Constitutional Court

TRANSLATION

Judgment No. 36/2023
Of 3 March 2023

Roll number : 7871

EXCERPT

Subject : the request for annulment of Article 5 of the law of 30 July 2022 on the assent for the following international instruments : 1) the Convention between the Kingdom of Belgium and the Republic of India on mutual assistance in criminal matters, executed in Brussels on 16 September 2021, and 2) the Treaty between the Kingdom of Belgium and the United Arab Emirates on mutual assistance in criminal matters, executed in Abu Dhabi on 9 December 2021, and 3) the Treaty between the Kingdom of Belgium and the United Arab Emirates on extradition, executed in Abu Dhabi on 9 December 2021, and 4) the Treaty between the Kingdom of Belgium and the Islamic Republic of Iran on the transfer of sentenced persons, executed in Brussels on 11 March 2022, and 5) the Protocol of 22 November 2017 amending the Additional Protocol to the Convention on the transfer of sentenced persons, signed on 7 April 2022 in Strasbourg », introduced by Farzin Hashemi and others.

The Constitutional Court,

comprised of the Presiding Judges P. Nihoul and L. Lavrysen, and the judges T. Giet, J. Moerman, M. Pâques, Y. Kherbache, T. Detienne, D. Pieters, E. Bribosia and W. Verrijdt, assisted by the Registrar of the Court P.-Y. Dutilleux, chaired by the Presiding Judge P. Nihoul,

after having deliberated thereon, renders the following judgment :

I. *Subject matter of the application and procedure*

By a request sent to the Court by registered mail on 3 October 2022 and which arrived at the Court Registry on 5 October 2022, an application for annulment of Article 5 of the law of 30 July 2022 on the assent for the following international instruments : 1) the Convention between the Kingdom of Belgium and the Republic of India on mutual assistance in criminal matters, executed in Brussels on 16 September 2021, and 2) the Treaty between the Kingdom of Belgium and the United Arab Emirates on mutual assistance in criminal matters, executed in Abu Dhabi on 9 December 2021, and 3) the Treaty between the Kingdom of Belgium and the United Arab Emirates on extradition, executed in Abu Dhabi on 9 December 2021, and 4) the Treaty between the Kingdom of Belgium and the Islamic Republic of Iran on the transfer of sentenced persons, executed in Brussels on 11 March 2022, and 5) the Protocol of 22 November 2017 amending the Additional Protocol to the Convention on the transfer of sentenced persons,

signed on 7 April 2022 in Strasbourg » (published in the *Belgian Monitor* of 4 November 2022), second edition), was introduced by Farzin Hashemi, Maryam Rajavi, Ahmed Ghozali, Sid Alaoddin Jalalifard, Giulio Terzi Di Sant'Agata, Robert G. Torricelli, Javad Dabiran, Tahar Boumedra, Linda Chavez, Ingrid Betancourt and the organisation governed by French law « The National Council of Resistance of Iran », assisted and represented by Maître F. Tulkens and Maître J. Renaux, lawyers practising in Brussels.

In the same application the applicants are also requesting the suspension of the same legal provision. By judgment no. 163/2022 of 8 December 2022 (ECLI:BE:GHCC:2022:ARR.163), published in the *Belgian State Gazette* of 12 December 2022, the Court suspended this legal provision.

(…)

II. *As to the law*

(…)

B.1. Article 5 of the law of 30 July 2022 « on the assent for the following international instruments : 1) the Convention between the Kingdom of Belgium and the Republic of India on mutual assistance in criminal matters, executed in Brussels on 16 September 2021, and 2) the Treaty between the Kingdom of Belgium and the United Arab Emirates on mutual assistance in criminal matters, executed in Abu Dhabi on 9 December 2021, and 3) the Treaty between the Kingdom of Belgium and the United Arab Emirates on extradition, executed in Abu Dhabi on 9 December 2021, and 4) the Treaty between the Kingdom of Belgium and the Islamic Republic of Iran on the transfer of sentenced persons, executed in Brussels on 11 March 2022, and 5) the Protocol of 22 November 2017 amending the Additional Protocol to the Convention on the transfer of sentenced persons, signed on 7 April 2022 in Strasbourg » (hereinafter : the law of 30 July 2022) provides :

« Le Traité entre le Royaume de Belgique et la République islamique d'Iran sur le transfèrement de personnes condamnées, fait à Bruxelles le 11 mars 2022, sortira son plein et entier effet ».

