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Does reintegration need REHAB? Early release procedures for prisoners without a legal permit of residence in Belgium.

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Abstract

Since the eighties, Belgium faces an increasing number of foreign prisoners. Accordingly, the number of foreign prisoners without a legal permit of residence, who are incarcerated in Belgian prisons due to (suspicion of) violation of the Belgian Criminal law is also rising. With regard to early release, all prisoners fall under the Belgian penitentiary Acts of 2005 and 2006 in which 'reintegration' is an important leading principle. However, a considerable part of the foreign prisoners without a legal permit of residence is exposed to expulsion under the Belgian Act of 1980 on the entry, stay, settlement and expulsion of foreigners after their (early) release. The use of different legal frameworks with conflicting rationales with regard to release from prison has consequences for the possibilities to prepare the reintegration of foreign prisoners without residence permit. The aim of this article is to analyse the meaning, use and importance of the reintegration principle with regard to the early release from prison of foreign prisoners without a legal permit of residence. The consequences of the interaction of requirements from immigration and penitentiary laws with regard to their release in society will be discussed. Also some statistical data on the presence of foreign prisoners without a legal permit of residence in the Belgian prisons are presented and commented from a methodological point of view.

Keywords: Early Release - Irregular migrants – Foreign prisoners – Reintegration – Rehabilitation -

1. Introduction

Several studies show that the Belgian prison population has increased sharply and in particular the number of foreign prisoners. To date, more than 40% of the prisoners do not have the Belgian nationality (Beyens 1991, 2010; Beyens, Snacken and Eliaerts 1993; Snacken, Keulen and Winkelmans 2004). Art. 9 § 2 of the Belgian Act of 12 January 2005 on the prison system

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and the internal legal position of prisoners[2] states that the implementation of a prison sentence for all prisoners aims at "[…] *the rehabilitation of the offender and the preparation of his reintegration into society*". However, the Belgian Act of 17 May 2006 on the External Legal Position of Prisoners and the Rights of Victims[3] enacts a specific early release procedure in view of expulsion for those foreign prisoners who do not possess a residence permit.[4] Before being eligible for early release, the Act of 2006 foresees a whole trajectory to be fulfilled in order to prepare the return to society. Afterwards, due to their illegal residence status, foreign prisoners without a legal permit of residence can be subjected to expulsion measures, enacted by the Act of 1980 on the entry, stay, settlement and expulsion of foreigners[5]. However, the implementation of the expulsion depends on the prisoner's residence status at the time of (early) release. Due to the dynamic character of the foreigners' residence status, the geographical destination after early release is often uncertain during imprisonment (Jansen, De Ridder and Scheirs 2010).

With regard to the return to society of the foreign prisoners without a legal permit of residence, the implications of the consecutive implementation of the different Acts having different rationales raise many questions. Furthermore, the insertion of a separate early release procedure for foreign prisoners without a legal permit of residence in view of expulsion in the External Legal Position Act of 2006 raises questions with regard to the possibilities of the preparation and expectations towards this specific group of prisoners. This article therefore focuses on the following questions:

- Who are the foreign prisoners without a legal permit of residence in the Belgian prisons? How can this group be defined and what do we know about its presence in Belgium?
- Which legal frameworks regulate the (early) release into society of foreign prisoners without a legal permit of residence? What are the leading principles of these different frameworks and how do they interact? And what is the importance of the residence status in both legal frameworks?
- What is the meaning and importance of the principle of reintegration in the process of release?
- How and when is it decided whether foreign prisoners without a legal permit of residence will be expelled to their country of origin? What are the implications of this decision for the preparation and realisation of their release into society?

This article starts with the difficult question of the definition of the group of foreign prisoners without a legal permit of residence. *Second*, the available statistical data on their presence in prison and their expulsion from the Belgian territory will be presented. As these data are difficult to trace, attention will be given to the methodological limitations and the encompassing problems

[2] Hereafter referred to as 'Prison Act of 2005'.
[3] Hereafter referred to as 'External Legal Position Act of 2006'.
[4] In this paper we will not discuss the execution of sentences in the country of origin. For interesting insights in the Belgian case we refer to (Dewree, Vander Beken and Vermeulen 2009).
[5] Hereafter referred to as 'Foreigners Act of 1980'.

of their reliability. *Third*, the concept of reintegration, which is a leading principle in the Belgian penitentiary Acts of 2005 and 2006, will be discussed from a theoretical point of view. *Fourth*, the relevance and impact of foreigners' residence status regarding early release will be discussed. *Fifth*, the two relevant legal frameworks will be described and their interacting aims will be pointed out. With regard to early release, all prisoners, including foreign prisoners without a legal permit of residence, fall under the Belgian penitentiary Acts of 2005 and 2006 in which 'reintegration' is an important leading principle. Besides, a considerable part of the foreign prisoners without a legal permit of residence is exposed to expulsion under the Foreigners Act of 1980 after their (early) release. The application of immigration and penitentiary laws with their own rationales and requirements has consequences for the possibilities to prepare the foreign prisoners without residence permit's reintegration. This will be discussed in the last part of the article.

2. Who are the foreign prisoners without a legal permit of residence in prison?

Definition

From a legal perspective, foreigners' residence status is difficult to define. While article 1 of the Foreigners Act of 1980 defines a foreigner as "*whoever does not prove that he is of Belgian nationality*", it is only since the implementation of the 'Return Directive[6]' in the Foreigners Act of 1980 that 'illegal residence' is explicitly defined as "*the presence on the territory of a foreigner who does not or no longer meets the conditions for the entry or stay at the territory*".[7]

The use of the concept 'illegal' or 'illegal immigrant' has been subject of debate on moral grounds and the alternative concept 'undocumented' is considered not being precise enough. As a result, the less contested and stigmatising concept 'irregular migrant' is broadly accepted (Van Meeteren 2010). Although it seems clear who can be defined as an irregular migrant, this population is in general characterized by a dynamic, i.e. changing residence status. This makes them difficult to grasp in statistics, which are static of nature. Some irregular migrants never obtain a permit of residence and reside continuously illegally on the Belgian territory. Besides them, others overstay their visa while they reside on the territory and others enter the territory without the required visa and start to apply for a residence status afterwards (Triandafyllidou 2010).

