Disparate impact

Discrimination of foreign nationals in criminal proceedings

A study of the situation in Belgium

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INTRODUCTION

In Belgium, foreign nationals represent a disproportionate share of the prison population. The Belgian prison service, known as the Direction générale des établissements pénitentiaires (DG EPI), reports that, in 2017, 44% of detainees were not Belgian nationals, and that foreign nationals coming from more than 130 countries were detained in Belgian prisons that year.[1] As scientific literature has long established[2], this does not necessarily mean that the latter commit more offences or crimes than Belgian nationals, but suggests that they may be subject to discrimination during the various stages of the criminal proceedings. For example, street controls on foreign nationals may be more frequent, with the result that such individuals are more likely to be arrested[3].

However, few studies on the matter have been published and no official statistics exist, prompting the UN Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to state that it was "*concerned by reports that the police continue to target members of minorities when carrying out identity checks and regrets the lack of data on these checks, since such data could be used to analyse why and how these checks are conducted*" and to recommend that Belgium "*improve the system for collecting data and registering complaints pertaining to police violence, including when such violence is racially motivated, by ensuring that comprehensive, disaggregated statistical data are gathered (...)*[4]."

1 The most represented nationalities were Belgian (56%), Moroccan (9.6%), Algerian (4,8%), Romanian (3.2%), Dutch (2.7%), French (2%), Albanian (2%), Italian (1.4%), Turkish (1.1%) and Tunisian (1.1%). See Direction générale des Etablissements Pénitentiaires (DG EPI), 2018, Rapport annuel 2017, Bruxelles, p. 46 (https://justice.belgium.be/sites/default/files/rapport_annuel_dg_epi_2017_0.pdf).

2 See L. Mucchielli, « Délinquance et immigration en France : un regard sociologique », Criminologie, vol. 36, n° 2, 2003, p. 27-55 ; F. Brion, A. Rea, C. Schaut, A. Tixhon, Mon délit ? Mon origine. Criminalité et criminalisation de l'immigration, De Boeck Université, Bruxelles, 2000 ; S. Snacken, J. Keulen et L. Winkelmans, Etrangers dans les prisons belges : problèmes et solutions possibles, Bruxelles, Fondation Roi Baudouin, 2004 (http://www.antoniocasella.eu/nume/etrangers_prisons_belges_2004.pdf); C. Vanneste, 'Origine étrangère' et processus décisionnels au sein des tribunaux de la jeunesse, in N. Queloz, F. Bütifoker Repond, D. Pittet, R. Brossard et B. Meyer-Bisch (ed), Délinquance des jeunes et justice des mineurs. Les défis des migrations et de la pluralité ethnique, Staempfi Editions SA Berne, Bruylant SA Bruxelles, 2005, 631-650 ; N. Delgrande et M.F Aebi, Les détenus étrangers en Europe : quelques considérations critiques sur les données disponibles de 1989 à 2006, Déviance et Société, 2009/4, vol. 33, pp. 475-499 ; V. Gautron, J.-N. Retière. La justice pénale est-elle discriminatoire ? Une étude empirique des pratiques décisionnelles dans cinq tribunaux correctionnels. Colloque "Discriminations : état de la recherche", Alliance de Recherche sur les Discriminations (ARDIS), Dec 2013, Université Paris Est Marne-la-Vallée (https://halshs.archives-ouvertes.fr/halshs-01075666/document); Observatoire International des Prisons, Notice 2016 : Pour le droit à la dignité des personnes détenues, pp. 72-73 (https://www.oipbelgique.be/files/uploads/2020/02/Notice-2016.pdf).

3 Fair Trials, « Disparities and Discrimination in the European Union's Criminal Legal Systems », January 2021 (https://www.fairtrials.org/app/uploads/2021/11/Disparities-and-Discrimination-in-the-European-Unions-Criminal-Legal-Systems.pdf) ; Ligue des Droits Humains, « Contrôler et punir ? Etude exploratoire sur le profilage ethnique dans les contrôles de police : paroles de cibles », Bruxelles, 2016 (http://www.liguedh.be/wp-content/uploads/2017/03/rapport_profilage_ethnique_ldh.pdf); Amnesty International Belgique, « On ne sait jamais avec des gens comme vous – Politiques policières de prévention du profilage ethnique en Belgique », Bruxelles, mai 2018 (https://www.amnesty.be/IMG/pdf/rapport_profilage_ethnique.pdf); F. Jobard, R. Lévy et I. Goris, Police et minorités visibles : les contrôles d'identité à Paris, New York, Open society justice initiative, 2009 ; C. Tange, D. Burssens et E. Maes, 2019, La détention avant jugement en Belgique. Étude empirique des facteurs explicatifs du recours au mandat d'arrêt et de sa durée, Champ pénal/Penal field, (16).

4 UN Committee against Torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, §§ 8, f) et 9 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/234/78/PDF/G2123478.pdf?OpenElement).

The UN Committee on the Elimination of Racial Discrimination (CERD) also recently stated that it remains "*concerned about (…) reports that non-citizens are overrepresented in the prison system and the lack of reliable data on the national or ethnic origin of the individuals and the rate and length of imprisonment.*" It is also concerned "*that racial profiling by the police remains a persistent problem in the State party and that there is no law explicitly prohibiting such profiling.*" The Committee "*is further concerned about the lack of comprehensive data in this regard (…)*" and "*about the national legislation on the collection of personal data that reveal a person's race or ethnic origin, which leads to a lack of comprehensive disaggregated data and makes it difficult to assess the extent to which the State party is fulfilling its obligations under the Convention. It regrets that the State party has not developed sufficiently appropriate and accurate criteria to be able to produce reliable statistics on the ethnic composition of its population*[5]."

This the background explains the current study, undertaken as part of a European partnership of non-governmental organisations 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 nature of such discrimination and its possible impact on the individuals' ability to exercise their rights.

For the purposes of this study, "discrimination" is understood to be any differential treatment of individuals based on the social group to which they belong, which can be reflected in individual, cultural, political and institutional behaviours[6].

Our study will begin by presenting the quantitative and qualitative methodology that we used, the findings of which will be represented in the form of tables, graphs and quotes based on the detainees' interviews. This will be followed by a brief description of the limitations observed during the study, and a presentation of the study sample.

After explaining certain aspects of Belgian criminal proceedings, we will study the findings observed at each stage of the proceedings, particularly any identified failings concerning the use of force or verbal aggression, information on rights, access to a lawyer, and also the defendant's perception of their trial and their detention conditions.

In this respect, we note with the Observatoire International des Prisons that "*the prison system does not treat all people or all offences equally.*[7]*"* Our study focuses on the impact of individual-specific variables (such as age, gender, nationality, ethnicity and length of sentence) on the treatment individuals receive during criminal proceedings.

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5 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, §§ 5, 15 et 26, a) (https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr69Gyhm7Q-M1Oqny37itcWj%2f24FroBjCaMewiKH8VB33Y8s%2fkXw5yPV3hlqdpQB%2bOqS3IHl2xZpGvNjS4Pnzd-N0Tddq%2ba2NCFvfVsZoKFo77mUMfCpZXue5SEUFrbxN9Dw%3d%3d).

6 M. Kite & B. Whitley (2013), Psychologie des préjugés et de la discrimination. Bruxelles : De Boeck, pp. 16-17. For a legal definition, see Art. 4 of the Belgian Law of 10 May 2007 prohibiting certain forms of discrimination (M.B. 30-05-2007).

7 Observatoire International des Prisons (2016), op. cit., p. 63.

1 PRESENTATION OF THE APPROACH

A. Methodology and the encountered difficulties

Concerning the methodology:

The methodology for this study focused primarily on a quantitative approach, but also included a qualitative aspect. Data was collected using a multiple-choice questionnaire, which was designed to be completed during an interview and had been predefined by the European Union and distributed in the four countries participating in the "DISPARATE IMPACT" project, of which this study is a part. The questionnaire was adapted to take into account the specifics of Belgian criminal proceedings, as well as the pandemic, which delayed the processing of the records. The sample was primarily made up of people sentenced since 2019, or on remand in custody.

The initial methodology aimed at gathering 500 questionnaires that were to be completed in various Belgian prisons throughout an interview in order to obtain clarifications on the given information. Due to significant difficulties accessing prisons and obtaining the detainees' consent to participate, we decided, during the study, to distribute the questionnaires in the authorised prisons, sometimes without an individual interview. This enabled us to obtain a total of 241 participants. The questionnaire was distributed in three languages – French, Dutch and English – and included several pages at the end to write down any comments or remarks on the study or on the criminal justice and prison system in general.

Each interview lasted between thirty minutes and one hour. Given the amount of information that the detainees wished to share, it did not seem appropriate to reduce the interview time. The request for participation in the study was sent to various Belgian prisons, as well as to support groups for the detainees' families on Facebook, a channel that was not, however, highly successful.

Note that this study will be based on statistical analysis of the responses to the questionnaire (conventional descriptive statistics and validation of the resulting statistical associations using Pearson's test with a risk of error of less than 5%, unless stated otherwise), as well as the detainees' views who participated in the study. Naturally, only the variables that give significant results will be discussed.

Concerning the encountered difficulties:

The first difficulty concerns the delay in obtaining authorisation to access the prisons. The Belgian prisons that received an email with the presentation of the project redirected us to the DG EPI, stating that they were unable to act without prior authorisation from this institution. It turned out, however, that the DG EPI also needed to request permission from each of the prisons individually with the result that it lasted several weeks before

we could start the interviews. Ultimately, an authorisation was obtained from the DG EPI for five prisons (Andenne, Huy, Mons, Arlon and Ghent). However, we only received two positive responses from the prisons that had given their prior agreement to the DG EPI (Andenne and Arlon). Following a second request made to a number of prisons, two others accepted the survey proposal (Jamioulx and Namur).

We also took advantage of the change in methodology (distribution of the questionnaires without interview) to expand our field of study by contacting all prisons and certain detainee support associations. It was necessary however to submit a new request to the DG EPI to obtain a new authorisation. Following this procedure, four other prisons and a detainee rehabilitation support service agreed to participate (Mons, Nivelles, Leuven-Centraal, Leuven-Hulp and ASBL Après).

