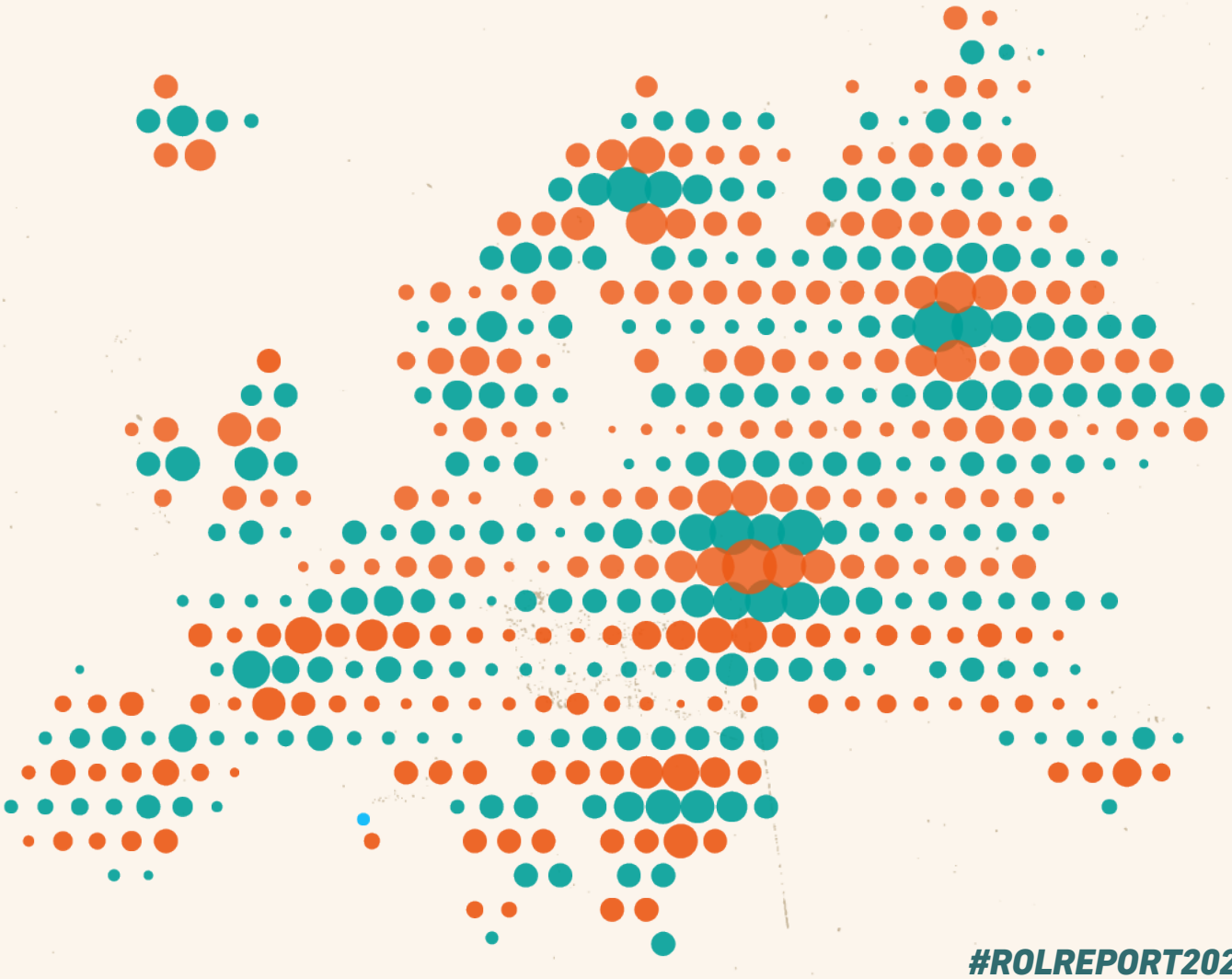
LIBERTIES RULE OF LAW REPORT 2023

BELGIUM



#ROLREPORT2023

CIVIL LIBERTIES UNION FOR EUROPE

LIGUE DES DROITS HUMAINS

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FOREWORD

This country report is part of the Liberties Rule of Law Report 2023, which is the fourth annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member and partner organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and gathers public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2023 Report was drafted by Liberties and its member and partner organisations, it and covers the situation during 2022. It is a 'shadow report' to the European Commission's annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports, and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties' report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2023 Report includes 18 country reports that follow a common structure, mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Forty-five member and partner organisations across the EU contributed to the compilation of these country reports.

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LIGUE DES DROITS HUMAINS

For over a hundred years, the **Ligue des Droits Humains (LDH)** (League of Human Rights) has fought injustices and infringements of fundamental rights in Belgium. LDH educates the public on the respect of basic human rights (including institutional violence, access to justice, respect for minorities, and women's rights), challenges the political powers on issues concerning human rights, trains adults on awareness of human rights issues and the law, and brings issues regarding the development of educational tools and training to the attention of educational stakeholders. Founded in 1901, LDH is a non-profit, independent, pluralistic and interdisciplinary organisation. It is a movement in which everyone feels concerned and acts with respect for the dignity of all. LDH works on subjects such as youth, prisoners' rights, the situation and rights of migrants and refugees, access to justice, economic, social and cultural rights, psychiatric patients' rights, equal opportunity, privacy and diversity. LDH is also a member of the International Federation for Human of Human Rights (FIDH), a non-governmental organisation with 192 members worldwide.

Key concerns

The failure by the executive to respect validly rendered judicial decisions in 2022 reached levels never seen before in the country. The refusal to comply with court decisions is a very worrisome issue and shows disrespect for a founding element of the rule of law.

If steps have been taken to implement the European Commission's recommendation to "(…) provide adequate human and financial resources for the justice system (…)", the gap remains too wide: the justice system is severely underfunded and the belief in the good faith of the authorities is low.

The Belgian state continues to deprive prosecution authorities of the necessary resources (financial, human and legal) that would allow an efficient fight against financial crime and corruption, forcing them to reduce their activities.

The Belgian state doesn't guarantee the right to film the police while in action in the interest of public debate, nor does it guarantee that journalists can do their job without fear of being arrested.

If steps have been taken to implement the Commission's recommendation to "strengthen the framework for access to official documents (…)", there is still room for improvement: the system does not work and the various

authorities (federal and Walloon) do not give the mechanism the importance it should have in a democratic state.

While clear progress has been made with the establishment of the Federal Human Rights Institute, concerns remain regarding the lack of independence of certain structures and some worrying trends appear, such as the disdain for the Central Supervisory Board of Prisons or the deepening of the fragmentation of the landscape for fundamental rights protection.

The French-speaking community did not consider the Commission's recommendation to "strengthen the integrity framework (…) and rules on revolving doors (…)" when it nominated the general delegate for children's rights, nor did the federal government or that of the Walloon Region regarding other bodies lacking independence.

By choosing to not respect the CJEU decision on data retention and adding a provision on the end of encryption, as well as by giving the power to mayors to pass individual and preventive prohibitions of demonstrations, the Belgian state puts fundamental freedoms in jeopardy.

Belgium has been struggling with certain issues for many years (prison overcrowding, length of legal proceedings, etc.) without any noticeable progress.

State of play

- Justice system
- Anti-corruption framework
- Media environment and freedom of expression and of information
- Checks and balances
- Enabling framework for civil society
- Systemic human rights issues

Legend (versus 2022)

- *Regression*
- *No progress*
- *Progress*

Justice system

Key recommendations

- The Belgian state should always respect court decisions, even those that are unfavourable to it.
- To reduce the length of proceedings, it is necessary to provide for massive investment in the judicial sector and give the judiciary control over the management of its budget. The Belgian state should also invest in judicial staff to reduce the dramatic backlog of cases in all jurisdictions, with a special attention to the situation in Brussels.
- The use of videoconferencing should be banned from courtrooms, except in strictly defined exceptional cases and

> never in contradiction with the right to a fair trial.

Judicial independence

Appointment and selection of judges, prosecutors and court presidents

Belgian law states that half of the Constitutional Court judges must be former representatives of the legislature[1] and must be nominated by political parties, which leads to obscure behind-closed-doors political negotiations and deals. Their nomination can therefore trigger political rivalry, as has happened previously,[2] and as happened again in 2022.[3] This situation is unacceptable to guarantee the independence of the Constitutional Court and should be remedied: all Constitutional Court judges must be highly qualified professionals and nominated by the High Justice Council, like any other magistrate.

To remedy such a deficiency, several legislative proposals have been introduced in Parliament,[4] but none of them had a positive outcome yet. In conclusion, LDH is of the opinion that:

All Constitutional Court judges should be highly qualified professionals and nominated by the High Justice Council; legislative reforms in this direction should be undertaken or pursued.

Independence/autonomy of the prosecution service

In a state governed by the rule of law, it is the task of the legislator to determine which conduct should be made an offence and therefore be subject to a penalty or not. To ensure compliance with these laws, the Minister of Justice then adopts criminal policy directives that give priority guidance to the prosecutors on the research policy and the prosecution of these offences. Article 151 of the Constitution thus guarantees the "right of the competent minister (…) to issue binding criminal policy directives."

