

## A. 2003 Criminal Code

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Available in French on <http://www.moniteur.be>, unofficial translation.]

New section I (a) of the Criminal Code (L. 5 August 2003, Article 5)

### Article 136 (a)

(L. 5 August 2003, Article 6)

The crime of genocide, as defined below, whether it is committed in time of peace or of war, constitutes a crime under international law and shall be punished in accordance with the provisions of this Act. In accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and without prejudice to the penal rules applicable to breaches committed by negligence, the crime of genocide shall mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

### Article 136 (b)

(L. 5 August 2003, Article 7)

Crimes against humanity, as defined below, whether committed in time of peace or of war, constitute a crime under international law and shall be punished in accordance with the provisions of this Act. In accordance with the Statute of the International Criminal Court, a crime against humanity shall mean any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or any other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in Articles 136 (a), 136 (b) and 136 (c);
9. Enforced disappearance of persons;
10. The crime of apartheid;
11. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

## **Article 136 (c)**

(L.5 August 2003, Article 8)

(1) War crimes referred to in the Conventions adopted in Geneva on 12 August 1949 and in Protocols I and II additional to those Conventions, adopted in Geneva on 8 June 1977, by the laws and customs applicable to armed conflicts, as defined in Article 2 of the Conventions adopted in Geneva on 12 August 1949, in Article 1 of Protocols I and II adopted in Geneva on 8 June 1977 additional to those Conventions, and in Article 8(2)(f) of the Statute of the International Criminal Court, and listed below constitute crimes under international law and shall be punished in accordance with the provisions of this section, when the crimes undermine, by act or omission, the protection of persons and property that is guaranteed by the Geneva Conventions, the Additional Protocols, laws and customs, without prejudice to the penal rules applicable to breaches caused by negligence:

1. Wilful killing;
2. Torture or other inhuman treatment, including biological experiments;
3. Wilfully causing great suffering or serious injury to body or health;
4. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of

sexual violence constituting a grave breach of the Geneva Conventions or a serious violation of Article 3 common to those Conventions;

5. Other outrages upon personal dignity, in particular humiliating and degrading treatment;
6. Compelling prisoners of war, civilians protected by the Convention on the Protection of Civilian Persons in Time of War or other persons protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949 to serve in the armed forces or armed groups of the enemy power or the hostile party;
7. Conscripting or enlisting children under the age of fifteen years into armed forces or armed groups or using them to participate actively in hostilities;
8. Depriving prisoners of war, civilians protected by the Convention on the Protection of Civilian Persons in Time of War or persons likewise protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949 of the right to a fair and regular trial, in accordance with the stipulations of those instruments;
9. Unlawful deportation, transfer or displacement, unlawful confinement of civilians protected by the Convention relative to the Protection of Civilian Persons in Time of War or persons likewise protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949;
10. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
11. The taking of hostages;
12. Destroying or seizing the enemy's property, in the case of an international armed conflict, or that of an adversary, in the case of a non-international armed conflict, unless such destruction or seizure be imperatively demanded by the necessities of war;
13. Extensive destruction and appropriation of property, not justified by military necessity as defined under human rights and carried out unlawfully and wantonly;
14. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
15. Intentionally directing attacks against buildings, material, medical units or vehicles and staff using, in accordance with international law, the distinctive signs provided for under international humanitarian law;
16. Utilizing the presence of a civilian or another person protected by international humanitarian law to render certain points, areas or military forces immune from military operations;
17. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
18. Acts and omissions for which there is no legal justification and which are likely to compromise the health of and cause bodily or mental harm to persons protected under international humanitarian law, particularly any medical treatment which is not justified by the state of health of those persons or which would not be in keeping with the generally acknowledged rules of the medical profession;
19. Unless it is justified by the conditions provided for under No. 18, treatment which subjects the persons stipulated under No. 18, even with their consent, to physical mutilation, medical or scientific experiments or the removal of tissue or organs for the use in transplant operations, except in the case of blood being donated for transfusions or skin for grafts, provided that those donations are voluntary, willingly given and intended for therapeutic purposes;
20. Intentionally attacking the civilian population or civilians not taking direct part in hostilities;

