who are still free at the time of the legal proceedings (immediate arrest).

If the detention on remand violates Article 5 of the ECHR, the accused person has an enforceable right to compensation. In other cases – such as acquittal or prescription of the criminal case – the person can be granted a fair remuneration. The former detainee does not have an enforceable right to this.

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[46] S. Snacken, "Belgium", in: A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dünkel, *Foreigners in European Prisons,* Nijmegen, 2007, p. 135.

Belgian law has no specific provisions for vulnerable groups such as women and foreigners with respect to pre-trial detention, other than with regard to the location where the detention must be served. However, there is a separate legal regulation for minors. It is not included in the Statute on Detention on Remand, but in the Statute on the Protection of Minors (SPM) of 8 April 1965 and the Law of 1 March 2002[47] regarding the temporary placement of minors (who are accused persons) in a special centre.

It can be said that the requirements of Article 5, ECHR appear to have been fulfilled concerning the fundamental rights of the defendant with respect to subjects such as the right to information, to silence, to an interpreter, to be informed about the charge, to legal assistance, and to legal aid. Yet a major problem remains, as the accused person has no right to legal aid during the police questioning or the interview by the investigating judge preceding the serving of the warrant of detention on remand. However, this does not mean that the above-mentioned rights are always guaranteed in practice, as was observed in many instances by the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment on its visit to Belgium in April 2005.[48]

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[47] B.S. 1.III.2002.

[48] Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 18 au 27 avril 2005, www.cpt.coe.int.

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