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Introduction

This report has been drafted by TRIAL International in partnership with the Open Society Justice Initiative. It provides an overview of the Belgian national legal framework regarding universal jurisdiction, including legislation and case law, and its practical application.

This report aims to contribute to a better understanding of the national justice systems among legal practitioners who operate in the domain of universal jurisdiction, in order to support the development of litigation strategies. It forms part of a series of reports regarding selected countries.¹

The content is based on documentary research carried out with the support of pro bono lawyers of the jurisdiction concerned. In addition, interviews with national practitioners were conducted regarding the practical application of the law. The interviewees have not been named in order to protect their identity and their affiliation to certain institutions or organisations.

In this report, universal jurisdiction is understood as encompassing the investigations and prosecutions of crimes committed in relation to a foreign territory by people who are not citizens of the jurisdiction in question. This report concentrates on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

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¹ See all briefing papers at https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness/?utm_content=Netherlands%2CTrial%2CFrance%2CUniversalJurisdiction%2CGermany&utm_campaign=social&utm_source=twitter&utm_medium=TRIAL+International.

1. Crimes invoking universal jurisdiction

The law concerning the punishment of serious violations of international humanitarian law of 16 June 1993,² the so-called law of universal jurisdiction, allows prosecutions to be brought against persons suspected of serious violations of international humanitarian law whether or not they are present within Belgian territory.³ However, this law was amended⁴ and replaced in 2003 by a much more restrictive law,⁵ amending the Belgian Criminal Code. The new Criminal Code criminalizes genocide,⁶ crimes against humanity,⁷ war crimes⁸ and torture,⁹ as defined below. Enforced disappearance does not exist as an independent offence but will be dealt with from the perspective of crimes against humanity.¹⁰

1.1 Genocide

The law of 5 August 2003 introduced Article 136*bis* to the Criminal Code which criminalizes genocide as a crime under international law, irrespective of whether it is committed in peacetime or in wartime. The crime of genocide is defined in accordance with the Convention on the Prevention and Punishment of the Crime

² Law concerning the punishment of serious violations of international humanitarian law, 16 June 1993 (1993-06-16/36), available at [http://www.ejustice.just.fgov.be/cgi_loi/arch_a1.pl?sql=\(text+contains+\(%27%27\)\)&language=fr&rech=1&ri=dd+AS+RANK&value=&table_name=loi&F=&cn=1993061636&caller=archive&fromtab=loi&la=F&ver_arch=003](http://www.ejustice.just.fgov.be/cgi_loi/arch_a1.pl?sql=(text+contains+(%27%27))&language=fr&rech=1&ri=dd+AS+RANK&value=&table_name=loi&F=&cn=1993061636&caller=archive&fromtab=loi&la=F&ver_arch=003) (last accessed September 2021).

³ For a commentary on this legislation, read: A. ANDRIES, E. DAVID, C. VAN DEN WIJNGAERT, AND J. VERHAEGEN, *Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire [Commentary on the law of 16 June 1993 on the punishment of serious violations of international humanitarian law]*, RDPC, 1994, p. 1173.

⁴ Law concerning the punishment of serious violations of international humanitarian law, 10 February 1999 (1999-02-10/40).

⁵ Law concerning serious violations of international humanitarian law, 5 August 2003 (2003-08-05/32).

⁶ Criminal Code, Art. 136*bis*.

⁷ Criminal Code, Art. 136*ter*.

⁸ Criminal Code, Art. 136*quater*.

⁹ Criminal Code, Art. 417*bis*.

¹⁰ Criminal Code, Art. 136*ter*.

of Genocide of 9 December 1948 and Article 6 of the Rome Statute of the International Criminal Court (Rome Statute).¹¹

The Belgian Supreme Court (*court de cassation*) had the occasion to recall, in its judgment of 27 May 2020 concerning the Fabien Neretse case, that “the particular moral element required of the perpetrator of genocide is therefore the intent, through the commission of the enumerated acts and over and above the moral element of the perpetrator, to destroy, in whole or in part, a national, ethnic, racial or religious group as such”.¹² [unofficial translation]

1.2 Crimes against humanity

Article 136*ter* of the Criminal Code criminalizes crimes against humanity in accordance with Article 7 of the Rome Statute. The elements constituting these crimes are: a widespread or systematic attack against a civil population (contextual elements), the commission of offences covered under Article 136*ter* of the Criminal Code (specific elements) and the knowledge of the attack (*mens rea*).

1.3 War crimes

War crimes are criminalized by Article 136*quater* of the Criminal Code, which lists fifty distinct offences applied in the context of an international or non-international armed conflict. They are defined in accordance with the laws and customs of war. Article 136*quater* expressly makes reference to the Geneva Conventions and to their two Additional Protocols, and to the laws and customs applicable to armed conflicts.¹³

The Belgian Criminal Code adds several crimes which are not included in the Rome Statute:

- the launching of an attack against structures or installations containing dangerous forces knowing that it could cause disproportionate damage (even if the effects of the attack are finally proportionate to the military gain);¹⁴

¹¹ N. BLAISE, N. COLETTE-BASECQZ, *Manuel de droit pénal général [Manual of General Criminal Law]*, 4th edition, Limal, Anthemis, 2019, p. 665; *Doc parl. [Parliamentary Document]*, Extraordinary Session of the Senate, 2003, 3 - 136/3, p. 35.

¹² Supreme Court 27 May 2020, No. P20 0146 F, *unpublished*.

¹³ N. BLAISE, N. COLETTE-BASECQZ, *op. cit.*, p. 665.

¹⁴ Criminal Code, Art. 136*quater*, para. 23.

- the act of delaying without justification the repatriation of prisoners of war or civilians;¹⁵ and
- apartheid or other inhumane or degrading practices based on racial discrimination and giving rise to outrages against personal dignity.¹⁶ This provision is not a war crime pursuant to the Rome Statute, but is a crime against humanity.¹⁷

The law of 5 May 2019¹⁸ supplements Article 136*quater* of the Criminal Code by three new sections thus raising to the status of war crime the use of arms which use microbial agents or other biological agents, the use of weapons that injure with shrapnel that cannot be located by x-rays in the human body and the use of laser weapons that cause permanent blindness. These crimes are punishable by imprisonment for twenty to thirty years, or even a life sentence if the consequence is the death of one or more people.¹⁹

Article 136*quinquies* provides for penalties ranging from ten years of imprisonment to a life sentence for war crimes.

Article 141*bis* of the Criminal Code provides that the punishment for terrorist offences “does not apply to the activities of armed forces in periods of armed conflict, as defined and governed by international humanitarian law, nor to the activities conducted by the armed forces of a State in the exercise of their official functions, in so far as they are governed by other rules of international law”.
[unofficial translation]

This clause of exclusion stipulated by Article 141*bis* has been invoked on several occasions in the cases of persons suspected of having joined the ranks of armed groups considered as terrorists, particularly the Islamic State and Al-Qaeda.²⁰ The

¹⁵ Criminal Code, Article 136*quater*, para. 32.

¹⁶ Criminal Code, Article 136*quater*, para. 33.

¹⁷ Rome Statute, Art. 7(1)(j).

¹⁸ The Law of 5 May 2019 contains various criminal provisions and provisions on religions, and amends the Law of 28 May 2002 relative to euthanasia and the Social Criminal Code, Article 72.

¹⁹ M. ALIE, C. GUILLAIN, A. DE BROUWER *et al.*, *Chronique de législation pénale [Chronicle of Criminal Legislation]*, RDPC, 2019/9, pp. 1033-1119.

²⁰ Brussels (49th ch. bis), 10 January 2008; Brussels (12th ch.) 26 June 2008; Brussels (70th ch.), 6 November 2015; Antwerp (AC 4 ch.), 11 February 2015.

Belgian courts have nonetheless systematically refused to apply it,²¹ with the exception of a case which concerned the Workers Party of Kurdistan.²²

1.4 Enforced disappearance

Belgium has signed the International Convention for the Protection of All Persons from Enforced Disappearances of 20 December 2006 and ratified it on 2 June 2010.²³

Article 136ter(9) of the Criminal Code defines enforced disappearance as a crime against humanity, in accordance with Article 7 of the Rome Statute. It is punished as such with a life sentence.²⁴

Under Belgian law, no internal provision stipulates that enforced disappearance is an autonomous offence. Enforced disappearance as an independent offence may however be prosecuted under universal jurisdiction according to Article 12bis of the Preliminary Title, which provides that Belgium has “jurisdiction to try the offences covered by a [rule of international law deriving from a convention or custom] [or a rule of law derived from the European Union] that is binding on Belgium, where [that rule] requires it, in any manner whatsoever, to submit the case to its competent authorities to conduct a prosecution”.²⁵ [unofficial translation]

Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance provides that States Parties shall take the measures necessary to establish their competence to exercise jurisdiction over the offence of enforced disappearance when the alleged perpetrator is present in any territory

²¹ P. JACQUES, R. VAN STEENBERGHE, pp. 178-181.