Aside from the "closed" nature of Belgian prisons, other studies – started prior to the pandemic and interrupted due to the successive lockdowns – were resumed at the same time as this study. Consequently, prisons already involved in those studies could not participate in an additional study. Furthermore, due to prison understaffing, putting in place the practical aspects of the study was difficult because sometimes there was no prison officer available to accompany the interviewer on site or to arrange the movements of the detainees participating in the survey. Additionally, even when the prison's management had agreed to the interviews, they were often busy or absent, or did not inform the prison warden, and the interviewer then had to prove to the prison officer that they had the right to enter the prison.

Finally, sampling for detainees that matched the study criteria was complex. Management was unable to identify the people who were sentenced after 2019 using the prison software system[8], so enrolment forms were issued to all detainees in the prisons. This meant that the people enrolling in the study did not always match the profile or did not speak one of the required languages, an issue that was not noted until the interview. It should be noted that some detainees only enrolled to inform the interviewer that the study was "*pointless*" or that the prison officers were dissuading detainees from participating.

B. Study limitations

Firstly, when presenting the study, the term "perceptions" during the criminal proceedings was used instead of "discrimination" in order to avoid response bias. Although, generally speaking, 75% of detainees in Belgium are undereducated and 30% illiterate[9], the study participants mostly spoke French or Dutch and few were illiterate. This means that, without access to an interpreter, a specific portion of the prison population was immediately excluded from the study. Additionally, some refused to participate through

8 Concerning issues relating to the collection of personal data, see UNIA, *Improving equality data collection in Belgium*, Rapport final, 2021 (https://www.unia.be/files/Documenten/Publicaties_docs/Rapport_IEDCB-FR-1106.pdf). The UN Committee for the Elimination of Racial Discrimination deplores the fact that Belgian data protection legislation does not make it possible to produce reliable statistics on the ethnic composition of its population (see above).

9 Observatoire International des Prisons, 2016*, op. cit*., p. 64.

fear of victimisation by the prison management, prison officers or police. Furthermore, several detainees who refused to participate in the study during yard times, mealtimes, work times or visiting times were subsequently not called on.

At last, the statistical analysis showed that, during the interviews and the collection of questionnaires, some questions had been misunderstood by some detainees. These responses were not therefore taken into account if they were inconsistent with the questionnaire as a whole or with the interviewee's words.

C. Sample

The prison population currently stands at 10,808 detainees (on remand or post-trial custody). Men make 95.4% of the population of which 44.3% are foreign nationals. Women make up to 4.6% of the prison population, 32.7% of whom are foreign nationals. This means that the total share of foreign nationals in the prison population in Belgium is 43%[10].

The study sample consisted of 241 detainees across ten prisons and a rehabilitation support association. In 2017, the total number of detainees in these ten prisons was 2,516[11]; the collected sample therefore represents nearly 10% of the targeted population. Of these 241 people, 88% of respondents were men and 91% had been on remand during their criminal proceedings or were still in custodyat the time of the study. The study was carried out in eleven different institutions: eight prisons in the Walloon region (182 respondents), two prisons in the Flemish region (54 respondents) and a detainee rehabilitation support association in the Brussels-Capital region (5 respondents).

Figure 1: Share by ethnic group (n = 237)

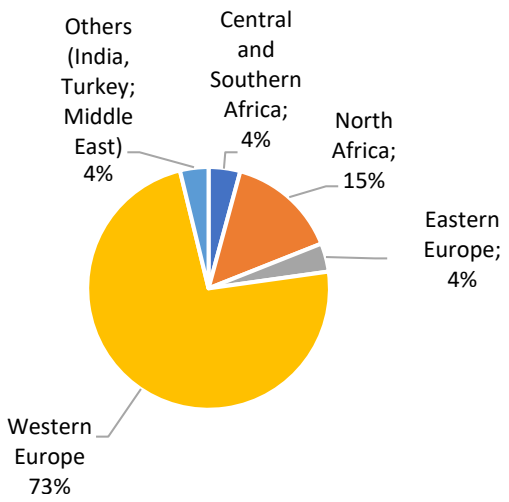
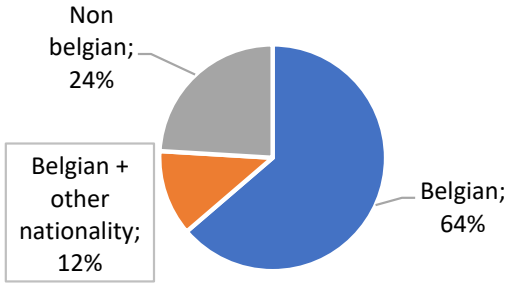


Figure 2: Share by nationality (n = 237)



10 M. F. Aebi et M. M. Tiago, 2021, *SPACE 1 – 2020 – Council of Europe Annual Penal Statistics: Prison populations.* Strasbourg : Council of Europe, pp. 33, 45, 64.

11 Direction générale des établissements pénitentiaires (DG EPI), 2017, *Rapport annuel 2016.* Bruxelles, p. 48.

As mentioned earlier, foreign nationals account for a disproportionate share of the prison population. 76% of the study sample was Belgian, of which 15% were of dual nationality. Figure 1 shows the share of respondents by ethnic group (on the basis of their nationality or their origin given in the questionnaires) and Figure 2 represents the share of respondents by nationality. In this study, we decided to gather the nationalities based on Figure 2 to give a broader and more accurate picture of the victims of discrimination.

Sample description

Table 1: Type of imprisonment

Type of imprisonment	Number	Percentage
Sentenced before 2019	57	24%
Sentenced in 2019 or after	121	50%
Sentenced without mention of the year	13	5%
Detention on remand	42	17%
Psychiatric detention	1	0%
Unknown	7	3%
Total	234	100%

50% of our sample had been sentenced since 2019, 24% before 2019 and 17% were on remand at the time of the survey.

Table 2: Age of the respondents

Age	Number	Percentage
14 to 18 years	1	0%
19 to 30 years	54	22%
31 to 40 years	77	32%
41 to 50 years	58	24%
50 and over	51	21%
Total	241	100%

Across the sample, the average age of the detainees was 37 years[12], with 32% falling within the 31-40 range.

12 M. F. Aebi et M. M. Tiago, 2021, *op. cit.*, p. 41.

Table 3: Maximum sentence

Maximum sentence	Number	Percentage
Less than 3 years	13	7%
3-5 years	37	21%
5-10 years	40	23%
More than 10 years	87	49%
Total	177	100%

Nearly half of the individuals in our sample had received a maximum sentence of more than 10 years. This means either the offences were relatively serious, or they were serving consecutive sentences.

2 STAGES OF CRIMINAL PROCEEDINGS IN BELGIUM

In Belgium, criminal proceedings are divided into two stages: the pre-trial stage and the trial stage[13]. The purpose of the pre-trial stage is to investigate offences and offenders, gather evidence and prepare the case for prosecution. The purpose of the trial stage is to judge the defendants and to sentence them if found guilty.

The pre-trial stage of criminal proceedings can itself take two different paths: the preliminary investigation and the judicial inquiry. It is important to note that these steps are not necessarily complementary: a case can be subject to a preliminary investigation without being subject to a judicial inquiry and vice versa.

Preliminary investigation

The purpose of a preliminary investigation is to investigate offences, evidence, offenders, and any information that may be useful to the prosecution[14]. This stage is conducted by the public prosecutor who has several prerogatives and may carry out the investigation with the help of the police. However, the public prosecutor cannot, in theory, impose constraints or any acts that infringe individual rights[15] or liberties. At the end of their investigation, they either decide not to prosecute[16], issue a court summons[17], issue a summons[18] with a statement of chargesfor the individual to appear before the police tribunal or criminal court, or decide to open a judicial inquiry, in which case they pass the case on to an examining magistrate[19].

Judicial inquiry

The judicial inquiry is also a preliminary investigation but concerns more serious offences. Its purpose is to enable the ordinary courts to make an informed decision[20]. The examining magistrate, unlike the public prosecutor, has broader prerogatives, including the possibility of using measures to constrain or that can infringe individual rights and liberties[21]. These prerogatives include the possibility of detaining the individual, as the examining magistrate may issue an arrest warrant if the offence carries a sentence of imprisonment for one year or more, when there is compelling evidence of guilt and there is a vital need to ensure public safety[22]. Prior to this, the accused must be interviewed by the examining magistrate regarding the charges against them and the possibility that

13 M.A. Beernaert, N. Colette-Basecqz, C. Guillain, L. Kennes, O. Nederlandt et D. Vandermeersch, *Introduction à la procédure pénale*, 2021, La Charte.

14 CICr, art. 28*bis*, §1er, 1.

15 CICr, art. 28*bis*, §3.

16 CICr, art. 28*quater*.

17 CICr, art. 145 et 182.

18 CICr, art. 216*quater*.

19 CICr, art. 64.

20 CICr, art. 55, al. 1.

21 CICr, art. 56.

22 Loi du 20 juillet 1990 relative à la détention préventive (*M.B.* 14-08-1990), art. 16.

an arrest warrant may be issued[23]. If a warrant is issued, the decision must be based on probable cause[24]. The warrant is valid for five days[25] but detention on remand may be extended by the judge's chambers, which convenes regularly to decide whether to extend the remand[26]. Throughout the judicial inquiry, the accused and the plaintiff have the right to submit a request to the examining magistrate to access to and a copy of the case bundle[27].

Finally, if the examining magistrate deems the judicial inquiry complete, they send the case bundle to the public prosecutor[28] for examination. If the public prosecutor deems the judicial inquiry complete, the bundle is sent to the judge's chambers and is made available to the accused and the plaintiff who may request additional tasks to be carried out[29]. The judge's chambers examines the case and decides whether to send the individual before the District Court or the Criminal Court[30]. If the individual is suspected of a crime, the judge's chamber sends the case to the Indictments Court[31], which has sole responsibility for sending an individual before the Cour d'assise. The judge's chamber has also the power to terminate the proceedings if they consider that there is insufficient grounds to send the case before a Criminal Court.