21. Intentionally launching attacks against places where the sick and wounded are gathered, unless those places are military objectives;
22. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated, without prejudice to the criminal nature of the attack of which the harmful effects, even if they are proportionate to the military advantage anticipated, would be incompatible with the principles of the law of nations, as they result from the usages established, from the laws of humanity, and the dictates of the public conscience;
23. Launching an attack against buildings or installations containing dangerous forces in the knowledge that such attack will cause loss of human life, injury to civilian persons or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to criminal nature of an attack of which the harmful effects, even if they are proportionate to the military advantage anticipated, would be incompatible with the principles of the law of nations, as they result from the usages established, from the laws of humanity, and the dictates of the public conscience;
24. Attacking or bombarding, by whatever means, demilitarized zones, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
25. Pillaging a town or place, even when taken by assault;
26. Attacking a person in the knowledge that such person is no longer involved in the fighting, provided that that attack leads to death or injury;
27. Treacherously killing or wounding members of the enemy nation or army or an enemy combatant;
28. Declaring that no quarter will be given;
29. Making improper use of the distinctive emblem of the red cross or red crescent or other protective signs recognized by international humanitarian law, resulting in death or serious personal injury;
30. Making inappropriate use of the flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, resulting in the loss of human life and serious personal injury;
31. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies;
32. Delaying without justification the repatriation of prisoners of war or civilians;
33. Indulging in apartheid or other inhumane and degrading treatment based on racial discrimination and resulting in outrages upon personal dignity;
34. Directing attacks against historic monuments, works of art or clearly recognized places of worship which constitute a national cultural and spiritual heritage and which have been granted special protection by virtue of a special arrangement even though there is no evidence of the enemy violating the prohibition of utilizing such objects to support the military effort and those objects are not located in the immediate vicinity of military objectives;
35. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments and hospitals, provided they are not military objectives;
36. Employing poison or poisoned weapons;
37. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
38. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

39. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
40. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Statute of the International Criminal Court.

(2) Serious violations of Article 3 common to the Conventions signed in Geneva on 12 August 1949, in the case of armed conflict defined by common Article 3, and listed below, constitute crimes under international law and shall be punished in accordance with the provisions of this Act, when such violations undermine, by act or omission, the protection of persons that is guaranteed by those Conventions, without prejudice to the penal provisions applicable to breaches committed out of negligence:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
2. Outrages upon personal dignity, in particular humiliating and degrading treatment;
3. Taking of hostages;
4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(3) The serious violations defined in Article 15 of Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted in The Hague on 26 March 1999, committed during armed conflict, as defined in Article 18, paragraphs 1 and 2, of the Hague Convention of 1954 and in Article 22 of the aforementioned Second Protocol, and listed below, constitute crimes under international law and shall be punished in accordance with the provisions of this Act when such breaches undermine, by act or omission, the protection of property guaranteed by those Conventions and the Protocol, without prejudice to the penal provisions applicable to breaches committed out of negligence:

1. Making cultural property under enhanced protection the object of attack;
2. Using cultural property under enhanced protection or its immediate surroundings in support of military action;
3. Extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol.

## **Article 136 (d)**

(L. 5 August 2003, Article 9)

The breaches listed in Articles 136 (a) and 136 (b) shall be punished by life imprisonment.

The breaches listed under Nos. 1, 2, 15, 17, 20 to 24 and 26 to 28 of paragraph 1 of Article 136 (c) shall be punished by life imprisonment.

The breaches listed under Nos. 3, 4, 10, 16, 19, 36 to 38 and 40 of the same paragraph of the same Article shall be punished by prison sentences of 20 to 30 years. They shall be punished by life imprisonment if they resulted in the death of one or more persons.

The breaches listed under Nos. 12 to 14 and 25 of the same paragraph of the same Article shall be punished by prison sentences of 15 to 20 years. The same breach and that referred to in Nos. 29 and 30 of the same paragraph of the same Article shall be punished by prison sentences of 20 to 30 years if they resulted in an apparently incurable illness, the permanent incapacity to work or the loss of use of an organ or serious mutilation. They shall be punished by life imprisonment if they resulted in the death of one or more persons.