²² Supreme Court 13 February 2018, RG. n P.17.1023.N/1.

²³ Law of 6 April 2010, *M.B.*, 30 April 2006. For more detailed information on this subject, see A-M. BALDOVIN, *la Belgique confirme son engagement dans la lutte contre les disparitions forcées* [Belgium confirms its commitment to combating enforced disappearances], available at http://www.vvn.be/wereldbeeld/la-belgique-confirme-son-engagement-dans-la-lutte-contre-les-disparitions-forcees/#_ftn1, 2014 (last accessed August 2021).

²⁴ Criminal Code, Art. 136quinquies.

²⁵ Code of Criminal Procedure, Preliminary Title, Art. 12bis.

under its jurisdiction.²⁶ It would thus be possible to pursue prosecutions on this basis.²⁷

1.5 Torture

The law of 14 June 2002 brought Belgian law in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in New York on 10 December 1984.²⁸

Article 417*bis* of the Criminal Code defines torture as an independent offence as “any deliberate inhumane treatment which causes acute pain or very serious and cruel physical or mental suffering”. [unofficial translation] Belgian legislation, contrary to the Rome Statute, does not specify that the victim must be under the custody or control of the perpetrator.²⁹ Nor does it mention that the torture must have been committed by a public official or any other person acting in an official capacity or at their instigation or with their express or tacit consent.

The Belgian legislature has chosen a broader concept than that of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.³⁰

The penalty envisaged may extend from ten to thirty years of criminal imprisonment.³¹

Torture as an independent offence may be prosecuted under universal jurisdiction by virtue of Article 12*bis* of the Preliminary Title, which provides that Belgium has “jurisdiction to try the offences covered by a [rule of international law deriving from a convention or custom] [or a rule of law derived from the European Union] that is binding Belgium, where [that rule] requires it, in any

²⁶ International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Art. 9.

²⁷ Interview with a former investigating judge, 9 August 2021.

²⁸ Law bringing Belgian law into conformity with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984 (2002-06-14/42).

²⁹ Rome Statute, Arts. 7(1)(f) and 8(2)(a)(ii-1); see also Rome Statute Elements of Crimes, available at <https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf> (last accessed September 2021).

³⁰ D. VANDERMEERSCH, *La Torture, le traitement inhumain et le traitement dégradant [Torture, Inhuman and Degrading Treatment]*, in Beernaert, M.-A. et al., *Les infractions contre les personnes [Crimes Against the Person]*, 2nd ed., Brussels, Larcier, 2021, p. 582.

³¹ Criminal Code, Art. 417*ter*.

manner whatsoever, to submit the case to its competent authorities to conduct a prosecution".³² [unofficial translation]

Article 7 of the Convention against Torture³³ provides that the State Party on whose territory a person suspected of having committed a crime of torture is found, if it does not extradite the person, shall submit the case to its competent authorities to exercise the criminal prosecution.³⁴

The exercise of universal jurisdiction is also possible if torture constitutes a crime against humanity, in the context of a widespread or systematic attack against a civil population (Article 136*ter*(6) of the Criminal Code) or if it constitutes a war crime, where the acts of torture are committed in a context of and in relation to an armed conflict (Article 136*quater*(2) of the Criminal Code).

2. Modes of liability

In Belgian criminal law, a distinction is made between perpetrators³⁵, co-perpetrators³⁶ and accomplices.³⁷ The modes of liability are understood very broadly by Belgian courts.³⁸ In particular, the responsibility of a hierarchical superior is assessed on a case-by-case basis in a flexible manner.³⁹

2.1 Perpetrators and military/hierarchical superiors

Article 136*septies* of the Criminal Code targets perpetrators and hierarchical superiors. It lists the following forms of participation: ordering (even if not followed by action), proposing or offering to commit an offence and the acceptance of a similar proposal or offer, provocation (even if not followed by action), and failure to act within the limits of one's possibility on the part of those

³² Code of Criminal Procedure, Preliminary Title, Art. 12*bis*.

³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Art. 7.

³⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Art. 7.

³⁵ Criminal Code, Art. 136*septies*.

³⁶ Criminal Code, Art. 66.

³⁷ Criminal Code, Art. 67.

³⁸ Interview with a Belgian lawyer, 22 July 2021.

³⁹ Interview with a Belgian lawyer, 22 July 2021.

who would have been able to avoid the commission of the offence.⁴⁰ This article applies to the crimes of genocide, crimes against humanity and war crimes.⁴¹

The rules of punishable attempt⁴² also apply to serious violations of humanitarian law. Article 136*quater* of the Criminal Code, which defines war crimes, penalizes both participation by “action” and by “omission”.⁴³

Article 136*sexies* imposes liability on persons who manufacture articles aiming to commit or to facilitate the commission of genocide, crimes against humanity or war crimes.

Article 136*octies* of the Criminal Code specifies that:

- Political, military or national necessity cannot justify the offences of genocide, crimes against humanity or war crimes, even if these latter are committed as reprisals.

An order by the hierarchical superior does not exempt the subordinate from responsibility if, in the given circumstances, the order could clearly lead to the commission of one of the above-mentioned offences.

2.2 Co-perpetrators

Article 66 of the Criminal Code punishes co-perpetrators as perpetrators. They must have provided indispensable assistance in the commission of the offence. The individuals targeted are:

- those who have carried out or cooperated directly in the execution of the offence;
- those who, by any means, give such assistance to the execution of the offence that, without their assistance, the crime or offence could not have been committed;
- those who, by means of gifts, promises, threats, abuse of authority or power, scheming or criminal deception, directly provoke the crime or offence; and
- those who, either by speeches made at meetings or in public places, or by writings, printed materials, images or emblems of any kind, which have been displayed, distributed or sold, put on sale or exposed to public view,

⁴⁰ Criminal Code, Art. 136*septies*; N. BLAISE, N. COLETTE-BASECQZ, *op. cit.*, p. 666.

⁴¹ Criminal Code, Art. 136*septies*, 1.

⁴² Criminal Code, Arts. 51 *et seq.*

⁴³ T. MOREAU, D. VANDERMEERSCH, *Éléments de droit pénal [Elements of Criminal Law]*, Bruges, La Chartre, 2019, p. 131.

have directly provoked the commission of such a crime, without prejudice to the penalties laid down by law for the perpetrators of provocations to crimes or misdemeanors, even if these provocations have not been followed by action.⁴⁴

2.3 Accomplices

Belgian criminal law provides for the liability of accomplices if they have provided useful assistance in the commission of the offence. Article 67 of the Criminal Code targets those who have given instructions to commit the offence; have procured arms, instruments, or any other means which has served to commit the crime or offence, knowing that they must serve this purpose; or who have knowingly assisted the perpetrator or perpetrators of the crime or offence in the acts, and those who have prepared or facilitated it, or those who have completed it.

Article 69 of the Criminal Code states that an accomplice to a crime shall be punished by the penalty just below the sentence which would have been incurred if s/he had committed the crime, and an accomplice to a misdemeanour shall be punished by a penalty equivalent to not more than two thirds of the penalty which would have been imposed if s/he had committed the misdemeanour.

2.4 Criminal participatoin

Criminal participation deals with the case of an offence committed by multiple perpetrators.⁴⁵ For criminal participation, three conditions must be met in principle, namely an agreement which includes an element of knowledge, an act of participation listed by the law and the existence of a principal crime or offence.⁴⁶

Criminal participation may take the form of positive acts or, more exceptionally, of a qualified omission.⁴⁷ The participant must have knowledge of the nature and aim of the offence, precise and detailed knowledge is not, however, required.

⁴⁴ Criminal Code, Art. 66.

⁴⁵ F. KUTY, *L'auteur de l'infraction pénale* [*The Perpetrator of the Criminal Offence*], in *Principes généraux du droit pénal belge* [*General Principles of Belgian Criminal Law*], Volume III: Brussels, Larcier, 2012, p. 222.

⁴⁶ F. ROGGEN, *La participation criminelle* [*Criminal Participation*], *Droit pénal et procédure pénale* [*Criminal Law and Criminal Procedure*], Malines, Wolters Kluwer, 2017, pp. 12-30.

⁴⁷ F. KUTY, *Section 6. - Les caractéristiques de la participation punissable* [*Section 6. - The Characteristics of Punishable Participation*] in *Principes généraux du droit pénal belge – Tome III* [*General Principles of Belgian Criminal Law - Volume III*], Brussels, Éditions Larcier, 2012, p. 280.

3. Temporal jurisdiction over crimes

3.1 Beginning of temporal jurisdiction

In Belgian law, Articles 12 and 14 of the Constitution respectively address the principle of legality in relation to the crime, the criminal procedure and the penalties. This is followed by the principle of non-retroactivity of criminal law that is found in Article 2 of the Criminal Code.