Besides the population of irregular migrants *at one point in time*, there are persons who *can potentially become* an irregular migrant *over time*. First, there are migrants who only have a temporary residence permit. Among them are for example migrants who entered the country as a

[6] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country Nationals, *Pb. L.* 24 December 2008, 348/98.

[7] Act of 19 January 2012 modifying the Foreigners Act of 1980, *BS* 17 February 2012, 11.412. There are different regulations for European citizens but this discussion is beyond the scope of our article. In general, according to article 7 of the Foreigners Act of 1980, persons who are residing illegally on the Belgian territory will receive an 'order to leave the territory', by which they are expected to leave the Belgian territory by their own means.

student. Others have applied for family reunification or asylum under the Geneva Convention[8]. While these migrants have not yet acquired a residence permit, during their application, they have the right to stay in the country and by consequence are not regarded as 'illegally residing'.

When a permit of residence expires, it can always be granted again by the Office of Foreigners' Affairs. However, within the Foreigners Act of 1980, a Ministerial or Royal Decree can be implemented against persons who are considered to be a threat to the public order or national security due to severe violations of the Criminal Law and through which their (possible initial) residence permit can be revoked.[9] Additionally, these persons are prohibited to re-enter the Belgian territory for ten years. Although these measures are in practice very rarely implemented to foreigners with a long-term permit of residence, it is still a possibility according to the Foreigners Act of 1980.

There are also migrants who have no residence status at a certain moment but who are nevertheless 'not deportable'. For example, foreigners who are in the process of application for the regularization of their illegal residence status, but having not yet acquired a residence permit, have the right to stay in the country and by consequence are not deportable.

As a result, based on the residence status, the group of foreign prisoners is a very heterogeneous one. However, like most international prison population studies, research of the Belgian prison population distinguishes foreign prisoners from national prisoners on the basis of their nationality and not of residence status (Beyens, Snacken and Eliaerts 1993; Snacken, Keulen and Winkelmans 2004; Beyens 2010). However, with regard to the implementation of their sentence and in particular with regard to the decision-making on early release, information on the residence status is more relevant than nationality. The Belgian penitentiary database SIDIS-Griffie contains information on both nationality and residence status. However, the registration of this latter variable is not always accurate or up to date, which is problematic given the already mentioned dynamic character of foreigners' residence status. In addition, the way the residence status is defined and thus registered by the prison administration remains unclear, as the codes used in the penitentiary database do not correspond with the legal categories in the Foreigners Act of 1980. The most relevant data on foreigners' residence status are available at the Office of Foreigners' Affairs, but their database is not synchronized with the penitentiary database. This makes criminological research, combining penitentiary data and data of the Office of Foreigners' Affairs particularly complicated and time consuming, also due to the provisions on the use of databases in the Belgian Privacy Act.

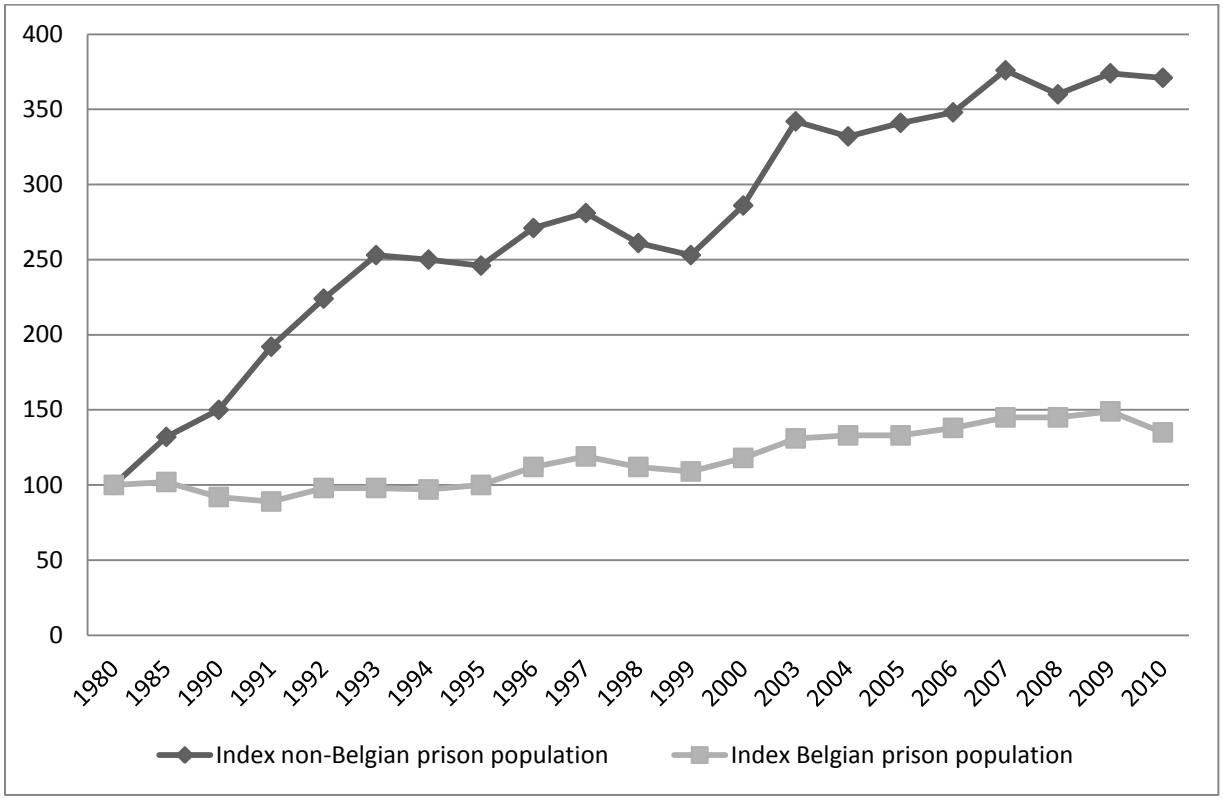
Statistical data

Figure 1 shows that the total group of non-Belgians in prison has almost quadrupled between 1980 (N = 1212) and 2010 (N = 4494). In 2010 the Belgian daily prison population consists of

[8] Act of 26 June 1953 approving the International Convention of the Refugee Status.
[9] Art. 20 of the Foreigners Act of 1980.