The breaches listed under Nos. 6 to 9, 11 and 31 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. In the case of aggravating circumstances stipulated in the preceding paragraph, they shall be punished by the sentences provided for in that paragraph, as is appropriate to the case in question.

The breaches listed under Nos. 5 and 32 to 35 shall be punished by prison sentences of 10 to 15 years, without prejudice to the application of the more severe penal provisions repressing outrages upon human dignity.

The breach stipulated in No. 18 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. It shall be punished by prison sentence of 15 to 20 years when it resulted in serious consequences for public health.

The breach listed under No. 39 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years.

The breach listed under No. 1 of paragraph 2 of Article 136 (c) shall be punished by life imprisonment.

The breaches listed under Nos. 2 and 4 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years, without prejudice to the application of the severer penal provisions repressing outrages upon human dignity.

The breach listed under No. 3 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. The same breach shall be punished by prison sentences of 20 to 30 years if it resulted in an apparently incurable illness, permanent incapacity to work, the loss of use of an organ, or serious mutilation. It shall be punished by life imprisonment if it resulted in the death of one or more persons.

The breaches listed under Nos. 1 to 3 of paragraph 3 of Article 136 (c) shall be punished by prison sentences of 15 to 20 years.

## Article 136 (e)

(L.5 August 2003, Article 10)

Anyone making, being in possession of or transporting any kind of instrument, device or object, erecting a construction or converting an existing construction in the knowledge that such instrument, device, or object, such construction or conversion is intended to commit one of the breaches provided for in Articles 136 (a), 136 (b) and 136 (c) or to facilitate the perpetration of such breaches shall be punished by the sentence stipulated for the breach which they have allowed or facilitated.

## Article 136 (f)

(L. 5 August 2003, Article 11)

The sentence stipulated for a breach that has been committed shall be applied to the following:

1. Orders, even if they are without effect, to commit one of the breaches stipulated in Articles 136 (a), 136 (b) and 136 (c);
2. Proposing or offering to commit such a breach and the acceptance of such proposal or offer;
3. Incitement to commit such a breach, even if it does not actually take place;
4. Participating, within the meaning of Articles 66 and 67, in such a breach, even if it does not actually take place;
5. Failure to do what could have been possible on the part of people who were aware of orders given with a view to committing such a breach or of acts beginning its perpetration, and who could have prevented its being carried out or have stopped it;
6. Attempting, within the meaning of Articles 51 to 53, to commit such a breach.

## Article 136 (g)

(L. 5 August 2003, Article 12)

Paragraph 1. Without prejudice to the exceptions listed under Nos. 18, 22 and 23 of Article 136 (c), paragraph 1, no interest, no political, military or national necessity can justify the breaches defined in Articles 136 (a), 136 (b), 136 (c), 136 (e) and 136 (f), even if they were committed as reprisals.

Paragraph 2. The fact that the accused acted on the orders of his government or a superior does not free him from his responsibility if, in the given circumstances, the order could clearly have led to one of the breaches targeted in Articles 136 (a), 136 (b) and 136 (c) being committed

## B. 2003 Code of Criminal Procedure

[Source: Available in French on <http://www.moniteur.be>; unofficial translation.]

## Article 1 (a)

(L. 5 August 2003, Article 13)

(1) In accordance with international law, legal action shall not be taken against:

- Foreign heads of State, heads of government and foreign ministers, during their term of office, as well as other persons whose immunity is recognized by international law;
- Persons with a total or partial immunity based on a treaty that is binding on Belgium.

(2) In accordance with international law, for the duration of their stay no pressure to initiate legal action may be exerted with regard to anyone who has been officially invited to reside in the territory of the Kingdom by the Belgian authorities or by an international organization established in Belgium and with which Belgium has concluded a headquarters agreement. [...]

## Article 10, 1 (a)

(L. 5 August 2003, Article 16 (2))

(1) Except for [certain cases], a foreigner may be tried in Belgium who, outside the Kingdom of Belgium, has committed: [...]

(1bis) A serious violation of international humanitarian law as stipulated in Part II, section I (a) of the Criminal Code, [...] against a person who, at the time of the occurrence, is a Belgian national or a person whose actual place of normal and legal residence has been in Belgium for at least three years.