However, in the Fabien Neretse case⁴⁸ it was ruled that the principle of non-retroactivity would not be violated by the application of crimes against humanity, war crimes and the crime of genocide, since these were crimes in international law deriving from conventions or custom; pre-existing rules which were sufficiently accessible and foreseeable to the defendant since 1994.⁴⁹

3.1.1 Genocide

Belgium signed the International Convention on the Prevention and Punishment of the Crime of Genocide on 12 December 1949 and acceded to it on 5 September 1951. The law of 5 August 2003 introduced the offence of genocide in Article 136*bis* of the Criminal Code.

For acts committed in 1994, prior to the entry into force of the offence of genocide in the Criminal Code, the accused Fabien Neretse⁵⁰ was specifically judged on the basis of Article 2 of the International Convention on the Prevention and Punishment of the Crime of Genocide and under customary international law.

3.1.2 War crimes and crimes against humanity

Belgium ratified the four Geneva Conventions of 1949 on 3 September 1952. The law of 5 August 2003 introduced Article 136*ter* and *quater* into the Criminal Code.

In the preparatory works to the law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law,⁵¹ the legislators had stressed that the law “will in any case be applicable to violations of

⁴⁸ French Speaking Court of First Instance Brussels (constitutional chamber), 20 October 2017, *J.L.M.B.*, 2018, No. 6, p. 259.

⁴⁹ French Speaking Court of First Instance Brussels (constitutional chamber), 20 October 2017, *J.L.M.B.*, 2018, No. 6, p. 259.

⁵⁰ Supreme Court 27 May 2020, No. P20 0146 F, *unpublished*.

⁵¹ Law concerning the punishment of serious violations of international humanitarian law, 10 February 1999 (1999-02-10/40).

international humanitarian law committed before its entry into force (...) the criminalisation of these violations is based on the general principles of criminal law recognised by all civilised nations (by ratifying) the international conventions (...) Genocide and crimes against humanity by definition constitute offences of common law and can, henceforth, always be prosecuted on that basis”.⁵² [unofficial translation]

According to these preparatory works, Belgian courts and tribunals can thus try actions constituting crimes of genocide or crimes against humanity committed prior to the entry into force of the national laws. The principle of non-retroactivity cannot “jeopardize the judgment and the punishment of a person guilty of an action or an omission which, at the moment when it was committed, was criminal according to the general principles of law recognised by civilized nations” [unofficial translation], which include war crimes, genocide and crimes against humanity.⁵³ [unofficial translation]

In the Pinochet case,⁵⁴ the investigating judge considered that “insofar as the offences included in the Law of 16 June 1993 were already punishable under domestic law before the entry into force of the Law, in particular on the basis of the provisions of ordinary criminal law such as those criminalising assassination, murder, assault and battery, kidnapping with torture, hostage taking, etc., the principle of legality of offences, as provided for in Article 2 of the Criminal Code, does not appear to preclude the prosecution of such offences as crimes under international law, with the understanding that the applicable penalties would be those in force at the time of the commission of the offences under ordinary criminal law, subject to the possibly more favorable new penalties (principles of legality of penalties and retroactivity of the more lenient criminal law)”.⁵⁵ [unofficial translation]

3.2 Statute of limitations

In accordance with Article 21*bis* of the Preliminary Title of the Code of Criminal Procedure, the offences of genocide, war crimes and crimes against humanity are

⁵² Parliamentary document, chamber of representatives, session 1998-1999, 1863/2 p. 3.

⁵³ Criminal Court of Brussels (pre-trial chamber) 20 October 2017, *J.L.M.B.*, 2018 pp. 262-263.

⁵⁴ Aguilar Diaz et al. v Pinochet, order of 6 November 1998, Tribunal of First Instance of Brussels.

⁵⁵ Aguilar Diaz et al. v Pinochet, order of 6 November 1998, Tribunal of First Instance of Brussels, p. 6 (Unofficial translation).

not subject to any statute of limitations. This includes torture as a war crime or crime against humanity and enforced disappearance as a crime against humanity. Torture that does not amount to a war crime or crime against humanity is subject to a limitation period of 20 years.⁵⁶

⁵⁶ Code of Criminal Procedure, Preliminary Title, Arts. 21 and 21*bis*.

4. Universal jurisdiction requirements

4.1 Presence/residence of the suspect

Since the legislative reform of 2003, a connection with Belgium must exist in order for the Belgian authorities to be able to open an investigation against suspects of serious crimes of international law committed abroad, irrespective of the basis of the prosecutions.⁵⁷

Belgian courts have jurisdiction to prosecute any person who could be guilty of a serious violation of international humanitarian law (genocide, crimes against humanity and war crimes):⁵⁸

- if the person is Belgian (active personality) or has their residence within Belgian territory,⁵⁹ even if they are not to be found in Belgium,⁶⁰ or
- if the person is a foreigner, but the offence is committed against a person who, **at the time of the commission (and not at the time of initiating the prosecution)**, is a Belgian citizen (passive personality) or a refugee recognized in Belgium and having their habitual residence there or a person who, for at least three years, has been actually, habitually and lawfully staying in Belgium.⁶¹

According to Article 12*bis* of the Preliminary Title of the Code of Criminal Procedure Belgian courts also have jurisdiction to prosecute any person, irrespective of their nationality or the nationality/presence of the victim, and their place of residence where a rule of international law based on a convention or customary law binding Belgium requires it to prosecute the perpetrator of certain offences, even if they are not to be found in Belgium.⁶² Consequently, in the absence of a connecting link with Belgium, Belgian courts will only have jurisdiction if a conventional or customary rule of international law requires Belgium to prosecute the offences concerned. Article 12*bis* of the Preliminary

⁵⁷ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁵⁸ LAW OF 5 AUGUST 2003 CONCERNING THE PUNISHMENT OF SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW.

⁵⁹ Code of Criminal Procedure, Preliminary Title, Art. 6(1)*bis*.

⁶⁰ Code of Criminal Procedure, Preliminary Title, Art. 12.

⁶¹ Code of Criminal Procedure, Preliminary Title, Art. 10.

⁶² Code of Criminal Procedure, Preliminary Title, Art. 12.

Title of the Code of Criminal Procedure has not yet been invoked before the Belgian authorities.⁶³

The requirement of presence depends upon the international convention in question. In practice, the presence of the suspect will be required for the crimes of torture and enforced disappearance, in accordance with international treaty law. This will also be the case for the crimes envisaged by the Geneva Conventions of 1949.⁶⁴ The criminal division of the court interprets this criterion strictly.⁶⁵

According to the Supreme Court, for the accused to be considered a resident in Belgium, it is necessary and sufficient that after the commission of the offence of which they are suspected, the accused has come to Belgium and has been found there, even if they have left the territory prior to the first step of the criminal procedure.⁶⁶ The investigation can then be conducted even if the suspect has left Belgian territory.

Trials may be conducted without the presence of the accused,⁶⁷ as in the case of Ephrem Nkezabera, a Rwandan convicted and given a prison sentence of 30 years for participating in the genocide committed in Rwanda in 1994. Nkezabera lodged an appeal against the judgment but died before being re-tried.⁶⁸

Since the presence is a question of admissibility of the prosecution, this factor must be met at the time the prosecution is initiated, the subsequent presence of the accused on Belgian soil does not “retrospectively permit” the initiation of the prosecution.⁶⁹

⁶³ Interview with an advocate general at the Supreme Court, 30 August 2021.

⁶⁴ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁶⁵ Interview with a Belgian lawyer, 12 August 2021.

⁶⁶ Supreme Court 30 May 2007, P.07.0216.F. See also Brussels (indictments), 9 November 2000, *Rev. dr. pén. Crim. [Review of Criminal Law]*, 2001, p. 761; C. HENNAU and J. VERHAEGEN, *Droit pénal général [General Criminal Law]*, 3rd ed., Brussels, Bruylant, 2003, p. 79; M. FRANCHIMONT, A. JACOBS and A. MASSET, *Manuel de procédure pénale [Manual of Criminal Procedure]*, 4th ed., Brussels, Larcier, 2012, p. 1447.

⁶⁷ Code of Criminal Investigation, Art. 286.

⁶⁸ Justiceinfo, – *Rwanda/Belgique- Decede, l'ancien banquier du genocide ne sera pas rejugé [Rwanda/Belgium- Deceased, the former banker of the genocide will not be re-tried]*, 24 June 2010, available at <https://www.justiceinfo.net/fr/12243-240610-rwandabelgique-decede-lancien-banquier-du-genocide-ne-sera-pas-rejuge9051.html> (last accessed August 2021).

⁶⁹ Supreme Court 30 May 2007, RG P.07.0216.F, *Pas.*, 2007, No. 282, submission of the advocate general D. Vandermeersch.

