

## Belgian Constitutional Court partially annuls downsized War Crimes Act

On August 5, 2003, Belgium repealed its hotly contested War Crimes Act.<sup>1</sup> U.S. pressure in the wake of a number of complaints against some of its most high-ranking officials, cajoled Belgium into forsaking universal jurisdiction over crimes against international humanitarian law (hereinafter ‘IHL crimes’). Since the 2003 Act, Belgian prosecutors and courts could only exercise jurisdiction over these crimes on the basis of the active and passive personality principles. In January 2004, two Belgian human rights organizations however lodged a complaint against the 2003 Act with the Belgian Constitutional Court (*Cour d’Arbitrage*), alleging a violation by the Belgian legislature of the constitutional principle of equality before the law.<sup>2</sup> On March 23, 2005, the Constitutional Court partially struck down the new legislation,<sup>3</sup> without denouncing the abandonment of the principle of universality.

The two Belgian human rights organizations, one Flemish and one Walloon, aimed at the annulment of two provisions of the Preliminary Title of the Belgian Code of Criminal Procedure, as amended by the 2003 Act.<sup>4</sup> The first provision confers passive personality jurisdiction over IHL crimes on Belgian prosecutors and courts, whereas the second confers universal jurisdiction over crimes which Belgium is obliged to prosecute under international law.<sup>5</sup> The complainants argued that the impossibility of civil party petition, combined with the impossibility of judicial recourse against a decision of the federal prosecutor not to prosecute, set forth by the contentious provisions, violated the principle of equality, because victims of all common crimes, unlike victims of international crimes, enjoy civil party petition.

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<sup>1</sup> *Moniteur belge*, August 7, 2003; 42 *ILM* 1258 (2003) (unofficial translation).

<sup>2</sup> Articles 10 and 11 of the Belgian Constitution.

<sup>3</sup> Judgment nr. 62, March 23, 2005, Dutch and French text available at [www.arbitrage.be](http://www.arbitrage.be).

<sup>4</sup> Article 10, 1°*bis* of the Preliminary Title of the Code of Criminal Procedure (‘PT CCP’ hereinafter), as introduced by Article 16, 2° of the 2003 Act, and Article 12*bis* of the PT CCP, as amended by Article 18, 4° of the 2003 Act.

<sup>5</sup> There may still be limited room for universal jurisdiction over IHL crimes in Belgium. According to First Chamber of Parliament, the Geneva Conventions contain an obligation to prosecute war crimes, wherever committed (*Parl. St.*, Kamer, B.Z. 2003, nr. 0103/003, pp. 5 and 37). According to the Second Chamber, the Senate, however, this provision (Article 12*bis* PT CCP) does not cover IHL crimes, which are covered by the provisions providing for nationality jurisdiction (*Gedr. St. Senaat*, B.Z. 2003, nr. 3-136/3, pp. 7 and 30).

The possibility of civil party petition is one of the basic tenets of Belgian criminal procedure. Victims (*parties civiles*) have the right to seize an investigating judge in case a prosecutor decides not to prosecute or fails to take a timely decision to prosecute.<sup>6</sup> Like victims of common crimes, victims of IHL crimes had the right of civil party petition under the old legislation. The 2003 Act abrogated this right in case of IHL crimes committed against persons who were Belgian nationals or residents at the time of the crime (passive personality jurisdiction) and in case of crimes that Belgium is obliged to prosecute under international law (universal jurisdiction).<sup>7</sup> The Act conferred the monopoly of prosecution on the federal prosecutor. Victims could lodge complaints with him, but he would be under no obligation to act on them, nor would the victims be entitled to judicial review of his decision not to prosecute.

The Constitutional Court ruled that the decision of the legislature to confer the prosecutorial monopoly on the federal prosecutor for the said crimes was not disproportionate.<sup>8</sup> It held that this monopoly corresponded to “the desire to establish an organ for the centralization and co-ordination of the exercise of the criminal action with respect to these crimes”.<sup>9</sup> This argument is not convincing though. Centralization of the exercise of the criminal action in case of crimes against international law need not imply the monopoly of the federal prosecutor. In order to safeguard the rights of the victims, the legislature could have provided for the possibility of civil party petition with a single *federal* investigating magistrate, who specializes in investigation and prosecution of international crimes. However, when the Belgian legislature created the federal prosecutor for a number of crimes – including IHL crimes – in 2001,<sup>10</sup> it did not opt for the creation of a federal investigating magistrate.<sup>11</sup> The Constitutional Court probably wanted to avoid second-guessing the legislature regarding another act which was not put before it for judicial review.

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<sup>6</sup> Article 63 of the CCP.