By its judgment no. 163/2022 of 8 December 2022 (ECLI:BE:GHCC:2022:ARR.163), the Court suspended the contested provision in so far as the treaty of 11 March 2022 between the Kingdom of Belgium and the Islamic Republic of Iran on the transfer of convicted persons

allows for the transfer to Iran of a person who was sentenced by the courts for having committed a terrorist offence with the support of Iran.

B.2.1. The application for suspension being subordinate to the action for annulment, the Court has already associated, in the aforementioned judgment, the admissibility of the action for annulment with the assessment of the application for suspension. This assessment concerned in particular the interest of the applicants and the intervening party Olivier Vandecasteele.

B.2.2. The judgment that suspends a contested legislative act has res judicata *erga omnes*, even if it is of a provisional nature until the judgment deciding on the action for annulment has been rendered or the time period of three months following the handing down of the judgment ordering suspension has elapsed.

B.2.3. Therefore, the authority of *res judicata* of the judgment that suspended the contested act does not prevent the Court from reassessing the admissibility of the action for annulment. More so, the possibility of provisionally preventing the application of the contested act specifically allows the Court to proceed with an in-depth assessment of the action for annulment without the application of the contested act being able to cause a serious and irreparable harm in the meantime. This in-depth assessment includes the admissibility of the action for annulment.

B.2.4. The fundamental principles of a democracy governed by the rule of law include not only the fundamental rights that the applicants and the first intervening party invoke, but also the guarantee that the courts rule within the limits of their jurisdiction.

Therefore, the principles at stake require a strict review of the jurisdiction of the Court.

B.3. The Court has jurisdiction to rule on an action for annulment, in whole or in part, of a law by which a treaty is granted assent (Article 1, read together with Article 3, § 2, of the special law of 6 January 1989 on the Constitutional Court). Moreover, it cannot usefully review such a law without considering the substance of the relevant provisions of that treaty.

The Court does not have jurisdiction to rule on a possible unconstitutionality that does not result from the contested act but from its application (see in particular judgment no. 182/2014

of 10 December 2014, ECLI:BE:GHCC:2014:ARR.182, B.10). This lack of jurisdiction extends to the application of the treaty that received the assent of the contested act.

When it examines the content of a treaty, the Court takes into account that it is not a unilateral act of sovereignty, but a conventional norm producing legal effects beyond the domestic legal system (see in particular the judgment no. 12/94 of 3 February 1994, ECLI:BE:GHCC:1994:ARR.012). When assenting to a treaty and, in particular, when assessing the diplomatic relations involved, the legislator has wide discretion.

B.4. The relevant provisions of the Treaty between the Kingdom of Belgium (hereinafter : Belgium) and the Islamic Republic of Iran (hereinafter : Iran) on the transfer of convicted persons, concluded in Brussels on 11 March 2022 (hereinafter : the treaty of 11 March 2022), are worded as follows :

« ARTICLE 3 - General Principles

1. The Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Treaty.

2. A person sentenced in the territory of a party may be transferred to the territory of the other Party, in accordance with the provisions of this Treaty, in order to serve the remaining period of the sentence imposed on him. To that end, he may express his interest to the Sentencing State or to the Administering State in being transferred under this Treaty.

3. Transfer may be requested by either the Sentencing State or the Administering State.

ARTICLE 4 - Conditions for Transfer

1. A sentenced person may be transferred under this Treaty only on the following conditions :

a. if that person is a national of the Administering State;

b. if the judgment is final and enforceable;

c. if, at the time of receipt of the request for transfer, the sentenced person still has at least one year of the sentence to serve or if the sentence is indeterminate;

d. if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition either State considers it necessary, by the sentenced person's legal representative, except in the cases mentioned in Articles 8 and 12;

e. if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the Administering State or would constitute a criminal offence if committed on its territory; and

f. if the sentencing and Administering States agree to the transfer.

2. In exceptional cases, the Parties may agree to a transfer even if the time to be served by the sentenced person is less than that specified in paragraph 1.c of this Article.

[…]

ARTICLE 10 - Effect of Transfer for the Sentencing State

1. The taking into charge of the sentenced person by the authorities of the Administering State shall have the effect of suspending the enforcement of the sentence in the Sentencing State.

2. The Sentencing State may no longer enforce the sentence if the Administering State considers enforcement of the sentence to have been completed.