Trial stage

Once the court hearing for the case has been decided, the case file is made available to the court registry, the case is listed for hearing and the initial hearing can be held. The defendant must appear in person or be represented by a lawyer[32]. If the individual does not appear, a judgement is rendered in absentia[33]. In the case where an individual involved in the trial (witness, plaintiff, defendant) does not understand the language of the proceedings, an interpreter can be appointed.[34]

Hearings are public and the proceedings must be conducted in accordance with the rules of fair trial[35]. At the end of the hearings, the judge withdraws to deliberate and sets a sentencing date. At the sentencing, the judge announces the reasoned judgement at a public hearing[36]. This decision can, where applicable, be subject to ordinary appeals (for the judgement to be set aside[37] or an appeal[38]) or special appeals (to the Court of Cassation[39]).

23 *Ibid*., art. 16, §2.

24 Const., art. 12, al. 3.

25 Loi du 20 juillet 1990 relative à la détention préventive (*M.B.* 14-08-1990)., art. 21.

26 *Ibid.,* art. 22.

27 ClCr, art. 61*ter*, §1er.

28 ClCr, art.127.

29 ClCr, art. 127, §3.

30 ClCr, art. 129 et 130.

31 ClCr, art. 133.

32 ClCr, art. 185, §1er.

33 ClCr, art. 186.

34 Loi du 15 juin 1935 concernant l'emploi dans langues en matière judiciaire (*M.B*. 22-06-1935), art. 30 et suiv.

35 Art. 6 CEDH.

36 Const., art. 149.

37 C.J., art. 1047.

38 C.J., art. 1050.

39 C.J., art. 1073 et suiv.

More specifically, Belgian criminal proceedings grant defendants certain specific rights. The first relates to the right to a lawyer and its corollaries (A), the second concerns the right to a translation of the materials in the case file and the right to an interpreter (B), the third concerns specific rights such as information about the charges, information about the rights of the individual being interviewed, the defendant or the accused, the possibility of informing a third party or the consular authorities at the time of arrest and during detention, and access to the case file (C). The second concerns the prohibition of torture and cruel, inhuman or degrading treatment in Belgium (D).

A. Right to a lawyer and its corollaries

i ACCESS TO A LAWYER

In the seminal judgement *Salduz v. Turkey* of 2008[40], the ECHR found Turkey guilty of violating Article 6 of the Convention. In this case, the Court highlighted, in particular, the principle that any individual interviewed by the police had the right to be assisted by a lawyer prior to such an interview. In 2011, Belgium amended its legislation to comply with European jurisprudence. Under Article 47*bis* of the Belgian Code of criminal procedure, the Code d'instruction criminelle, any individual interviewed and suspected of an offence punishable by imprisonment has the right to to be represented by a lawyer of their choice or appointed on their behalf[41]. They also have the right to be assisted by a lawyer during the interview and for any subsequent interviews[42]. If the individual is already in custody, they will also have the right to a thirty-minute consultation with their lawyer prior to the initial interview. This confidential consultation must take place within two hours of contacting the chosen lawyer or the lawyer from the bar associations' legal aid service[43].

Finally, when the individual is summoned to appear before a criminal court, they can also, prior to the start of the appearance, have confidential access to a lawyer. The lawyer may play an active role during the interview[44]. In addition, their assistance is also required during measures to collect evidence and certain investigative measures. However, in this case, the lawyer is present but does not play an active role[45]. During the hearing, the accused may also be assisted by their lawyer. Thus, if they are to be detained or to appear before the Cour d'Assise, a lawyer's assistance is required[46].

40 ECHR (Gd ch.), *Salduz c. Turquie*, 27 November 2008.

41 See also Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.

42 M. Giacometti et L. Grisard, « Salduz à la lumière de la jurisprudence : passé, présent et.. futur ? », *in Actualités en procédure pénal de l'audition à l'exécution,* Limal, Anthémis, 2020, p. 38.

43 Loi du 20 juillet 1990 relative à la détention préventive *(M.B.* 14-08-1990), art. 2*bis*, §2.

44 CICr, art. 47*bis*, §6, 7.

45 P. Monville et M. Giacometti, « Accès à l'avocat durant la phase préliminaire du procès pénal : du changement en perspective ! - Analyse de la directive du 22 octobre 2013 relative au droit d'accès à un avocat »,, *Rev. dr. pén. entr.*, Anthemis, 2016/1, p. 13.

46 M.A. Beernaert, N. Colette-Basecqz, C. Guillain, L. Kennes, O. Nederlandt et D. Vandermeersch, 2021, *op. cit.*, p. 319.

Communication between an individual and their lawyer is confidential. This is a crucial aspect of the right to a fair trial and is a principle of public policy. The lawyer is bound by professional secrecy for anything shared with them in confidence in their capacity as a lawyer[47].

ii CONDITIONS CONCERNING THE WAIVER OF THE RIGHT TO A LAWYER'S ASSISTANCE

Currently, Belgian law makes provision for a suspect to waive their right to a lawyer, on condition that the waiver is in writing and is dated and signed[48]. In addition, the voluntary waiver must be carefully considered, and the individual must be an adult and able to fully assess the significance of their act. They must also be informed of the possibility of revoking the waiver[49]. All interviews of minors, however, must be carried out in the presence of a lawyer when the offence is subject to imprisonment. They cannot therefore waive such a right[50].

The Belgian Law of 20 July 1990 relating to custody on remand stipulates that aan individual held in custody, after confidential counsel with their lawyer or with a lawyer from the bar associations' legal advice service, may also waive the right to be assisted by a lawyer. The individual must also provide a written document, dated and signed, to this effect, containing information about the consequences of such a waiver. They must also be informed that the waiver can be fully revoked[51]. TThe interview can also, if possible, be recorded and taped on video[52].

iii ACCESS TO LEGAL AID AND THE STATUS OF SUCH AID

In Belgium, legal aid is organised in two stages: first-line legal aid and second-line legal aid[53]. An initial type of legal aid is granted in the form of practical information, legal information, initial legal advice, or referral to a specialist organisation or body. It is available to everyone and is not dependent on income[54].

The second type of legal aid provides, among other things, for the assistance of a lawyer during legal proceedings[55]. This aid concerns individuals with insufficient resources[56] and

47 CP, art. 458.

48 CICr, art. 47*bis*, §3, al. 3. See also L. Kennes, « La loi du 13 août 2011 conférant des droits à toute personne auditionnée et à toute personne privée de liberté. », *Rev. dr. pén.*, 2012/1, p. 37.

49 CICr, art.47*bis*, §3, al. 4.

50 CICr, art. 47*bis*, §3, al. 5.

51 Loi du 20 juillet 1990 relative à la détention préventive, art. 2*bis*, §§ 3 et 6.

52 Loi du 20 juillet 1990 relative à la détention préventive, art. 2*bis*, §3, al. 1er.

53 Voir C.J., art. 508/1 et suiv.

54 C.J., art. 508/1 ; CEDH art.6, Const., art. 23 al.3, 2.

55 C.J., art. 508/1, 2.

56 C.J., art. 508/13.

family members[57]. It can be partially granted or totally free of charge[58]. For that matter, the near totality of the applicant's means of subsistence are taken into account[59].

Although this legal aid is a fundamental right[60], it is becoming increasingly difficult to access it. This is for several reasons: lack of information for those who are eligible, the complexity of legal language, the cost of legal fees and, above all, the constant increase in aid applications while the allocated financial resources have not increased proportionally[61].

Therefore, those who are eligible for free aid are : single people whose monthly net income does not exceed €1,226[62], and single people with dependants, or people living with a partner or another individual in a household and whose net household income does not exceed €1,517[63]. Those who qualify for partially free aid are: single people who can show proof of net monthly income between €1,226 and €1,517[64], and single people with dependants, or people living with a partner or another individual in a household and whose net household income is between €1,517 and €1,807[65].

B. Translation and interpreting

i TRANSLATION OF ESSENTIAL DOCUMENTS IN CRIMINAL PROCEEDINGS

The right to have certain documents in the case file translated in writing is provided for by Art. 6, §3, e) of the ECHR and by Directive 2010/64[66]. Directive 2012/29 concerns the victims and grants the right to a free translation of the written acknowledgement of their complaint, along with a translation of the place and date of the trial and also any information essential to the exercise of their rights in criminal proceedings[67].

57 C.J., art. 508/13/1.

58 C.J, art. 508/13.

59 AR du 3 août 2016 modifiant l'arrêté royal du 18 décembre 2003 déterminant les conditions de la gratuité totale ou partielle du bénéfice de l'aide juridique de deuxième ligne et de l'assistance judiciaire.

60 CEDH, art.6 ; Constitution, art.23.

61 Plateforme Justice pour tous !, Livre noir – La réforme de l'aide juridique de 2ème ligne : un jeu d'échec, 2017 (https://www.liguedh.be/wp-content/uploads/2020/02/livre_noir_reforme_aide_juridique_2017.pdf). See also Coordination et initiatives pour réfugiés et étrangers, *l'aide juridique en perspective*, décembre 2014 (https://www.cire.be/publication/l-aide-juridique-en-perspective/) ; Ligue des droits humains, *Réforme de l'aide juridique : la Cour constitutionnelle annule le ticket modérateur mais l'accès à la justice reste semé d'embûches*, 25 juin 2018 (https://www.liguedh.be/reforme-de-laide-juridique-cour-constitutionnelle-annule-ticket-moderateur-lacces-a-justice-reste-seme-dembuches/).

62 C.J., art. 508/13/1.

63 *Ibid.*

64 C.J., art. 508/13/2.

65 *Ibid.*

66 Directive 2010/64/UE du Parlement européen et du Conseil du 20 octobre 2010 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales, OJ L 280, 26.10.2010, pp. 1–7. See also L. Grisard De La Rochette et P. Monville, Le droit à l'interprétation et à la traduction : de quoi (ne plus) en perdre son latin !, *in Actualités de droit pénal et de procédure pénale,* Limal, Anthemis, 2019, p. 465.