<sup>7</sup> Under Article 6, 1°*bis* PT CCP, civil party petition remains possible for crimes committed by Belgian nationals or residents (active personality principle).

<sup>8</sup> Judgment (*supra* n. 3), § B.7.4.

<sup>9</sup> *Id.*

<sup>10</sup> Act of June 21, 2001, *Moniteur belge*, July 20, 2001.

<sup>11</sup> See for two rejected amendments in the other sense: *Parl. St.*, Kamer, 2000-2001, nr. 897/8, p.5 and nr. 897/12, p. 91; *Gedr. St.*, Senaat, 2000-2001, nr. 2-691/2, pp. 8-9, and nr. 2-691/4, p. 64. In March 2005, the Council of Minister of the federal Government of Belgium however announced the creation of a federal investigating magistrate who would co-ordinate all terrorism investigations. See <http://www.belgium.be/eportal/application?languageParameter=nl&pageid=comnewslist&navId=5907>.

To strengthen its argument, the Constitutional Court pointed out that the federal prosecutor does not have discretionary powers not to prosecute.<sup>12</sup> He is indeed legally bound to act on a complaint alleging IHL crimes (on the basis of the passive personality principle) or other international crimes (on the basis of the universality principle), *unless* the complaint is clearly without merit, if the facts listed in the complaint do not correspond to a definition of the international offenses, if the complaint cannot give rise to an admissible criminal prosecution, or if there is a more appropriate adjudicative forum (*forum non conveniens*).<sup>13</sup> This obligation remains however largely theoretical if the complainant is not entitled to seek judicial review of the prosecutor's decision not to prosecute. This is the Achilles' heel of the 2003 Act, which explicitly rules out any judicial review so as to avoid negative publicity for the alleged perpetrators. Granting the federal prosecutor exclusive powers to dismiss rash complaints, without the brouhaha of a judge pronouncing himself on the legality of a dismissal, largely reflects the desiderata of the United States. In this context, the Government admitted that the impossibility of judicial review was "not ideal", but it asked the complainants to "trust the federal prosecutor".<sup>14</sup>

In a State governed by the rule of law, Belgium in particular, the prosecutor is usually *mistrusted* however. In order to safeguard the rights of the victims, the Code of Criminal Procedure therefore generally provides for civil party petition when the acts of the prosecutor do not correspond to the wishes of the victims. In case the legislature legitimately excludes civil party petition for certain crimes, such as international crimes, it should grant the victims a remedy or at least guarantee that the decision not to prosecute is taken in an independent and impartial manner. Judicial review of this decision is one avenue. Another avenue is conferring the decision not to prosecute on a judge instead of on a prosecutor.

In the Act of April 23, 2003, which amended the War Crimes Act for the first time since 1999, the legislature chose the first avenue. Without being entitled to civil party petition, the complaining party could appeal the federal prosecutor's decision not to

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<sup>12</sup> Judgment (*supra* n. 3), § B.7.4.

<sup>13</sup> 42 *ILM* 1258, 1266 (2003).

<sup>14</sup> Judgment (*supra* n. 3), § A.6.4.

prosecute within fifteen days. A special chamber of the court of appeals (*Chambre des Mises en Accusation*) would pronounce itself on the legality of that decision.<sup>15</sup>

The Constitutional Court opted for the second avenue: a *judge* taking the decision whether or not to prosecute *instead* of the federal prosecutor. The Court nevertheless allowed the federal prosecutor to remain the sole responsible of one ground of dismissal: it held that it was not disproportionate "to determine that the federal prosecutor had the sole responsibility to decide that the case should not be brought before the Belgian courts, because it could be brought either before an international tribunal or before an independent and impartial national judge [...]."<sup>16</sup> The Court herewith referred to the ground of dismissal based on the principle of subsidiarity: Belgian courts only have jurisdiction when other (reliable) tribunals could not establish their jurisdiction.<sup>17</sup> The application of this principle inevitably implies a political balancing act. The prosecutor indeed needs to ascertain whether a competent foreign tribunal has the characteristics of independence, reasonableness and equity. For such an analysis with political overtones, which takes into account the consequences of a decision to prosecute for the forum State's foreign affairs, a judge may not be the appropriate actor.<sup>18</sup> For that reason, when adopting a Code of Crimes against International Law in 2002, the German legislature also excluded judicial review of the federal prosecutor's decision not to prosecute.<sup>19</sup>

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<sup>15</sup> Article 5 of the Act of April 23, 2003 amending the Act of June 16, 1993 concerning the punishment of grave breaches of international humanitarian law, *Moniteur belge*, May 7, 2003; 38 *I.L.M.* 749 (2003). Article 5 modified Article 7, § 1 of the 1993 Act.

