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Sat 10/06/07 7:25 AM

Reply-to:

west.support@thomson.com

To:

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International Legal Materials

Legislation and Regulations

July, 1999

BELGIUM: ACT CONCERNING THE PUNISHMENT OF GRAVE BREACHES  
OF INTERNATIONAL

HUMANITARIAN LAW

February 10, 1999

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\*918 The text of the act was translated by and provided to ILM by Stefaan Smis and Kim Van der Borght.

Introductory note

by

Stefaan Smis and Kim Van der Borght [FN1]

FN1. Stefaan Smis, Lic.Iur., LL.M; Kim Van der Borght, Lic.Iur., PG.Dip. The authors are University Assistants at the Vrije Universiteit Brussel. They would like to express their gratitude to Dr. J.-M. Henckaerts and Tim De Bondt.

End of Footnote(s).

The current developments in international criminal law, with numerous high profile evolutions such as the establishment and first judgments of the ad-hoc tribunals for Former Yugoslavia and Rwanda, the Rome Conference for the establishment of an international criminal court and the adoption of the Statute of the latter as well as the recent Pinochet case in the United Kingdom, have considerably increased public awareness in this domain. It is in this light that the renewed interest of the Belgian Parliament for an efficacious implementation of its international commitments concerning the breaches of international humanitarian law should be seen.

Recently, a number of members of Parliament have taken a personal interest in this issue. In September 1996, they organized a colloquium in the Belgian Senate to clarify the issues that still need attention from the Belgian legislature. [FN2] The conclusion of this colloquium was that Belgian law needed specific acts to punish the crime of genocide as well as crimes against humanity. The initial proposal intended to incorporate the legal concept of genocide into Belgian law in accordance with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). [FN3]

In fact, Belgium had ratified the Genocide Convention in 1951 but had never enacted implementation legislation. [FN4] Nevertheless, the actions that constitute the crime of genocide under the definition of the Genocide Convention were punishable under Belgian law. Indeed, an important body of Belgian and international doctrine maintains that the punishability of this offense is enshrined in customary international law and in natural law. [FN5] Moreover, the 1993 Act concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977 [FN6] made actions such as those described in the \*919 definition of genocide punishable under Belgian law. Thus, from a strictly technical viewpoint, a new Act was not required in order to comply with the international obligations. However, as the proposed Act had the dual aim of punishment and prevention, it was considered that criminalizing genocide as such would have greater effect and would increase the preventative force. Indeed, the colloquium organized by the senators emphasized the symbolic and educational value of declaring genocide a crime in itself, of "calling the issues by their proper name" [FN7].

FN2. The proceedings of this colloquium are published in A. DESTEXHE & M. FORET, DE NUREMBERG A LA HAYE ET ARUSHA. ACTES DU COLLOQUE ORGANISE PAR LE GROUPE PRL-FDF DU SENAT 144 (1997).

FN3. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277. See Senat de Belgique, Proposition de loi relative a la repression du crime de genocide, en application de la Convention internationale pour la prevention et la repression du crime de genocide du 9 decembre 1948, Rapport fait au nom de la commission de la justice par Mme Merchiers, 1 Decembre 1998. (Report of the Justice Commission -- Senate) (Available on the website of the Belgian Senate <[www.senate.be](http://www.senate.be)>).

FN4. Ratification Act of 26 June 1951 (Official Journal, 11 January 1952).

FN5. See Report of the Justice Commission -- Senate, supra note 3, at 14-18 referring to E. DAVID, TRAITE DE DROIT PENAL INTERNATIONAL 266-268 (1995); C. VAN DEN WYNGAERT, STRAFRECHT EN STRAFPROCESRECHT IN HOOFDLIJNEN (BOEK II) 804 (1994); R. A. LAWSON & H. G. SCHERMERS (EDS.), LEADING CASES OF THE EUROPEAN COURTT OF HUMAN RIGHTS 615 (1997).

FN6. Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977 (Official Journal, 5 August 1993). English translation of this Act

provided by Dr. J.-M. Henckaerts, International Committee of the Red Cross (on file with authors).

FN7. M.-A. Swartenbroeckx, Moyens et limites du droit belge, in A. DESTEXHE & M. FORET, DE NUREMBERG A LA HAYE ET ARUSHA. ACTES DU COLLOQUE ORGANISE PAR LE GROUPE PRL-FDF DU SENAT 124 (1997).