ARTICLE 11 - Effect of Transfer for the Administering State

1. The competent authorities of the Administering State shall continue the enforcement of the sentence either immediately or by virtue of a court or administrative order, under the conditions set out in Article 12.

2. The enforcement of the sentence shall be governed by the law of the Administering State and that State alone shall be competent to take all appropriate decisions.

ARTICLE 12 - Nature and Duration of the Penalty

1. The Administering State is bound by the legal nature and duration of the sentence arising from the conviction.

2. However, if the nature or duration of this sentence is incompatible with the legislation of the Administering State, or if its legislation so requires, the Administering State may, by court or administrative order, adjust this sentence to the sentence or order which would be handed down under its own law for offences of the same nature.

The nature of this sentence or order shall correspond as far as possible to that of the sentence to be enforced. It shall not aggravate the nature or duration of the penalty passed in the Sentencing State or exceed the maximum laid down by the law of the Administering State.

ARTICLE 13 - Pardon, Amnesty, Commutation

Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.

ARTICLE 14 - Review of Judgement

The Sentencing State alone shall have the right to decide on any application for review of the judgment.

ARTICLE 15 - Termination of Enforcement

The Administering State shall terminate enforcement of the sentence as soon as it is informed by the Sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable.

ARTICLE 16 - Information on Enforcement

The Administering State shall provide information to the Sentencing State concerning the enforcement of the sentence :

a. when it considers enforcement of the sentence to have been completed;

b. if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or

c. if the Sentencing State requests a special report.

[…]

ARTICLE 20 - Settlement of Disputes

Any dispute between the Parties concerning the interpretation or application of this Treaty shall be settled amicably and via negotiation through diplomatic channels.

ARTICLE 21 – Amendments

This Treaty may be amended at any time upon mutual agreement of the Parties in written form. Such an amendment shall enter into force in accordance with the same procedure as applicable for the entry into force of this Treaty.

ARTICLE 22 - Final Clauses

1. This Treaty is subject to ratification and shall come into force for an unlimited period thirty days after the exchange of the instruments of ratification through diplomatic channels.

2. This Treaty is also applicable to the enforcement of sentences passed before coming into force.

3. Without prejudice to current proceedings, either Party may denounce this Treaty at any time by sending written notice to the other Party through diplomatic channels. The denunciation shall come into effect one year from the date of receipt of this notice.

4. The termination of this Treaty shall not affect the transfer requests which have been submitted before its termination ».

B.5.1. The treaty is necessary to allow transfers in accordance with the law of 23 May 1990 « on the transfer of convicted persons between States, the takeover and the monitoring of the supervision of conditionally sentenced or conditionally released persons as well as the takeover and the monitoring of the enforcement of custodial sentences and measures » (hereinafter : the law of 23 May 1990).

Article 1 of this law provides :

« Le Gouvernement peut, en exécution des conventions et traités conclus avec les Etats étrangers sur la base de la réciprocité, accorder le transfèrement de toute personne condamnée et détenue en Belgique vers l'Etat étranger dont elle est le ressortissant ou accepter le transfèrement vers la Belgique de tout ressortissant belge condamné et détenu à l'étranger, pour autant toutefois :

1° que le jugement prononçant condamnation soit définitif;

2° que le fait qui est à la base de la condamnation constitue également une infraction au regard de la loi belge et de la loi étrangère;

3° que la personne détenue consente au transfèrement.

Au sens de la présente loi, le terme de ' condamnation ' vise toute peine ou toute mesure privative de liberté prononcée par une juridiction pénale en complément ou en substitution d'une peine ».

Custodial sentences or measures, the enforcement of which have been transferred to a foreign State can no longer be enforced in Belgium, unless the foreign State notifies that the enforcement is refused or impossible (Article 27 of the law of 23 May 1990, inserted by Article 20 of the law of 26 May 2005).

B.5.2. Regarding the transfer to a foreign State of a person sentenced and detained in Belgium, Articles 4 and 5 of the law of 23 May 1990 provide :

« Art. 4. Lorsqu'en application d'une convention ou d'un traité international, une demande est adressée à l'État belge ou par l'État belge en vue de transférer une personne condamnée et détenue en Belgique vers l'État étranger dont elle est le ressortissant, cette personne est entendue par le procureur du Roi près le tribunal du lieu de détention, qui l'informe de cette demande et des conséquences qui découleraient du transfèrement.

Elle est assistée d'un conseil, soit lorsqu'elle le demande, soit lorsque le procureur du Roi l'estime nécessaire compte tenu de l'état mental ou de l'âge du détenu.