As part of the definition of this policy, the College of Prosecutors General (*Collège des*

1 See https://www.const-court.be/en/court/presentation/organization.

2 See among others B. Henne, Zakia Khattabi :"Le MR a tenté de marchander ma nomination à la Cour constitutionnelle contre 300 millions d'euros", *RTBF.be*, 6 June 2020 or P. Walkowiak, Une Cour, la particratie et madame Khattabi, *RTBF.be*, 16 May 2022.

3 See Belga, La Chambre confirme Kattrin Jadin comme juge à la Cour constitutionnelle, *La Libre*, 7 July 2022

4 Proposition de loi spéciale du 2 août 2022 modifiant la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle en ce qui concerne sa composition et la procédure de nomination, DOC 55 2850/001 (https://www.lachambre.be/FLWB/PDF/55/2850/55K2850001.pdf) and Proposition de loi spéciale du 20 janvier 2020 modifiant la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle en vue de dépolitiser et d'assurer l'égalité de genre dans sa composition, DOC 55 0949/001 (https://www.lachambre.be/FLWB/PDF/55/0949/55K0949001.pdf).

procureurs généraux) is responsible for providing advice to the Minister, with the objective of "developing a coherent criminal policy". To this end, it "may make binding decisions for Attorneys General by the Courts of Appeal, the Federal Prosecutor and all members of the prosecution under the supervision and direction of the Attorneys General."[5]

The role of the College seems a priori well defined. However, the reality is that its role in defining criminal policy and in the public debate is growing. Indeed, several academics[6] and NGOs stressed the fact that "[i]f the legal texts state that criminal policy directives are issued by the Minister, after obtaining the advice of the College of Attorneys General, criminal policy is in fact set by the College of Attorneys General, under the guise of the executive."[7] And the recent pandemic seems to have boosted inclinations by the public ministry to deal directly with theses issues, bypassing the government and adopting a series of particularly broad measures to crack down on COVID violations.[8]

It demonstrates not only the disproportionate importance that prosecutors take in defining the applicable criminal policy, but also the acuteness of establishing a democratic debate on it, especially at a political moment when plans to reform the Code of Criminal Investigation may greatly increase the prerogatives of the prosecutor's office and questions as to its relative independence remain.

The questions that arise are indeed numerous: multiplication of instruments for defining criminal policy (ministerial circulars, circulars of the College of Attorneys General, police circulars, local authorities); inconsistency of the resulting criminal policy; inequality of citizens under criminal law; the democratic deficit of criminal policy; and a loss of confidence in justice, among others.

It is to be noted that many criminal policy circulars (*circulaires du Collège des Procureurs généraux*) are not published and that the use of these legal instruments is problematic in that they are not controlled by any jurisdiction, as

5 See https://www.om-mp.be/fr/politique-gestion/college-procureurs-generaux.

6 C. Guillain, "La politique criminelle: épée de Damoclès du système pénal ?" in Libertés, (l)égalité, humanité, Bruxelles, Bruylant, 2018, pp. 1117-1134 ; C. Guillain et M. Alié, "La légalité en procédure pénale : mutations contemporaines d'une exigence constitutionnelle" in La légalité: un principe de la démocratie belge en péril, Bruxelles, Éditions Larcier, 2019, pp. 101-139.

7 Ligue des Droits Humains and Syndicats des Avocats pour la Démocratie, Réforme du Code d'instruction criminelle, May 2018, p. 10.

8 See Collège des procureurs généraux, COL n° 06/2020 du 25 mars 2020 et toutes les révisions subséquentes (https://www.om-mp.be/fr/savoir-plus/circulaires) and D. Tatti, C. Guillain et A. Jonckheere, Répression des infractions en temps de COVID-19 : nul n'est censé ignorer la loi ?, L'Observatoire, March 2021.

they are not legislative acts, administrative acts, or judicial acts.[9]

In conclusion, LDH is of the opinion that:

- All criminal policy circulars of the College of Prosecutors General (*circulaires du Collège des Procureurs généraux*) must be published.

- They should be endorsed by the Minister of Justice, who should bear the political responsibility of such acts.

- The criminal policy options of the College should be presented and debated in Parliament prior to their adoption.

Quality of justice

Accessibility of courts

As discussed in last year's report, access to justice remains complicated in Belgium, despite the fact that the Constitution expressly states that everyone has the right to legal aid, and that the legislator cannot infringe this right.[10]

However, it should be noted that some improvements can be observed over the years. For example, the thresholds for access to legal aid have been raised[11] and statistics published in 2022 show that it has had an impact on access to the justice system for those citizens who are most in need.[12] Moreover, the current economic crisis risks aggravating the situation.

In conclusion, LDH is of the opinion that:

- The Belgian state should proceed with an in-depth reform of first- and second-instance legal aid and allocate the necessary funding to guarantee an effective right of access to justice for all.

Resources of the judiciary

The chronic lack of resources in the Belgian justice system has serious detrimental consequences, and is particularly felt in three aspects.

Regarding human resources, the legal framework establishing the number of judges is not respected;[13] in many jurisdictions there is a serious lack of personnel.[14] According to the

9 Cfr Conseil d'Etat, arrêt n° 223.623 28 May 2013.

10 Const., art. 23.

11 Act of 31 July 2020, amending the Judicial Code to improve access to legal aid by increasing the applicable income limits (M.B. 06-08-2020).

12 See Belga, Justice: augmentation de 9% des dossiers pro deo depuis l'assouplissement du seuil d'accès, *La Libre*, 22 August 2022

13 M. Joris, "Justice: des juges à bout de souffle, des délais six fois plus longs", *RTBF.be*, 17 May 2021.

14 This article lists the number of magistrates in each judicial district: C. Dath, "La justice belge est suchargée: quels sont les temps d'attente dans les différentes cours d'appel", *RTBF.be*, 9 May 2019.

CEPEJ Study for the EU Justice Scoreboard, there are a total of 1,524 professional judges sitting in courts in Belgium, which is -0.1% less than in the previous cycle. More precisely, in Belgium, there are 13.23 professional judges per 100,000 inhabitants,[15] which is far below the EU median of 23.92 judges per 100,000 inhabitants. This lack of judges leads in some cases to the postponement and cancellation of hearings.[16]

Financially, the justice system is struggling as well.[17] Since 2018, there have been denunciations of the way the government treats its justice system. The justice budget represents 0.22% of GDP, which is far below the average of other countries of the Council of Europe (0.3%).[18] This way, the government does not give the justice system the means to properly carry out its missions.

On the material level, some progress has been made in digitalising the justice system, but this is still insufficient, as highlighted by the above-mentioned CEPEJ study.[19] As mentioned in last year's report, the government is considering ambitious initiatives, which are to be completed by 2025.[20]

All in all, the means allocated to the justice system do not guarantee its independence.[21] The only constitutional power against the executive is the judiciary. However, successive federal governments considerably weakened it, which constitutes a danger for democracy as a whole. As the EU Commission puts it, "a lack of human and financial resources remains a challenge for the justice system".[22] In 2022, this is more acute than ever.

The examples of the precariousness of the judicial world could be multiplied: the press has noted that the Brussels Family Court is working "on the verge of asphyxiation"[23] and an NGO (La Ligue des familles) has brought an action for liability against the Belgian state

15 See https://rm.coe.int/belgium-country-fiche/1680a7785c.

16 Belga, La Justice sonne l'alarme sur son sous-financement, *La Libre*, 18 May 2022 .

17 All data related to the justice budget can be found on the Federal Public Service website, https://justice.belgium.be/fr/statistiques/moyens/budget_evolution_2016_2020.

18 See https://rm.coe.int/cepej-fiche-pays-2020-22-f-web/1680a86277.

19 See https://rm.coe.int/belgium-country-fiche/1680a7785c.

20 Belgian government (2021), National Plan for Recovery and Resilience.

21 Opinion of the President of the French Bar Association in an interview by L. Colart, "Les avocats attaquent l'état federal en justice".

22 Opinion of the European Commission in its report on the state of law in Belgium as of 2022, Document SWD(2022), of 13 July 2022, p. 4.

23 F. Delepierre, Le tribunal de la famille de Bruxelles travaille au bord de l'asphyxie, *Le Soir*, 21 November 2021.

because of the extent of the judicial backlog affecting this same court;[24] the Brussels Labour Court denounced the exhaustion of judicial actors due to the inaction of the administration (Fedasil, in this case)[25] in the context of the asylum seekers' reception crisis;[26] the High Council of Justice described the backlog of the Brussels Court of Appeal as "colossal". [27]

The Federal Institute for the Protection and Promotion of Human Rights repeatedly stressed in 2022 "the importance of equipping the judiciary with the necessary means to judge behaviour that the legislator has criminalised".[28]

Digitalisation

As discussed in last year's report, following the COVID-19 pandemic, the government tried to normalise the use of videoconference for oral hearings. LDH argued in the past that the right of access to a judge must be concrete and effective, not theoretical or illusory. In certain matters, particularly in criminal matters, personal appearance is a fundamental right[29] recognised by the Constitutional Court.[30] The accused should always be able to appear in person.