42.8% non-Belgians. Compared to the increase of the Belgian prison population between 1980 and 2010 of 'only' 35% from 4459 to 5999 prisoners, the presence of foreigners has become more and more prominent in prison.

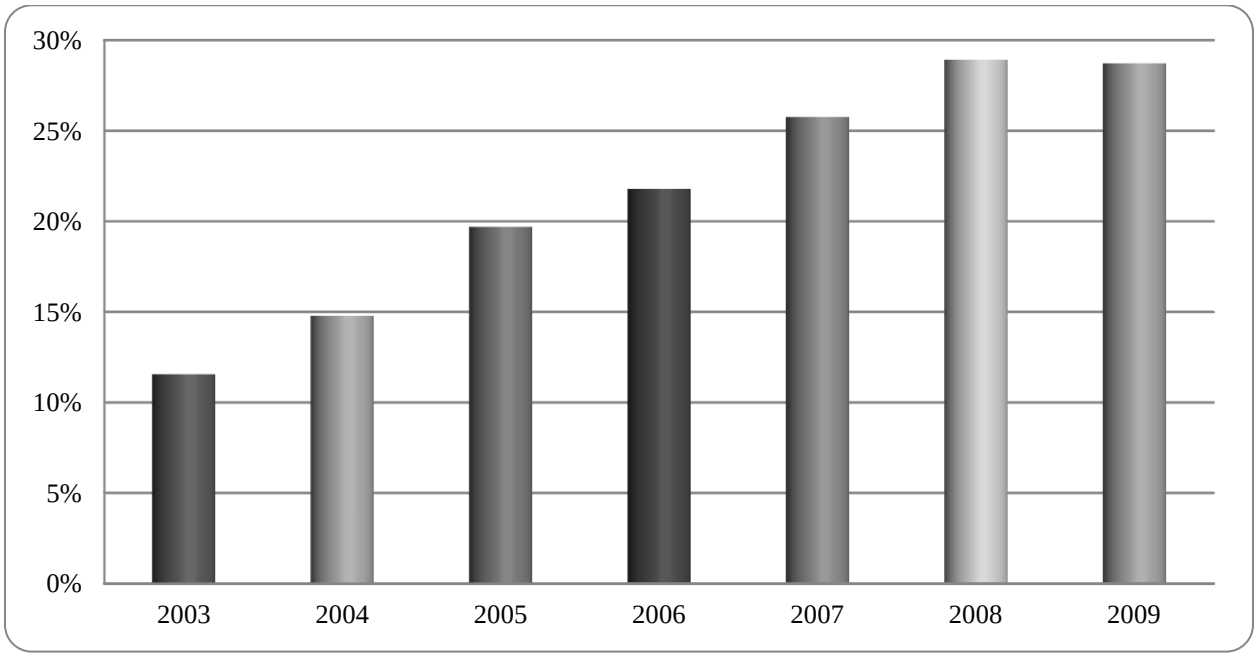
Figure 1: Index of Belgian and non-Belgian prisoners between 1980-2010



Sources: Data for the period 1993-2003: Snacken, Keulen and Winkelmans (2004: 26). Data for the period 2004 – 2010: penitentiary database SIDIS-Griffie (variable: nationality).

At the end of eighties of the previous era, prison overcrowding became a severe problem in Belgium. At that time, one of the reasons for the growth of the prison population was the increasing presence of illegal aliens, who were administratively detained due to a violation of the Foreigners Act of 1980. During the nineties, this specific group of foreigners, who had not committed a crime but were only detained due to their illegal administrative status, was transferred from the regular prisons to administrative detention centres for illegal aliens. The result of this policy change is that, today, illegal aliens are supposed to be incarcerated in prisons solely following violations of the Criminal Law.

Figure 2: Percentage of foreign prisoners without a legal permit of residence in the foreign prison population in Belgian prisons (2003-2009).



Source: Penitentiary database SIDIS- GRIFFIE (variable: residence status).

Figure 2 shows the percentage of foreign prisoners without a legal permit of residence within the total number of foreign prisoners in the Belgian prisons. In 2009, 1301 out of 4529 foreign prisoners did not have a residence permit (29%). These data however underestimate the proportion of foreign prisoners without a legal permit of residence in the Belgian prisons, because they do not include the group of foreign prisoners who are temporary granted a residence permit by the Office of Foreigners' Affairs and who thus potentially can become irregular migrants over time. In addition, the penitentiary database contains a significant number of 'unknown' residence statuses.

Despite the inadequate registration of the residence status in the penitentiary database, residence status[10] is a decisive element in the trajectory of the foreign prisoner without residence permit, because his release -whether it is early or at the end of sentence- can be followed by an administrative detention under the Foreigners Act of 1980 in view of expulsion. However, the changing residence status complicates the decision-making regarding release and has implications for the preparation of the return to society and the possible reintegration of the released prisoner. Before we focus on the impact of the residence status on the penal trajectory of

[10] In order to provide this information, the department 'Identification Prisoners' of the Office of Foreigners' Affairs gathers all the necessary information to identify the foreign prisoners. In addition, the department 'Prisoners' at the Office of Foreigners' Affairs does the follow-up of the foreign prisoners' dossiers with regard to their residence status. The latter will decide at the time of the release from prison whether or not the foreign prisoner will be administratively detained in view of his expulsion.

the foreign prisoners without a legal permit of residence, the principle of reintegration is briefly clarified from a theoretical and legal point of view in order to understand its importance and meaning for the trajectory of the foreign prisoners without a legal permit of residence.