4.2 Double criminality

The Belgian authorities have jurisdiction to prosecute serious violations of humanitarian law, even if the crimes were not punishable in the country of commission at the time when they were committed.⁷⁰

4.3 Prosecutorial discretion

Articles 10(1)*bis* and 12*bis* section 2 of the Preliminary Title of the Code of Criminal Procedure expressly envisage that prosecutions may only be brought at the request of the federal prosecutor.

The federal prosecutor may invoke the principle of good administration of justice to refer the complaint to another competent court (based on territorial, personal or international jurisdiction).⁷¹ The criminal division of the court exercises judicial control in relation to the power of the prosecutor, according to Article 12*bis*(4) of the Preliminary Title of the Code of Criminal Procedure.

The prosecution of serious violations of international law under Article 6 of the Preliminary Title of the Code of Criminal Procedure, which requires that the alleged perpetrator has their residence in Belgium, is also possible by filing of a civil party complaint directly to the the investigating judge.⁷²

4.4 Political approval

According to Article 151 of the Constitution, in matters of individual investigations and prosecution policy, the public prosecutor's office is independent, without prejudice to the right of the competent minister to order prosecutions and to issue binding criminal policy directives. This right (*droit d'injonction positive*) authorizes the competent minister to order prosecutions.

As the minister's power is a procedural act,⁷³ the document in which the initiation of proceedings is ordered must be attached to the proceedings in order to ensure transparency for the judge and the parties to the proceedings. This right in no way authorizes the minister to interfere in the investigation or to take control of it. The minister's power is limited solely to giving the order and not to the manner in

⁷⁰ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁷¹ Code of Criminal Procedure, Preliminary Title, Art. 12*bis*, 4.

⁷² Code of Criminal Procedure, Preliminary Title, Art. 6; interview with a former investigating judge, 6 August 2021.

⁷³ D. VANDERMEERSCH ET AL., *Droit de la procédure pénale [Law of Criminal Procedure]* (ed. 2017), Bruges, die Keure / la Charte, 2017, p. 657.

which it is executed. No legal provision allows the order of the minister to be reviewed or even be objected to.

An order by the minister to the public prosecutor not to prosecute the perpetration of a particular acts is rigorously forbidden.⁷⁴

4.5 Subsidiarity

For the crimes falling within the competence of Article 12*bis* of the Preliminary Title of the Criminal Code, respecting the principle of subsidiarity is not required, since the Belgian courts do not need to make sure that another court, national or international, has jurisdiction to judge the case before assuming jurisdiction.

Insofar as it pertains to serious violations of international humanitarian law, Articles 8 and 47 to 49 of the Law of 29 March 2004 concerning cooperation with the International Criminal Court and the international criminal courts⁷⁵ provides a possibility for Belgian courts to relinquish jurisdiction. Article 8 provides that the Minister of Justice may as a matter of discretion bring serious violations of international humanitarian law, as defined in the Belgian Criminal Code to the knowledge of the International Criminal Court. The Supreme Court, at the request of the Prosecutor-General, then declares that the Belgian court seized of the same facts is no longer competent.

If the Prosecutor of the International Criminal Court decides not to issue an indictment, or if the International Criminal Court does not confirm the indictment, declares itself incompetent or declares the case inadmissible, the Belgian courts will again have jurisdiction.⁷⁶

This principle has not yet been applied before the Belgian courts.⁷⁷

⁷⁴ I. DE LA SERNA, *Quel ministère public pour le futur?* [*Which public prosecutor for the future?*], *J.T.*, 2019/39, No. 6709, pp. 761-766.

⁷⁵ Law of 29 March 2004 concerning cooperation with the International Criminal Court and the international criminal courts, 1 April 2004 (2016-11-30/05).

⁷⁶ Law of 29 March 2004 concerning cooperation with the International Criminal Court and international criminal courts, 1 April 2004 (2016-11-30/05), Art. 8.

⁷⁷ Interview with an advocate general of the Supreme Court, 30 August 2021.

5. Key steps in criminal proceedings

5.1 Investigation stage

5.1.1 Competent authorities

The federal prosecution service is the competent prosecution authority. As of September 2021, four magistrates are in charge of cases of serious violations of international humanitarian law.⁷⁸

There are no specialized units as such in Belgium. Investigations concerning serious violations of international humanitarian law are conducted by Section 7 of the federal judicial police of Brussels. The team of investigators is theoretically constituted by a French-speaking and Dutch-speaking investigator.⁷⁹

5.1.2 Opening of the investigation

Article 1 of the Preliminary Title of the Code of Criminal Procedure and Article 138 of the Judicial Code entrust the exercise of the prosecutorial powers to the public prosecutor. An investigation may be opened in the following conditions:⁸⁰

- after receipt of an international arrest warrant (see section E.I.e);
- where the exclusionary clause Article 1F of the Geneva Convention of 1951 relating to the status of refugees has been invoked by the immigration services (where there exist reasons to believe that the asylum seeker would have committed an international crime);
- after the lodging of a complaint with the federal prosecution service; or
- an investigation may be opened by the prosecutors at their own initiative (*proprio motu*).

THE COMPLAINT

Article 5*bis* of the Preliminary Title of the Code of Criminal Procedure provides that the complaint must be lodged in person or by a lawyer, and must indicate the contact details of the victim, the facts at the basis of the complaint as well as the harm resulting from it and finally the personal interest resulting from it.

⁷⁸ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁷⁹ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁸⁰ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

This provision is applicable to a complaint before the federal prosecution service and it is advised to attach the declaration form of the injured person to the complaint in order to be kept informed of the subsequent procedure.⁸¹

The complaint as such does not need to take a particular form. If the victim lives abroad, they must agree to be served notice in Belgium, at the office of their counsel in Belgium for example.⁸²

Complaints concerning serious violation of international humanitarian law must be lodged with the federal prosecutor.⁸³ Articles 10(1)*bis* and 12*bis* of the Preliminary Title of the Code of Criminal Procedure in fact envisage that prosecutions can only be initiated at the request of the federal prosecutor who assesses all complaints.⁸⁴ In the event that the alleged perpetrator of the facts has Belgian nationality, or has their principal residence in Belgian territory, a complaint with the investigating judge can be lodged together with a civil party claim.⁸⁵

THE DECISION OF THE PROSECUTOR

The federal prosecutor then requests the investigating judge to investigate the complaint, unless

- (1) the complaint is manifestly unfounded;
- (2) the facts arising in the complaint do not correspond to a qualification of offences covered by book II, title *Ibis*, of the Criminal Code (i.e. serious violation of international humanitarian law) or to any other international offence that is criminalized by a treaty binding on Belgium;
- (3) an admissible prosecution cannot result from this complaint; or
- (4) from the specific circumstances of the case, it emerges that, in the interest of the proper administration of justice and respecting Belgium's international obligations, the case should be brought before another court.⁸⁶

⁸¹ Interview with a Belgian lawyer, 22 July 2021.

⁸² Criminal Code of Investigation, Art. 68.

⁸³ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁸⁴ Code of Criminal Procedure, Preliminary Title, Art. 12*bis*.

⁸⁵ Code of Criminal Procedure, Preliminary Title, Art. 6.

⁸⁶ Code of Criminal Procedure, Preliminary Title, Art. 12*bis* indent 2.

If these four criteria can be ruled out, the prosecutor shall *ex officio* refer the case to the investigating judge.⁸⁷ The investigating judge must investigate both inculpatory and exculpatory facts.⁸⁸ They investigate the case *in rem*, i.e., limited to the facts that are referred to them. The investigating judge may request an extension of the initial referral from the public prosecutor if evidence of offences that are not set out in the initial referral is discovered.⁸⁹ The public prosecutor may make further submissions. The accused and any civil parties may ask the investigating judge to undertake additional acts of investigation.⁹⁰

On the other hand, if he considers that points 1, 2 or 3 above are applicable, the federal prosecutor may refer the case to the criminal division of the court of appeal of Brussels seeking a declaration depending on the case, that there are no grounds to prosecute or that the prosecution is not admissible.⁹¹ Only the federal prosecutor shall be heard.

The federal prosecutor may lodge an appeal against decisions from the criminal chamber permitting the opening of the investigation and the appointment of an investigating judge. This appeal shall be lodged within fifteen days of the delivery of the judgment.⁹² When the criminal chamber finds, against the advice of the public prosecutor, that the complaint is admissible and may be prosecuted, it designates the competent investigating judge and indicates the facts to be investigated. It is then processed in accordance with the general rules.⁹³

If the federal prosecutor considers that it is clear from the concrete circumstances of the case, in the interests of the proper administration of justice and in compliance with Belgium's international obligations, that the case should be brought before another court,⁹⁴ he or she may close the case without having to make an application to the criminal chamber. This decision to discontinue proceedings is not subject to any appeal.⁹⁵

⁸⁷ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁸⁸ Code of Criminal Investigation, Art. 56.