<sup>16</sup> Judgment (*supra* n. 3), § B.7.7.

<sup>17</sup> See 4° of Article 10, 1° *bis*, third paragraph, and 12 *bis*, third paragraph of the PT CCP (*supra* n. 13).

<sup>18</sup> Other States, the United States in particular, nevertheless consider the judge to be up to this task. When applying the Alien Tort Claims Act (ATCA), which provides for universal *tort* jurisdiction over violations of the law of nations, wherever committed, U.S. federal judges may apply the political questions doctrine (*Baker v. Carr*, 369 U.S. 186, 217 (1962)), pursuant to which they examine whether the constitutional or political interests of the U.S. political branches do not outweigh the interests of the court in adjudicating an ATCA claim. See K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Texas Int'l L. J.* 1, 13 (2004). See e.g. *Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995).

<sup>19</sup> *Völkerstrafgesetzbuch*, 2002 *Bundesgesetzblatt*, Teil 1, 2254. When adopting this Code, the German legislature also modified a number of provisions of the Code of Criminal Procedure (*Strafprozessordnung*, StPO). New § 153 (f) StPO recommends the federal prosecutor not to prosecute, *inter alia* when the case could be brought before an international tribunal or the tribunal of the State on whose territory the crime occurred or whose national was a victim of the crime. § 172 StPO rules out any judicial review of a decision of the prosecutor not to prosecute.

Since the evaluation of the other grounds for dismissal<sup>20</sup> would not imply a political interest-balancing test, the Constitutional Court ruled that it was not reasonably justified not to confer the decision to prosecute on an independent and impartial judge, seized by the federal prosecutor.<sup>21</sup> Accommodating the concerns of the legislature, the Court stated however that the legislature need not provide a remedy against the decision of the judge. Neither did it have to provide for a public procedure or the hearing of the parties involved.<sup>22</sup> The Court thereupon annulled the 2003 Act, insofar as it provided that there was no recourse against the decision of the federal prosecutor.<sup>23</sup> It maintained the effects of the annulled provisions until March 31, 2006 in order to leave time for the legislature to modify the Act.<sup>24</sup> The Belgian legislature will now probably grant a special chamber of the court of appeals the power to take a decision whether or not prosecute.

Henceforth, a judge will need to decide whether a complaint alleging international crimes is clearly without merit or not, whether the facts correspond to the definitions listed in the Criminal Code or to the international definitions, and whether the complaint can give rise to an admissible criminal prosecution. Considering such an assessment to be without political overtones nonetheless appears an illusion. The Constitutional Court considered the legislature's decision not to provide for judicial review of the federal prosecutor's application of the subsidiarity principle as justified in that, in so doing, complainants are "prevented from filing complaints with the Belgian courts so as to artificially spark a political debate compromising foreign prominent persons."<sup>25</sup> In case the complaints are filed against persons who are nationals of a State with a functioning and reliable legal system or who committed the alleged crimes in the territory of such a State, the federal prosecutor could indeed decide not to prosecute without any further ado.

When these conditions are not satisfied however, *i.e.* when the Belgian courts can subsidiarily exercise their jurisdiction because another tribunal is not able or willing

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<sup>20</sup> See 1°, 2° and 3° of Article 10, 1°*bis*, third paragraph, and 12*bis*, third paragraph of the PT CCP (*supra* n. 13).

<sup>21</sup> Judgment (*supra* n. 3), § B.7.8.

<sup>22</sup> *Id.* Compare Article 5 of the Act of April 23, 2003 (*supra* n. 15).

<sup>23</sup> *Id.*, § B.9.

<sup>24</sup> *Id.*, § B.10.

<sup>25</sup> *Id.*, § B.7.7.

to prosecute, the federal prosecutor is no longer entitled to take the decision not to prosecute on the basis of other grounds, such as in case of complaints that are clearly without merit. That decision belongs to the judge. As Belgium entertains friendly relations with States that are hardly governed by the rule of law, a judge may easily find himself mired in politics, provoking hostile foreign governmental reactions by these States, when considering the complaint as not clearly without merit or as admissible, or when characterizing the facts as matching the IHL or other definitions. Since the main rationale of the legislature's decision not to provide for recourse against the federal prosecutor's decision was to prevent rash complaints from being filed, as the Constitutional Court itself stated,<sup>26</sup> it appears logical - from the perspective of limiting a political fall-out - that not (only) the ground for dismissal based on the subsidiarity principle, but at least (also) the ground for dismissal based on the clear lack of merit of complaints should be assessed solely by the federal prosecutor and not by the judge.