Art. 5. Le consentement est irrévocable pendant une période de 90 jours à dater de celui de la comparution.

Si le transfèrement n'a pas eu lieu à l'expiration de ce délai, le condamné peut librement révoquer son consentement, par lettre adressée au directeur de l'établissement pénitentiaire, jusqu'au jour où lui est notifiée la date du transfèrement ».

B.5.3. Regarding the transfer to Belgium of a person sentenced and detained abroad, Articles 6 to 8 and 10 of the law of 23 May 1990 provide :

« Art. 6. Lorsqu'une personne condamnée et détenue dans un état étranger est transférée en Belgique en application d'une convention ou d'un traité international, la peine ou la mesure prononcée à l'étranger est, par l'effet même de la convention, directement et immédiatement exécutoire en Belgique pour la partie qui restait à subir dans l'état étranger.

Art. 7. Dès son arrivée en Belgique, la personne transférée est conduite vers l'établissement pénitentiaire qui lui a été assigné.

Art. 8. Dans les vingt-quatre heures suivant son arrivée dans l'établissement pénitentiaire, la personne transférée comparaît devant le procureur du Roi près le tribunal de première instance du lieu.

Celui-ci procède à son interrogatoire d'identité, en dresse procès-verbal et, au vu des pièces constatant l'accord des états concernés et le consentement ou, par dérogation à l'article 1er, alinéa 1er, 3°, l'avis de l'intéressé, ainsi que de l'original ou d'une expédition du jugement étranger de condamnation ou, le cas échéant, d'une copie de la mesure d'expulsion ou de remise à la frontière, ou de toute autre mesure équivalente, ordonne l'incarcération immédiate du condamné ou son placement à l'annexe psychiatrique de l'établissement pénitentiaire, lorsque la mesure prononcée à l'étranger est de même nature que celle prévue au chapitre II du titre III de la loi du 5 mai 2014 relative à l'internement.

[…]

Art. 10. Lorsque la peine ou la mesure prononcée à l'étranger ne correspond pas, par sa nature ou sa durée, à celle prévue par la loi belge pour les mêmes faits, le procureur du Roi saisit sans délai le tribunal de première instance et requiert l'adaptation de la peine ou mesure à celle qui est prévue par la loi belge pour une infraction de même nature. En aucun cas, la peine ou la mesure prononcée à l'étranger ne peut être aggravée.

Le tribunal statue dans le mois en respectant la procédure suivie en matière répressive. Sa décision est susceptible de recours. Toutefois, elle est immédiatement exécutoire ».

B.5.4. Regarding the enforcement in Belgium of custodial sentences or measures imposed abroad, Articles 19, 20 and 22 of the law of 23 May 1990 provide :

« Art. 19. Dès que l'Etat belge a reçu une demande d'exécution d'une peine ou mesure privative de liberté, la personne condamnée est transférée dans l'établissement pénitentiaire du lieu où elle a sa résidence habituelle.

Art. 20. § 1er. Dans les vingt-quatre heures de son arrivée dans l'établissement pénitentiaire, la personne condamnée comparaît devant le procureur du Roi près le tribunal de première instance du lieu. Le procureur du Roi procède à l'audition de la personne condamnée et en dresse procès-verbal, après consultation des pièces transmises par les autorités compétentes de l'Etat qui a prononcé la condamnation. Le consentement du condamné à l'exécution de la peine ou mesure privative de liberté étrangère en Belgique n'est pas requis. La personne condamnée est assistée d'un conseil, soit si elle en fait la demande, soit si le procureur du Roi l'estime nécessaire compte tenu de l'état mental ou de l'âge du condamné.

[…]

Art. 22. § 1er. Lorsque la peine ou la mesure privative de liberté prononcée à l'étranger ne correspond pas, par sa nature ou sa durée, à celle prévue par la loi belge pour les mêmes faits, le procureur du Roi saisit sans délai le tribunal de première instance et requiert l'adaptation de la peine ou mesure à celle qui est prévue par la loi belge pour une infraction de même nature. La peine ou mesure privative de liberté adaptée doit, en ce qui concerne sa nature, correspondre autant que possible à la peine ou mesure privative de liberté infligée par la condamnation prononcée à l'étranger, et cette dernière ne peut en aucun cas être aggravée.

§ 2. Le tribunal statue dans le mois conformément à la procédure pénale. Sa décision est susceptible de recours. Elle est toutefois immédiatement exécutoire ».