67 Directive 2012/29/UE du Parlement européen et du Conseil du 25 octobre 2012 établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité et remplaçant la décision-cadre 2001/220/JAI du Conseil, OJ L 315, 14.11.2012, pp. 57–73.

The Belgian Law of the 15th of June 1935 concerning the use of languages in legal matters guarantees the right to a written translation of case materials at all stages of criminal proceedings[68]. In practice, the right to the assistance of an interpreter is prioritised during the pre-trial stage, whereas the right to a translation of essential case materials is important during the trial[69]. Right at the start of the prosecutor's ruling, the accused immediately has the right to obtain a translation of several essential materials The Court of Cassation has confirmed that the prosecutor's ruling cannot take place until the requested written translation has been given to the accused and appended to the case file[70]. Concerning summons to appear and judgements/arrests, it is possible to obtain the written translation of the relevant parts[71]. This right to a written translation concerns the relevant parts of the arrest warrant[72].

Concerning the beneficiary of this right, the applicant can be the plaintiff, the accused, the defendant or the convicted individual. Note that it does not give a right to a translation of the entire case bundle as the translation is limited to the parts of the bundle that are needed to ensure that the applicant can exercise their rights effectively[73]. The right to a translation must be granted within a reasonable time and the State is in charge of the fees.

ii INTERPRETING DURING CRIMINAL PROCEEDINGS AND STATUS

This right is guaranteed under Article 6, § 3 of the ECHR, Article 14.3. f) of the International Covenant on Civil and Political Rights, and by the aforementioned Directive 2010/64. Directive 2012/29 stipulates that victims may lodge a complaint in a language they know and understand[74].

In Belgian law, Article 31 of the aforementioned Law of the 15th of June 1935 provides for the interpreting and therefore oral translation of all declarations made, in the language of choice of any individual involved in the criminal proceedings. This right is applicable throughout the proceedings regardless of the jurisdiction, and from the moment of the initial interview with the police. Therefore, where necessary, a sworn interpreter is called on and the fees rely on the State. It is the magistrate's duty to assess whether the assistance of an interpreter is necessary and to ascertain the appropriate language.

Concerning hearings and interviews, Article 47*bis* of the Belgian Code of criminal procedure, the *Code d'instruction criminelle*, provides for the assistance of an interpreter for any interviewed individual, but the means can differ according to the status of the individual.

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68 Loi du 15 juin 1935 concernant l'emploi des langues en matière judiciaire (*M.B*. 22-06-1935), art. 22.

69 L. Grisard De La Rochette et P. Monville, *op.cit*., p. 466.

70 *Ibid*, p. 474.

71 CICr, art. 145, al. 5 et 6 ; Loi du 20 juillet 1990 relative à la détention préventive, art. 16, §6*bis*.

72 L. Grisard De La Rochette et P. Monville, *op.cit*., p. 480.

73 Loi du 15 juin 1935 concernant l'emploi des langues en matière judiciaire*, op.cit.,* art. 22, al. 4 ; L. Grisard De La Rochette et P. Monville, *op.cit*., p. 467*.*

74 See above.

As such, if they are a suspect or a victim and there is no sworn interpreter available, the individual must prepare their oral statement in the language they understand. However, in this specific case and when the individual is not acting in this capacity, the statements are noted by either the individual or by the police officer[75]. In the case of custodyon remand, this right is combined with the right to the assistance of a translator[76].

In court, the Belgian Code of criminal procedure provides that a sworn interpreter be appointed if necessary[77].

In addition, in the confidential consultation between a detainee and their lawyer, Article 2*bis*, §4 of the Law on custody on remand provides for the assistance of an interpreter.

C. Particular rights

i INFORMATION CONCERNING THE CHARGES

Articles 6, §3, a) of the ECHR and 6.1 of Directive 2012/13/EU[78] provide that any accused has the right to be informed about the charges against them as soon as possible. The accused must be aware of the allegations against them, but also the legal implications of those allegations, in other words the application of the law to the offences[79].

ii PRESENTATION OF A NOTICE OF RIGHTS[80]

An individual who is not being detained must receive the following information: 1) that they have the right to a confidential consultation with a lawyer and assistance during the interview; 2) brief notification about the offences for which they are being interviewed; 3) the right to remain silent; 4) other rights; 5) the right to a playback/transcript at the end of the interview and to be able to correct it and 6) the right to be assisted by an interpreter.

An individual who is being detained must be made aware of the rights mentioned in the paragraph above, as well as: 1) the right to inform someone of their arrest; 2) the right to medical assistance; 3) the right to request that the interview is audio and video-recorded; 4) the fact that they may be held in police custody for a maximum of 48 hours, and of the possibilities regarding the decision of an examining magistrate going forward.

At last, the notice of rights for a detained individual following a European arrest warrant/ alert must contain all the information mentioned in the paragraphs above. In addition, the

75 L. Grisard De La Rochette et P. Monville, *op.cit*., p. 455.

76 *Op.cit*., p. 457.

77 CICr, art. 152*bis*.

78 Directive 2012/13/UE du Parlement européen et du Conseil du 22 mai 2012 relative au droit à l'information dans le cadre des procédures pénales, OJ L 142, 1.6.2012, pp. 1–10.

79 M.A. Beernaert, « Article 48. - Présomption d'innocence et droits de la défense », *in* F. Picod et al. (dir.), *Charte des droits fondamentaux de l'Union européenne*, 2e édition, Bruxelles, Bruylant, 2019, pp. 1174-1175.

80 See FPS Justice: https://justice.belgium.be/fr/themes_et_dossiers/documents/telecharger_des_documents/declaration_de_droits.

notice of rights must also contain information concerning the European arrest warrant or alert, along with information on the possibility of agreeing to extradition.

iii INFORMING A THIRD PARTY OR CONSULAR AUTHORITIES AT THE TIME OF ARREST AND DURING DETENTION

Under Article 2*bis*, §7, al.1 of the Law of the 20th of July 1990 relating to custody on remand, during their judicial arrest, any individual has the right to inform a trusted third party of their situation. However, the burden of informing the third party does not lie on the individual but on the authority interviewing them[81]. Moreover, in the event that such communication could jeopardises the investigation, the examining magistrate or the public prosecutor may, on justified grounds, defer the right to inform a third party[82].
Article 69 of the Law on the Principles of Prison Administration of the 12th of January 2005, which also covers the legal status of the detainee[83], provides that foreign nationals are able to contact the consular authorities of their country if they are detained in Belgium. These communications are not subject to control by the prison manager.

iv ACCESS TO CASE BUNDLE MATERIALS

Any directly concerned individual may request access to the case bundle in an investigation[84]. This right is not automatically conferred as the examining magistrate can prohibit access 1) if the requirements of the investigation require so; 2) if the applicant does not have legitimate grounds; or 3) if communicating the case bundle could form a risk or seriously violate the privacy of the individuals[85]. The public prosecutor has "automatic" right of access, with the examining magistrate unable to refuse their access to the case file.

D. Torture and cruel, inhuman and degrading treatment

Torture and any other punishments or cruel, inhuman and degrading treatments are absolutely prohibited under Belgian law. Belgium is signatory to all international and regional instruments that incriminate such acts, such as the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment of 10 December 1984 and the European Convention on Human Rights. Under National law, articles 417*bis* to 417*quinquies* prohibit acts of torture and cruel, inhuman and degrading treatment.

81 M. Beys, *Quels droits face à la police ? Manuel juridique et pratique*, Jeunesse & Droit Editions – Couleur Livres Editions, Liège-Bruxelles, 2014, p. 188.

82 Loi du 20 juillet 1990 relative à la détention préventive, art. 2*bis*, §7, al. 2, a) et b) ; M.A. 2, a) et b) ; M.A. Beernaert, *Détention préventive*, 1ère éd., Bruxelles, Bruylant, 2016, p. 21.

83 *M.B*. 01-02-2005.

84 CICr, art. 61*ter*, §1er. See also M-A. Beernaert, N. Colette-Basecqz, C. Guillain, L. Kennes, P. Mandoux, M. Preumont et D. Vandermeersch, *Introduction à la procédure pénale,* Bruxelles, La Charte, 2e éd., 2019, p. 221.

85 CICr art. 61*ter*, §3; M-A. Beernaert, N. Colette-Basecqz, C. Guillain, L. Kennes, P. Mandoux, M. Preumont et D. Vandermeersch, *op. cit..,* p. 224.

Belgian law punishes acts of ill-treatment in all instances indistinctly of the perpetrator, co-perpetrator or accomplice – be it a police officer or a private individual – and whatever the motive. The sentence is more severe when the torture is committed by "*a public agent or servant, a prison guard or a member of law enforcement acting in their duties*" because this particular status of the perpetrator is considered an aggravating circumstance under Belgian law[86].

While discrimination is not an essential condition of the offence of torture or inhuman or degrading treatment in Belgian law, it can be taken into consideration by the judge who can decide to deliver a higher penalty within the penalty range stipulated by law. Moreover, discrimination is an aggravating factor when sentencing offences associated with ill-treatment such as blows and injuries, failure to rescue or illegal detention[87].

Torture is defined as any intentional inhuman treatment that causes agonising pain or serious and terrible physical or mental suffering; inhumane treatment as any treatment that will cause a person severe intentional physical or mental pain with the aim to receive intelligence, confessions, punish, exert pressure on that person or on a third party, or to intimidate them or a third party; and degrading treatment as any treatment that in the eyes of the victim or of a third party, is a serious injury or impairment to human dignity[88]. Additionally, the Court of Cassation[89] considers that Article 417*bis*, 1° does not limit the classification of torture to a continuous or repeated act. Finally, unlike the Convention of 1984, Belgian law does not limit this ban to public officials or other similar types of people[90].

Concerning inhuman treatment, the offence involves serious suffering but not to the extent of torture, and the seriousness of the act implies profound contempt for the integrity of the victim[91]. Thus, as with torture, the status of the perpetrator is irrelevant.