Legal action, including the investigation, may be initiated only at the request of the federal prosecutor who assesses any charges that may have been brought. There is no channel through which to appeal against that decision. [N.B.: On 23 March 2005, the Belgian Constitutional Court (“Cour d’arbitrage”) held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (See the decision in French, online: <http://www.const-court.be>).]

If a charge has been submitted to the federal prosecutor in application of the preceding paragraphs, he must instruct the examining magistrate to investigate that charge unless:

1. The charge is manifestly unfounded; or
2. The facts cited in the charge cannot be deemed to be one of the breaches stipulated in Part II, section I (a), of the Criminal Code; or
3. That charge cannot lead to an admissible public action; or
4. The actual circumstances of the case show that, in the interest of justice being fairly administered and



respecting Belgium's international obligations, that case should be brought either before international courts or before the courts in the place where the acts were committed, or before the courts of the State of which the perpetrator is a national or those of the place where he may be found, provided that those courts demonstrate independence, impartiality and equity, as may arise, in particular, from the relevant international commitments between Belgium and that State.

If the federal prosecutor deems a case to be closed, he shall notify the Minister of Justice, indicating the points which are listed in the previous paragraph and on which he bases that classification. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (See the decision in French, online: <http://www.const-court.be>.)]

If a case is classified as closed solely on the basis of points No. 3 and No. 4 above or solely on the basis of point No. 4 above and when those acts were committed after 30 June 2002, the Minister of Justice shall inform the International Criminal Court accordingly. [...]

## **Article 12 (a) new**

(L. 5 August 2003, Article 18)

Apart from the cases referred to in Articles 6 to 11, the Belgian courts are also authorized to take cognisance of breaches committed outside the territory of the Kingdom and stipulated in international treaty or customary law which is binding on Belgium, when that rule requires it, in whatever manner, to submit the matter to its competent authorities to take legal action.

Legal action, including the investigation, may be initiated only if requested by the federal prosecutor who assesses any charges that may have been brought. There is no channel through which to appeal against that decision. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (See the decision in French, online: <http://www.arbitrage.be>.)]

If a charge has been submitted to the federal prosecutor in application of the preceding paragraphs, he must instruct the examining magistrate to investigate that charge unless:

1. The charge is manifestly unfounded; or
2. The facts cited in the charge cannot be deemed to be one of the breaches stipulated in Part II, section I (a), of the Criminal Code; or
3. That charge cannot lead to an admissible public action; or
4. The actual circumstances of the case show that, in the interest of justice being fairly administered and respecting Belgium's international obligations, that case should be brought either before international courts or before the courts in the place where the acts were committed, or before the courts of the State of which the perpetrator is a national or those of the place where he may be found, provided that those

courts demonstrate independence, impartiality and equity, as may arise, in particular, from the relevant international commitments between Belgium and that State.

If the federal prosecutor deems the case to be closed, he shall notify the Minister of Justice to that effect, referring to the points listed in the preceding paragraph on which that classification is based.

If a case is classified as closed solely on the basis of points 3 and 4 above or solely on the basis of point 4 above and when those acts were committed after 30 June 2002, the Minister of Justice shall inform the International Criminal Court accordingly.

## C. Evolution of the Belgian Law on Universal Jurisdiction

[Source: Université Libre de Bruxelles, Centre de Droit International, Dossier d'Actualité sur la compétence universelle en droit belge, <http://www.ulb.ac.be/droit/cdi>, unofficial translation.]

### Legislation

The Law on “universal jurisdiction”, as it is called, was adopted on 16 June 1993 and addressed the repression of grave breaches of the Geneva Conventions of 12 August 1949 and the Additional Protocols I and II of 8 June 1977. Its scope of application was limited to war crimes, whether they are committed during an international or non-international conflict. To that extent, the Law broke new ground, in particular with regard to the international instruments that it set out to implement. It will be recalled that the notion of war crimes was restricted in the Geneva Conventions and the Additional Protocols to international armed conflicts.

That Law is also an innovation under Belgian law in that it enables legal action to be taken against an accused party regardless of whether the latter is on Belgian territory or not. This possibility is not referred to explicitly in the Law but appears in the parliamentary proceedings of the Senate on 30 April 1991.