B.6.1. Although the treaty is necessary to allow for a transfer, it does not oblige the contracting States to accept a transfer request :

« Cette absence de caractère véritablement contraignant dans le chef des États parties signifie que, quel que soit l'État qui a initié la procédure, ni l'État de condamnation, ni l'État d'exécution ne sont contraints d'accepter une requête de transfèrement. Il s'agit d'une différence notable avec les traités d'extradition et d'entraide judiciaire » (*Doc. parl.*, Chambre, 2021-2022, DOC 55-2784/003, p. 10).

During the parliamentary debates, it was also indicated :

« Le ministre souligne que ce traité résulte de négociations aux niveaux technico-administratif et diplomatique entre les deux pays. La Belgique n'a évoqué aucun lien entre des dossiers individuels. En d'autres termes, la Belgique n'anticipe rien sur la base de ce traité. Dès qu'il sera entré en vigueur, le traité pourra être mis en œuvre dans le respect des conditions strictes qu'il prévoit.

Pourquoi la Belgique a-t-elle négocié ce traité et pourquoi le gouvernement demande-t-il à la Chambre d'y adhérer ? Ces dernières années, les services de sécurité ont mis en garde, dans plusieurs rapports, contre certaines menaces à l'égard des intérêts nationaux de la Belgique. Ces menaces ont considérablement augmenté depuis l'été 2018 et cela a incité le SPF Affaires

étrangères à émettre le 26 juin 2021 un conseil de voyage expressément négatif où l'on peut lire que: ' Tous les voyages de ressortissant belges vers l'Iran sont formellement déconseillés. Les voyageurs doivent être conscients du risque d'interpellation et d'arrestation arbitraires. Plusieurs occidentaux ont été récemment arrêtés de façon arbitraire. Le contexte politique interne et régional sont des facteurs dont il convient de tenir également compte '.

Pour détourner cette menace accrue, le gouvernement a suivi l'avis des services de sécurité et a signé ce traité » (*ibid.*, p. 11).

B.6.2. Asked whether the treaty undermines judicial authority, the competent minister replied in the negative :

« La Belgique a conclu un traité similaire avec pas moins de 74 pays. Les autorités judiciaires souscrivent à cette politique. En principe, dans le cas d'un transfèrement individuel, l'avis du parquet est sollicité. Le traité est également un moyen de faire en sorte que l'exécution de la peine se fasse dans le pays d'origine. Ce n'est pas un moyen d'instaurer l'impunité » (*ibid*., p. 52).

The judgment granting the transfer of a person sentenced and detained in Belgium to a foreign State of which he or she is a national does not escape judicial review of legality :

« Si une partie prenante estime que la décision du ministre de la Justice est illégale, elle pourra introduire un recours en annulation. Ces décisions feront systématiquement l'objet d'un contrôle judiciaire » (*ibid*., p. 54).

Admissibility

B.7. By its judgment no. 163/2022 of 8 December 2022, the Court held that the interest of the applicants and the intervening parties was established. There is no reason to hold otherwise at the stage of examining the action for annulment.

B.8. In their reply, the Council of Ministers and Olivier Vandecasteele invoke that the three pleas would be partially or totally inadmissible, in that they are taken in breach of Articles 10, 11 and 23 of the Constitution, read in conjunction with several articles of the European Convention on Human Rights, because none of the applicants are Belgian nationals nor reside or remain in Belgium.

B.9.1. Article 1 of the European Convention on Human Rights limits the application thereof to « persons » within the « jurisdiction » of the States parties to the Convention. The European Court of Human Rights specifies : « The mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is not […] likely to establish the jurisdiction of the State concerned over those persons outside its territory » and « this is primarily a question of fact, which requires it to explore the nature of the link between the applicants and the defendant State and to ascertain whether the latter effectively exercised authority or control over them » (ECtHR, grand chamber, admissibility ruling, 5 May 2020, *M.N. e.a. v. Belgium*, ECLI:CE:ECHR:2020:0505DEC000359918, §§ 112-113).

B.9.2. Articles 10, 11 and 23 of the Constitution are part of title II of the latter, entitled « Belgians and their rights ». By virtue of Article 191 of the Constitution « any foreign person on Belgian territory enjoys the protection provided to persons and property, apart from those exceptions established by law ». Foreign persons may therefore invoke the benefit of the articles of title II of the Constitution on the condition, in principle, « that they are on » Belgian territory.