Lastly, the offence of degrading treatment implies serious injury or impairment to human dignity[92]. The seriousness of such an act is assessed according to the circumstances of the case, the consequences and its duration[93]. The status of the perpetrator of degrading treatment is once again irrelevant.

86 CP, art. 417*ter* et 417*quater*.

87 CP, art. 405*quater*, 422*quater* et 438*bis.*

88 CP, art. 417*bis*.

89 Cass. (2e ch.), arrêt du 4 février 2009, RG P.08.1776.F. See also Cass., 11 janvier 2017, P.16.1280.F ; Cass. 10 octobre 2007, RG P.07.1362.F, *Pas*. 2007, n° 474.

90 D. Vandermeersh, « Chapitre VII – La torture, le traitement inhumain et le traitement dégradant » *in* M.A. Beernaert et al. (dir.*), Les infractions – Volume 2 – Les infractions contre les personnes*, 2e édition, Bruxelles, Larcier, 2020, p. 591.

91 Cass. (2e ch.), arrêt du 4 février 2009, RG P.08.1776.F.

92 Cass., 11 janvier 2017, P.16.1280.F; Cass., 10 décembre 2014, RG P.14.1275.F, *Pas*. 2014, n° 778 ; Cass., 18 mai 1999, R.G.P. 98.0883.N.

93 Cass., 9 décembre 2015, R.G.P. 15.0578.F.

However, the Belgian State faces serious failings in combating inhuman and degrading treatment and, as such, has been called out by international and national bodies[94] for such violations, particularly with respect to the prison and police systems.

Concerning the wrongful use of force by the police, in their recommendations made to the Belgian State, the European Committee for the Prevention of Torture (CPT)[95], the United Nations Human Rights Council[96], and the United Nations Committee Against Torture, stipulated that "*The State party should take all necessary measures to combat effectively ill-treatment […], including treatment based on discrimination of any kind, and take appropriate steps to punish those responsible.*[97]" More recently, the United Nations Committee Against Torture recommended that the Belgian State "*urgently conducts an independent and transparent investigation into the use of ill-treatment and the excessive use of force by the police, with a view to establishing the necessary prevention policies and strengthening internal and external oversight mechanisms.*[98]" While the United Nations Committee on the Elimination of Racial Discrimination stated that it is "*concerned about allegations of deaths in custody or as a result of police action and allegations of violence and ill-treatment suffered by persons belonging to ethnic minorities, migrants and asylum seekers at the hands of police officers*" and recommended that the Belgian State "*takes measures to ensure that prompt, thorough and impartial investigations are carried out into all racist incidents caused by or involving the police, ensures that those responsible for such acts are prosecuted and appropriately punished and provides adequate reparation to the victims.*[99]" Despite these recommandations, allegations of ill-treatment at the hands of law enforcement officers persist[100].

94 See also Conseil central de surveillance pénitentiaire, *Rapport annuel 2020*, Bruxelles, 2021 (https://ccsp.belgium.be/wp-content/uploads/2021/09/CCSP_RapportAnnuel_2020-2.pdf).

95 CPT, « Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017 », 8 mars 2018, §§12 et suivants. See also, CPT, « Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 18 au 27 avril 2005 », 20 avril 2006, §§11 et 12 ; CPT, « Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 28 septembre au 7 octobre 2009 », 23 juillet 2010, §§13 et suivants.

96 Conseil des droits de l'homme, « Draft report of the Working Group on the Universal Periodic Review – Belgium », 11 avril 2016, A/HRC/32/8, pt. 139.8 - 139.10.

97 Comité contre la torture (CAT), « Observations finales : Belgique », 19 janvier 2009, CAT/C/BEL/CO/2, §13.

98 UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 8 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/234/78/PDF/G2123478.pdf?OpenElement).

99 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, § 13 et 14, a) (https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr69Gyhm7QM1Oqny37itcWj%2f24FroBjCaMewiKH8VB33Y8s%2fkXw5yPV3hlqdpQB%2bOqS3IHl2xZpGvNjS4PnzdN0Tddq%2ba2NCFvfVsZoKFo77mUMfCpZXue5SEUFrbxN9Dw%3d%3d).

100 See Ligue des droits humains, Rapport alternatif présenté au Comité contre la torture en vue de l'examen du quatrième rapport périodique de la Belgique, 71ème session, 12-13 juillet 2021, pp. 16-21 (https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:bb3803f5-9a25-4387-859e-41cc914eec5b#pageNum=21).

As regards to prisons, the CAT, like the CPT previously, recently noted a series of recurring issues: deplorable living conditions (the Committee refers to the "*the dilapidated nature of the prison estate resulting in unsanitary detention conditions, infestations, mould, lack of showers and toilets, and lack of appropriate diets*"), chronic overcrowding, an increase in the number of people on remand, consecutive and extended sentences, marginal and poor use of parole, lack of alternatives to imprisonment, lack of psychiatric care, a high suicide rate, insufficient support for potentially suicidal detainees, insufficient healthcare, lack of trained and specialised medical staff in prisons, poor quality dental care, systematic body searches, and the placement of so-called "radicalised" detainees in isolation or in D-Rad:Ex sections, with significant restrictions and without any proceedings or judicial review[101]. Moreover, the Belgian authorities have been subject to frequent complaints[102], even resulting in a European Court of Human Rights pilot judgement[103], concerning the imprisonment of people with mental health disorders in prisons. The European Court of Human Rights recently reminded the Belgian State that "*the situation of detainees in prisons called for immediate measures*.[104]" Finally, it should be highlighted that the use of segregation cells is also a serious cause for concern as regards to the risk of inhuman and degrading treatment[105].

101 UN Committee against torture, 2021, *op. cit*., §§ 17, 19, 21 et 23.

102 See CPT, « Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017 », 8 mars 2018, §107. See also CAT/C/CR/30/6, §5, k) and CPT/Inf (2010) 24, §132 et suiv.

103 CEDH, arrêt *W.D. c. Belgique*, 6 septembre 2016, req. n° 73548/13.

104 CEDH, arrêt *Venken et autres c. Belgique*, 6 avril 2021, n° 46130/14.

105 Conseil central de surveillance pénitentiaire, *Rapport sur l'utilisation des cellules de punition et de sécurité dans les prisons belges*, Bruxelles, 25 octobre 2021.

3 RESULTS

A. Arrest and police procedures

i THE USE OF FORCE DURING THE ARREST AND/OR POLICE CUSTODY

Before starting this chapter, it is important to take into account the subjective aspect of violence[106]. Indeed, respondents perceived the use of physical force as legitimate or otherwise based on their perception of their arrest or police custody. The interviews conducted for this study highlighted that an individualmay perceive this physical force as "unjustified" (abuse of power) or "justified" (if their own behaviour was aggressive or violent). In most cases, the respondent accepts that the State can exercise "justifiable" or "legitimate" violence because it suggests intent in such acts. Yet, violence is often perceived as an abuse of power by the authorities[107].

In this study, 92.5% of the respondents were placed in police custody. Some stated that they had experienced or witnessed physical violence by law enforcement officers. In this regard, 29.5% of respondents reported that they had been subjected to physical violence during arrest; 17% during police custody, and 14% had witnessed violence. This means that 11% of the people arrested in our sample stated that they had experienced physical force both during their arrest and during police custody.

In the statistical analysis, we noted that:

- A person who experiences physical violence during their arrest is more likely to also witness violence at the police station.
- A person who is subjected to physical violence during arrest is almost four times more likely to also experience violence at the police station (in this regard, 39% of those arrested with the use of illegitimate force stated that they also experienced physical violence at the police station, compared to 9% of people arrested without the use of force).
- There is also a positive association between witnessing physical violence at the police station and experiencing physical violence.

Several types of violence were reported by the respondents during arrest or police custody: being pinned to the floor, being struck, the individual or their family being unjustifiably threatened with a weapon during a search, violence against family members during a search, violent driving in the police van with the aim of injuring the arrested individual, etc.

Several types of negligence were also reported: not allowing the person time to dress during a search or to go to the police station, being placed in a segregation cell without

106 D. Kaminski, 2013, Violence et emprisonnement, *Revue de science criminelle et de droit pénal comparé*, (2), 461-474, p. 462.

107 *Ibidem*.

being able to go to the toilet, to eat, to drink, to take medication, to go to the hospital or to see a doctor in the event of an injury. Moreover, some individuals did not talk in terms of violence but assault. In contrast, others, who had not been subjected to the use of force during arrest and police custody, described the police officers as respectful and kind.

Which people experience acts of violence during arrest or police custody?

First of all, we can see a difference in treatment depending on the individual's **nationality or ethnic origin**. In the first category, we find fewer forceful arrests among Belgian nationals than among people of dual nationality or foreign nationals. A Belgian national has a 23% chance of experiencing a forceful arrest, while for a foreign national or a person of dual nationality has a 44% chance to experience such violence. In the second category, 50% of people of African descent declared that they experienced acts of violence during arrest. They are twice as likely to experience violence than people of Western European origins. The latter are arrested with force in 25% of cases, whereas the figure rises to 38% for people of African descent. Similarly, this figure stands at 59% among respondents from Northern Africa and 63% among those from Central or Southern Africa.

There is also a statistical association based on the **offence**. Consequently, there are more forceful arrests among people incurring a maximum sentence of 5 to 10 years than among those incurring a lower (under 5 years) or higher (more than 10 years) maximum sentence. It should also be noted that people aged between 31 and 40 years old experience more violence during police custody.

This physical force by the authorities is not understandable for some respondents:

> *"The police insults you and hits you. But, if you do the same thing, it's an offence."*

> *"Police violence, that's been the norm for years. Blows when you're handcuffed, arrests where they pin you to the ground and the police officer puts his foot on your throat to immobilise you even if you're calm (...) violence is commonplace now, and more than that, it's never punishable for those guys."*

ii INFORMATION ON RIGHTS

The respondents also reported discrimination during the notice of rights.

Regarding the right to a lawyer's assistance:

In Belgium, after being detained, the arrested individual has the right to be assisted by a lawyer during the police interview and before the examining magistrate. In our research, 52% of respondents stated that they had been assisted by a lawyer during police custody. Some had not been informed about this right, some knew about it but were unable to contact a lawyer, and others had not wanted to be assisted by a lawyer.