3. Rehabiliation, reintegration, re-entry: what's in a name?

Article 6 of the 2006 European Prison Rules emphasizes that "*All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty*".[11] "Reintegration" refers here to the objective of "*enhancing the ability of prisoners to return to and function normally in civil society upon release*". It is seen as a more neutral term than "resocialization", used in Germany and the Netherlands, or (social) rehabilitation, which both seem to imply that all prisoners are de-socialized or present some forms of deficiencies (van Zyl Smit and Snacken 2009: 106). In Anglo-Saxon penological literature, "rehabilitation" is closely linked to the penal welfarism and treatment ideology of the 1960s-70s (von Hirsh and Ashworth 1998, 1: "*curing an offender of his or her criminal activities, changing an offender's personality, outlook, habits or opportunities so as to make him or her less inclined to commit crimes*") and its revival since the 1990's with the "neo-rehabilitationist' and the "What Works" movements (McGuire 2002). In French, however, "*réhabilitation*" refers to the original meaning of the Latin word "*rehabilitare*", i.e. restoration of the reputation and status of the offender as a full citizen, which can also be linked to practices of "judicial rehabilitation" in many countries (Maruna 2011: 103). For other authors still, rehabilitation is one aspect of the reintegration process, reintegration being "*everything that is intended to reduce recidivism after release from prison*" (Maruna, Immarigeon and LeBel 2004: 3-26) or "*a systematic and evidence-based process by which actions are taken to work with the offender in custody and on release, so that communities are better protected from harm and re-offending is significantly reduced*" (UK Chief Officers of Probation, in Morgan and Owers 2001). In the US, "prisoner re-entry" is a hot issue again. In his now famous article "But they all come back – Rethinking Prisoner Reentry", Travis (2000) reminded US politicians and citizens that half a million prisoners are released into society every year and emphasized the importance of "*the process of managing the transition from the status of "imprisoned offender" to the status of "released ex-offender*" (Travis 2000: 1). The primary objective of reentry in his view, "*for offender and criminal justice agency alike, is to prevent the recurrence of antisocial behavior.*" (Travis 2000: 2). "Reentry" or "reintegration" refers hence not only to the moment a prisoner leaves the prison to return to society, but also to the reintegration process, a lengthy process which starts before release and continues long after release (Maruna, Immarigeon and LeBel 2004: 5). Finally, from a human rights point of view, social reintegration can be seen as derived from the fundamental social right of "social integration" as "*the opportunities to participate in all aspects of social life which are necessary to enable a person to lead a life in accordance with human dignity*" (Bouverne-De Bie 2002: 360). While the concepts "reintegration", "re-entry", "rehabilitation" and "resocialization" may

[11] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, https://wcd.coe.int/ViewDoc.jsp?id=955747.

thus have different connotations, their common underlying intention is to enhance prisoners' ability and opportunities to function in society at the time of their release (van Zyl Smit and Snacken 2009: 106).

In Belgian legislation, "rehabilitation" and "reintegration" are used as two separate concepts in the Prison Act of 2005. Art. 9 § 2 of this Prison Act states that the implementation of a prison sentence aims at "[…] *the rehabilitation of the offender and the preparation of his reintegration into society*". "Rehabilitation" refers to the French traditional meaning of restoration as full citizen, while "reintegration" should be interpreted not as treatment but as the limitation of the detrimental effects of imprisonment and the availability of adequate activities and services in order to prepare the readmission of the prisoner into society (Dupont 1998: 144; Commissie Basiswet 2001: 73-74). In addition to the Prison Act of 2005, the External Legal Position Act 2006 was implemented to reform and ameliorate the external legal position of prisoners in respect of their (early) release possibilities and to strengthen possibilities for preparation of reintegration for prisoners (Snacken 2004: 41-43). Both Acts should function hand in hand as "*both areas interact with each other and should be congruent and consistent in their aims*" (Snacken, Beyens and Beernaert 2010: 84).

In this article, rather than using concepts referring to "reducing recidivism after prison release", we will use the concept of "reintegration" from a human rights point of view to emphasize the process of returning to society after prison release.

4. The importance of residence status for penal decision-making

The residence status of a prisoner has an impact on the decision-making both during his detention and at the end of his sentence.

Firstly, according to the External Legal Position Act of 2006, *during the imprisonment*, Belgian prisoners can benefit from short prison leaves (day leave, systematic prison leave) or special modalities of serving their sentences outside prison (semi-detention and electronic monitoring) in view of reintegration. Foreign prisoners with a temporary permit of residence are equally considered as Belgians and can thus benefit from these modalities. Furthermore, the External Legal Position Act of 2006 does not formally exclude foreign prisoners without a legal permit of residence from short prison leaves, but it is unlikely that they can benefit from these possibilities. In its jurisprudence, the Belgian Supreme Court (*Cour de Cassation*) has confirmed that "*none of these provisions [within the External Legal Position Act of 2006] states that a continuous legal residence in Belgium is a prerequisite for the admissibility of a request for semi-detention.*"[12] Consequently, the same applies for electronic monitoring. However, Snacken, Keulen and Winkelmans (2004) point out that the assumed risk of absconding will impede the implementation of a short prison leave. Systematic research to test this presumption is non-existent, however, from contacts with the field we know that foreign prisoners without a legal

[12] Supreme Court (*Cour de Cassation*) 20 January 2009, P.08.1930.N.