B.9.3. In this case the connecting factor to Belgium invoked by the applicants is the circumstance that they have brought civil actions before the Belgian courts following a criminal trial directed against several persons prosecuted for facts qualified as an attempted terrorist attack committed in France, that they were recognised by the Belgian courts as victims of these facts and that as such they obtained a right to compensation for their harm.

B.10.1. The first ten applicants, who are natural persons, therefore have the status of victim within the meaning of Article 2 (6) of the law of 17 May 2006 « on the external legal status of persons sentenced to a custodial sentence and to the rights recognised to the victim in the context of the methods of enforcement of the sentence » (hereinafter : the law of 17 May 2006). They benefit, under the provisions of that law, from the right to be informed of the granting to the convicted person of certain sentencing modalities and from the right to be heard by the sentencing court regarding the « special conditions » to which certain sentencing modalities implying a modification of the nature or duration of the pronounced sentence must be subject, in their « interest ».

B.10.2. In so far as the treaty of 11 March 2022 to which it grants assent, could be implemented to carry out the transfer to Iran of one of the persons sentenced for acts of which

they have been acknowledged as victims, and in so far as that person could benefit, in the case of transfer, from a measure of pardon, by virtue of which he would not have to serve the remaining period of the sentence pronounced in Belgium, the applicants criticise the contested provision for infringing the procedural obligations resulting from the right to life guaranteed by Article 2 of the European Convention on Human Rights, for failing to provide an effective remedy allowing them to invoke this right before a Belgian court and thus depriving them of the possibility of exercising the rights that they derive from the law of 17 May 2006.

B.11.1. The status of victim acknowledged by a criminal court constitutes, in that it concerns the protection of rights of the victim that are directly linked to the conviction of the author of the acts of which he or she is the victim, a sufficient connecting factor justifying the jurisdiction of the Constitutional Court to hear arguments based on the breach of the provisions of title II of the Constitution, read in conjunction with the provisions of the European Convention on Human Rights.

B.11.2. The exceptions of inadmissibility are rejected.

On the merits

Regarding the first plea

B.12. The first plea is based on the breach of Articles 10, 11 and 23 of the Constitution, read in with articles 2 and 13 of the European Convention on Human Rights, with articles 2 paragraph 3 and 6, paragraph 1 of the International Covenant on Civil and Political Rights, with articles 33 and 40, paragraph 2 of the Constitution and with the principle of the separation of powers.

It appears from the presentation of the plea that the applicants argue that Article 5 of the law of 30 July 2022 violates these provisions insofar as it authorises the Belgian Government to transfer to Iran a person convicted by the courts of having committed, with the support of Iran, a terrorist offence which endangered the lives of other people.

B.13. It is apparent from the judgment which has become final and which was handed down on 4 February 2021 by the criminal court of Antwerp, and which is produced by the applicants, that the latter have brought a civil action against Assaddollah Assadi, a person of Iranian nationality who, by this judgment, was definitively sentenced to a custodial sentence of twenty years and to moral damages for the harm caused to the applicants by the attempted terrorist attack he committed.

The right to life, guaranteed by Article 2 of the European Convention on Human Rights, is one of the basic values of the democratic societies making up the Council of Europe. This right requires each State to take the necessary measures to safeguard the lives of those within its jurisdiction (ECtHR, Grand Chamber, 31 January 2019, *Fernandes de Oliveira v. Portugal*, ECLI:CE:ECHR:2019:0131JUD007810314, § 104; 26 May 2020, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, ECLI:CE:ECHR:2020:0526JUD001724713,§§ 109-110). That duty of protection applies, in particular, to individuals who have been faced with an imminent risk to their life, even if they have not been injured (ECtHR, 26 May 2020, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, ECLI:CE:ECHR:2020:0526JUD001724713, §§ 89-94) and also implies that the competent authority conducts an effective investigation in the case of a potential violation of the right to life (ECtHR, Grand Chamber 27 May 2014, *Marguš v. Croatia*, ECLI:CE:ECHR:2014:0527JUD000445510, §§ 125 and 127; 26 May 2020, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, ECLI:CE:ECHR:2020:0526JUD001724713, § 154).

The requirement of effectiveness of the criminal investigation under Article 2 of the European Convention on Human Rights can also be interpreted as imposing a duty on States to execute their final judgments without undue delay. It is so since the enforcement of the sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under this article (ECtHR, 13 October 2016, *Kitanovska Stanojkovic e.a. v. the former Yugoslav Republic of Macedonia*, ECLI:CE:ECHR:2016:1013JUD000231914, § 32*)*.