As regards to this right, two statistical associations emerge: during proceedings, people of European origin are more rapidly informed of their right to legal counsel. Additionally, where physical force is used during the arrest, the individual is less likely to receive information on their right to counsel.

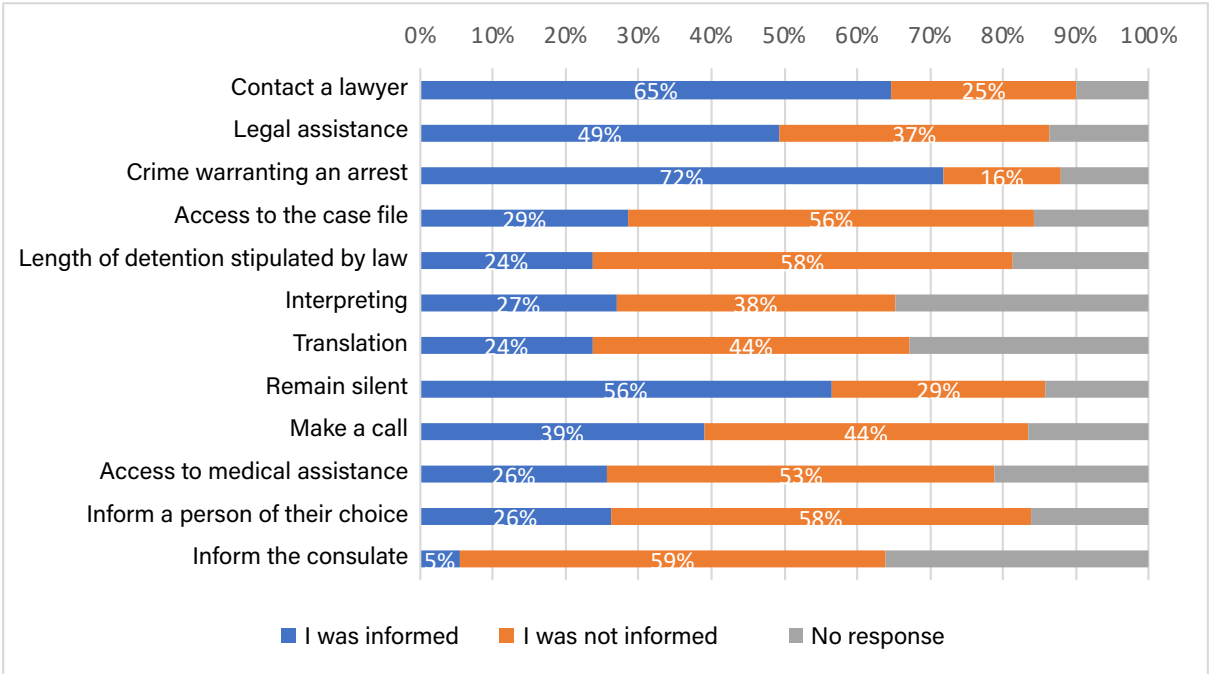
This information concerning the right to a lawyer can be communicated at various times in the proceedings: 26% of respondents received oral notice of their rights during arrest, 40% during the interview with the police (verbally or in writing), 13% at another time (often before the examining magistrate or on arriving at the prison on remand), and 20% did not receive this information. **This means that one in five individuals stated that they were not informed about their right to be assisted by a lawyer.**

A person also has the right to consult with their lawyer prior to the police interview. In this case, 52% of respondents had the opportunity after 24 hours in police custody. However, 37% stated that they did not benefit from this right. Additionally, 13% of people made contact with their lawyer other than via the police (often, on arriving at the prison).

Note that reports were mixed as regards to exercising the right to legal representation during the police interview. Some respondents described "pressure" from the police not to contact a lawyer: *"He told me that if I wanted things to go quicker, I shouldn't call a lawyer."* Others reported refusal by the police to contact the lawyer requested, meaning that several were therefore unable to choose their counsel.

As regards to other rights:

Figure 3: Information concerning various rights during police proceedings (n = 241)



During police custody, the detainee must be informed of their various rights. These rights are shown in the figure above; the section “no response” was often used by the respondents when they did not remember the information.

Note that information concerning the right to an interpreter and the right to a translation of the documents is under-represented because the sample population spoke one of the national languages. For some respondents, it was not relevant to be informed of these rights because they understood the language. However, we observed that only 13% of foreign nationals were informed of their right to inform a consulate about their arrest. Belgian nationals were also more informed about the reasons for their arrest than foreign nationals. In total, 46% of respondents only received verbal notice of their rights.

In general, people who experienced violence during arrest and/or police custody were less informed about their rights than others.

In particular:

- 60% were informed about their right to be assisted by a lawyer, compared to 74% for those who did not experience physical force.
- 65% were informed about the reason for their arrest, compared to 86% for those who did not experience physical force.
- 20% were informed about their right to view their case bundle, compared to 40% for those who did not experience violence.
- 25% were informed about their right to make a call, compared to 53% for those who did not experience physical force.
- 19% were informed about their right to inform a person of their choosing about their arrest, compared to 34% for those who did not experience physical force.

Several detainees also stated that the record of the interview did not correspond with what they had said during the interview. 28% of respondents were informed of their rights in writing and had access to the documents they had signed.

B. Preliminary stage and trial

i LAWYERS

Figure 4: Lawyer's presence with their client (n = 241)

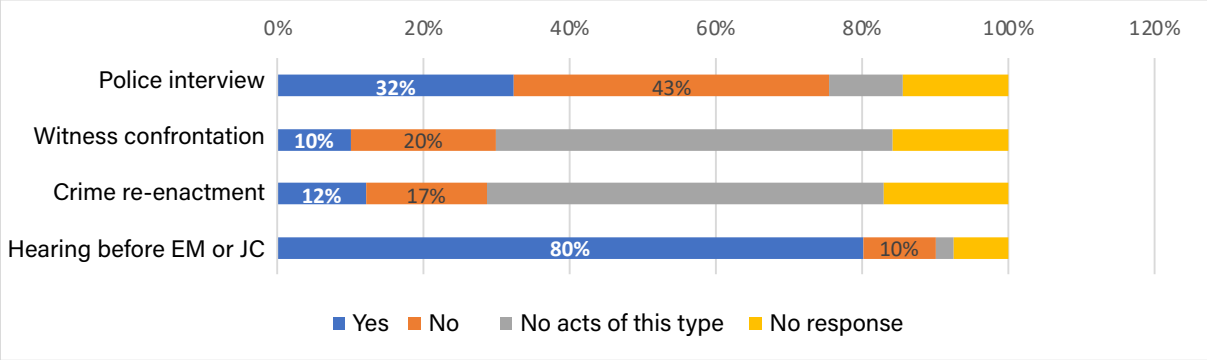


Figure 4 shows the lawyer's presence at certain stages of the proceedings (police interview, witness confrontation, crime re-enactment, hearing before the examining magistrate, hearing before the judge's chambers). In our sample, we can see that witness confrontations and crime re-enactments are not frequent. There is a low rate of lawyer presence in these instances. 53% of respondents had a lawyer present at each stage and 63.5% were assisted by a lawyer although the lawyer was not necessarily present at each stage.

During the interviews, several criticisms were made regarding the lawyers:

- representation by an intern who did not know the case;
- a pro bono lawyer who did not know the case;
- lack of information regarding follow-up of the case and/or regarding alternatives;
- the lawyers' lack of time.

Several detainees changed counsel during the proceedings either because they did not feel supported or because they were concerned about the lawyer's absence during the various stages of the proceedings.

We also observed that during police custody without physical altercation, people were more likely to have a prior consultation with their lawyer. They were more satisfied with their lawyer when they had chosen them compared with a pro bono lawyer because the latter was not necessarily present at every stage. Overall, 70% of the respondents said they were dissatisfied with their counsel.

ii SATISFACTION WITH THE TRIAL

For the purposes of this study, the term "satisfaction" means the respondent's positive perception of their trial and "dissatisfaction" their negative perception.

We can see that "satisfaction" with the trial is directly associated with access to information concerning the right to a lawyer. If the individual was informed about this right at a late stage, the sense of dissatisfaction with the trial increased. Likewise, if the individual was assisted by a lawyer throughout the criminal proceedings, the person was more "satisfied" with the trial. Overall, the respondents were "dissatisfied" with their trial, with only 29% stating they were "satisfied". In general, "dissatisfaction" was due to lack of respect by State representatives toward the person, lack of follow-up by the lawyer, and the sentence imposed.

Here again, we can see a difference based on nationality. Belgian nationals were more "satisfied" with their trial than people of dual nationality while the latter were more satisfied than foreign nationals. Moreover, individuals were generally more "satisfied" with their trial when they had not been subjected to inappropriate remarks and/or insults by State representatives during the criminal proceedings.

Satisfaction varies according to the maximum sentence ($p = 0.0657$ – see above). 56% of respondents who committed offences with a sentence of up to three years stated they were "satisfied" with their trial. This rate drops to 15% for those with a maximum sentence of three to five years. "Satisfaction" with the trial then increases slightly for heavier sentences: those with more than 10 years' imprisonment stated they were "satisfied" in 34% of cases. The results of these findings is that medium sentences (between 3 and 10 years) generate greater dissatisfaction.

Finally, our study highlighted that additional hearings are more frequent for Belgian nationals or Western Europeans than for foreign nationals. That being said, people who experience a forceful arrest are more likely to have additional hearings. Moreover, the higher the maximum sentence, the more the individual is invited to be examined during these hearings. This suggests that when a person undergoes more serious criminal proceedings (based on the seriousness of the offences or the experienced violence), additional hearings are more often used; this is true for Belgian nationals and Western Europeans. For the rest, additional hearings are more common when the lawyer is not pro bono. One reason for this is that the interviewed individuals who had a pro bono lawyer most often changed counsel during the proceedings and as such did not receive appropriate follow-up.