permit of residence *can* sometimes benefit from short prison leaves in order to prepare their reintegration in Belgium during their imprisonment. Nevertheless, the possibility of being expulsed after being early released or at the end of the sentence still exists. In addition, during imprisonment, foreign prisoners without a legal permit of residence are not formally excluded from reintegration activities *intra muros*. However, different thresholds exist and result *de facto* in an exclusion of this specific group. It has also to be pointed out that there is a big difference between prisons in the number and types of activities that are offered to prisoners. Participation to activities often requires the knowledge of Dutch or French, which is a strong excluding mechanism (Snacken and Tournel 2009). In addition, due to their illegal residence status, foreign prisoners without a legal permit of residence can be put on a waiting list in case there are too many candidates for activities[13] (Hellemans, Aertsen and Goethals 2008). Foreign prisoners can also be excluded from working activities resulting in a lack of resources to make phone calls, send money to the family in the country of origin (Snacken, Keulen and Winkelmans 2004: 59-60) or pay the civil parties, the latter being an important element that is taken into account when the decision of early release is taken.

Secondly, *at the end of the prison sentence*, the residence status is decisive to determine how the prisoner will be released and in which country. While Belgian prisoners and legally residing foreign prisoners will be released in Belgium, foreign prisoners without a residence permit will, according to the Foreigners Act of 1980, be expulsed by the Office of Foreigners' Affairs to their country of origin after their prison sentence. In order to implement the expulsion, these prisoners can, after having served their sentence, further be administratively detained in prison[14] or in a closed detention centre for illegal aliens[15]. As a consequence, the release of foreign prisoners without a legal permit of residence is a two-stage process where the *judicial* decision to (early) release precedes the *administrative* decision to detain the foreign prisoner without a legal permit of residence in prison or in a closed administrative detention facility[16] in view of expulsion according to the Foreigners Act of 1980.

[13] The research of Hellemans, Aertsen and Goethals (2008: 93) mentions 'illegal residence status' as one of the reasons for being put on the waiting list of the Flemish Employment Service, which has to support prisoners in the search for a job in order to prepare their release in the Belgian society.

[14] In general the period of administrative detention in prison can be no longer than ten days due to recent changes in the External Legal Position Act of 2006 by the Act of 15 March 2012.

[15] Art. 7 Foreigners Act of 1980. The administrative detention in a closed centre is limited to five months, renewable with one month up to a maximum of eight months in case of "*the protection of public order or national security*".

[16] There is a quotum of 20% regarding the number of foreign prisoners without a legal permit of residence who are transfered from prison to the closed administrative detention facility in view of expulsion after the granting of the early release.

However, not all foreign prisoners without a legal permit of residence can be expulsed. The foreigner's identification[17] is necessary to obtain a travel document (a so called "*laissez passer*") from the Consulate of the country of origin. This is often a problem when migrants do not cooperate in order to impede the expulsion (Broeders and Engbersen 2007; Engbersen and Broeders 2011). When the identification and travel documents cannot be obtained, the Office of Foreigners' Affairs has no other possibility than to release the foreign prisoners without a legal permit of residence in Belgium. As a result, some foreigners without residence permit are more 'expulsable' than others and expulsions are related to the willingness of countries of origin to cooperate with Belgium.[18]

Table 1: Decision-making by the Office of Foreigners' Affairs regarding foreign prisoners without a legal permit of residence.[19]

	2008	**2009**	**2010**	**2011**	**Total**
Released in Belgium	383	384	342	250	1359
Deported	439	461	366	351	1617
Total	822	845	708	601	**2976**

Source: Bureau Detainees of the Office of Foreigners' Affairs.

Between 2008 en 2011 a total of 2976 foreign prisoners without a legal permit of residence were considered to be 'expulsable' by the Office of Foreigners' Affairs. As table 1 shows, the yearly number of prisoners who were effectively deported decreased with 20% from 439 to 351. During this period, 1359 (46%) foreign prisoners without a legal permit of residence were released in Belgium with an 'order to leave the territory'[20] and 1617 (54%) were expulsed to their country of origin by the Office of Foreigners' Affairs.[21] As a result, the reintegration of more than half of the foreign prisoners without a legal permit of residence is connected with a forced return to the

[17] In general a foreigner is identified by his name, data and place of birth. Often, the name of the parents is requested by the Consulate. Consulates often interview the foreigner who claims to be a citizen of their country before delivering a travel document.

[18] For example Algeria does not cooperate well with the Belgian authorities to readmit their citizens. This practice is also known among foreigners. As a result, foreign prisoners who do not want to be deported claim to be citizen of Algeria in order to obstruct and slow down the identification procedure.

[19] In general, near the end of the judicial release, the Prison Administration asks the Office of Foreigners' Affairs whether or not they want to administratively detain the foreigner in view of expulsion. Since 2008, the Office of Foreigners' Affairs makes lists on a yearly basis of foreign prisoners they further detain after the judicial release in view of expulsion.

[20] This is a decision taken by the Office of Foreigners' Affairs that consists of an A4 paper that informs the foreigner he has to leave the entire Schengen Area (in case of third country nationals) or the Belgian territory (in case of European citizens). Although this is a binding decision, the responsibility of its implementation is on the account of the foreigner himself. This practice hence results in a low enforceability of the decision.

[21] Prisoners eligible for international execution of sentences do not appear in these figures. Prisoners eligible for expulsion to another European member state according to the Dublin procedure (Council Regulation (EC) Nr. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national) are

country of origin. However, these figures need to be interpreted carefully as the foreign prisoners without a legal permit of residence whose expulsion is regarded as not appropriate or possible by the Office of Foreigners' Affairs are not included in this table. These prisoners are also released in Belgium with an 'order to leave the territory'. As a result, the above mentioned number of foreign prisoners without a legal permit of residence released in Belgium is an underestimation of the total number.