Despite all those obstacles, the Minister of Interior pushed for the use of video-conferences in cases dealing with migration. The Royal Decree of 26 November 2021, amending the Royal Decree of 11 July 2003 and

24 Belga, Arriéré judiciaire au tribunal de la famille: la Ligue des familles attaque l'État belge, *RTBF.be*, 6 October 2022.

25 See below.

26 Tribunal du travail francophone de Bruxelles, Communiqué de presse - Contentieux Fedasil : plus de 1000 ordonnances sur requête unilatérale depuis le 1er janvier 2022, 24 May 2022. Between 2014 and 2019, the Brussels Labour Court was dealing with a few dozen applications per year. Since then, the number of cases has risen to more than 1,000 per year. In 2022, the figure exceeded 5,000, and the only reason is the reluctance of Belgian authorities to give shelter to asylum seekers who have a legally established right to it (G. Derclaye and M. Biermé, Chaos migratoire: Fedasil condamnée pour procédures "abusives", *Le Soir*, 28 October 2022; A. Costas-Santos, M. Deleixhe, H. El Moussawi, S. Ngo and Y.L. Vertongen, Revoir le modèle d'accueil à Bruxelles: la leçon ukrainienne, BSI Position Papers, no 3, 19 December 2022, https://bsiposition.hypotheses.org/1425).

27 Conseil supérieur de la justice, Audit de la Cour d'appel de Bruxelles, 30 June 2022, p. 4.

28 IFDH, Avant-projet de loi relative à l'approche administrative communale, à la mise en place d'une enquête d'intégrité communale et portant création d'une Direction chargée de l'Évaluation de l'Intégrité pour les Pouvoirs publics, Avis n° 13/2022, 30 octobre 2022, p. 7; IFDH, Proposition de loi modifiant la loi du 24 juin 2013 relative aux sanctions administratives communales, Avis n° 14/2022, 29 November 2022, p. 4.

29 ECHR, 24 November 1993, *Poitrimol vs. France*, § 35 ; ECHR, 25 November 1997, Zana vs. Turkey, § 68.

30 C.C., judgment n° 76/2018, 21 June 2018.

laying down the procedure before the General Commissioner for Refugees and Stateless Persons and its functioning, was published in the Belgian Official Gazette on 9 September 2022.[31] This decree raises concerns regarding data protection and the loss of quality involved in remote hearing. Replacing a plea hearing with a tele-hearing is giving up on human justice and introduces biases into the debate that hinder its effectiveness. This decree should therefore be repelled.

Fairness and efficiency of the justice system

Length of proceedings

As highlighted by the EU Commission 2022 Rule of Law Report, "The Council of Europe's Committee of Ministers continues its enhanced supervision of Belgium regarding the excessive length of proceedings in civil cases at first instance, and has expressed deep concerns at the persistent lack of comprehensive statistical data on the first-instance civil tribunals".[32]

Indeed, data gaps remain with respect to the length of court proceedings and available data shows that the length of proceedings is particularly long. The lack of resources allocated to the justice system is one of the main reasons for the length of proceedings.[33]

This is not a new phenomenon. Belgium has already been condemned several times by the European Court of Human Rights (ECtHR) for violations of the right to be tried within a reasonable time.[34] Despite this, the judicial framework remains unchanged. In the case of Bell v. Belgium, the ECtHR condemned Belgium for its excessive length of civil proceedings.[35] As noted by the Federal Institute for Human Rights in July 2022,[36] this condemnation was handed down in 2008 and has not yet been implemented. Backlogs are frequent

31 Arrêté royal du 26 novembre 2021 modifiant l'arrêté royal du 11 juillet 2003 fixant la procédure devant le commissariat général aux réfugiés et aux apatrides ainsi que son fonctionnement (M.B. 9 September 2022).

32 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 6.

33 For example, it takes 39 months for a dispute between an employee and his employer to simply be settled in the Labour Court. This example taken from an interview with the President of the Labour Court of Brussels conducted by J. Balboni https://www.lecho.be/economie-politique/belgique/bruxelles/la-cour-du-travail-de-bruxelles-etouffe-entreprises-et-travailleurs-trinquent/10344220.html, 5 November 2021.

34 ECHR, *J.R. v. Belgium*, 24 January 2017. For a more recent case, see ECHR, *Brus v. Belgium*, 14 September 2021.

35 ECHR, *Bell v. Belgium*, 4 November 2008, 44826/05.

36 Institut fédéral pour la protection et la promotion des droits humains, Communication au Comité des ministres du Conseil de l'Europe concernant l'affaire *Bell. c Belgique*, 29 July 2022.

in most jurisdictions in Belgium, especially in Brussels.[37]

Maurice Krings, the President of the French Bar Association of Brussels (the largest in the country), stated, "Justice is so slow in Brussels that we risk a return of vendettas".[38]

Execution of judgments

The failure to respect validly rendered judicial decisions in 2022 was significant, to levels never seen before in the country. This is very worrisome and does not respect one of the founding elements of the rule of law.

Three examples illustrate perfectly the extremely problematic nature of the situation.

In the *Trabelsi vs. Belgium* case, which the ECtHR decided on 4 September 2014,[39] it was shown that Belgian courts have handed down no fewer than five judicial decisions enjoining the Belgian state to respect its obligations, without it deigning to comply.[40] In fact, the person concerned was convicted and served his entire sentence in Belgium. At the end of his sentence, he was handed over to the authorities of the United States of America, in flagrant violation of the injunctions of the ECtHR. This earned Belgium a severe condemnation by the Court and raised the first doubts about the willingness of the Belgian state to respect judicial decisions. As the Brussels Court of Appeal points out, the responsibility of the Belgian authorities is clear: "...the Belgian state has therefore deliberately and consciously chosen to yield to the demands of the US authorities and to disregard its obligations" and "without the violation of this injunction (...) the appellant would not have been imprisoned or prosecuted for any act whatsoever in the United States, nor would he run the risk of being convicted in the United States (...)." In this case, the Federal Executive has consciously chosen to ignore five decisions of the Brussels Court of Appeal and one decision of the ECtHR. As a result, Mr Trabelsi suffered violations of Article 3 of the ECHR, as established by competent UN bodies.[41]

37 See for instance Conseil supérieur de la justice, Audit de la Cour d'appel de Bruxelles, 30 June 2022.

38 M. Benayad, Maurice Krings: "La justice est si lente à Bruxelles que l'on risque un retour de vendettas", *La Libre*, 2 August 2022

39 ECtHR, Trabelsi c. Belgique, requête 140/10, 4 September 2014.

40 See, for the last ones, Cour d'appel de Bruxelles (référé), 23 mai 2022, n° de rôle 2021/AR/1769 and Cour d'appel de Bruxelles (responsabilité), 12 septembre 2022, n° de rôle 2020/AR/508. See also LDH, Affaire Trabelsi : une question de respect de l'État de droit, 29 September 2022.

41 Consequently, both the UN Special Rapporteur against torture and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, as well as the Special Rapporteur on the right to physical and mental health and the Working Group on Arbitrary Detention, have questioned the Belgian and/or American states about this case, without success to date, despite clear and unmistakable evidence of treatment contrary to Article 3 of the Convention. See

Walloon authorities have awarded licences to arms dealers that authorise them to sell arms and ammunition to the Saudi National Guard, which is at the heart of the Yemen conflict.[42]

Despite mobilisation and warnings by NGOs, the United Nations and academic actors,[43] the Walloon government has not only chosen to turn its head and close its eyes, but it delivered the weapons with full knowledge of the facts, as shown by the various procedures launched by LDH and its partners at the Council of State since the end of 2018. Despite several suspensions or cancellations of the Walloon Minister-President's decisions by the Council of State,[44] the latter has, in the greatest opacity and in flagrant contradiction with the government agreement, granted new licences to allow these weapons to leave Belgian territory. Even more worryingly, the press recently reported[45] that, faced with negative opinions from the ad hoc Commission charged with advising it, the Walloon government took the decision to change the composition of this body, with the result that the newly composed body now gives positive opinions where it previously gave negative ones.[46] Another dispute, but the same reality: the executive power, whether federal or Walloon, chooses to ignore judicial decisions condemning it.

Another terrible example occurred in October 2022, when the ECtHR was inundated with hundreds of requests from lawyers who fight for the rights of asylum seekers who are on the streets because of a lack of available reception places. Belgium has indeed been condemned more than 7,000 times by its own courts. Despite this, the fines are not paid and the vast majority of successful applicants remain on the streets. The ECtHR has therefore ordered an interim measure against the Belgian state in 148 cases brought before it.[47] In this case, the Belgian state is in clear breach of its obligation

OHCHR, AL BEL 2/2020, 16 December 2020, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25770.

42 See, among others, https://www.liguedh.be/rapport-wallon-sur-le-commerce-des-armes-la-region-wallonne-a-continue-dalimenter-des-violations-de-droits-humains/; https://www.liguedh.be/10e-anniversaire-du-decret-wallon-sur-les-armes-une-nouvelle-action-en-justice-visera-la-fn-herstal/; https://www.liguedh.be/ventes-darmes-a-larabie-saoudite-une-decision-immorale-et-irresponsable-du-gouvernement-wallon/.