⁸⁹ Code of Criminal Investigation, Art. 56, para. 1 and Art. 29.

⁹⁰ Code of Criminal Investigation, Art. 127, para. 3.

⁹¹ Code of Criminal Procedure, Preliminary Title, Art. 12*bis* section 3.

⁹² Code of Criminal Procedure, Preliminary Title, Art. 12*bis* section 6.

⁹³ Code of Criminal Procedure, Preliminary Title, Art. 12*bis* section 5.

⁹⁴ Code of Criminal Procedure, Preliminary Title, Article 12*bis* section 3 and 4.

⁹⁵ Code of Criminal Procedure, Preliminary Title, Article 12*bis* section 8.

Where the facts have been committed after 30 June 2002 and fall within the substantive jurisdiction of the International Criminal Court, the Minister of Justice informs the International Criminal Court of the facts.⁹⁶

No structural investigation can be opened in Belgium because of the obligation to investigate *in rem*.⁹⁷ Structural investigations are understood as a situation where the suspects have not initially been identified. Such investigations have been opened in France and Germany concerning Syria, after the release of a report documenting abuses committed in detention by the regime.⁹⁸

TIME LIMITS FOR PROSECUTIONS

Since genocide, crimes against humanity and war crimes are not subject to any statute of limitations, they can generally be prosecuted at any time. However, the principle of fair trial under Article 6 of the European Convention on Human Rights may limit the duration of an ongoing investigation. Therefore, subject to the complexity of the case in question, any investigation must be completed within a reasonable time.

The Code of Criminal Investigation has established a twofold test to avoid exceeding the reasonable time limit of investigations:

- If the investigation is not completed after one year, the suspect or civil party may appeal to the criminal division by filing a petition with the registry of the court of appeal.⁹⁹
- The crown prosecutor sends a report to the Prosecutor-General containing all cases where the pre-trial chamber has not ruled within a year from the first indictment.¹⁰⁰

⁹⁶ Code of Criminal Procedure, Preliminary Title, Article 12*bis* section 7.

⁹⁷ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

⁹⁸ See OSJI and TRIAL International Briefing Papers, Universal Jurisdiction Law and Practice in France and in Germany, available at <https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf> and <https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf> (last accessed October 2021).

⁹⁹ Code of Criminal Investigation, Art. 136 section 2.

¹⁰⁰ Code of Criminal Investigation, Art. 136*bis* section 1.

COMPLETION OF INVESTIGATIONS

POSSIBLE OUTCOMES

Where the investigating judge considers that his or her investigation is at an end, he or she communicates the file to the crown prosecutor. If the crown prosecutor does not require the completion of other acts, he or she makes submissions in order for the procedure to be settled by the pre-trial chamber.¹⁰¹ The pre-trial chamber sets a date for a hearing, which is communicated to the suspect, to the civil party (for more information, see Chapter E, I, 6 and E II 3 on the right of the victims), and to the injured person and their counsel. The file is made available to them at the registry.¹⁰²

The pre-trial chamber decides the fate of the criminal case file, it is thus not bound to follow the submissions of the public prosecutor. It rules after having heard the report of the investigating judge, the summing up of the crown prosecutor, and where applicable, the pleadings of the civil party and the suspect.¹⁰³

The pre-trial chamber may stay the proceedings if it considers that the investigation is incomplete. Since it cannot order investigative duties, it forwards the file to the public prosecutor, who may or may not, send the investigating judge additional requests.¹⁰⁴

If the pre-trial chamber considers that the charges are insufficient, the act is not punishable or if the perpetrator has not been identified or is not the intended suspect, it issues an order to dismiss the case.¹⁰⁵

Finally, if the pre-trial chamber considers that the alleged offences fall within the jurisdiction of the trial court and that the case against the accused is sufficiently well-founded, it issues committal order.¹⁰⁶ In this case, the pre-trial chamber orders the prosecutor to forward the document to the Prosecutor-Generaal or the

¹⁰¹ Code of Criminal Investigation, Art. 127, para. 1.

¹⁰² Code of Criminal Investigation, Art. 127, para. 2.

¹⁰³ Code of Criminal Investigation, Art. 127, para. 4.

¹⁰⁴ Code of Criminal Investigation, Art. 127, para. 3.

¹⁰⁵ Code of Criminal Investigation, Art. 128.

¹⁰⁶ Code of Criminal Investigation, Art. 133.

federal prosecutor so that the criminal chamber can refer the case to the criminal trial court.¹⁰⁷

POSSIBILITY OF APPEAL FOR VICTIMS

The Law of 5 August 2003 provides that it is the federal prosecutor who initiates investigations and makes a request to the investigating judge except when encountering one of the four situations mentioned in Articles 10(1*bis*) and 12*bis* of the Preliminary Title. In accordance with the Law of 5 August 2003, this decision of the federal prosecutor is not subject to an appeal.

After a judgment of the Constitutional Court of 23 March 2005,¹⁰⁸ the Law of 22 May 2006¹⁰⁹ introduced the possibility of an appeal in the event that the federal prosecutor refuses to refer to an investigating judge, in case of the first three points of Article 10(1*bis*) and Section 3 of Article 12*bis* of the Preliminary Title of the Code of Criminal Procedure. The fourth point (referral to a different court in certain circumstances for the proper administration of justice) is not subject to appeal.

Article 135 of the Code of Criminal Investigation provides that the public prosecutor and any civil party may appeal all orders of the pre-trial chamber. For the suspect, the possibility to appeal is limited as it is only possible if an irregularity is apparent in the order or if the arguments in support of the appeal have been communicated by means of written submissions during the proceedings before the pre-trial chamber.¹¹⁰

The time limit for an appeal is 15 days starting from the ruling or 24 hours if one of the suspects is detained (starting from the notification of the ruling).¹¹¹ This time limit applies to any civil party as well as the public prosecutor. In the absence of pre-trial detention, the starting point for the time limit is the day when the ruling is pronounced. It is the same for all parties, whether they are the public

¹⁰⁷ Code of Criminal Investigation, Art. 133.

¹⁰⁸ Court of Arbitration, judgment of 23 March 2005 (62/2005).

¹⁰⁹ Law amending certain provisions of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure, as well as provision of the Law of 5 August 2003 concerning serious violations of international humanitarian law, 8 April 2005, (2006-05-22/37).

¹¹⁰ Code of Criminal Investigation, Art. 135, para. 2.

¹¹¹ Code of Criminal Investigation, Art. 135, para. 4.

prosecutor, a civil party, or an accused. The criminal division rules on the appeal. The Prosecutor-General, the other parties and their counsel are heard.¹¹²

ARREST WARRANT

The arrest warrant is governed by the Law of 20 July 1990 concerning pre-trial detention.¹¹³ The magistrate with the power to issue an arrest warrant is the investigating judge.

In order for a person to be placed under an arrest warrant, Article 16 of the Law of 20 July 1990 imposes certain formal and substantive requirements:

- Substantive requirements: significant indicators of culpability,¹¹⁴ a minimum penalty incurred of one year of prison¹¹⁵ and an absolute necessity for public security.¹¹⁶ Where the maximum penalty does not exceed 15 years of imprisonment, the criterion of absolute necessity must be combined with one of the following risks: re-offending, flight, disappearance of evidence or collusion with third parties.¹¹⁷
- Formal requirements: it is necessary that a prior interrogation of the accused took place (except if the accused is a fugitive),¹¹⁸ a precise reasoning for the warrant,¹¹⁹ the signature of the investigating judge¹²⁰ and the service of the arrest warrant within 48 hours of the actual deprivation of liberty¹²¹ or of the service of the warrant of arrest.¹²²

The judge thus has a great deal of leeway. Articles 17 and 19 of the Law of 20 July 1990 provide that the decisions of the investigating judge, in terms of the arrest warrant, are not subject to appeal. Nonetheless, the arrest warrant can never be issued with the aim of exercising an immediate punishment or any other form

¹¹² Code of Criminal Investigation, Art. 135, para. 3.

¹¹³ Law of 20 July 1990 concerning preventive detention.

¹¹⁴ Law of 20 July 1990 concerning preventive detention, Art. 16, para. 5.

¹¹⁵ Law of 20 July 1990 concerning preventive detention, Art. 16, para. 1.

¹¹⁶ Law of 20 July 1990 concerning preventive detention, Art. 16, para. 1.

¹¹⁷ Law of 20 July 1990 concerning preventive detention, Art. 16, para. 1.

¹¹⁸ Law of 20 July 1990 concerning preventive detention, Art. 16, para. 2.

¹¹⁹ Law of 20 July 1990 concerning preventive detention, Art. 16, para. 5.