Moreover, the Constitutional Court's decision may undermine the logical order of the grounds of dismissal set forth by the Belgian legislature. The order of these grounds in the 2003 Act before annulment made clear that the legislature required the prosecutor to first dismiss on the basis of frivolosity or inadmissibility, and only if dismissal on these grounds proved impossible, to conduct a tricky subsidiarity test. That order is implicitly reversed by the Constitutional Court. It is likely that the prosecutor will now first apply the subsidiarity principle in order to avoid a compulsory seizure of the judge, and only if he finds subsidiary jurisdiction for the Belgian courts, to seize the judge so as to allow the latter to assess the frivolosity or inadmissibility of the complaint.<sup>27</sup> There is a real risk that the federal prosecutor will all too often invoke the subsidiarity principle, instead of seizing the judge competent for an assessment of the other grounds for dismissal.

What is more, outright abuse by the federal prosecutor seems obvious. The Constitutional Court implied that the federal prosecutor, and not the complaining

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<sup>26</sup> *See supra* n. 25.

<sup>27</sup> *Compare* the order of the grounds for dismissal set forth by Article 17 of the Statute of the International Criminal Court, which appears to require the Prosecutor to assess admissibility firstly in light of the unwillingness or inability of the territorial or national State (a-b) and only secondly in light of the gravity of the case.

party, seizes the judge when the subsidiarity principle is not called into play. Unless the judge has the power to control the prosecutor *proprio motu*,<sup>28</sup> there appears to be no check on the federal prosecutor's decision. In this situation, the parties are again invited to trust the prosecutor. Yet if the judge is given control over the prosecutor's assessment of the grounds for dismissal, the subsidiarity principle in particular, the former's decision will inevitably affect Belgium's foreign affairs, an outcome that the Constitutional Court precisely wished to avoid. The only way out of this conundrum may be for the legislature to provide for a *marginal* appreciation of the prosecutor's decision.

Meanwhile, Belgium's Court of Cassation, *i.e.* the Supreme Court, asked the Constitutional Court whether a transitory provision of the 2003 Act was constitutional. That provision preserves universal jurisdiction with respect to all IHL proceedings pending at the time of the entry into force of the 2003 Act (August 7, 2003), provided that there was at least one Belgian complainant at the time of the filing of the complaint, or that at least one presumed offender resided in Belgium at the time of the entry into force of the 2003 Act.<sup>29</sup> The Court of Cassation wondered whether the apparent exclusion of asylum-seekers as complainants by the transitory provision did not violate the constitutional principle of equality before the law.<sup>30</sup> The Constitutional Court's opinion over this question is also due this year.

Finally: is the Constitutional Court's partial annulment of the Belgian 2003 Act concerning IHL crimes reason for concern in the United States? The answer appears to be in the negative. For one thing, the Constitutional Court did not call into question the Belgian legislature's abandonment of the universality principle for IHL crimes.<sup>31</sup> For another, it left untouched the abolition of civil party petition for international crimes, which corresponded to U.S. wishes. Furthermore, it upheld the prosecutor's exclusive competence to apply the subsidiarity principle. This implies that a judge

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<sup>28</sup> Pursuant to Article 235*bis*, § 2 of the CCP, a special chamber of the court of appeals (*Chambre des Mises en Accusation*) may control the investigating magistrate (not the prosecutor) *proprio motu*.

<sup>29</sup> Article 29, § 3 of the 2003 Act.

<sup>30</sup> Cass., *TotalFinaElf*, May 5, 2004, nr. P.04.0482.F; Cass., *K.P. e.a.*, May 19, 2004, nr. P.04.0352.F, French text available at <http://www.cass.be>.

<sup>31</sup> The Court held that the legislature's choice for universal jurisdiction does not preclude it from re-assessing that choice by restricting the possibilities to initiate proceedings for international crimes. Judgment (*supra* n. 3), § B.6.2.

will not pronounce himself on the ability and willingness of the United States to prosecute international crimes committed by its nationals. In practice, it is hardly conceivable that the federal prosecutor will *not* defer to the U.S., in view of the emphasis that the 2003 Act puts on the role of the "relevant international agreements by which Belgium and [the national or territorial] State are bound" in assessing the impartial and independent nature of the foreign tribunals.<sup>32</sup> Although the Act urges the federal prosecutor to assess the concrete circumstances of the case, the fact that Belgium and the United States are both parties to the 1966 International Covenant on Civil and Political Rights may suffice for the prosecutor to defer. The Constitutional Court's annulment of the 2003 Act insofar as it excludes judicial recourse will then not affect complaints against U.S. nationals, as the annulment does indeed not undermine the federal prosecutor's exclusive powers over the application of the subsidiarity principle.

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<sup>32</sup> See 4° of Article 10, 1°*bis*, third paragraph, and 12*bis*, third paragraph of the PT CCP (*supra* n. 13).