End of Footnote(s).

The Act went through a number of stages before being adopted. As stated, it was first introduced as a proposal of individual senators. [FN8] On the basis of this proposal, a report was prepared by the Commission on Justice of the Belgian Senate, incorporating the points of view of the members of this Commission and the Minister of Justice. [FN9] Meanwhile, the diplomatic efforts to agree on a statute for the international criminal court had produced results. The amended text that ensued from the report of the Commission and the Minister of Justice incorporated both the genocide convention and the definitions of the Rome Statute of the International Criminal Court into the 1993 Act. After its acceptance by the Senate, the text was proposed by the Government in the Chamber of Representatives. [FN10] The Minister of Justice, in his introduction, stressed the coherence in integrating in the 1993 Act, both the incrimination of genocide as well as the Rome Statute. [FN11] He further emphasized that the law does not provide immunity on the basis of the official capacity of the person indicted for the crimes described in the Act. The Act was passed with an overwhelming majority in both houses and was promulgated by the King on 10 February 1999.

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FN8. Senat de Belgique, Proposition de loi relative a la repression du crime de genocide, en application de la Convention internationale pour la prevention et la repression du crime de genocide du 9 decembre 1948 (Deposee par M. Foret et consorts), 16 octobre 1998. (Initial Proposal in the Senate) (Available on the website of the Belgian Senate <[www.senate.be](http://www.senate.be)>).

FN9. See Report of the Justice Commission -- Senate, supra note 3. Also see Proposition de loi relative a la repression du crime de genocide, en application de la Convention internationale pour la prevention et la repression du crime de genocide du 9 decembre 1948, Amendements No 1 du Gouvernement & No 2 de M. Erdman, 1 decembre 1998. (Amendments by the Government and by senator Erdman) (Available on the website of the Belgian Senate <[www.senate.be](http://www.senate.be)>).

FN10. See Chambre des Representants de Belgique, Projet de loi relatif a la repression des violations graves du droit international humanitaire, Projet transmis par le Senat, 7 decembre 1998. (Proposal submitted by the Government in the Chamber) (Available on the website of the Belgian Chamber of Representatives <[www.dekamer.be](http://www.dekamer.be)>).

FN11. See Chambre des Representants de Belgique, Projet de loi relatif a la repression des violations graves du droit international humanitaire, Rapport fait au nom de la Commission de la Justice par M. J. Van Overberghe, 29 Janvier 1999. (Report of the Justice Commission -- Chamber) (Available on the website of the Belgian Chamber of Representatives <[www.dekamer.be](http://www.dekamer.be)>).

End of Footnote(s).

As mentioned, the purpose of the Act concerning the punishment of grave breaches of international humanitarian law is to define three categories of graves breaches of humanitarian law and to integrate them into the Belgian domestic legal order.

To remain consistent with the definitions used in international law, the Act textually refers to the wording of the relevant provisions of the international conventions. Thus for the crime of genocide, the Act quotes the definition of "genocide" in Article 2 of the Genocide Convention. The definition of crimes against humanity in the Act is directly taken from Article 7 of the 1998 Statute of the International Criminal Court. [FN12] However, the Act limits itself to nine of the eleven criminal offenses enumerated in the Statute. Finally, for the grave breaches of the 1949 Geneva Conventions and their Additional Protocols I and II, the Act provides a combination of the grave

breaches enumerated \*920 in the four Geneva Conventions of 1949 and their Additional Protocols I and II. [FN13] However, contrary to the Geneva law, the Belgian Act does not make a distinction between international and non-international conflicts for the purpose of defining grave breaches. In fact, pursuant to Articles I/49, II/50, III/129 and IV/146 of the Geneva Conventions and Article 85, s 1 of Additional Protocol I, the term "grave breaches" is only applicable to international armed conflicts. The violations of humanitarian law in non-international armed conflicts (Additional Protocol II) do not fall within the ambit of the undertaking referred to in the above mentioned Articles. However, considering the number of violations of international humanitarian law that are committed during non-international conflicts, the Belgian legislator found it wise to extend the application of "grave breaches" to violations of the laws of war committed during internal conflicts. [FN14]

FN12. United Nations, Rome Statute of the International Criminal Court, 17 July 1998, 37 I.L.M. 999 (1998).