C. Custody on remand

i USE OF REMAND

In Belgium, it has been noted that remand is used extensively[108]. Particularly so for foreign nationals, this common practice could be due to outside pressure from various bodies such as public opinion, the police and the media[109]. The disproportionate share of immigrants in police, legal and prison statistics is due to selective controls among foreign

108 See Direction générale des Etablissements pénitentiaires (DG EPI), 2017, *op. cit.,* p. 48.

109 C. Tange, D. Burssens & E. Maes. (2021). *Un tiers des personnes en prison sont des prévenus : expliquer le recours à la détention préventive en Belgique. Une étude longitudinale*. Bruxelles : Institut National de Criminalistique et de Criminologie, p. 12.

populations, their criminalisation in the name of the country's security, and as such to a sense of insecurity within society.

Since 1990, there has been an increase in the prison population that is not justified by a rise in crime, but by a different use of prisons[110]. For example, the increase in the number of Belgian nationals is due among other things to the extension of custody periods (particularly due to increased use of custody on remand, harsher penalties and an extension of consecutive sentences, non-use of alternatives to imprisonment, drastic reduction in probation, etc.). Concerning Moroccans and Turks, this can also be due to increased controls on immigration. These generalisations give rise to stereotypes (also reported in the study interviews), as well as increased controls in working-class neighbourhoods, etc.[111] Moreover, grounds for issuing arrest warrants to "protect society" was cited in 94% of cases in 2008, compared with 69.7% in 1993[112].

A recent study by the National institute for forensic science and criminology (Institut National de Criminalistique et de Criminologie – INCC) shows that individuals aged 36 years old are twice as likely to be detained than those over 45 years old. Moreover, an individualborn outside Belgium is more likely to be detained, and all the more so if they were born outside Europe, regardless of whether or not they reside in Belgium. However, an individual who does not reside in Belgium is twice as likely to be detained. This is because magistrates are concerned about the risk of absconding and escaping justice[113]. In this regard, foreign nationality increases the possibility of ending up in custody on remand and increases the length of imprisonment[114]. Moreover, issues such as drug use, psychopathology or social problems increase the likelihood of custody twofold[115].

ii DETENTION CONDITIONS

In Belgium, several organisations focus on living conditions in prison. Indeed, the rate of prison overcrowding is one of the highest in Europe[116], leading to tensions, violence, poor hygiene conditions, difficulties accessing healthcare and a lack of medical and prison staff[117]. This means that there are operational problems in the majority of Belgian prisons, highlighting the difficulty of managing the human aspect in prisons when focus has to be

110 S. O. El Bey & A. Manço, 2017, *Stéréotypes et illégitimation des migrants en Europe et en Belgique: à qui profite le crime?*, Liège : IRFAM, p. 4. See also « Les prisons au bout du rouleau », *Revue Politique,* n°77, Bruxelles, novembre-décembre 2012 ; C. Vanneste, *Les chiffres des prisons. Des logiques économiques à leur traduction pénale*, L'Harmattan, collection Déviance et Société, Paris, 2001.

111 *Ibidem*, pp. 2 – 4.

112 C. Tange, D. Burssens et E. Maes, 2019, La détention avant jugement en Belgique. Étude empirique des facteurs explicatifs du recours au mandat d'arrêt et de sa durée. *Champ pénal/Penal field*, (16), p. 19.

113 C. Tange, D. Burssens et E. Maes, 2021, *Un tiers des personnes en prison sont des prévenus : expliquer le recours à la détention préventive en Belgique. Une étude longitudinale*, op. cit., pp. 7-8.

114 *Ibidem*, p.11

115 C. Tange, D. Burssens et E. Maes, 2019, *op. cit.,* p. 14.

116 E. Maes, A. Jonckheere, M. Deblock et M. Hovine, 2016, *DETOUR – Towards Pre-trial Detention as Ultima Ratio. 2nd Belgian National Report on Expert Interviews,* Bruxelles : Institut National de Criminalistique et de Criminologie, p. 19.

117 Observatoire International des Prisons, 2016, *op. cit.,* pp. 19 et 30 ; Conseil central de surveillance pénitentiaire, 2021, *op. cit.*, pp. 32 et suiv.

placed on their operation[118]. The majority of prison facilities do not comply with the required health and safety standards[119]. Moreover, the prison system has also recently been put under pressure by the COVID-19 pandemic[120].

The effective exercise of these rights is therefore hindered by prison overcrowding. Statistically, we did not establish associations demonstrating different treatment relating to living conditions according to the detainees' age, gender, maximum sentence, nationality or ethnicity. Prison conditions affect the entire prison population.

In Belgium, the average rate of overcrowding is 11.8%[121]. This corresponds to 93.6 detainees per 100,000 inhabitants, while the European average is 129[122]. Below the Belgian average is the Netherlands with a rate of 58.5 detainees to 100,000 inhabitants, whereas above the Belgian average per 100,000 inhabitants are Greece with 102.4 detainees, France with 105.3 detainees, Bulgaria with 105.6 detainees, and Romania with 106.5 detainees[123]. There are 10,808 detainees across all Belgian prisons, for a total of 9,219 places, in other words, 117.2 inmates per 100 available places[124]. This means that activities in prisons dealing with overcrowding are reduced. We noted that 85% of respondents declared spending more than twenty hours a day in a cell during custody on remand. This can be partly attributed to the effects of COVID-19 (but marginally, because many of the respondents were not on remand during the pandemic), the low rate of possible activities due to prison overcrowding, under-staffing among prison officers, as well as fear among specific detainees who do not dare to leave their cell because of possible victimisation for their offences, etc.

The average size of a prison cell in Belgium is 9 to 12 m². However, 38% of respondents stated that they had been placed on remand in a cell that they considered to be smaller than 4 m² (excluding the surface area of sanitation facilities). 34% stated that they were with several other detainees in a cell measuring less than 4 m² (excluding the surface area of sanitation facilities). Moreover, 11% of respondents on remand stated that they spent more than twenty hours a day, for more than a year, in a cell measuring less than 4 m² (excluding the surface area of sanitation facilities). During the interview, several detainees highlighted that in Belgian prisons there are unsanitary cells, rusted sanitary facilities, people sleeping on the floor on a mattress, etc., a situation that has been recorded in a number of national and international reports[125].

118 D. Kaminski,2013*,, op. cit.,* p. 468.

119 Observatoire International des Prisons, 2016*, op. cit*., p. 85.

120 See, among others, Ligue des Droits Humains, *Quatrième vague et marée haute en prison : il faut libérer d'urgence des catégories de détenu.e.s*, 10 décembre 2021 ; Conseil central de surveillance pénitentiaire, *Avis du CCSP face à la surpopulation des prisons dans le contexte de la 4ème vague de covid-19*, 25 novembre 2021.

121 Direction générale des établissements pénitentiaires (DG EPI), 2017*, op. cit*., p. 44.

122 C. Tange, D. Burssens et E. Maes,2019, *op. cit.,* p. 2.

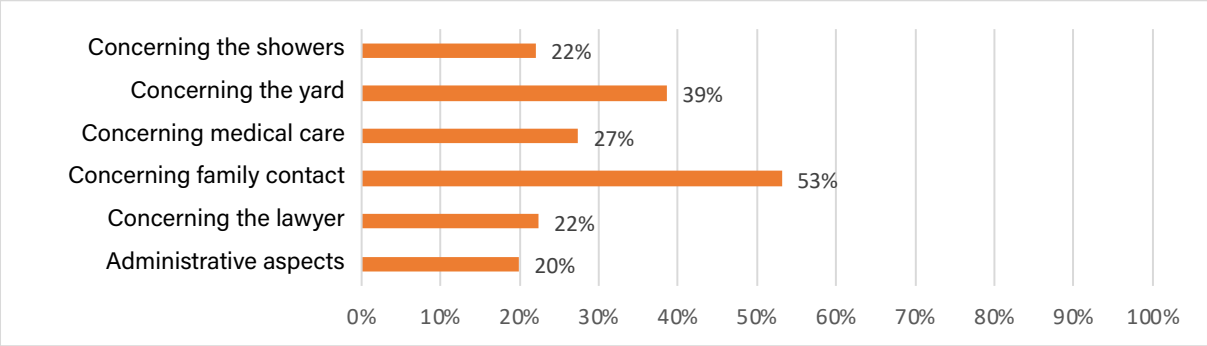
123 M. F. Aebi & M. M. Tiago. (2021). *SPACE 1 – 2020 – Council of Europe Annual Penal Statistics : Prison populations,* Op. Cit., p. 33.

124 Observatoire International des Prisons, 2017*, op. cit*., p. 91. For more recent figures, see Direction générale des établissements pénitentiaires (DG EPI), 2017, *op. cit*., p. 44 et Conseil central de surveillance pénitentiaire, 2021, *op. cit*., p. 32.

125 See above.

Several statistical associations emerge from these figures. For instance, individuals who experience acts of violence during police custody are more likely to end up in a cell measuring less than 4 m² (excluding the surface area of sanitation facilities) and also spending more time in their cell. One in two people who stated that they experienced violence during police custody spent more than twenty-three hours in a cell whilst on remand.

Figure 5: Percentage of respondents who experienced COVID-19-related restrictions whilst on remand (n = 241)



As this study was conducted during a pandemic, Figure 5 corresponds to the restrictions actually experienced by respondents during this period and not to general prison restrictions associated with COVID-19. Indeed, these restrictions were applied in all facilities, but depending on the infrastructure, some restrictions were more present than others. For example, if a cell has a shower, restrictions associated with using the shower will not be experienced in the same way as for a detainee whose cell does not have a shower. It is important to note that some individuals we interviewed did not respond because they were not on remand during this period.

We can see that the most difficult restrictions concerned the decrease in family contact and yard time as well as difficulty accessing medical care. Indeed, while seeing a doctor was already extremely difficult before the pandemic[126], it was even harder during the pandemic and suspected COVID infection was presumed. Detainees therefore had to undergo quarantine before being able to see a doctor. Detainees explained that it was difficult for prison management and officers to know what decisions were appropriate. At the start of the pandemic, everything was put on hold, not only detainee case proceedings, but also psycho-social services, hearings, the canteen and the laundry. If the detainee was quarantined in their cell, their cellmates were also automatically quarantined.