The residence status has thus a decisive impact on the decision-making on the eligibility for temporary release modalities, which are important to prepare the reintegration in society during imprisonment. And although both principles of reintegration and rehabilitation are enacted in the Prison Acts of 2005 and 2006, the penal trajectory of foreign prisoners residence permit seems very much to be overshadowed by the threat of expulsion according to the Foreigners Act of 1980. However, before drawing conclusions, we will now examine the place of reintegration in the early release procedures of the foreign prisoners without a legal permit of residence.

5. Early release of foreign prisoners without a legal permit of residence

The conditions of (early) release for all prisoners, including foreign prisoners without a legal permit of residence, and the way their reintegration has to be prepared and realized are enacted in the External Legal Position Act of 2006. This Act makes a clear distinction between two groups of prisoners, whose early release is decided by different actors. Convicted prisoners with a sentence of up to three years are eligible for *provisional release*, which is still an administrative decision under the responsibility of the Minister of Justice, regulated by the Ministerial Circular 1771 of 17 January 2005.[22] Prisoners serving a sentence of more than three years are eligible for *conditional release*, which is decided by the Sentence Implementation Courts. For foreign prisoners without a legal permit of residence, the External Legal Position Act of 2006 has enacted a specific procedure in article 26: the *provisional release in view of expulsion or extradition*.

5.1. Provisional release of foreign prisoners without a legal permit of residence with a sentence of up to three years

According to Part II of the Ministerial Circular 1771 of 17 January 2005, the local Prison Governor decides about the provisional release for foreign prisoners without a legal permit of residence.[23]

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included in these figures. Consequently, a minority of the foreign prisoners without residence status were expelled to another European country and not to their country of origin.

[22] Due to various reasons, the implementation of the Act of 2006 is still not complete. Therefore, regulations from before are still in use.

[23] Two groups of foreign prisoners without residence permit are eligible according to the Ministerial Circular of 17 January 2005: (1) foreign prisoners without a legal permit of residence and (2) prisoners who are subjected to a definitive Royal or Ministerial decision for expulsion. Prisoners who are in a procedure for international execution of sentences and prisoners who are under the jurisdiction of the Act of 9 April 1930 concerning abnormal, habitual offenders and perpetrators of certain criminal sexual offenses are excluded.

At the moment of writing this article[24], all prisoners with *a sentence of up to six months* do not have to serve one day in prison, if this is the only sentence they have to serve. The provisional release of foreign prisoners without a legal permit of residence with *a sentence of more than 6 months but not more than one year* is implemented systematically after the prisoner has served a predetermined part of his sentence.[25] For these two categories of prisoners, early release is granted by the Prison Governor without any consideration of counter indications or conditions regarding their reintegration. For foreign prisoners without a legal permit of residence with *a sentence of more than one year but not more than three years* the Prison Governor has to evaluate the following two counter indications three months before the day of admissibility of the provisional release:

- *Is the prisoner capable of realizing his material needs?*
- *Is the prisoner a danger for the physical integrity of others in society?*

The Ministerial Circular defines the first counter indication as "*does the prisoner know where to go and are there any indications that the person has shelter in his country of origin*". This description is a very limited interpretation of a prisoner's reintegration needs. And indeed, the Ministerial Circular that enacts the procedure for prisoners with a sentence of up to three years explicitly emphasizes that there is no follow-up of the foreign prisoners without a legal permit of residence in terms of *reintegration*. If the Prison Governor does not grant a provisional release, he has to motivate this decision and the prisoner has to serve his full sentence.

Although the Prison Governor grants the provisional release according to the described procedure, the Ministerial Circular enacts that the early release will be implemented according to the decision of the Office of Foreigners' Affairs, whereby the foreign prisoners without a legal permit of residence can be further detained administratively in prison at the disposal of the Office of Foreigners' Affairs in view of their expulsion. As a result, the destination of the prisoners with a sentence of up to three years is decided by the Office of Foreigners' Affairs without any further consideration of counter indications for release and with the only concern of expulsion. The provisional release can be revoked when the person is sentenced for a new offence committed after the day of release.

5.2. Provisional release of foreign prisoners without a legal permit of residence with a sentence of more than three years

Foreign prisoners without a legal permit of residence with a sentence of more than three years fall under the jurisdiction of the Sentence Implementation Court. To be eligible for a provisional

[24] Initiatives are however taken by the Belgian government to introduce the so called 'home detention' to enable the execution of prison sentences of up to eight months at home under the regime of voice verification by the end of 2012.

[25] After 15 days for prisoners with a sentence up to 4 months, after one month for prisoners with a sentence up to 7 months, after two months for prisoners with a sentence up to 8 months and after three months for prisoners with a sentence up to 1 year.

release, the prisoner must have completed (1) one third of his sentence imposed by the sentencing judge, or (2) in case of legal recidivism, two thirds of his sentence without exceeding 14 years of punishment. In case of a life sentence, the prisoner must have completed at least ten years of imprisonment or sixteen years in case of legal recidivism.

The procedure is almost identical as for conditional release applied to Belgian prisoners and prisoners with a permit of residence. However, article 48 of the External Legal Position Act of 2006 states that foreign prisoners without a legal permit of residence do not have to make a reintegration plan, which is required for Belgian prisoners in order to be granted conditional release. Such reintegration plan consists of the prisoners' efforts and realisations regarding his reintegration to society and relates, i.a., to working and living conditions. This implies that the requirements for foreign prisoners without a legal permit of residence to be released early on this aspect are much less demanding than for Belgian prisoners. In comparison to foreign prisoners without a legal permit of residence with a sentence of up to three years, the requirements are more demanding. Nevertheless, it shows that there is less concern for the preparation of reintegration for the foreign prisoners without a legal permit of residence in general.