FN13. Geneva Conventions of 12 August 1949 (75 U.N.T.S. 3) and their Additional Protocols I and II of 18 June 1977 (1125 U.N.T.S. 609).

FN14. A. Andries, E. David, C. Van Den Wijngaert and J. Verhaegen, Commentaire de la loi du 16 juin 1993 relative a la repression des infractions graves au droit international humanitaire, 74 REVUE DE DROIT PENAL ET DE CRIMINOLOGIE 1121 (1994).

End of Footnote(s).

Any person who has committed one of the criminal offenses defined in the Act, falls within the application of the present Act. The Act recognizes a universal competence for the Belgian courts to deal with grave breaches irrespective of the place where the criminal offense has been committed, the nationality of the offender or the victim. This universal competence is based on the above mentioned Articles of the Geneva Conventions and Additional Protocol I that are a reflection of the principle *aut dedere aut judicare*, obliging the High Contracting Parties to extradite or to prosecute the offenders of grave breaches. Some senators also feared that the country could become a place of refuge for the perpetrators of the Rwandan genocide if it did not enact legislation that could also deal with cases not involving Belgian nationals. [FN15] Moreover, according to the Act, any person who contributed to the grave breach through making such breaches possible or facilitating them, is put on the same level in terms of criminal responsibility as the person who has committed the grave breach (Art. 3).

FN15. See Proposition de loi relative a la repression du crime de genocide, en application de la Convention international pour la prevention et la repression du crime de genocide du 9 decembre 1948, supra note 8, at 2-3.

End of Footnote(s).

For the criminal offenses named in the Act, it enumerates the penalties (Art. 2) in accordance with the Articles of the Geneva Conventions that allow the High Contracting Parties to decide the penalties on condition that the mechanism of international criminal responsibility could be exercised [FN16] and with Article 5 of the Genocide Convention which requires from the Contracting Parties "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide." Punished with the same penalties as the completed breaches, are the order, the proposal or offer, the incitement to commit, the participation, the failure to act and the attempt to commit such grave breach (Art. 4). Justifications such as political, military or national interest or necessity are explicitly excluded. Similarly the claim to have acted on the order of ones government or a superior does not absolve the author of the grave breach of his/her responsibility (Art. 5). Finally, the grave breaches are not subject to statutory limitations of public prosecutions and penalties.

FN16. Andries, David, Van Den Wijngaert & Verhaegen, supra note 14, at 1161.

End of Footnote(s).

By adopting the Act concerning the punishment of grave breaches of humanitarian law, the Belgian legislator wanted to place itself at the outpost of countries which have adapted their legislation to better fight the most odious crimes. The result is an Act that has become one of the most progressive of its kind.

\*921 BELGIUM

ACT CONCERNING THE PUNISHMENT OF GRAVE BREACHES OF  
INTERNATIONAL HUMANITARIAN

LAW

The Act of 16 June 1993 concerning the punishment of grave breaches of the

Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977 (Official Journal of 05.08.1993, at 17751-17755)

As modified by the

Act of 10 February 1999 concerning the punishment of grave breaches of international humanitarian law (Official Journal of 23.03.1999, at 9286-9287)

## CHAPTER I

### Grave breaches

Article 1, s 1. The crime of genocide defined below, committed in peace time or in time of war, shall constitute a crime under international law and be punishable in accordance with the provisions of the present Act. In accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 - without prejudice to the criminal provisions applicable to other breaches committed out of negligence - genocide means any of the following acts, committed with the intent to destroy in whole or in part, a national, ethnic, religious or racial group, as such:

1o killing members of the group;

2o causing serious bodily or mental harm to members of the group;

3o deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

4o imposing measures intended to prevent births within the group;

5o forcibly transferring children of the group to another group.

s 2. The crime against humanity defined below, committed in peace time or in time of war, shall constitute a crime under international law and be punishable in accordance with the provisions of the present Act. In accordance with the Statute of the International Criminal Court, a crime against humanity means any of the following acts, committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1o murder;

2o extermination;

3o enslavement;

4o deportation or forcible transfer or popular;

5o imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

6o torture;

7o rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

\*922 8o persecution against any identifiable group or collectivity or political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in the Article.