43 See, for example, O. Dua, La Région wallonne doit rejeter les demandes d'exportations d'armes présentant un risque pour les droits humains, *Le Soir*, 1 July 2022.

44 See for the last ones http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=669. See also, among others, https://www.liguedh.be/suspension-conseil-detat-licences-dexportation-darmes-wallonnes-vers-larabie-saoudite-decision-historique/.

45 Médor, Armes wallonnes : l'étrange revirement de la Commission d'avis, Médor, 1 September 2022.

46 https://www.liguedh.be/armes-wallonnes-les-revelations-choquantes-de-medor-demontrent-labsolue-neces-site-dune-transparence-accrue/.

47 See ECtHR, *Msallem and 147 others v. Belgium*, press release, 16 November, 2022, ECHR 363 (2022).

and its attitude is in flagrant contradiction with the concepts of the rule of law. A judgment of 7 June 2022 questioned the government's "deliberate, concerted and persistent practice" of not granting shelter rights to asylum seekers.[48] The Federal government not only recognises that the right claimed by the applicant - namely the right to shelter - is indisputable, but it admits that it is waiting to be condemned before considering fulfilling its obligation. In view of these statements, it appeared to the court that the administration is diverting the judicial procedure from its purpose, using it to make it "an extralegal condition for the recognition of the right to reception". With this behaviour, repeated hundreds of times, the administration of justice is jeopardised. So much so that the court criticised the executive for organising "the destabilisation of a jurisdiction of the judiciary".[49] The Federal Migration Centre Myria, the Federal Ombudsman, the General Delegates for Children's Rights and the Federal Institute for the Protection and Promotion of Human Rights sounded the alarm in a joint statement on the crisis surrounding the reception of asylum seekers. They stated that "the situation regarding the reception of asylum seekers is extremely worrying. (…) The law and the rule of law are being flouted".[50] The ECtHR ordered Belgium on 16 December 2022 to receive 160 applicants for international protection in accordance with the law.[51] The Court again imposed interim measures on Belgium. Finally, confronted with the deliberate violation of the rule of law by the federal government, LDH decided to alert the European Commission of these repeated violations by the Belgian state.[52]

Respect for fair trial standards including in the context of pre-trial detention

In Belgium, the use of pre-trial detention of foreign nationals remains a common practice in 2022. Funded by the EU Commission, LDH participated in a study, undertaken as part of a European partnership of NGOs, with the aim of gathering first-person accounts from detainees to determine whether they believe there are discriminatory practices in Belgian criminal proceedings, from judicial arrest to custody on remand and, if so, to identify the

48 A. François, Un tribunal bruxellois soupçonne Sammy Mahdi de violer sciemment le droit à l'accueil, *VRT*, 14 June 2022.

49 G. Derclaye and M. Biermé, Chaos migratoire: Fedasil condamnée pour procédures "abusives", *Le Soir*, 28 October 2022.

50 Federal Institute for the Protection and Promotion of Human Rights, Recommandations pour résoudre la crise de l'accueil, Brussels, December 2022.

51 ECtHR, A*l-Shujaa and Others v. Belgium* (application no. 52208/22 and 142 others) and *Niazai v. Belgium and Others* (application no. 55140/22 and 16 others), press release, 16 December 2022, ECHR 396 (2022).

52 https://www.liguedh.be/droit-dasile-et-etat-de-droit-la-ligue-des-droits-humains-alerte-la-commission-europeenne-des-violations-a-repetition-de-letat-belge/. See also J. Balboni, Crise de l'accueil: les avocats appellent à "ressusciter l'État de droit", *L'Echo*, 1 December 2022.

nature of such discrimination and its possible impact on the individual's ability to exercise their rights.[53]

This study, part of a larger European study about equality data in criminal justice,[54] highlighted the fact that it would seem that an individual is more often informed of their rights during police custody if he or she is of European nationality. It was also noted that one in five people stated that they did not have their rights read to them. Moreover, some postulate discrimination relating to respect for defendants by state representatives. Indeed, at every stage of the proceedings, allegations of insults and inappropriate remarks made to some individuals are present and primarily concern nationality and ethnicity, as well as addictions, family ties, etc.

The results of this study show major failures in the safeguards provided to people in pre-trial detention. In conclusion, LDH is of the opinion that:

- The Belgian state should guarantee to every individual, regardless of their origin or nationality, equal access to procedural rights during pre-trial detention. In that objective, it should create a national preventive mechanism against torture and inhuman or degrading treatment consistent with the Optional Protocol to the Convention Against Torture (OPCAT).[55]

- Preventive detention should be thoroughly reformed in order to limit its use to solely the most serious crimes and offences.

Quality and accessibility of court decisions

As of 1st September all judgments and rulings rendered by Belgian courts and tribunals were supposed to be published online in a database accessible to every citizen. This fundamental right goes beyond all commercial considerations and was guaranteed by a 5 May 2019 law, amending article 149 of the Constitution.[56] However, this major democratic promise remains unfulfilled because three years after its adoption, this law was not yet in implemented. As the Ministry of Justice itself puts it, "Belgium is not (yet) among the best countries in terms of online accessibility of court decisions. The number of judgements already available digitally via Just-On-Web is still limited: currently only recent judgements of the police courts are available."[57] Therefore,

53 Ligue des droits humains, Disparate impact - Discrimination of foreign nationals in criminal proceedings - A study of the situation in Belgium, March 2022.

54 Fair Trials, Equality Data in Criminal Justice, 24 October 2022.

55 See below.

56 Act of May 5, 2019 amending the Code of Criminal Procedure and the Judicial Code regarding the publication of judgments and rulings (M.B. 16-05-2019).

57 Service Public Fédéral Justice, Tableau de bord de la Justice 2022: la Justice belge fait le point, 19 May 2022.

the deployment of this database "will be done in stages".[58]

In this context, the Parliament adopted a new law aiming to create a "Central Register of Judicial Decisions and on the publication of judgments",[59] which is *prima facie* good news. However, besides the fact that this law will not come into force before October 2023,[60] it has been heavily criticised by both presidents of representative bodies of lawyers (Avocats.be and Advocaat.be)[61] because it does not comply with the EU Data Governance Act[62] which requires public data to be made available.

In view of the difficulties that lie ahead and the unpreparedness of the Belgian authorities, it is to be feared that the entry into force of this law will be postponed once again.

In conclusion, LDH is of the opinion that:

- The Belgian state should invest in an online database for court decisions to be accessible to the public. The database should be open source and GDPR compliant.

Anti-corruption framework

Key recommendations

- The Belgian state should allocate the necessary resources (financial, human and legal) to allow an efficient fight against financial crime and corruption.
- It should implement all GRECO recommendations.

Levels of corruption and investigation and prosecution of corruption cases

As highlighted by the EU Commission 2022 Rule of Law Report, Belgium's corruption-related problems lie, among other places, in the link between corruption and the lack of financial means granted to the fight against

58 *Ibidem*.

59 Loi du 16 octobre 2022 visant la création du Registre central pour les décisions de l'ordre judiciaire et relative à la publication des jugements et modifiant la procédure d'assises relative à la récusation des jurés, M.B. 24/10/2022

60 It is to be noted that the coming into force of the above-mentioned 5 May 2019 law has been postponed from 1 September 2020 to 1 September 2022, and it is still not in force. Doubts arise regarding the 16 October 2022 law as well.

61 P. Sculier and P. Callens, Justice: non au progrès!, 5 October 2022. See also P. Montens and others, Face aux retards de sa digitalisation, la justice recule, 21 November 2022.

62 Regulation 2022/868 of 30 May 2022 - OJ, 3 June 2022.

financial crime[63] and the fact that GRECO recommendations are not fully implemented.[64]

Several actors have been denouncing for years the timidity of political actions in the fight against financial crime. 2022 was no exception.[65] Indeed, investigations are confronted with obstacles, not only because of a lack of legal and material means, but also because of political obstacles.[66]

Evidence of the desperate lack of resources of anti-corruption actors is easy to find. As already highlighted,[67] the judicial system itself has put in place incapacitation mechanisms, such as the one resulting from the mercurial decision of the Brussels Public Prosecutor,[68] which stipulates that, for financial files in the hands of the judicial police, the Public Prosecutor's Office will henceforth sort out which files will be dealt with and which will not. As a result, the justice system in Brussels is "putting financial crime cases on the side" due to a lack of available resources.[69] To put it plainly: the justice system is deliberately choosing not to deal with a certain type of litigation, due to a lack of resources.

Media environment and freedom of expression and of information

Key recommendations

- Guarantee the right to film and to take photographs of law enforcement interventions and prevent all lawsuits, detention and prosecutions against journalists and citizens for simply filming the police.
- Strengthen the framework for access to official documents, in particular by improving request and appeal pro-

63 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 juillet 2022, SWD(2022) 501 final, pp. 7-14.