¹²⁰ Law of 20 July 1990 concerning preventive detention, Art. 16, para. 6.

¹²¹ Constitution, Art. 12, para. 3.

¹²² Law of 20 July 1990 concerning preventive detention, Art. 18.

of constraint.¹²³ The investigating courts nonetheless monitor the arrest warrants issued and the enforcement of the pre-trial detention.

By way of example, in the Fabien Neretse case,¹²⁴ an international arrest warrant was issued on 6 August 2007 charging Neretse with genocide, assassination, extermination and creation and direction of a criminal association whose object was to cause harm to persons and their properties. On 23 June 2011, the investigating judge sent an international rogatory letter to the French authorities to search the accused's home and seize any relevant documents or objects. The same day, a European arrest warrant and an international arrest warrant by default were drawn up by the Belgian investigating judge. The accused was arrested on 29 June 2011 at his home and the European arrest warrant was served to him the same day. On 30 August 2011, Neretse was handed over to Belgian authorities and placed under an arrest warrant on the same day by the investigating judge after having been charged with genocide and war crimes.¹²⁵

VICTIM RIGHTS AND PARTICIPATION AT INVESTIGATION STAGE

INJURED PERSON

According to the first and second sections of Article 5*bis* of the Preliminary Title of the Code of Criminal Procedure, a person who claims to have suffered harm as a result of an offence may acquire the status of an injured party by means of a statement which is made in person or by a lawyer to the public prosecutor. The status of injured person allows the victim to obtain certain rights throughout the criminal proceedings, namely:

- the right to be assisted or represented by a lawyer;
- the right to add any document that they consider useful to the case file;
- the right to be informed of a decision to discontinue proceedings and the reason for this, a decision to put the matter to trial, the determinations by the investigating court and the judgment;¹²⁶ and
- the right to seek to consult the case file and to obtain a copy of it.¹²⁷

¹²³ Law of 20 July 1990 concerning preventive detention, Art. 16 § 1, indent 3.

¹²⁴ Brussels criminal trial court, 9 October 2019, FD. 30.98.101/02 F.

¹²⁵ Interview with a Belgian lawyer, 22 July 2021

¹²⁶ Code of Criminal Procedure, Preliminary Title, Art. 5*bis*, § 3, indent 3.

¹²⁷ Code of Criminal Procedure, Preliminary Title, Art. 5*bis*, § 3, indent 4; Code of Criminal Investigation, Arts. 21*bis*, 61*ter* and 127, para. 2.

CIVIL PARTY

If the victim of an offence wishes to claim compensation for the harm suffered before the criminal court, they must file a civil action. They can do so either in advance, by filing a civil action before the investigating judge,¹²⁸ or before the trial court to which the case will be referred.¹²⁹ During the investigation, civil parties have the same rights as injured persons and additionally possess:¹³⁰

- the right to request an additional act of investigation;¹³¹
- the right to participate, at the closure of the investigation, at the hearing of the investigating court (the pre-trial chamber) during which a decision is taken concerning the direction of the case;¹³²
- the right to participate in any reconstruction of facts;¹³³ and
- the right to be heard by the investigating judge, upon simple request, at least once during the course of the proceedings.¹³⁴

An NGO may become a civil party if it proves that it has personally suffered harm.¹³⁵ In the cases concerning the genocide in Rwanda, only natural persons filed civil actions as civil parties, except for the third Rwandan trial, the Bernard Ntuyahaga case, where the Belgian State and the Rwandan State acted as civil parties.¹³⁶

The civil action of a legal entity aiming to protect human rights or fundamental freedoms recognized in the Constitution and in international instruments which bind Belgium is also admissible on the following conditions:

¹²⁸ Criminal Code of Investigation, Art. 63.

¹²⁹ Criminal Code of Investigation, Art. 67; Code of Criminal Procedure, Preliminary Title, Arts. 4, paras. 3 and 4.

¹³⁰ M-A. BEERNAERT N., COLETTE BASECQZ, C. GUILLAIN ET AL. , *Introduction à la procédure pénale [Introduction to the Criminal Procedure]*, Brussels, la Chartre, 2019, p. 88.

¹³¹ Code of Criminal Investigation, Arts. 61*quinquies* and 127 para. 3.

¹³² Code of Criminal Investigation, Art. 127, § 2.

¹³³ Code of Criminal Investigation, Art. 62.

¹³⁴ Code of Criminal Investigation, Art. 63, section 2.

¹³⁵ Judicial Code, Art. 17.

¹³⁶ Interview with an advocate general at the Supreme Court, 30 August 2021; see also <https://www.legal-tools.org/doc/039abc/pdf/> (last accessed August 2021).

- the corporate purpose of the legal entity is of a particular nature, distinct from the pursuit of the general interest;
- the legal entity pursues this corporate objective in a long-term and effective manner;
- the legal entity pursues the civil action in the framework of this corporate objective, with a view to ensuring the defense of an interest in relation to that object; and
- only a collective interest is pursued by the legal entity by means of its action.¹³⁷

The Belgian courts had the occasion to interpret the provision on the admissibility of legal entities as civil parties in the context of civil proceedings brought by the civil party Association française des victimes de terrorisme [French Association for the Victims of Terrorism]. The Supreme Court considered that assistance to victims could not in itself be classified as one of the fundamental rights covered in the Belgian Constitution or the international conventions which bind Belgium.¹³⁸ The court concluded that this association therefore could not bring civil proceedings as a civil party.

The courts are strict when assessing these criteria and generally do not grant applications of legal entities brought on account of the harm caused either to the generality of their members or to the objectives that they pursue.¹³⁹

Certain laws expressly grant certain groups an interest to bring a civil action for the purposes and under the conditions which are specified in each of these laws:

¹³⁷ Judicial Code, Art. 17 section 2.

¹³⁸ Criminal trial court Brussels-Capital, 22 October 2019, *J.L.M.B.*, 2020, p. 748.

¹³⁹ Numerous decisions are available regarding this question. See notably Supreme Court 9 December 1957, *R.C.J.B.*, 1958, p. 255, note J. Dabin; Antwerp, 14 January 1981, *Pas.*, 1981, II, p. 29; Supreme Court 9 November 1983, *Rev. dr. pén. crim. [Review of Criminal Law]*, 1984, p. 330; Supreme Court 24 November 1982, *Rev. dr. pén. crim. [Review of Criminal Law]*, 1983, p. 390, submissions of the advocate general J. Velu; J. Van Compernelle, *Le droit d'action en justice des groupements [The Right of Groups to take Court Action]*, Brussels, Larcier, 1972, p. 240; M. van de Kerchove, *L'intérêt à la répression et l'intérêt à la réparation [The Interest in Punishment and the Interest in Compensation]*, *Droit et intérêt [Law and Interest]*, Brussels, Publication of the Facultés Saint-Louis [Saint-Louis Faculties], vol. 3, 1990, pp. 4-27; Criminal Court of Dinant, 6 June 1990, *Rev. dr. pén. crim. [Review of Criminal Law]*, 1990, p. 1023; Supreme Court 19 September 1996, *R.C.J.B.*, 1997, p. 105, note O. De Schutter.

- Law of 30 July 1981 seeking to punish certain acts inspired by racism or xenophobia (Articles 31-32);
- Law of 23 March 1995 seeking to punish the denial, downplaying, justification or approval of the genocide committed by the national-socialist regime (Article 4);
- Law of 13 April 1995 containing provisions with a view to the punishment of human trafficking and smuggling (Article 1);
- Law of 10 May 2007 seeking to combat certain forms of discrimination (Articles 29 and 30); and
- Law of 10 May 2007 seeking to combat discrimination between women and men (Articles 34 and 35).

However, the question is not settled as to whether an NGO which defends victims of crimes against humanity could raise civil court proceedings as a civil party by invoking racist crimes or discrimination.¹⁴⁰ At the time of publication of this report, no NGO has been admitted as a civil party in a case of serious violations of international humanitarian law.

An NGO can report international crimes to the federal prosecution service. Without being a party to the proceedings, it can thus forward in an informal manner information and elements of evidence which, as the case may be, can contribute to the opening of an investigation.¹⁴¹ It can also share evidence with a physical victim who is a civil party.¹⁴²

5.2 Trial Stage

The international crimes (genocide, crime against humanity and war crimes) are adjudicated by the criminal trial court¹⁴³ which is a criminal court composed of a popular jury and three professional magistrates. It is directed by a magistrate of the court of appeal assisted by two judges of the court of first instance and by a jury which is composed of twelve citizens designated by the drawing of lots. The procedure before the criminal trial court is governed by Title II of the Code of Criminal Investigation.

¹⁴⁰ Interview with a Belgian lawyer, 12 August 2021.

¹⁴¹ Interview with a Belgian lawyer, 12 August 2021.

¹⁴² Interview with a federal magistrate, federal prosecution service, 9 September 2021.