The Prison Governor has to start the early release procedure and gives an advice to the Sentence Implementation Courts between four and two months preliminary to the day of admissibility of the provisional release. Within one month after the advice of the Prison Governor, the Public Prosecutor gives his motivated advice and informs the Sentence Implementation Court, the Prison Governor and the prisoner. Within two months after this advice, a court meeting will be organized. The Sentence Implementation Court is authorized to decide on four counter indications: (1) the possibility to have a shelter, (2) the risk of committing new offences, (3) the risk to harm victims and (4) the efforts to pay the civil parties.

In terms of reintegration, only the first counter indication with regard to housing has some affinity with the future social context of reintegration and the prisoner's return to society. However, it seems a rather limited interpretation of reintegration. In practice, the only 'proof' that has to be given is a letter from a family member or a friend in the country of origin who confirms that the person can stay at his place. Not yet published research at our Department shows that foreign prisoners without a legal permit of residence do not get any support in prison to deliver this proof of residence and that the suitableness and duration of the shelter place is not taken into account or checked by the Sentence Implementation. The discrepancy with Belgian prisoners is huge, taking into account that their housing, income, employment and social involvement are carefully considered by the Sentence Implementation Court before deciding on the early release.[26] Remarkably, the counter indication "risk of committing new offences", a connotation that is often associated with the concept reintegration (Maruna, Immarigeon and LeBel 2004: 3-26), is not taken into account by the Sentence Implementation Courts.

[26] Cf. Ongoing doctoral research of Veerle Scheirs on the functioning of the Sentence Implementation Courts.

In line with these very minimal considerations for the possibilities for reintegration, the follow up of the expulsed prisoner once he is deported to the country of origin is nonexistent. The External legal Position Act of 2006 has also been criticized for not allowing the Sentence Implementation Court to impose conditions for the foreign prisoners without a legal permit of residence (Vanacker 2007).

A second counter indication that is considered for the foreign prisoners without a legal permit of residence is their 'effort to pay the civil parties'. Taking into account that working in prison is not evident and very badly paid and that the prisoners have to pay all their personal needs during imprisonment with the limited amount of money they can earn in prison, this requirement to be released is particularly demanding for this group of often socially vulnerable prisoners.

Furthermore, a pilot study of dossiers at the Office of Foreigners' Affairs shows that several Sentence Implementation Courts define in their judgment the prohibition for the prisoner to return to Belgium for 10 years.[27] As a result, the foreign prisoner without residence permit will have to serve the remaining part of his sentence if he is intercepted on the Belgian territory in this period of banishment.

From this it can be concluded that rehabilitation and reintegration are not the main objectives of Belgian penal policy for this specific category of prisoners.

6. Conclusion. Foreign prisoners without a legal permit of residence caught between inclusive and exclusive policies

Since the last decades, Belgian prisons detain more and more prisoners with a non-Belgian nationality. An increasing part of them have no residence permit. This article focuses on the impact of foreign prisoners' residence status on the possibilities to prepare the return to society during imprisonment and the decision-making regarding early release from prison, which, according to Belgian penitentiary law and the European Prison Rules, should be prepared and implemented in view of rehabilitation and reintegration. Our analysis shows that in Belgium penitentiary and immigration policies regarding foreign prisoners without a legal permit of residence converge whereby the aim of expulsion becomes the main priority.

Today, the early release of foreign prisoners without a legal permit of residence into society not only depends on a decision related to the migrant's status as 'prisoner', but also on his status as 'foreigner'. After the prisoner's early release, the country of destination is decided by the Office of Foreigners' Affairs as all foreign prisoners without a legal permit of residence can be further detained administratively according to the Foreigners Act of 1980 pending their expulsion. While 'reintegration and rehabilitation' are important rationales for all prisoners within the penitentiary legal framework, the Foreigners Act of 1980 aims primarily to expulse the foreign prisoners without a legal permit of residence. Although they are not formally excluded *de jure*

[27] This prohibition to return within 10 years decided by the Sentence Implementation Courts is not the same as a Ministerial or Royal Decree according to the Foreigners Act of 1980 (as described under title 2 of this article).

from reintegration activities and short prison leaves in view of reintegration during their imprisonment, their residence status excludes them often *de facto* from these reintegration possibilities.

Also at the end of the imprisonment, the changeable residence status has a decisive impact on whether or not the prisoners will benefit from an early release procedure in view of release in Belgium or in view of expulsion to the country of origin according to the Foreigners Act of 1980. With the implementation of the External Legal Position Act of 2006, a specific procedure for the early release of foreign prisoners without a legal permit of residence was enacted. We explained how, depending on the sentence length, different actors are involved in the decision making of the early release from prison of foreign prisoners without a legal permit of residence. As a result, different standards are applied when considering early release. While foreign prisoners with a sentence of up to three years are provisionally released from prison once they meet the date of admissibility, without any more requirements, the expectations to be released for prisoners with a sentence of more than three years by the Sentence Implementation Courts are more demanding. To meet the counter indications, conditions have to be fulfilled, such as proving that they will have shelter in the country of origin and that they have started to compensate the civil parties. As long as the Sentence Implementation Courts decide that the foreign prisoners without a legal permit of residence have not sufficiently met the counter indications, they stay in prison. And in the end, the concern for reintegration is subordinated to expulsion.

As a result, the dynamic nature of the residence status during imprisonment can lead to the paradoxical situation for the foreign prisoners without a legal permit of residence, that during imprisonment they are assumed and legally not excluded to prepare their return to the Belgian society, while in the end they can be deported to their country of origin, where, maybe, they do not dispose of networks and/or resources to reintegrate in society. This ambiguous situation may immobilize and discourage them to take initiatives to prepare their release. In conclusion, the uncertain context of the foreign prisoners without a legal permit of residence from different angles, associated with being at the crossroads of inclusionary release policies and exclusionary expulsion policies, seems rather detrimental for the realization of reintegration in any manner whatsoever.

Reference

Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners.