64 See the third interim compliance report on Belgium published by the Group of States on Corruption (GRECO) on 12 September 2022: https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a7eada.

65 See for instance the opinion of Paul D'Hayere, President of the Brussels Enterprise Court in M. Benayad, "La Belgique a un problème mafieux aujourd'hui", *La Libre*, 17 December 2022.

66 Numerous testimonies of magistrates specialized in financial crime are included in the article of L. Baudrihaye-Gérard, "The Doubts: les magistrats belges face à la lute contre la délinquance économique et financière", Rev. Dr. Pén. Crim., 2017/2, p. 100. See also Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 9.

67 See above.

68 Ministère public, Audience solennelle de rentrée de la cour d'appel de Bruxelles – Discours prononcé par le Procureur général Johan Delmulle, 1 September 2021.

69 A. Sente and L. Colard, Pourquoi la justice bruxelloise a mis « au frigo » 53 enquêtes financières, *Le Soir,* 29 March 2022.

cesses and by limiting the grounds for rejection of disclosure requests, taking into account European standards on access to official documents.

- Properly finance transparency institutions, such as the Federal Commission for Access to Administrative Documents (CADA) and the Commission for Access to Administrative Documents of the Walloon Region.

Safety and protection of journalists and other media activists

Frequency of verbal and physical attacks

In 2022, journalists have regularly faced threats and physical violence in the field when covering demonstrations and various events, as reported by the Association of Professional Journalists (AJP)[70] and CIVICUS.[71] Some media – which have requested anonymity – have hired private security agents to accompany their journalists, especially since the COVID-19 crisis and the protests against the measures imposed by the government.

Reporters Without Borders notes that despite a relatively high level of trust in the press, Belgian journalists sometimes face violence from police and demonstrators at rallies, as well as frequent online threats, targeting mostly women journalists. As a result, Belgium faced a downgrade of its ranking in 2022 compared to 2021 (from 11th in the world to 23rd).[72] The Media Freedom Rapid Response (MFRR) recorded eight alerts for Belgium involving 12 attacked persons or entities related to the media in its 2022 report.[73]

In conclusion, LDH is of the opinion that:

- The Belgian state should guarantee the safety of journalists and prosecute adequately all perpetrators, including if they are members of a police force.

Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists and media activists

As highlighted in the EU Commission's 2022 report, cases of complaints filed against police officers seizing and erasing journalistic material or arresting journalists who were reporting on demonstrations and police interventions are often reported.[74] These complaints, when filed, are generally eventually successful, as

70 AJP, L'agression d'une équipe de BX1 ne peut rester sans suite, press release, 24 January 2022.

71 See https://monitor.civicus.org/country/belgium/.

72 Reporter Without Borders, opinion on Belgium, available on https://rsf.org/fr/belgique.

73 Media Freedom Rapid Response, Monitoring Report – Mapping Media Freedom, January – June 2022, p. 28.

74 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 juillet 2022, SWD(2022) 501 final, p. 17.

the Belgian courts respect the jurisprudence of the European Court of Human Rights and the EU Court of Justice, which recognise that the role played by the media is of particular importance. The courts state that their presence guarantees that the authorities can be held accountable for their behaviour towards the public in general.[75]

However, police forces sometimes ignore this state of play. For a few years now, following several well-documented incidents of questionable, even illegitimate, police action against both professional journalists and citizens, the issue of the right to film law enforcement agencies has been an issue at various events, whether large scale or in everyday life. While the work of journalists in providing information is more necessary than ever, it is also under threat. Indeed, in December 2021, a Brussels civil court convicted the Belgian state for the arrest of two journalists reporting a peaceful demonstration, stating that this arrest is "a clear violation of the fundamental right to freedom of expression of journalists".[76]

In conclusion, LDH is of the opinion that:

- The Belgian state should immediately cease any type of harassment or intimidation against journalists and citizens who record police action.

- The Belgian state should reaffirm clearly the right to film the police while in action in the interest of public debate by amending the law.

Access to information and public documents

In September 2021, the Federal Commission for Access to Administrative Documents (CADA)[77] ceased to function because the royal decree appointing its members, which must be issued every four years, had not been renewed and there is no provision for members to extend their mandate until the decree is renewed. The president of the CADA managed to keep its work going for part of the summer 2021, in line with the continuity of public services. But since 1 September 2021, the Commission has been inoperative.[78]

75 ECtHR, case Pentikaïnen v. Finlande, October 25, 2015, § 89; CJEU, 14 February 2019, Buivids vs. Latvia, Case C–345/17.

76 Trib. Bxl (civ), Jugement du 23 décembre 2021 (https://v3.globalcube.net/clients/englebert/content/medias/2021_12_23_jugement_tpi_bxl.pdf). See also L. Wauters, Arrestation de journalistes en reportage au 127 bis: la police condamnée, *Le Soir,* 23 December 2021.

77 See https://www.ibz.rrn.fgov.be/fr/commissions/publicite-de-ladministration/presentation-de-la-commission/.

78 See T. Denoël, Transparence: toujours pas de bâton wallon, *Le Vif*, 1 October 2021.

Through the Royal Decree of 21 February 2022, the federal government reconstituted the CADA.[79] This decree was published in the Belgian Official Gazette on 7 March 2022. The Commission could only be re-established once the members and deputy members had taken the constitutional oath before the Minister of the Interior. The decree states that requests for opinions submitted to the Commission from 1 April 2022 would be dealt with. No opinions would be issued on requests for opinions previously submitted due to the limited time available for the Commission to issue useful opinions.

As requested by applicants after 1 April 2022, the Commission noted that "the period within which it can provide a useful opinion has now expired". Indeed, the members of the Commission could only take the constitutional oath on 22 June 2022 and the Commission was installed on 29 June 2022. They could not deliberate before then. The law of 11 April 1994 provides that if the Commission delivers its opinion late, the administrative authority must overrule this opinion".[80]

As a result of such a jurisprudence, it seems that all applications filed between 1 September 2021 and 29 June 2022 were purely and simply rejected.

Difficulties of the CADA seem to also affect the Walloon Commission.[81] Therefore, the time taken to obtain a response to a request is extremely long, whether before the federal institution or the regional institution, as both entities seem to be underfunded and awarded little priority by the authorities. It is clear that the Belgian state has not responded satisfactorily to the Commission's recommendation that it should "strengthen the framework for access to official documents (…)."[82]

Checks and balances

Key recommendations

- The Parliament of the Walloon-Brussels Federation should review the French Community decree of 20 June 2002 establishing a general delegate of the French Community for children's rights to create a) a new nomination procedure guaranteeing the strict independence of the office holder; and b) clear incompatibilities with political functions and forbidding all revolving doors phenomenon, consistent with the 2022 EU Commission Rule of Law Report.

79 Arrêté royal du 21 février 2022 portant nomination des membres de la Commission d'accès aux documents administratifs, M.B. 07/03/2022.

80 CADA, Avis n° 2022/15, 29 June 2022.

81 See Le Vif, Cada wallonne: des renforts, mais au forceps, *Le Vif*, 28 September 2022

82 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 juillet 2022, SWD(2022) 501 final, p. 2.

- The Belgian state should ratify the OPCAT as soon as possible and establish a preventive mechanism with adequate financial, human and legal means to ensure an effective, independent and impartial expertise consistent with its international obligations, without furthering the fragmentation of the landscape for fundamental rights protection.
- The Belgian state should review the composition of the investigation department of the Standing Police Monitoring Committee (Committee P) and make sure it is composed of independent experts recruited from outside the police. It should also guarantee the independence of the Supervisory Body for Police Information.
- The Parliament of the Walloon Region should review the Walloon Decree of 21 June 2012 on the import, export, transit and transfer of civilian arms and defence-related products to review the composition of the Commission for advice on arms export licences in the Walloon region in order to guarantee its independence and multidisciplinarity.
- The Belgian state should guarantee adequate funding of human rights monitoring bodies and pay attention to their work and recommendations.

Independent authorities

As the 2022 EU Commission Rule of Law Report rightly states, the active role of the Federal Human Rights Institute (FIRM/IFDH) should be noted. However, to ensure its effective functioning, "further expansion of its activity or mandate, such as a competence to handle individual complaints, would need to be accompanied by matching additional resources".[83]

The same could be said about the Central Supervisory Board of Prisons (Conseil central de surveillance pénitentiaire – CCSP).[84] However, regarding the latter, it should be noted that Belgian authorities are not paying attention to its work and recommendations. As stated by the CCSP itself, "(…) it has to be said that these calls have not received the expected response either in the policy choices, the political choices made by the Minister or in the administrative measures adopted to regulate the daily life of detainees. The CCSP also regrets that the Minister of Justice has not asked the CCSP for a single opinion in 2021 on the bills falling within its mandate (Art. 22, 2°, of the Law of Principles). The CCSP also regrets that it is most often informed by the

83 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 18.