Article 6 of the International Covenant on Civil and Political Rights, that has been ratified by Iran, has a similar scope to that of Article 2 of the European Convention on Human Rights.

B.14. The intervening party, Olivier Vandecasteele is a Belgian national detained since February 2022 in an Iranian prison. Following the judgment no. 163/2022 of 8 December 2022, it was revealed that he was sentenced to a 28-year prison term. One month later the news emerged according to which he had been sentenced to 40 years imprisonment and 74 lashes of the whip. He was reportedly held in solitary confinement, without necessary health care and without access to a lawyer of his choice.

The right to lead a life in compliance with human dignity, guaranteed by Article 23 of the Constitution inconjunction with Article 3 of the European Convention on Human Rights assumes in particular that all prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the sanction or measure do not subject them to distress or hardship of an intensity exceeding the unavoidable suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (ECtHR, 25 April 2017, *Rezmiveș e.a. v. Romania*, ECLI:CE:ECHR:2017:0425JUD006146712, § 72). Besides the nature of sentence, such as lashes of the whip to which the intervening party was sentenced, the length of a detention period may be a relevant factor in assessing the gravity of suffering or humiliation caused to a detainee by the inadequate conditions of his detention (ECtHR, grand chamber, 20 October 2016, *Muršić v. Croatia*, ECLI:CE:ECHR:2016:1020JUD000733413, § 131).

Article 7 of the International Covenant on Civil and Political Rights, that has been ratified by Iran, has a similar scope to that of Article 3 of the European Convention on Human Rights. Article 10 of the same Covenant guarantees humane treatment in case of loss of liberty.

B.15. More explicitly than at the time of examining the application for suspension, it currently results from the debates before the Court that the action for annulment does not concern the unconstitutionality of the law of assent and of the treaty as such, but the unconstitutionality of their application in a very specific case, which is not mentioned either in the text of the law of 30 July 2022 or in that of the treaty of 11 March 2022.

The balancing of the duty to protect the right to life on the one hand and the right to lead a life in compliance with human dignity on the other hand, cannot take place *in abstracto*, following the action for annulment currently being assessed, but must operate *in concreto* and

on a case-by-case basis after the entry into force of the treaty, and must be open for judicial review.

The Council of State has already ruled, on several occasions, that it does not have jurisdiction to rule on an application against a ministerial decision of transfer taken in application of the law of 23 May 1990 (Council of State, 14 June 2010, no. 205.129; 12 January 2012, no. 217.205; 14 August 2014, no. 228.202; 25 October 2016, no. 236.252). However, in any case, it is up to the court of first instance, on a residual basis, to conduct judicial review.

B.16. Compliance with the standards of review, quoted in B.13 and B.14, must be reviewed in a concrete case, while balancing the interests involved as mentioned in B.15.

It is up to the competent judge to verify whether the decision authorising the transfer of a person sentenced and detained in Belgium to a foreign State of which he or she is a national complies with the law. In this regard, he/she must respect the principle of the separation of powers and therefore limit himself/herself to a review of legality.

This review of legality does not concern the law of assent of the treaty and therefore does not fall within the jurisdiction of the Court.

B.17. The first plea is unfounded.

Regarding the second plea

B.18. The second plea is based on the breach of Articles 10 and 11 of the Constitution, read in conjunction with Articles 33 and 40, paragraph 2 of the Constitution and with the principle of the separation of powers, and of Article 14 of the Constitution read in conjunction or not with Articles 2 and 7 paragraph 1 of the European Convention on Human Rights and with Article 15 paragraph 1 of the International Covenant on Civil and Political Rights.

The applicants criticise the contested provision for not providing any condition or any limit on the discretionary power given to the executive to transfer a convicted person to Iran and in particular, for not providing that the authority of *res judicata* attached to court decisions taken

by the Belgian courts is safeguarded even in case of transfer. They argue furthermore that the transfer, the effect of which would be to change the nature of the sentence and which therefore constitutes a condition of enforcement of the sentence, must be decided by the courts of the judicial order.