¹⁴³ Code of Criminal Investigation, Art. 216*novies*.

5.2.1 Possible results

Before the criminal trial court, according to Articles 322 to 327 of the Code of Criminal Investigation, at the end of the hearings, the president poses questions to the jurors regarding culpability, attenuating circumstances and the defenses. Where the accused has been declared not guilty, the president pronounces their acquittal and orders their immediate release, if they are not detained for another cause.

Where the accused has been declared guilty, the court withdraws, together with the jurors, to the deliberations chamber. The committee thus constituted, chaired by the president of the court, deliberates the sentence to be pronounced in accordance with the criminal law and its justification.¹⁴⁴

In the event of a conviction of the accused, the Court also makes a ruling regarding the civil action¹⁴⁵ (see below on Reparation).

5.2.2 Challenge by victims or NGOs

The decisions made by the criminal trial court are not subject to appeal. It is a court which rules at first and last instance.¹⁴⁶ Only an appeal to the Supreme Court can be possible, but in relation to legal questions or procedural questions and not in relation to the substance of the case. The parties have fifteen days to file a notice of appeal¹⁴⁷ and are subject to various deadlines and form to submit a brief. Each of the parties can only appeal to the Supreme Court about the provisions which concern them (for example, the civil party can only appeal to the Supreme Court in relation to the provisions concerning the civil action).¹⁴⁸

NGOs cannot lodge an appeal to the Supreme Court if they have not been acknowledged as parties to the procedure.

5.2.3 Victim rights and participation at trial stage

Civil parties can make submissions in relation to the chronology of the facts, their legal qualification and the involvement of the accused and thus participate in the establishment of culpability. At the preliminary hearing of the criminal trial court, Article 278 of the Code of Criminal Investigation allows the parties to file a list of

¹⁴⁴ Code of Criminal Investigation, Arts. 341 to 345.

¹⁴⁵ Code of Criminal Investigation, Art. 347.

¹⁴⁶ M-A. BEERNAERT N., COLETTE BASECQZ, C. GUILLAIN ET AL., *Introduction à la procédure pénale [Introduction to Criminal Procedure]*, Brussels, la Charte, 2019, pp. 363-364.

¹⁴⁷ Code of Criminal Investigation, Art. 359.

¹⁴⁸ Code of Criminal Investigation, Art. 359, para. 3.

additional witnesses they wish to hear, a right which is also reserved for civil parties. At the main hearing, the civil parties may be heard, attend the debates and be represented by a lawyer.

In Belgium, there is no direct cross-examination of witnesses: all questions must be posed through the president of the criminal trial court.¹⁴⁹

Article 347 of the Code of Criminal Investigation also provides the right to claim compensation for the harm suffered (see below on [Reparation](#)).

5.2.4 Intervention of third parties

Belgian law does not provide for the intervention of third parties in the trial.

5.3 Private prosecutions

Private prosecutions do not exist in Belgium on account of the nature of the facts: crimes. Victims of a crime therefore cannot issue a direct summons.¹⁵⁰

6. Rules of evidence

6.1 At investigation stage

6.1.1 Necessary information for a complaint

In Belgian law, any evidence is allowed and an investigation can be opened on a simple body of evidence on guilt, such as press articles or reports by NGOs.¹⁵¹

6.1.2 Necessary evidence to open an investigation

The public prosecutor may prosecute offences *ex officio* and thus does not necessarily need to await a complaint by the victim to commence the prosecution. A decision by the federal prosecutor to prosecute will only be taken in accordance with Article 28*bis*, section 3 of the Code of Criminal Investigation, after an examination of the legality and trustworthiness of the means of evidence.¹⁵²

The examination of legality entails an assessment of the *prima facie* merits of the prosecution, that is to say the elements constituting the offence, the evidence, the culpability of the suspect, the identification of the suspect and the absence of

¹⁴⁹ Code of Criminal Investigation, Art. 301.

¹⁵⁰ Interview with a Belgian lawyer, 22 July 2021.

¹⁵¹ Interview with a federal magistrate, federal prosecution service, 9 September 2021.

¹⁵² M-A. BEERNAERT N., COLETTE BASECQZ, C. GUILLAIN ET AL., *Introduction à la procédure pénale [Introduction to the Criminal Procedure]*, Brussels, la Charte, 2019, p. 50.

defenses, as well as the admissibility of the prosecution, i.e. the competence of the public prosecutor, the obstacles to prosecution or the reasons for dismissing prosecution.¹⁵³ It therefore falls to the federal prosecutor to judge the chances of a prosecution by virtue of Article 28*quater*, paragraph 1 of the Code of Criminal Investigation.

6.1.3 Necessary evidence for an indictment

The bill of indictment must set out the nature of the offence forming the basis of the accusation and the facts and all the circumstances capable of aggravating or mitigating the sentence. The accused must be named and clearly identified.¹⁵⁴

The bill of indictment as such makes reference to the pieces of evidence in the criminal court record, namely: testimonies (on context, on facts or even of victims), interrogations of the accused, medical-legal reports, medical evaluations, psychiatric or psychological evaluations, or historic documents, etc.

6.1.4 Admissibility of evidence

GENERAL RULES OF ADMISSIBILITY

Insofar as concerns the general rules of admissibility of the, Belgian law enshrines the principle of freedom of evidence. Therefore, any evidence is admissible as long as it is accepted through logic and experience that it can lead the judge to a conviction.¹⁵⁵ This principle is not absolute, however, because the criminal trial court can only base its conviction on elements which have been subjected to adversarial debate.

UNLAWFULLY OBTAINED MATERIALS

The Code of Criminal Investigation obliges the prosecutor, the investigating judge and the investigating courts to ensure the legality of the means of evidence.¹⁵⁶ The Supreme Court considered in its judgment of 14 October 2003 in the so-called *Antigone* case that if a piece of evidence has been obtained in an irregular manner the judge is forbidden from taking account of it if:

¹⁵³ M-A. BEERNAERT N., COLETTE BASECQZ, C. GUILLAIN ET AL., *Introduction à la procédure pénale [Introduction to the Criminal Procedure]*, Brussels, la Charte, 2019, p. 50.

¹⁵⁴ Criminal Code of Investigation, Art. 261.

¹⁵⁵ M-A. BEERNAERT N., COLETTE BASECQZ, C. GUILLAIN ET AL., *Introduction à la procédure pénale [Introduction to the Criminal Procedure]*, Brussels, la Charte, 2019, p. 37.

¹⁵⁶ Code of Criminal Investigation, Arts. 28bis, § 3, section 2 and 56, § 1, section 2.

- respecting predetermined requirements of form is mandatory with the consequence of annulment of the evidence;
- the irregularity committed has tainted the reliability of the evidence; or
- the use of the evidence is incompatible with the right to a fair trial.¹⁵⁷

This principle is enshrined in Article 32 of the Preliminary Title of the Code of Criminal Procedure.

This rule applies to all irregularities, whether they contravene a right guaranteed by a rule of domestic law or by an international treaty having a direct effect in Belgian law, notably the prohibition on using evidence obtained under torture.¹⁵⁸

OPEN SOURCE EVIDENCE

By virtue of the principle of freedom of evidence, nothing impedes open source evidence from being used as evidence.¹⁵⁹ However, this public information, in the event of being contested by the accused, must undergo the *Antigone* test. Even if obtaining and/or producing this evidence was illegal, there would be no reason to exclude it from the proceedings on this ground, provided that no mandatory requirements of form has been violated, the irregularity does not infringe the right to a fair trial and the reliability of the evidence is not affected by the alleged irregularity.¹⁶⁰

6.2 At trial stage

6.2.1 General rules of admissibility

The burden of proof rests on the public prosecutor who must demonstrate that the person charged is guilty beyond any reasonable doubt.¹⁶¹ Article 327 of the Code of Criminal Investigation concerning the deliberation in the criminal trial court expressly provides that a guilty verdict can only be pronounced if it emerges from

¹⁵⁷ Supreme Court 14 Oct. 2003, *Rechtspr. A.B.G.*, 2004, 6, pp. 333-334.

¹⁵⁸ Supreme Court 5 June 2019, P.19.0356.F.

¹⁵⁹ Liège, 8th division, 16 February 2016, note under: A. MICHEL *L'utilisation des contenus postés sur les réseaux sociaux comme éléments de preuve d'un dommage* [The use of content posted on social networks as elements of evidence of a harm], in *Rev. dr. Tech.* [Technical Law Review] No. 65/2016, pp. 94-95.

¹⁶⁰ Liège, 8th division, 16 February 2016.

¹⁶¹ H.-D. BOSLY and D. VANDERMEERSCH, *Droit de la procédure pénale* [Law of criminal procedure], Bruges, Die Keure, 2003, 549., p. 1101; See, e.g., Pol. Brussels, 7 January 2014, *J.J.Pol.*, 2014, book 3, p. 155.

the admitted pieces of evidence that the accused is guilty beyond any reasonable doubt of the facts charged he or she is charged with.