s 3. The grave breaches listed below which cause injury or damage, by act or omission, to persons or objects protected by the Conventions signed at Geneva on 12 August 1949 and approved by the Act of 3 September 1952, and by Protocols I and II additional to those Conventions adopted at Geneva on 8 June 1977 and approved by the Act of 16 April 1986, shall - without prejudice to the criminal provisions applicable to other breaches of the Conventions referred to in the present Act and without prejudice to criminal provisions applicable to breaches committed out of negligence - constitute crimes under international law and be punishable in accordance with the provisions of the present Act:

1o willful killing;

2o torture or other inhuman treatment, including biological experiments;

3o willfully causing great suffering or serious damage to physical integrity

or health;

4o compelling a prisoner of war, a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected in that same respect by Protocols I and II additional to the international Geneva Conventions of 12 August 1949 to serve in the forces of a hostile power or adverse party;

5o depriving a prisoner of war, a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected in that same respect by Protocols I and II additional to the international Geneva Conventions of 12 August 1949 of the right to a regular and impartial trial in accordance with the contents of those provisions;

6o the unlawful deportation, transfer or movement, or unlawful detention of a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or of a person protected in that same respect by Protocols I and II additional to the international Geneva Conventions of 12 August 1949;

7o hostage-taking;

8o extensive destruction and appropriation of property not justified by military necessity as permitted by international law and carried out unlawfully and wantonly;

9o acts and omissions not justified in law which are likely to endanger the physical or mental health and integrity of persons protected by one of the Conventions relative to the protection of wounded, sick and shipwrecked persons, in particular any medical procedure which is not indicated by the state of health of such persons or not consistent with generally accepted medical standards;

10o other than where justified under the conditions provided for in subparagraph 9o, acts which consist in carrying out on persons referred to in subparagraph 9o, even with their consent, physical mutilations, medical or scientific experiments or the removal of tissue or organs for transplantation, except in the case of donations of blood for transfusion or of skin for grafting, provided that such donations are voluntary, consented to and intended for therapeutic purposes;

11o making the civilian population or individual civilians the object of

attack;

12o launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of the attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience;

\*923 13o launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of the attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience;

14o making non-defended localities or demilitarized zones the object of attack;

15o making a person the object of attack in the knowledge that he/she is hors de combat;

16o the perfidious use of the distinctive emblem of the red cross;

17o the transfer by the occupying power of parts of its own civilian population into the territory it occupies, in the case of an international armed conflict, or by the occupying authority in the case of a non-international armed conflict;

18o unjustifiable delay in the repatriation of prisoners of war or civilians;

19o indulging in practices of apartheid or other inhuman or degrading practices based on racial discrimination and resulting in outrages upon personal dignity;

20o directing attacks against clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, where there is no evidence of the adverse party having violated the prohibition of using such objects in support of the military effort, and where such objects are not located in the immediate proximity of military objectives.

The acts listed in subparagraphs 11o, 12o, 13o>, 14o, 15o, and 16o shall be regarded as grave breaches within the meaning of this Article where they bring about death or cause serious injury to the physical integrity or health of one or more persons.

Art. 2. The criminal offenses enumerated in Article 1, first and second paragraph, and in Article 1, third paragraph, 1o, 2o and 11o to 15o, shall be punishable by reclusion for life.

The criminal offenses enumerated in Article 1, third paragraph, 3o and 10o, shall be punishable by penal reclusion for twenty to thirty years. They shall be punishable by penal reclusion for life where they result in the death of one or more persons.

The criminal offense referred to in Article 1, third paragraph, 8o>, shall be punishable by penal reclusion for fifteen to twenty years. The same criminal offense, as well as the criminal offense referred to in Article 1, third paragraph, 16o, shall be punishable by penal reclusion for twenty to thirty years where they result in either an incurable illness, the total loss of the use of an organ, or a serious mutilation. They shall be punishable by penal reclusion for life where they result in the death of one or more persons.

The criminal offenses enumerated in Article 1, third paragraph, 4o to 7o and 17o, shall be punishable by penal reclusion for ten to fifteen years. In the cases of aggravating circumstances such as those provided for in the preceding paragraph, they shall be punishable, depending on the case, by penalties provided for in that paragraph.

The criminal offense enumerated in Article 1, third paragraph, 18o to 20o shall be punishable by penal reclusion for ten to fifteen years, subject to the application of more stringent penalties imposed for serious injury to personal dignity.