B.19. Inter-State transfers of convicted persons as they are organised in Belgium by the law of 23 May 1990 have neither the purpose nor the effect of modifying the nature or the duration of sentences pronounced by the courts. They also do not have the effect of modifying the findings of the ruling courts as to the criminal facts observed, or of calling into question the culpability of the authors of these facts as they are established by the sentencing judgments. Therefore, the implementation of a transfer decision does not harm the authority of *res judicata*, which is attached to the sentencing ruling.

B.20. Furthermore, it is the responsibility of the Government when it takes a decision authorising the transfer of a convicted person to balance all the interests at stake, as stated in B.16.

B.21. Finally, neither Article 5 of the law of 30 July 2022, nor the provisions of the treaty of 11 March 2022 authorise the Government to disregard the authority of *res judicata* attached to Belgian judicial decisions. In particular, the circumstance that the treaty of 11 March 2022 does not contain any provision expressly providing that the authorities of the State of enforcement are bound by the finding of the facts, to the extent that the latter feature explicitly or implicitly in the judicial decision pronounced in the sentencing State, cannot be interpreted as allowing the States parties to the treaty to infringe the authority of *res judicata* attached to the sentencing decisions.

B.22. The second plea is unfounded.

Regarding the third plea

B.23. The applicants base a third plea on the breach, by Article 5 of the law of 30 July 2022, of Articles 10 and 11 of the Constitution, read in conjunction or not with Article 157 paragraph 4, of the Constitution, with Articles 2 and 13 of the European Convention on Human

Rights and with Articles 2 paragraph 3, and 6, paragraph 1 of the International Covenant on Civil and Political Rights.

They criticise the contested provision and the treaty of 11 March 2022 for not providing any mechanism by which victims of an offence committed by a person of Iranian nationality sentenced by a Belgian criminal court are informed or heard on the subject of the conditions of enforcement of the sentence consisting of authorising their transfer, or by which they may contest this condition (first branch) and not providing any effective remedy for the victims against a transfer decision (second branch).

B.24.1. Concerning the first branch of this plea, the law of 17 May 2006 provides that persons to whom it acknowledges the status of victim may request, in the cases that it specifies, if a condition of enforcement of the sentence is granted, to be informed or heard according to the rules provided by the King (Article 2, (6)).

B.24.2. Although the transfer of a person sentenced in Belgium to another State to serve the remaining period of the sentence does not constitute a condition of enforcement of the sentence, it may be admitted that the principle of equality and non-discrimination requires that victims of the actions of a person who requests the benefit of an inter-State transfer measure or who agrees to be the subject of such a measure be informed in case of a transfer decision by the Government and, if applicable, that they are heard regarding the consequences that this decision would have for them, along the lines of what is provided by the law of 17 May 2006 for victims of a person who requests and benefits, in Belgium, from a condition of enforcement of the sentence.

B.25. However, even if this difference in treatment between victims would not be compatible with Articles 10 and 11 of the Constitution, neither does it originate in Article 5 of the law of 30 July 2022 nor in the provisions of the treaty of 11 March 2022, but rather in a legislative lacuna which the legislator needs to fill by completing the existing legislation. At the risk of creating a difference in treatment contrary to Articles 10 and 11 of the Constitution, such a rule could not in fact be provided solely in the favour of victims of the actions of persons of Iranian nationality likely to benefit from the provisions of the treaty of 11 March 2022 but must be so in a general manner, in favour of all victims of actions of persons of foreign nationality likely to benefit from a transfer measure, regardless of the State of enforcement.

B.26.1. Concerning the second branch of this plea, Article 13 of the European Convention on Human Rights provides that :

« Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity ».

B.26.2. An effective remedy against the transfer decisions that might infringe the right to life that the victims derive from Article 2 of the European Convention on Human Rights must, by virtue of this provision, be accessible to the victims of actions of the convicted person subject to a transfer measure. Such recourse could be exercised before the court of first instance or, in case of emergency, before the presiding judge of that court.

B.26.3. In order to guarantee the effectiveness of the remedy, the Government should be required, when it takes an inter-State transfer decision regarding a convicted person, to ensure that the persons, whose status as a victim of the actions of this person has been recognised, are informed of this decision.

B.27. Subject to that which is stated in B.26.3, the third plea is unfounded.

For these reasons,

the Court,

subject to that which is stated in B.26.3, rejects the appeal.

Thus handed down in French, in Dutch and in German, in accordance with Article 65 of the special law of 6 January 1989 on the Constitutional Court, on 3 March 2023.

The Registrar of the Court, The Presiding Judge,

(sgd.) P.-Y. Dutilleux (sgd.) P. Nihoul