84 https://ccsp.belgium.be/.

press of crucial information that has a direct impact on the tasks it performs".[85]

Apart from these bodies operating efficiently, there are several bodies in Belgium that do not enjoy the independence required to carry out their missions.[86]

As reported last year, the Standing Police Monitoring Committee (Committee P) has been criticised by many international organisations for its lack of independence, particularly because of the composition of its investigation department.[87] The same could be said about the Supervisory Body for Police Information.[88] As a result, some of its analyses seem to be aimed at defending police forces instead of the fundamental rights of citizens. As already mentioned, it's particularly the case about the right to film the police: the Supervisory Body analysis sheds doubt on the well-established right of citizens and journalists to film police action.[89]

Human rights actors fear that new institutions will deepen the fragmentation of the landscape for fundamental rights protection. Indeed, given the will of the Flemish authorities to develop regional autonomous human rights bodies (as was the case for UNIA and the creation of the Flemish Human Rights Institute[90]), "concerns exist regarding potential

85 Conseil central de surveillance pénitentiaire, Rapport annuel 2021, p. 57.

86 For more information, see League of Human Rights, Chiens de garde de la démocratie: mordants ou non? Chronique n° 196, September 2021,

87 "The Committee once more expresses its concern about the ineffectiveness of the inquiries carried out by oversight bodies, in particular the Investigation Service of the Standing Committee for Police Oversight (Committee P), which is made up of full members and members seconded from the police and is responsible not only for inquiries but also for identifying police failings and helping the police to remedy them, a situation that can give rise to a conflict of interests and undermine its impartiality", UN Committee against torture, concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 7.

88 https://www.organedecontrole.be/.

89 Organe de contrôle de l'information policière, Avis d'initiative concernant les situations dans lesquelles des citoyens filment des interventions de police et concernant la protection des données à caractère personnel et de la vie privée des fonctionnaires de police à l'égard de tiers pendant l'exécution de leurs missions policières, 22 November 2021. For a contradictory analysis, see Police Watch, Droit de filmer la police: de l'utilité d'avoir recours à la bonne focale, Observations sur l'avis d'initiative adopté par l'Organe de contrôle de l'information policière du 22 novembre 2021 (version longue), 2022.

90 The government of Flanders withdrew from the Belgian interfederal agreement establishing the mandate of Unia (Interfederal Centre for Equal Opportunities). Instead, the government of Flanders established a Flanders Human Rights Institute (VMRI) through a decree of the Parliament of Flanders.

further fragmentation of the landscape for fundamental rights protection".[91] On the contrary, competent NGOs need to create a new single body to ensure the effectiveness of the control.[92]

These examples reflect various and serious problems of independence within certain institutions in Belgium on the federal level. But the regional level should not be overlooked and questions arise regarding human rights monitoring bodies of regions and communities.

For instance, the nomination of a new French-speaking General Delegate for Children's Rights (DGDE) is dragging amidst political revolving doors issues. Indeed, the government of the Wallonia-Brussels Federation should have appointed the next DGDE in September 2021. To this day, almost a year and a half later, it's still not the case.[93] NGOs insist on the fact that it is essential that this appointment be made outside of any political arrangements. However, discussions at government level are stalled because several of the six selected candidates are running with a political label.[94] Now, political parties are competing to impose their candidate, holding the long-awaited nomination back. Therefore, the institution of the DGDE risks being discredited, which will most certainly prevent it from fulfilling its missions in the future, since its independence is an absolutely necessary prerequisite. The associations in the field are very worried and fear difficulties in collaborating with an institution whose positions will potentially be open to question, since there will be doubts as to the real interests being defended. Henceforth, NGOs call on the government of the Walloon-Brussels Federation to live up to its role so that this institution has the capacity to monitor, promote and protect children's rights independently and effectively

91 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 19.

92 For more information, see Coalition OPCAT, "Un mécanisme de prévention de la torture et des mauvais traitements pour les personnes privées de liberté? Oui, mais pas à n'importe quel prix!", press release of 26 June 2022 and its February 2021 position paper: https://www.dei-belgique.be/index.php/ressources-externes/publications/send/41-publications/493-avis-de-la-coalition-opcat-01-21-ratification-de-l-opcat-et-creation-d-un-mecanisme-national-de-prevention-en-belgique.html

93 A. Hovine, "Plusieurs événements récents inquiétants ramènent chaque fois à la question de l'autorité", *La Libre*, 11 January 2023.

94 One candidate is a former Minister of Interior and former president of a prominent political party, another is a current member of the cabinet of the Minister for Youth, another is a former cabinet member of the Minister for Youth. See N. Spies, Un marchandage politique obscur au cœur de la désignation du délégué aux droits de l'enfant, *Le Vif*, 7 September 2022.

as required by the Committee on the Rights of the Child.[95]

As mentioned above, another example of a flagrant lack of independence of a relevant authority is the controversy about the commission for advice on arms export licences in the Walloon region.[96] Indeed, the press reported that, faced with negative opinions from the ad hoc advisory commission, the Walloon government took the decision to change the composition of this body, towards one that now gives positive opinions.[97] This report highlights the need to substantially improve transparency on the procedures for granting Walloon arms export licences. Indeed, the decision to grant or refuse arms export licences is taken by the Minister-President alone, who receives only non-binding confidential advice. Parliamentary oversight is minimal and civil society is only informed about arms exports authorised by the Minister-President at a very late stage and in a very limited way.[98] The composition of this commission must be reviewed in order to guarantee its independence and multidisciplinarity.

Accessibility and judicial review of administrative decisions

Transparency of administrative decisions and sanctions

As already stated, the granting of arms export licences is subject to a severe lack of transparency on the part of the Walloon authorities. So much so that the Parliament organised a hearing on the matter in January 2022.[99] However, this hearing has not been followed up by any action, either by the government or the Parliament.

Even if the Belgian state has signed and ratified the United Nations treaty on the arms trade,[100]

95 See Coordination des ONG pour les droits de l'enfant, "Pour un·e Délégué·e général·e des droits de l'enfant sans étiquette politique", press release, 30 August 2022

96 Commission d'avis sur les licences d'exportations d'armes (see art. 19 of the Décret wallon du 21 juin 2012 relatif à l'importation, à l'exportation, au transit et au transfert d'armes civiles et de produits liés à la défense, M.B. 05/07/2012).

97 Médor, Armes wallonnes : l'étrange revirement de la Commission d'avis, *Médor*, 1 September 2022.

98 See C. Zutterling, Les angles morts du contrôle des exportations d'armes de la Région wallonne. Analyse du "Rapport Armes", Groupe de recherche et d'information sur la paix et la sécurité (GRIP), 5 March 2021.

99 Commission des affaires générales et des relations internationales, "Compte rendu intégral", Parlement wallon, January 17, 2022. See also E. Renette, Armes wallonnes: une pétition pour plus de transparence défendue au Parlement wallon, *Le Soir*, 17 January 2022 and LDH, Armes wallonnes: Amnesty, la CNAPD, la LDH et Vredesactie déposent une pétition au Parlement de Wallonie pour plus de transparence, press release, 21 June 2021.

100 Arms trade Treaty of the United Nations. There is a particular interest in its article 7, which establishes a precautionary principle in the context of arms export.

it blithely violates it – as well as European and Walloon law – by allowing arms exports to states involved in serious violations of international humanitarian law. The violations of these different rights are attested by the multiple suspensions by the Council of State of the decisions of the Walloon Minister-President to grant export licences to Saudi Arabia to Walloon arms companies.[101] There have been numerous political declarations stating that the Minister will not grant licences for new contracts to countries that commit serious violations of international humanitarian law or international human rights law.[102] In fact, these weapons are constantly found in countries that should be prohibited, which contradicts the statements of political representatives.[103]

In order to put an end to this opacity, NGOs ask that the decisions to grant – or refuse – licences, as well as the decisions of the Commission of Advice, in its counsel to the Walloon Minister-President, be made public; that the date provided in the government reports be standardised with those available to the customs authorities in order to allow for a real readability of exports; that the frequency with which these reports are published be increased; and that the time limits for the publication of the reports be reduced in order to allow for an effective parliamentary and public control.

Furthermore, as already highlighted, it is of utmost necessity to review the composition of the Commission of Advice, to guarantee its independence. Indeed, the decree of 21 June 2012 on the import, export, transit and transfer of civilian arms and defence-related products[104] has created a "Commission for advice on arms export licences", responsible for formulating reasoned and confidential opinions "at the request of the government or on its own initiative". Unfortunately, the advice it has produced remains secret and its composition is

101 For the last one, see Council of State, decision n° 249.991 of 5 March 2021: "The Council of State suspends, under the extreme urgency procedure, the execution of four export licences for arms and defence-related material issued by the Walloon Region to Saudi Arabia. It considers that these licences are not adequately motivated with regard to the clear risk that the military technology or equipment whose export is envisaged will be used for internal repression or to commit serious violations of international humanitarian law in the context of the conflict in Yemen" (http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=669).

102 Région Wallonne, "Déclaration de politique régionale pour la Wallonie 2019-2024", 9 September 2019, pp. 20-21.

103 See O. Dua, La Région wallonne doit rejeter les demandes d'exportations d'armes présentant un risque pour les droits humains, *Le Soir,* 1 July 2022. More details are in the report of the Walloon weapons observatory, available at https://www.amnesty.be/IMG/pdf/wam_rapport_2022-2.pdf, 10 June 2022.