On the basis of that Law, an investigation concerning Augusto Pinochet was initiated on 1 November 1998 [available in French on <http://competenceuniverselle.files.wordpress.com/2011/07/loi-du-5-aout-2003-texte-de-loi1.pdf>].

The Law was submitted to an initial revision on 10 February 1999. That revision made two important amendments: on the one hand, the universal jurisdiction of Belgian judges was extended to the crime of genocide and to crimes against humanity and, on the other hand, the perpetrators of criminal breaches were to cease to be able to plead any kind of immunity.

There were few lawsuits based on that Law at first. The trial at the crown court in Brussels in April 2001 of four persons accused of having taken part in the Rwandan genocide and their conviction led to an increase in the number of lawsuits [details on this process available on <http://trial-ch.org/>]. These were aimed at, among

others, Fidel Castro, Saddam Hussein, Laurent Gbagbo, Hisséne Habré and Ariel Sharon. The charges proffered against Ariel Sharon on 1 and 18 June 2001 gave rise to strong criticism from the Israeli authorities.

The Law, as amended in 1999, was again amended four years later. On 14 February 2002 Belgium was ordered by the International Court of Justice to annul the international warrant for the arrest of Abdulaye Yerodia when he was the Minister for Foreign Affairs of the Democratic Republic of Congo on the grounds that the warrant for arrest took no account of the immunity granted to heads of State and to the Foreign Affairs Ministers in office. [See ICJ, *Democratic Republic of the Congo v. Belgium*] Following that ruling, a bill which took account of the adoption of the Statute of the International Criminal Court and which provided for bringing the Law into line with the existing rules of international law, was presented to the Senate on 18 July 2002. The text was approved by the Senate on 30 January 2003 and forwarded to the Chamber on 5 February 2003.

However, bringing charges against US political and military leaders, particularly after the intervention of the United States in Iraq, was to trigger increasingly harsh reactions by those leaders, which culminated in threats to move NATO headquarters and finally led to the 1993 Act being repealed. The first charge, relating to acts committed during the first Gulf War, was brought against George Bush Senior and former members of his team in March 2003. Colin Powell, who was targeted by that charge, considered that the Belgian Act presented a “serious problem”, particularly given the fact that NATO headquarters was in Brussels and issued a warning to Belgium.

Consequently, the bill was amended and stipulated that, in situations that are not linked to Belgium, the public prosecutor could refuse to instruct the examining magistrate in certain cases. Moreover, the bill also stipulated that the Justice Minister had the authority to issue a negative injunction, which in explicit terms meant the possibility of referring the charge back to the State on whose territory the breach was committed or of which the perpetrator is a national. The Law was passed on 23 April 2003.

Moreover, following the two rulings by the Chamber of Indictment in Brussels which deemed the lawsuits against Abdulaye Yerodia and against Ariel Sharon and Amos Yaron to be inadmissible on the grounds that those persons were not present on Belgian territory, a second bill interpreting the 1993 Law, according to which legal proceedings could be instituted regardless of the location of the accused, was also presented. That second bill was never adopted because the rulings were subsequently nullified by the Court of Cassation.

It was not to prevent a charge being lodged against US General Tommy Franks on 14 May 2003. On 13 May 2003, at a press conference at NATO headquarters, General Richard Myers, who had been informed by a journalist that the charge was about to be lodged, said that he considered the situation “very serious” and that it could have a significant bearing on where NATO held its meetings.

At the meeting of NATO defence ministers one month later, and despite the lawsuit filed against General

Franks having been referred back to the United States in accordance with the new procedure, Donald Rumsfeld, after having called the lawsuit “absurd” and refusing to recognize Belgium’s authority to try American leaders, confronted it with its responsibilities as the country in which NATO has its headquarters and made the American contribution to the building of a new headquarters subject to assurance that Belgium would again be a “hospitable place for NATO to conduct its business”, while at the same time acknowledging that Belgium’s sovereignty had to be respected. [Speech available on <http://www.nato.int/docu/speech/2003/s030612g.htm>].

At the end of June 2003, the Belgium Minister for Foreign Affairs announced his intention to amend the Law again as soon as the new government had been formed.