The criminal offense referred to in Article 1, third paragraph, 9o>, shall be punishable by penal reclusion for ten to fifteen years. It shall be punishable by penal reclusion for fifteen to twenty years where it has serious

consequences for public health.

\*924 Art. 3. Anyone who manufactures, holds or transports an instrument, device or object, or erects a construction or converts an existing construction in the knowledge that the instrument, device, object, construction or conversion is intended to commit one of the breaches provided for in Article 1 or to facilitate the commission thereof, shall be punished by the penalty provided for with respect to the breach that he/she has made possible or facilitated.

Art. 4. The following shall be punishable by the penalty provided for completed breaches:

-an order, even where it is not carried out, to commit one of the breaches listed in Article 1,

-a proposal or offer to commit such a breach and the acceptance of such proposal or offer,

-incitement to commit such a breach, even where it is not carried out,

-participation, within the meaning of Articles 66 and 67 of the Penal Code, in such a breach, even where it is not carried out,

-failure to act to the extent available to them by persons who had knowledge of the orders given to commit such a breach or of acts initiating the commission thereof and who were able to prevent or put an end to such a breach,

-any attempt, within the meaning of Articles 51 to 53 of the Penal Code, to commit such a breach.

Art. 5. s 1. No political, military or national interest or necessity, even on grounds of reprisals, can justify the breaches provided for in Articles 1, 3 and 4, without prejudice to the exceptions referred to in subparagraphs 9o>, 12o and 13o of paragraph 3 of Article 1.

s 2. The fact that the defendant acted on the order of his/her government or a superior shall not absolve him/her from responsibility where, in the prevailing circumstances, the order could clearly result in the commission of a

crime of genocide or of a crime against humanity, as defined in the present Act, or a grave breach of the Geneva Conventions of 12 August 1949 and their Additional Protocol I of 8 June 1977.

s 3. The immunity attributed to the official capacity of a person, does not prevent the application of the present Act.

Art. 6. Without prejudice to Articles 4 and 8 of the present Act, all the provisions contained in Book I of the Penal Code shall, with the exception of Article 70, be applicable to the breaches provided for in the present Act.

## CHAPTER II

### Competence, applicable procedure and the execution of sentences

Art. 7. The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.

In respect of breaches committed abroad by a Belgian national against a foreigner, no filing of complaint by the foreigner or his family or official notice by the authority of the country in which the breach was committed shall be required.

Art. 8. Article 21 of the Introductory Part of the Code of Penal Procedure and Article 91 of the Penal Code, relative to the statutory limitation of public prosecutions and penalties, shall not be applicable to the breaches listed in Article 1 of the present Act.

Art. 9. s 1. Subject to Articles 99 to 108 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 and Article 75 of Additional Protocol I of 8 June 1977, the breaches provided for in the present Act shall, when Belgium is in a state of war, fall under the competence of military courts.

\*925 s 2. Where a breach falling under the competence of an ordinary court is related to one which, pursuant to paragraph 1 above, falls under the competence of a military court, both breaches shall be tried by the military court.

s 3. Where a breach provided for in the present Act falls under the

competence of a military court, public prosecution shall be instituted through a summons issued by the Public Prosecutor's Office for the accused to appear before the trial court or through a complaint filed by any person claiming to have suffered injury as a result of the breach and bringing a suit for damages before the president of the judicial commission at the Conseil de Guerre [Court Martial] under the conditions provided for in Article 66 of the Code of Criminal Investigation.

In the latter case, the decision not to prosecute may be taken only by the Court Martial composed solely of a civilian member assisted by a clerk, or by the Military Court composed solely of its president and two of its military members with the rank of major, assisted by a clerk, without prejudice to the application of Articles 111 to 113, 140 and 147 of the Military Code of Penal Procedure. Such a decision shall be given, when the submissions of the public prosecutor's office have been heard, only under conditions such as those provided for in Article 128 of the Code of Criminal Investigation or where public prosecution is not admissible; it shall also order the party bringing the action for damages to pay the costs incurred by the State and the accused.

s 4. The procedure for referring a case to corps disciplinary authorities as provided for in Article 24 s 1 of the Military Code of Penal Procedure shall at no time be applicable to breaches provided for in the present Act.

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38 I.L.M. 918 (1999)

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