> *"Concerning remand during the first wave of Covid, it was a nightmare, no visits, tons of restrictions. 24 hours a day in your cell, no laundry changes, tensions, the impression that there was nothing for us outside anymore and no psychological support. How can you expect us not to be marked by this imprisonment?"*

126 See especially CPT, « Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017 », 8 mars 2018, §§ 85 et 107.

D. Throughout all proceedings

i INSULTS AND INAPPROPRIATE REMARKS

We have mentioned the use of physical force during arrest and police custody. However, violence can also be perceived in a person's words, omissions or silence[127]. We note particularly that 42.5% of respondents felt insulted at least once by a State representative (police, lawyers, public prosecutors, magistrates, prison officers, prison management) during the criminal proceedings.

Figure 6: Share of insults by type (n = 154)

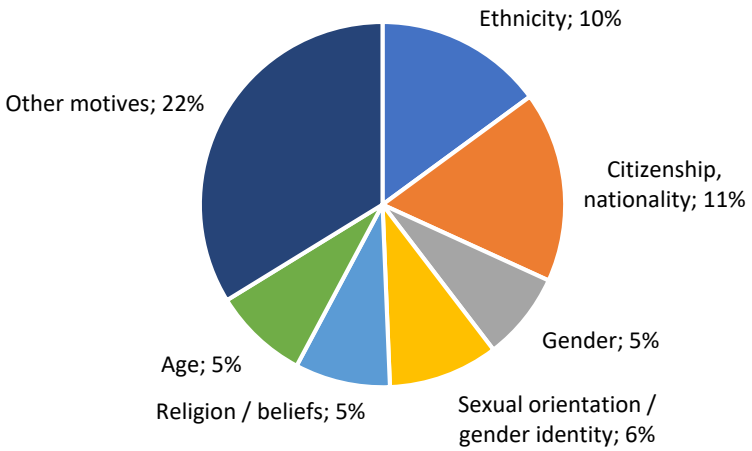


Figure 6 shows the share of insults by type of motive. The main categories are "ethnicity" and "nationality" as well as "other motives". The category "other motives" primarily includes the offence, addictions, family or offences committed by a family member, dehumanisation, intelligence, physical appearance and illnesses.

The people who stated that they experienced the use of physical force (during arrest, police custody or as a witness) were more likely to be insulted. 55% of those who experienced violence during arrest stated they were insulted, compared to 36% for those who did not experience violence. This is even more significant in the case of violence at the police station as 64% of those who experienced violence said they were insulted, compared to 36% for those who did not experience violence.

One individual who considered that they had been a victim of racism during their criminal proceedings said: *"I'm a gypsy so, in their eyes, I'll never change. The minute you're a detainee, you're no longer considered a human being, but a number. We're told to respect the law, that we have rights, but a detainee has none of their rights respected. People are surprised about reoffending, but it's the justice system that pushes detainees to reoffend."*

127 D. Kaminski. (2013). Violence et emprisonnement. *Op. cit.,* pp. 2-3.

We also observed, via the interviews, discrimination and insults between detainees due to their nationality or illegal status in the country.

ii COMPLAINTS

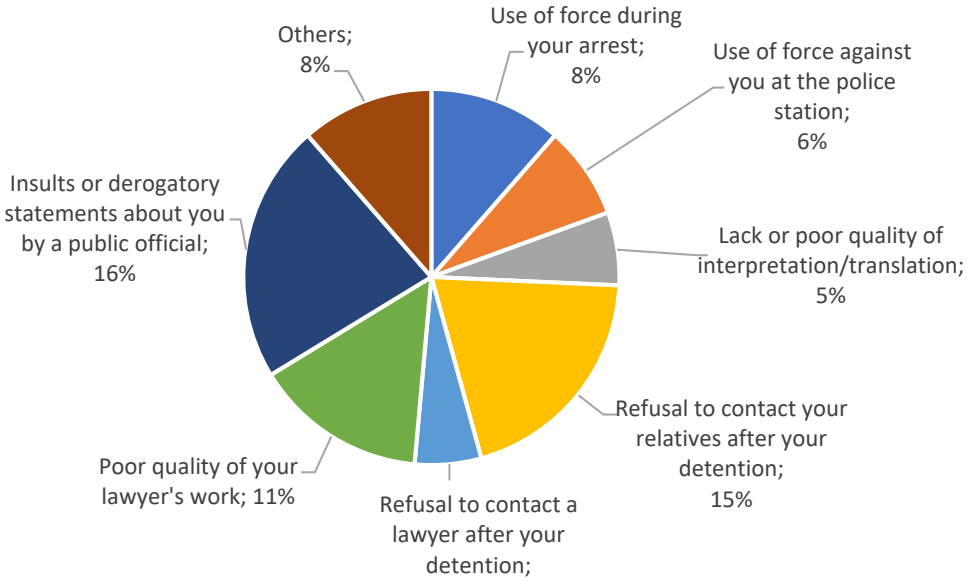
We must first point out that the questionnaire did not specify if this concerned a complaint to the police, the prison management or the supervisory committee.

In prisons, detainees are often punished after having experienced acts of violence themselves. Several reasons prompt detainees not to report these acts of violence. Some stated a feeling of shame that they do not wish to share (example: sexual abuse), others mentioned the prison officers of knowing their name (implying fear of victimisation). Likewise, some prison officers are too afraid to report offences committed by their colleagues or have difficulties confiding with prison management[128]. Other reasons for not filing a complaint is the inefficiency of the system, poor knowledge of the law and its provisions, as well as the cost or slow speed of the procedures, etc.[129]

We can see complaints are more often filed by Belgian nationals or those who hold dual nationality. One reason for this could be that they have better knowledge of the law and the procedures than foreign nationals. Additionally, in the case of violence experienced during police custody, the individual is less likely to file a complaint (foreign nationals are more likely to experience violence).

During this study, we observed fewer complaints among women than among men.

Figure 7: Share of insults by type (n = 175)



128 Observatoire International des Prisons,2017, op. cit., p. 153.

129 Ligue des droits humains, 2020, *Rapport Police Watch : abus policier et confinement,* Bruxelles, p. 4.

Figure 7 shows the types of complaints filed against State representatives. During the interviews, the detainees reported that lodging a complaint was “pointless” because often it would not lead to anything or would be to their disadvantage. Some respondents were dissuaded from filing a complaint by the police, or even by their lawyer. Others feared victimisation. The most common complaints concerned insults and inappropriate remarks by a public official, refusal to contact a family member or friend after being detained, as well as the use of force during arrest or custody.

CONCLUSION

The statistical analysis shows presumption of discrimination during criminal proceedings. Firstly, although the **use of force** is not systematic, it would seem that a foreign national or a person with dual nationality is more likely to experience acts of violence during arrest, police custody or as a witness, than a Belgian national. However, we should note that violence is a subjective notion and that how a particular situation is perceived varies from one person to the next. Secondly, it would seem that an individual is more often **informed of their rights** during police custody if they have not experienced violence previously. This information is also quicklier provided if the individual has not experienced a violent arrest and if they are of European nationality. In this respect, we should note that one in five people stated that they did not have their rights read to them.

Moreover, an individual who states that they experienced physical violence during police custody has less chance of benefiting from an **initial consultation** with their counsel. Statistically, the people who stated that they experienced violence during police custody tended to end up in smaller cells during remand and to spend more time in their cell. While we were unable to explain the link between violence during police custody and the **size of the cell**, the link between violence and **time spent in the cell** seems to be based on the seriousness of the offences, addictions, nationality or ethnicity, etc. 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. Once again, those who stated they had experienced violence during arrest or police custody were more likely to be insulted by a State representative. The result is that detainees feel dehumanised by the police and legal system.

Finally, we observed that Belgian nationals seem more inclined to **file a complaint** of abuse than foreign nationals, which may be due to better knowledge of Belgian law, even if some say they are prevented from doing so for fear of victimisation or because they feel that the justice system is ineffective.

In conclusion, people likely to experience discrimination are more often those who experience violence during the initial stages of the criminal proceedings (arrest and/or police custody), violence whose discriminating impact is systematically felt at every subsequent stage.

BIBLIOGRAPHY

Aebi, M. F., & Tiago, M. M. (2021). *SPACE 1 – 2020 – Council of Europe Annual Penal Statistics : Prison populations.* Strasbourg : Council of Europe.

Direction générale des établissements pénitentiaires (DGEPI). (2017). *Rapport annuel 2016.* Bruxelles.

El Bey, S. O., & Manço, A. (2017). *Stéréotypes et illégitimation des migrants en Europe et en Belgique: à qui profite le crime?.* Liège : IRFAM.

Kaminski, D. (2013). Violence et emprisonnement. *Revue de science criminelle et de droit penal compare*, (2), pp. 461-474.

Kite, M., & Whitley, B. (2013). *Psychologie des préjugés et de la discrimination.* Bruxelles : De Boeck.

Ligue des droits humains. (2020). *Rapport police-watch* : abus policier et confinement. Bruxelles.

Maes, E., Jonckheere, A., Deblock, M. & Hovine, M. (2016). *DETOUR – Towards Pre-trial Detention as Ultima Ratio. 2nd Belgian National Report on Expert Interviews.* Bruxelles : Institut National de Criminalistique et de Criminologie.

Observatoire International des Prisons. (2016). *Notice 2016 : Pour le droit à la dignité des personnes détenues.*

Tange, C., Burssens, D., & Maes, E. (2019). La détention avant jugement en Belgique. Étude empirique des facteurs explicatifs du recours au mandat d'arrêt et de sa durée. *Champ pénal/pénal field*, (16), https://doi.org/10.4000/champpenal.10921.

Tange, C., Burssens, D. & Maes, E. (2021). *Un tiers des personnes en prison sont des prévenus : expliquer le recours à la détention préventive en Belgique. Une étude longitudinale*. Bruxelles : Institut National de Criminalistique et de Criminologie**.**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