Act of 12 January 2005 on the prison system and the internal legal position of prisoners.

Act of 17 May 2006 on the External Legal Position of Prisoners and the Rights of Victims.

Bergans, K., Cruysberghs, W. et al. (2010). Het verwijderingsbeleid. In M.-C. Foblets and D. Vanheule. *Migratie- en migrantenrecht. Recente ontwikkelingen.* Brugge, die Keure: 69-197.

Beyens, K. (1991). Detentie in internationaal perspectief. *Panopticon, 12(*5), 433-457.

Beyens, K. (2010). La diversité ethnique et le système pénal en Belgique. In M. Herzog-Evans (Ed.), *Transnational Criminology Manual* (Vol. 2, pp. 377-395) Wolf Legal Publishers.

Beyens, K., Snacken, S. and Eliaerts, C. (1993). *Barstende muren. Overbevolkte gevangenissen: omvang, oorzaken en mogelijke oplossingen*. Antwerpen: Kluwer Rechtswetenschappen.

Bouverne – De Bie, M. (2002). Het forensisch welzijnswerk en de 'sociale integratie'-doelstelling. In M. Bouverne – De Bie, K. Kloeck, W. Meyvis, R. Roose and J. Vanacker (Eds.), *Handboek Forensisch Welzijnswerk,* Gent: Academia Press, 351 – 380.

Broeders, D. and G. Engbersen (2007). The Fight Against Illegal Migration: Identification Policies and Immigrants' Counterstrategies. *American Behavioral Scientist 50*(12), 1592-1609.

Commissie Basiswet, Eindverslag Commissie Basiswet gevangeniswezen en rechtspositie van gedetineerden, *Parl.St.* Kamer 2000-01, nr. 501076/001, 73-74.

De Wree, E., Vander Beken, T. and Vermeulen, G. (2009). The transfer of sentenced persons in Europe. *Punishment & Society, 11*(1), 111-128.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

Dupont, L. (Ed.). (1998). *Op weg naar een beginselenwet gevangeniswezen*. Leuven, Universitaire Pers Leuven.

Engbersen, G. and D. Broeders (2011). Fortress Europe and the Dutch Donjon. Securization, Internal Migration Policy and Irregular Migrants' Counter Moves. In T.-D. Truong and D. Gasper (Eds.), *Transnational Migration and Human Security. The Migration-Development-Security Nexus.* Heidelberg, Springer.

Hellemans, A., Aertsen, I. et al. (2008). *Externe evaluatie strategisch plan hulp- en dienstverlening aan gedetineerden. Eindrapport.* Leuven, Katholieke Universiteit Leuven.

Jansen, H., De Ridder, S. and Scheirs, V. (2010). Eindelijk vrij! Een terugkeer naar (n)ergens: de invrijheidstelling van illegale gedetineerden. *Fatik. Tijdschrift voor Strafbeleid en Gevangeniswezen, 28*, 6-15.

Maruna, S. (2011). Judicial rehabilitation and the 'Clean Bill of health' in Criminal Justice, *European Journal of Probation, 3* (1), 97-117.

Maruna, S., R. Immarigeon, et al. (2004). Ex-offender reintegration: theory and practice. In S. Maruna and R. Immarigeon (Eds.), *After Crime and Punishment. Pathways to offender reintegration.* Cullompton, Willan Publishing, 3-26.

McGuire, J. (Ed). (2002). *Offender Rehabilitation and Treatment: Effective Programmes and Policies to Reduce Re-offending*. Chichester, Wiley.

Morgan, R. and Owers, A. (2001). Foreword. In HMIProbation/HMIPrisons, *Through the Prison Gate.* London: HMI Probation and HMI Prisons.

Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, https://wcd.coe.int/ViewDoc.jsp?id=955747.

Snacken, S., Keulen, J. and Winkelmans, L. (2004). *Buitenlanders in Belgische gevangenissen: knelpunten en mogelijke oplossingen*. Brussel: Koning Boudewijnstichting.

Snacken, S. (2004). De voorstellen van de subcommissie Externe rechtspositie van gedetineerden" in I. Aertsen, K. Beyens, S. De Valck and F. Pieters (Eds.), De *Commissie Holsters Buitenspel? De voorstellen van de commissie Strafuitvoeringsrechtbanken, externe rechtspositie van gedetineerde en straftoemeting*, Brussel, Politeia, 37-70.

Snacken, S. (2007). Belgium. In A. M. van Kalmthout, F. B. A. M. Hofstee-van der Meulen and F. Dünkel (Eds.), *Foreigners in European Prisons* (Vol. 1) (pp. 129-156). Nijmegen: Wolf Legal Publishers.

Snacken, S., K. Beyens and Beernaert, M.A. (2010). Belgium. In N. Padfield, D. van Zyl Smit and F. Dünkel (Eds.), *Release from Prison. European policy and practice*. Cullompton: Willan Publishing.

Supreme Court (*Cour de Cassation*) 20 January 2009, P.08.1930.N.

Travis, J. (2000). But They All Come Back: Rethinking Prisoner Reentry. *Papers from the executive sessions on sentencing and corrections* (7), 1-11

Triandafyllidou, A. (2010). Irregular Migration in Europe in the Early 21st Century. In A. Triandafyllidou (Ed.), *Irregular Migration in Europe. Myths and Realities.* Farnham, Ashgate, 1-21.

Vanacker, J. (2007). De strafuitvoeringsrechtbanken en de externe rechtspositie van veroordeelden: een (recht)bank vooruit?" *Panopticon 28*(2), 1-7.

Van Meeteren, M. (2010). *Life Without Papers. Aspirations, incorporation and transnational activities of irregular migrants in the Low Countries.* Rotterdam, Erasmus University Rotterdam.

van Zyl Smit, D. and S. Snacken (2009). *Principles of European Prison Law and Policy. Penology and Human Rights*. New York, Oxford University Press.