104 M.B. 05-07-2012.

not independent, as a majority of its members directly depend on the Walloon authorities.[105]

Implementation by the public administration and state institutions of final court decisions

As highlighted above, the lack of implementation of final court decisions by public authorities is extremely worrying. Indeed, the failure to respect validly rendered judicial decisions was paramount in 2022, reaching levels never seen before in the country. It is a very worrisome issue of non-respect of a founding element of the rule of law.[106]

Enabling framework for civil society

Key recommendations

- The 25 August 2022 circular on individual and preventive prohibition of demonstrations should be withdrawn.
- The 20 July 2022 law on data retention should be withdrawn and the Belgian authorities should refrain from massively collecting personal data of citizens, in line with the CJEU decisions.
- The penal law should not be interpreted so as to criminalise humanitarian aid. To do so, a clarification of the law is necessary.

Regulatory framework

Counterterrorism regulations, including on terrorist financing

The Counter-Terrorism Vigilance Committee (Committee T)[107] analysed, in its 2022 annual report,[108] the criminal framework applicable to terrorist financing and looked at some case law examples in this area.

Terrorist financing acts can be covered by various offences. Firstly, they can be prosecuted as participation in the activity of a terrorist group (art. 139 and 140 of the penal code). Secondly, the financing of terrorist activities by a lone perpetrator falls under the application of article 141 of the penal code. Finally, acts of financing can also be prosecuted on the basis of article 140*septies* of the penal code, which criminalises the planning of a terrorist offence. Committee T analysed these provisions and

105 Among the 8 members of the Advisory Committee on Arms Export Licences, 5 are members of the Walloon administration, including its president (https://www.liguedh.be/wp-content/uploads/2020/09/observatoire_des_armes_wallonnes_-_3e_me_e_dition.pdf).

106 See above, chapter about the Justice system, Execution of judgments, pp. 15-17.

107 https://comitet.be/.

108 Comité T, Rapport annuel 2022, pp. 48-55.

reviewed the problematic changes that have been made to some of them, which undermine the presumption of innocence and the principle of legality of offences. In all three offence cases, it is not necessary for a terrorist act to have been perpetrated or to have been started: it is sufficient that it is the objective pursued by the perpetrator or, possibly, by third parties.

The judgments analysed by Committee T deal with the hypothetical financing of a terrorist group (art. 140 PC). According to the judgments, the simple transfer of funds to a member of one's own family who is part of a group such as the Islamic State or Jabhat al Nosra is sufficient to justify a conviction for participation in the activities of a terrorist group. This is so even if the helper's intention was purely humanitarian or emotional, as long as he or she is aware of the membership of his or her relative in one of these groups. Committee T considers that any assistance given to (alleged) members of a terrorist group, even if it is "strictly for humanitarian reasons" and "even if it condemns all violent actions" is problematic: this reasoning could potentially allow all humanitarian aid to be considered unlawful and could therefore apply, more generally, to any humanitarian organisation acting in camps where members (alleged or actual) of terrorist groups are detained.

(Un)safe environment

Freedom of assembly, including rules on organisation of and participation in assemblies, equal treatment, policing practices

On 25 August 2022, the Minister of Interior published a circular on individual and preventive prohibition of demonstrations.[109] The purpose is to give mayors the possibility to impose a preventive ban on participation in a protest or a demonstration for "troublemakers". This circular gives local authorities the ability to issue "individual and preventive bans on demonstrations". It raises questions in regards to the respect of freedom of assembly and gives very broad prerogatives to local authorities to limit this fundamental liberty.[110]

First of all, there is the question of the respect for the principle of legality, as this fundamental freedom is limited by means of a circular from the Minister of Interior and not by a law, debated in Parliament. As it was often the case during the COVID-19 pandemic, the executive limits fundamental freedoms by excluding Parliament and democratic debate. Furthermore, it seems *prima facie* abusive to derive from art. 135 § 2 of the communal law,[111] which deals with mayors prerogatives, the possibility for a mayor to prohibit individuals from participating in demonstrations.

109 Circulaire du 25 août 2022 relative à l'interdiction individuelle et préventive de manifestation, en complément de la circulaire OOP 41, M.B. 27/10/2022.

110 See M. Benayad, L'interdiction préventive des casseurs dans une manif ne fait pas l'unanimité, *La Lib*re, September 6, 2022.

111 Nouvelle loi communale codifiée par l'arrêté royal du 24 juin 1988, M.B. 03.09.1988.

The principle of proportionality is also infringed. Indeed, if a series of guarantees are provided (motivation, limitation in time and space, rights of defence, etc.), which is fortunate, then a preventive ban may be sensible. But making it an administrative police measure also presents a series of risks: in matters of fundamental freedoms, it is better to sanction abuses *a posteriori* than to prevent them *a priori*. This is particularly true for freedom of expression: limiting this freedom *a priori* (even for notorious repeat offenders) is considered more harmful to democratic systems than introducing censorship. The same principle should apply to the freedom of demonstration: the democratic system has more to gain from bearing the inconveniences that may result from the exercise of this freedom than from censoring it *a priori*. Generally speaking, this obviously raises the question of the prior imposition of a form of sanction (even if it is very appropriately described as a police measure) even though wrongful conduct may be sanctioned after the demonstration, i.e. the compatibility of the measure with the general principle of a repressive rather than a preventive constitutional regime.

It should be noted that this position is also shared by the federal police, as revealed by the press.[112]

Other

Belgium scores high on the ILGA-Europe Rainbow Index,[113] which ranks countries according to their legal and policy practices in relation to LGBTQI+ people. In May 2022, the Belgian Justice Minister presented a plan to make the country a safer place for the LGBTQI+ community.[114] The plan is in response to the increase in crimes on the basis of sexual orientation, including discrimination, hate speech and hate crimes.[115] It is a very positive step in the fight against homophobia and transphobia.

On 15 July 2022, the Council of Ministers approved the Interfederal Action Plan to Combat Racism.[116] The plan contains dozens of measures to address equal opportunity, employment, the economy, asylum and migration, health, justice, police, civil service, foreign affairs, digital services and mobility. Further measures also support academic research on neo-colonialism and decolonisation. It is a very positive step in the fight against racism.

112 A. Sente, La note "fantôme" de la police qui critiquait "l'interdiction individuelle de manifester", *Le Soir*, 23 December 2022.

113 See Rainbow Europe map and index 2022 (https://www.ilga-europe.org/report/rainbow-europe-2022/).

114 Plan d'action fédéral 2021-2024, Pour une Belgique LGBTQI+ friendly, 17 May 2022.

115 L. Walker, 'Unacceptable violence': Belgium to crack down on crimes against LGBTQ community, *The Brussels Times*, 18 May 2022

116 Mesures fédérales du Plan d'action national contre le racisme 2021-2024, 15 July 2022.

Online civic space

Data protection and privacy issues

In 2015, the Constitutional Court[117] annulled the law of 30 July 2013 amending Articles 2, 126 and 145 of the Act of 13 June 2005 on electronic communications and Article 90decies of the Code of Criminal Procedure (the so-called Data Retention Act)[118] transposing the European Directive 2006/24/EC,[119] which had itself been invalidated by the Court of Justice of the European Union.[120] This annulment was intended to put an end to the obligation imposed on telecommunications operators and Internet access providers to retain, for the purposes of combating serious crime, all traffic information concerning telecommunications users (also known as metadata).

Despite this first annulment, the Belgian state adopted a new similar legislation[121] which, although it did not have all the flaws of the first one, nevertheless imposed a systematic and massive collection of the metadata of people present on Belgian territory. Therefore, NGOs logically asked and obtained from the Constitutional Court the annulment of this legislative norm in 2021.[122]

The CJEU clearly established that the legislature may derogate from this prohibition of generalised surveillance, but only in the event of a serious threat to national security and provided that the retention of data is limited in time and to the extent strictly necessary, that sufficient safeguards are provided and that the control of access is in the hands of a court or an independent administrative authority.

Unfortunately, the Belgian federal government disregarded the clear indications provided by both national and international courts. Indeed, the Council of Ministers introduced a bill, finally adopted by Parliament in 20 July 2022,[123] that, far from limiting itself to "repairing" the illegalities observed by

117 C.C., 11 June 2015, n° 84/2015.

118 M.B., 23-08-2013.

119 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Official Journal of the European Union (ISSN 1725-2563), 13 April 2006, p. 54.

120 CJEU, 8 April 2014, *Digital Rights Ireland Ltd & Michael Seitlinger e.a.*, C-293/12 & C-594/12.

121 Act of 29 May 2016 on the collection and retention of data in the electronic communications sector, M.B., 18-07-2016.