The Law of 16 June 1993 was repealed on 5 August 2003. The Criminal Code, the Act of 17 April 1878 containing the first part of the Code of Criminal Procedure and the Code of Criminal Procedure were thus amended to allow serious breaches of international humanitarian law to be prosecuted. However, in the absence of connections authorizing the Belgian courts to take cognizance of it, the charge is upheld only if a rule of international law, deriving from treaty or customary law which is binding on Belgium, requires it to prosecute perpetrators of the breaches specified therein.

If universal jurisdiction really does subsist under Belgium law, its bearing is far more restricted (given that in the current state of international law, universal jurisdiction in absentia can no longer be exercised) and with an extensive system for filtering the charges (provided that the system set up at the time of the previous amendment of the law is upheld). According to several hypotheses, the federal prosecutor may thus close the case without further action, particularly if he considers that an international court or another national court has “more justified” competence. The only requirements are the competence and “guarantees of impartiality and independence” of the court. Consequently, the closure of the case is not conditional upon the existence of effective proceedings before that court. It should be noted that the legislator has chosen vague terms to define the qualities to be demonstrated by a court whose competence would take precedence over Belgian universal competence.

That sovereign assessment by the federal prosecutor is evidently a political safeguard to prevent Belgium from finding itself in another a difficult diplomatic situation.

## Discussion

1. Do the Criminal Code and the Code of Criminal Procedure fulfil Belgium’s obligations to establish its (universal) jurisdiction over persons alleged to have committed grave breaches? Did the former 1993 law (amended in 1999) exceed treaty-based obligations? If so, was it a violation of international law? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)
2. a. Are the definitions of genocide and crimes against humanity, taken from the 1948 Convention on Genocide and the Statute of the International Criminal Court, part of customary law? Could this

national legislation create definitions other than those of the said Conventions? More restrictive or broader definitions?

- b. Can genocide be committed in peacetime? Can a crime against humanity? Is armed conflict not a necessary condition for the commission of those crimes? How do you reconcile the definition of the crime against humanity, which has to be committed “as part of a widespread or systematic attack” with the fact that this crime can be committed in peacetime?
3. a. Does Art. 136(c) of the Criminal Code cover all grave breaches mentioned by IHL? Does it permit punishment of violations of customary IHL? Does Belgium also establish its universal jurisdiction over violations of IHL not qualified as grave breaches? (GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11 and 85) Does that violate IHL or general international law in the case of persons who were not otherwise under Belgian jurisdiction when they committed their crime?
  - b. Is it appropriate for the Criminal Code to extend the notion of grave breaches to non-international conflicts? Is the prosecution of serious violations of IHL of non-international armed conflicts prescribed by IHL? Is it compatible with IHL?
4. When the Criminal Code addresses international and non-international armed conflicts together, for which crimes listed does this present no difficulty from the point of view of substantive IHL? For which crimes are there only terminological problems? For which crimes are there substantive problems because the criminalized acts are not prohibited by the IHL of non-international armed conflicts? Which crimes at least do not fall under a prohibition contained in Protocol II? Does the Belgian Law criminalize acts committed in a non-international armed conflict which are not prohibited by the applicable substantive IHL? Under IHL, may a State punish behaviour in armed conflict which is not prohibited by IHL? May universal jurisdiction be established for such crimes?
5. a. Can Art. 136(f) be inferred from the pertinent provisions of the Conventions and Protocol I? Does it correspond to a rule of customary IHL? Could it conceivably be a rule introduced by the Criminal Code? What about Art. 136(e)? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 85(1) and 86(2))
  - b. Is the provision in Art. 136(f) concerning failure to act different in substance from Art. 86(2) of Protocol I?
6. a. When may a superior order be a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation? Is Art. 136(g)(2) consistent with IHL?
  - b. Is there no possible defence for having committed any grave breach? For some breaches? Are the limitations to defences designated in Art. 136(g)(1) prescribed by IHL?
7. Do you think that the provisions of the former 1993 law stipulating that immunity did not prevent its application (and which have been removed from the present Belgian law), combined with the interpretation of that law to the effect that the accused did not have to be present in Belgium, were excessive? Why? What do you think of the limitations included in the Code of Criminal Procedure? Do they eliminate Belgian universal jurisdiction? Or do they adapt that universal jurisdiction to make it consistent with international law?