By virtue of Article 32 of the Preliminary Title of the Code of Criminal Procedure, any means of proof is allowed provided that it is rational and has been subject to adversarial debate by the parties. The Supreme Court has also affirmed that in criminal matters, where the law does not establish a special method of proof, the trial judge assesses the probative value of the evidence on which he or she bases his or her conviction.¹⁶² Therefore, confessions, testimonies, evidence collected in the context of the preliminary phase of the criminal trial and expert opinions, etc., can be used. Furthermore, no hierarchy exists between the different means of evidence.¹⁶³

However, there are exceptions to the principle of free assessment of evidence. In certain cases, the law determines the probative value of certain modes of proof. This is the case for minutes,¹⁶⁴ completely anonymous testimony,¹⁶⁵ statements made through a telephone conference,¹⁶⁶ statements made through a video conference or closed-circuit television with image and voice alteration,¹⁶⁷ statements made by a repentant person,¹⁶⁸ evidence obtained by virtue of the application of a civil infiltration¹⁶⁹ and the possibility of drawing adverse consequences from the silence of the accused.

Victims who are civil parties cannot testify under oath,¹⁷⁰ but they can of course testify as a party to the trial at the hearing. The same applies for witnesses having family links with the accused.¹⁷¹

¹⁶² C. DE VALKENEER, *Chapitre 2 - Les principes généraux du droit de la preuve en matière pénale* [Chapter 2 - The General Principles of the Law of Evidence in Criminal Matters] in *Manuel de l'enquête pénale* [Manual of the Criminal Investigation], Brussels, Éditions Larcier, 2018, p. 71 et seq.

¹⁶³ M-A. BEERNAERT N., COLETTE BASECQZ, C. GUILLAIN ET AL., *Introduction à la procédure pénale* [Introduction to the Criminal Procedure], Brussels, la Charte, 2019.

¹⁶⁴ Code of Criminal Investigation, Art. 154.

¹⁶⁵ Code of Criminal Investigation, Art. 189bis section 3.

¹⁶⁶ Code of Criminal Investigation, Arts. 112bis § 6, 158ter § 5 and 229 § 4.

¹⁶⁷ Code of Criminal Investigation, Arts. 158bis and 298.

¹⁶⁸ Code of Criminal Investigation, Art. 216/4, § 2, para. 1.

¹⁶⁹ Code of Criminal Investigation, Art. 47novies/3, § 3.

¹⁷⁰ Code of Criminal Investigation, Art. 305.

¹⁷¹ Code of Criminal Investigation, Art. 303.

The rules concerning the means of evidence obtained illegally as well as the open source evidence set out in the context of the investigation also apply before the trial judge.

6.2.2 Introduction of new evidence

In a manner that conforms with to the principle of respecting the rights of the defense, any piece of evidence taken into account by the judge must be subject to adversarial debate. Due to the presumption of innocence, it is the prosecutor and civil party who have the burden of proof under the control of the judge.¹⁷²

An NGO, where it is not a party to the proceedings, may not furnish pieces of evidence. Nonetheless, it may transmit the relevant evidence to the public prosecutor, or even to the victim. The NGO may also be called by one of the parties if hearing the NGO would appear useful for establishing the truth.¹⁷³

7. Witness and victim protection

7.1 Judicial protection

The presidents of the criminal courts and of the criminal trial court may, at the request of the public prosecutor, decide to hear a witness who has been threatened or who is located abroad by means of a videoconference or by means of closed-circuit television. A criminal investigations police officer or an official of the foreign court authority will be with the person to be heard and will verify the identity of the witness. In these cases, the hearing is recorded by audio-visual means.¹⁷⁴ The court may, furthermore, authorize the distortion of the image and the voice of the witness,¹⁷⁵ or hear these persons, if they agree, by teleconference.

7.2 Witness protection

The Law of 7 July 2002 containing rules concerning the protection of threatened witnesses¹⁷⁶ introduced chapter *VIIter* into the 1st Book of the Code of Criminal Investigation.

¹⁷² Code of Criminal Investigation.

¹⁷³ Code of Criminal Investigation, Art. 306.

¹⁷⁴ Code of Criminal Investigation, Art. 158*bis* §1.

¹⁷⁵ Code of Criminal Investigation, Art. 158*bis* §6.

¹⁷⁶ Law of 7 July 2002 containing the rules concerning the protection of threatened witnesses, 10 August 2002 (2002-07-07/4).

The Law covers any person giving testimony, whatever their capacity (witness or victim) or their function (individual or police official).

The protective measures can be extended to the relatives of the witness.¹⁷⁷ In particular circumstances, protective measures can be extended to persons other than those mentioned in Article 105 of the Code of Criminal Investigation to the extent that these individuals are in real danger.¹⁷⁸

The Witness Protection Commission is competent in matters of granting, modifying or withdrawing protective measures and measures of financial aid.¹⁷⁹ It can grant ordinary measures, which are listed exhaustively (such as close and immediate physical protection of the person concerned, electronic protection of the person concerned or relocation of the person concerned for a maximum of 45 days), special measures (relocation of the person concerned for a period of more than 45 days, change of identity of the person concerned or the granting of a temporary protective identity and of the documents strictly necessary to support this identity), and also psychological and financial assistance.¹⁸⁰

The Minister of Justice may authorize the change of first names, surnames and the date and place of birth of the person concerned.¹⁸¹ This procedure is only applied with regard to persons who have Belgian nationality.¹⁸²

The right to introduce an application for protection sits with either the investigating judge or the public prosecutor, but not with the witness.¹⁸³ This application is made by means of a duly reasoned request, accompanied by the file and addressed to the president of the witness protection commission.¹⁸⁴

¹⁷⁷ Code of Criminal Investigation, Art. 102.

¹⁷⁸ Code of Criminal Investigation, Article 105, para. 1, last section.

¹⁷⁹ Code of Criminal Investigation, Art. 103.

¹⁸⁰ Code of Criminal Investigation, Art. 104.

¹⁸¹ Code of Criminal Investigation, Art. 104 para. 2 section 2, 2, 1.

¹⁸² Code of Criminal Investigation, Art. 106.

¹⁸³ Code of Criminal Investigation, Art. 105.

¹⁸⁴ Code of Criminal Investigation, Art. 105.

8. Reparation for victims in criminal proceedings

Article 4 of the Preliminary Title of the Code of Criminal Procedure expressly provides that the civil action can be pursued at the same time and before the same judges as the prosecution. It can also be pursued separately. The victim therefore has the choice of bringing their civil action either before the criminal courts, or before the civil courts.

Before the criminal courts, claims for damages or restitution are brought before the criminal trial court. The civil party must formulate their claim for damages before the judgment.¹⁸⁵

The Court rules, without the jury, on the damages or restitutions claimed by the civil party. When the latter makes their request, the accused can plead only that the facts do not give rise to damages in favor of the civil party or that the damages which are due to them are excessive.¹⁸⁶

An accused found guilty must pay an indemnity to the civil party covering the procedural costs, travel and other costs.¹⁸⁷

If a victim has not participated in the criminal trial as a civil party, they can still bring the case back before the criminal judge to request that their application for compensation be ruled upon. The competence of the civil judge is therefore only seized in rare cases.¹⁸⁸

9. Immunities and amnesties

9.1 General rule

Article 13 of the Law of 5 August 2003 concerning serious violations of international humanitarian law has inserted Article *1bis* in the Preliminary Title of the Code of Criminal Procedure which grants immunity to heads of state, heads of government and ministers of foreign affairs during the period in which they exercise their functions, as well as other persons whose immunity is recognized

¹⁸⁵ Code of Criminal Investigation, Art. 347.

¹⁸⁶ Code of Criminal Investigation, Art. 348.

¹⁸⁷ Judicial Code, Arts. 1018, 1022.

¹⁸⁸ Code of Criminal Procedure, Preliminary Title, Art. 4, section 2 and 3.

by international law. This provision came about as a result of the *Yerodia* case brought before the International Court of Justice.¹⁸⁹

Paragraph 2 of Article 1*bis* provides that, in accordance with international law, no act of compulsion in relation to the exercise of public action may be taken against any person during their stay who has been officially invited to stay in the realm by the Belgian authorities or by an international organization established in Belgium and with which Belgium has concluded a headquarters agreement.

The immunity of a head of state is only valid for the period during which they occupy this post and terminates once their mandate comes to an end and it is at this moment that they can be judged before a national court for criminal acts that they have committed.

¹⁸⁹ International Court of Justice, 14 February 2002, *Democratic Republic of the Congo v. Belgium*, available at <https://www.icj-cij.org/en/case/121> (last accessed August 2021).



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