122 C.C., 22 April 2021, n° 57/2021.

123 Loi du 20 juillet 2022 relative à la collecte et à la conservation des données d'identification et des métadonnées dans le secteur des communications électroniques et à la fourniture de ces données aux autorités (dite loi DATA RETENTION 3), M.B. 08/08/2022.

the above-mentioned courts, introduced a requirement relating to encrypted messaging applications aimed at making it possible to decrypt what is exchanged by certain users, at the request of law enforcement agencies and with the agreement of an investigating judge. In other words, service providers are obliged to "disable" encryption for certain users. However, the encryption of communications makes the information sent with an application unreadable for people who are not the recipients of the message. Thus, the information that passes through an encrypted channel is scrambled, accessible only to those who are communicating with each other. This is an indispensable tool in a democracy, not only for certain specific professions (journalists, lawyers, etc.), but also for all individuals.

It should also be noted that, with regard to the other issues raised by the data retention reform, the draft bill in question has been the subject of a very critical and detailed opinion from the Data Protection Authority (DPA).[124] The DPA notes that there are significant risks for the respect of fundamental rights, whether from the point of view of legality, necessity or proportionality.[125] It also notes, among other things, the fact that the preliminary draft does not provide for access to data to always be subject to prior control either by a court or by an independent administrative body which has the status of a third party in relation to the authority requesting access to the data, which is a European requirement.[126]

In view of the DPA's conclusions regarding this preliminary draft, LDH also submitted an opinion to the Parliament.[127] Despite these concurring and alarming opinions, the Parliament decided to adopt the offending text without taking into account the well-founded criticism of these two authorities.

However, as the DPA concludes with regard to the preliminary draft, "It must be noted, however to note that the draft bill does not really bring about the change of perspective required by the case law of the CJEU and the CC. In its opinion, the Authority notes that the draft bill intends to impose new measures for the retention of traffic and location data which could lead to the de facto reintroduction of general and undifferentiated data retention obligations, while at the same time extending the possibilities of access to such data".[128]

124 Data Protection Authority, Opinion n° 108/2021 of 28 June 2021

125 *Ibid*., pp. 71-75.

126 *Ibid*., §§ 153-155.

127 LDH, Avis de la Ligue des Droits Humains sur le projet de loi du 17 mars 2022 relatif à la collecte et à la conservation des données d'identification et des métadonnées dans le secteur des communications électroniques et à la fourniture de ces données aux autorités – DOC 552572/001, May 2022.

128 *Ibid*., p. 76.

Disregard of human rights obligations and other systemic issues affecting the rule of law framework

Key recommendations

- Follow international recommendations from human rights monitoring bodies (whether from the UN, the COE or the EU) and respect all decisions rendered by international jurisdictions.
- Put an end to the endemic prison overcrowding situation by developing alternatives to deprivation of liberty and by reviewing its penal policies to ensure that the prison sentence is the ultimum remedium.
- Put an immediate end to the incarceration of people with mental illnesses in prisons.

Systemic human rights violations

Widespread human rights violations and/or persistent protection failures

Prison overcrowding is endemic in Belgium and the resulting conditions of detention lead to inhuman or degrading treatment. As a result, the Belgian state faced several convictions of violations of article 3 of the ECHR.[129] The Belgian State was also sentenced by the national judicial order for endemic prison overcrowding of a Brussels establishment.[130] Once again, in 2022, the European Committee for the Prevention of Torture (CPT) issued a highly critical report on the situation in Belgium.[131]

The Belgian state must comply with the requirements of international bodies in this field, in particular of the CPT[132] and of the

129 ECHR, *Sylla and Nollomont vs Belgium*, 16 May 2017, req. n°37768/13 and 36467/14 ; *ECHR, W.D. vs. Belgique*, 6 September 2016, req. n°73548/13 ; ECHR, *Bamouhammad vs Belgium*, 17 November 2015, req. n°47687/13 ; ECHR, *Vasilescu vs Belgium*, November 25, 2014, req. n°68682/12 ; etc.

130 International Prison Observatory (OIP) - Belgian section, "The Belgian State responsible for prison overcrowding", 17 January 2019.

131 CPT, Council of Europe anti-torture Committee publishes the report on its visit to prisons in Belgium, November 29, 2022.

132 See, notably, CPT's Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 6 April 2017, published 8 March 2018, §§ 36 and seq.; see also CPT's Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture

High Commissioner for Human Rights of the Council of Europe,[133] by adopting a policy that does not involve the construction of new penal institutions. As also highlighted by the UN CAT, "the State party must consider instituting alternative measures to detention rather than increasing prison capacity".[134] The CPT points out that "It is important, however, that priority should continue to be given to reducing the prison population and controlling it to a reasonable proportion [...]. This also requires ensuring that attention is not excessively given to the increase of the total capacity of the penal institution".[135]

Prison expansion is a ploy, as many scientific studies have shown: the evolution of the prison population actually depends on the implemented criminal policies. Given the obvious failure of the criminal policy that has been deployed for decades and the largely counterproductive nature of freedom deprivation, it is necessary to ensure that prison sentences are truly the *ultimum remedium*. This includes in particular the use of alternative sanctions. The Belgian State should on the one end ensure the proper implementation of cooperation agreements between the Federal State and the Communities responsible for the enforcement of unpaid work and electronic monitoring, on the other end by developing new alternatives (special confiscation, day fines, etc.), while remaining careful not to widen the criminal net.

Follow-up to recommendations of international and regional human rights monitoring bodies

As already highlighted, Belgium has serious shortcomings in following-up recommendations of international and regional human rights bodies. Specifically for the year 2021, see the UN CAT recommendations,[136] the UN Committee on the Elimination of Racial Discrimination[137] and the UN Human Rights

and Inhuman or Degrading Treatment or Punishment (CPT) from 28 September to 7 October 2009, published 23 July, 2010, § 79.

133 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Belgium from 15 to 19 December 2008, published 17 June 2009, CommDH(2009)14, p. 31, § 6.

134 UN Committee against Torture, "Concluding observations of the Committee against Torture – Belgium", 21 November 2008, CAT/C/BEL/CO/2, § 18.

135 CPT's Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 6 April 2017, published 8 March 2018, § 38.

136 UN Committee against torture, concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4.

137 UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth to twenty-second periodic reports of Belgium, 21 May 2021, CERD/C/BEL/CO/20-22.

Council.[138] A considerable number of those recommendations are reiterations of recommendations already made in previous reports, which remain unimplemented.

Implementation of decisions by supranational courts, such as the Court of Justice of the EU and the European Court of Human Rights

Data retention

As already mentioned in previous sections, the Belgian state continues to show reluctance in abiding by CJEU jurisprudence in the case of data retention.

Rights of detainees with mental health problems

The incarceration of people with mental illnesses in prisons must be ended: this recommendation has been made many times before and the Belgian authorities have been frequently condemned for this, even to the extent of a pilot ruling by the ECtHR.[139] This underlines once more the urgency of this issue. However, to date, and although the government seems to have become aware of the importance of this problem, in part by creating closed care facilities which are independent of prisons, the psychiatric annexes to prisons do still exist and the law of 4 May 2016 on internment and various provisions relating to justice[140] still allows patients to be sent there.

Length of judicial procedure

Belgium has already been condemned several times by the ECtHR for violating the right to be tried within a reasonable time.[141] However, the judicial framework remains unchanged. In the case of *Bell v. Belgium*, the European Court of Human Rights condemned Belgium for the excessive length of civil proceedings in Belgium.[142] As noted by the Federal Institute for Human Rights in July 2022,[143] this condemnation was handed down in 2008 and has not yet been implemented. Backlogs are frequent in most jurisdictions in Belgium, especially in Brussels.[144]

138 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Belgium, 14 July 2021, A/HRC/48/8..

139 ECHR, *W.D. vs. Belgique,* 6 September 2016, req. n°73548/13.

140 M.B. 13-05-2016.

141 ECHR, *J.R. v. Belgium*, January 24, 2017. For a more recent case, see ECHR, Brus v. Belgium, September 14, 2021.

142 ECHR, *Bell v. Belgium*, November 4, 2008, 44826/05.

143 Institut fédéral pour la protection et la promotion des droits humains, Communication au Comité des ministres du Conseil de l'Europe concernant l'affaire *Bell. c Belgique*, 29 juillet 2022.

144 See for instance Conseil supérieur de la justice, Audit de la Cour d'appel de Bruxelles, 30 juin 2022.

Rights of asylum seekers

As already highlighted, in October 2022, the ECtHR was inundated with hundreds of requests from lawyers who found no other solution to have the rights of asylum seekers heard when they find themselves on the streets because of a lack of available reception places. Belgium has indeed been condemned more than 7,000 times by its own courts. Despite this, the fines are not paid and the vast majority of successful applicants remain on the streets. The ECtHR has therefore ordered an interim measure against the Belgian state in 148 cases brought before it.[145] It had no effect on the Belgian authorities and the situation remains unchanged to this day.

145 ee ECHR, Msallem and 147 others v. Belgium, press release, Novembre 16, 2022, ECHR 363 (2022).

Contacts

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League of Human Rights

For over a hundred years, the Ligue des Droits Humains (LDH, League of Human Rights) has combated injustices and infringements of fundamental rights in the French Community of Belgium. LDH works on subjects such as: youth, prisoners' rights, migrant and refugees situation and rights, access to justice, economic, social and cultural rights, psychiatric patient's rights, equal opportunities, privacy and diversity.

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