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Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (editors)



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Front cover: *Extraction of resources was a primary engine of colonization. The pictures show teak extraction in Colonial Burma by the British Bombay Burmah Trading Corporation around 1920. Above: A girdled teak tree and two foresters. Below: The Corporation used some 3,000 elephants to move logs. The photographs were taken by Mr. Percival Marshall (an employee of the Corporation). TOAEP thanks his great grandson Mr. Ben Squires for making them available and Professor Jonathan Saha for explanations.*

Back cover: *Storing ground used by the Bombay Burmah Trading Corporation. The photograph was taken by Mr. Percival Marshall around 1920.*

Possible Impediments to Justice for Colonial Crimes: A Belgian Perspective

Christophe Marchand, Crépine Uwashema
and Christophe Deprez*

14.1. Introduction

Justice for colonial wrongs is a difficult matter. Collective or individual responsibilities have rarely been established in history.¹ This may be described as an ‘accountability gap’.² While this gap may partly be due to circumstantial and factual reasons, it is also the result, specifically, of legal impediments that are faced by victims in their quest for justice. Such impediments exist on the plane of international(ized) justice, at the level of former colonies, as well as in the domestic legal order of former colonial States.

This chapter takes the latter perspective as a starting point. Drawing from our experience in assisting victims of colonial crimes and their families in Belgium, we will seek to examine the ‘accountability gap’ from

* **Christophe Marchand, Crépine Uwashema and Christophe Deprez** are all attorneys at JUS COGENS, a Brussels-based, small-size law firm specialising in human rights and international criminal issues. Deprez is Associate Lecturer at the University of Liège and a Visiting Professor at the University of Lille and at Aix-Marseille University. He holds a Ph.D. from the University of Liège. Marchand qualified as an attorney in 1996 and is a partner at and founder of JUS COGENS. He has extensive experience in international criminal cases and in human rights litigation, including before the European Court of Human Rights and United Nations monitoring bodies. Uwashema is a partner at JUS COGENS. She holds master’s degrees in law from the Vrije Universiteit Brussel and Université libre de Bruxelles.

¹ See Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015, p. i. See also, pointing at a few recent, domestic attempts to address this issue, Morten Bergsmo, “Myanmar, Colonial Aftermath, and Access to International Law”, in Occasional Paper Series No. 9 (2019), Torkel Opsahl Academic EPublisher, Brussels, 2019, pp. 17–18.

² See also Chapter 15 below by Mutoy Mubiala (“Addressing Colonial Wrong-Doing in the Great Lakes Region of Africa”).

the perspective of the criminal law and practice of a former colony. We will do so by presenting a selected series of concrete legal impediments that victims may face in litigating at the Belgian level, as well as potential solutions to tackle them.

The analysis will be structured in four sections, each addressing one specific, possible legal impediment. Firstly, the characterization of colonial wrongs as war crimes will be examined, with a discussion on legal nature of colonial conflicts under international humanitarian law ('IHL') and possible implications in terms of criminal prosecutions in Belgium (Section 14.2.). Secondly, the chapter will address the non-application of statutory limitations for international crimes and its contours in the Belgian experience (Section 14.3.). Thirdly, we will turn to the Belgian experience in establishing parliamentary commissions of inquiry on colonial wrongs, and the impact that such process may have in the context of criminal proceedings (Section 14.4.). Fourthly and finally, in light of recent legislative developments, the chapter will leave the domain of individual responsibility and turn to novel perspectives on the criminal liability of Belgium as a State (Section 14.5.).

14.2. Prosecution for War Crimes and the Classification of Armed Conflicts

From a legal perspective, the characterization of colonial wrongs as international crimes is of key importance to the efforts to bring those responsible to justice. This is because in many legal systems, the catalogue of international crimes – whether war crimes, crimes against humanity or genocide – triggers the application of a series of derogatory tools (either procedural or substantive in nature) that are specific to this category of offences. This includes the application of specific modes of liability,³ the ban on immunities,⁴ or, as will be further examined below,⁵ the application of specific norms pertaining to statutory limitations.

³ See, for example, in the Belgian context, Article 136*septies* of the Criminal Code (for a commentary, see Damien Vandermeersch, "Les violations du droit international humanitaire", in *Les infractions – Volume 5: les infractions contre l'ordre public*, Brussels, Larcier, 2013, pp. 140–145).

⁴ See, for example, in the context of the Rome Statute of the International Criminal Court ('ICC'), 17 July 1998, Article 27 ('ICC Statute') (<http://www.legaltools.org/doc/7b9af9/>).

⁵ At Section 14.3.

Among international crimes, war crimes are the ones that have probably been most commonly associated with colonial, decolonization or post-colonial contexts. As Kaleck observes: “War crimes were a common feature of colonial wars”,⁶ also in the context of struggles of independence against Belgium.⁷ This includes Congo (then Zaïre) in the early 1960’s.

On 17 January 1961, soon after the 30 June 1960 independence, Congo’s first Prime Minister, Patrice Lumumba, was assassinated in Katanga (which had recently seceded from the newly independent Congo), in the presence of both Belgian and Katangese officials.⁸ His corpse was dissolved in acid.⁹ Patrice Lumumba was known to have attracted strong opposition from Belgian officials due to his highly critical position towards the former colonial State and its remaining interests in Congo.

In 2001, a commission of inquiry¹⁰ was established within the Belgian Parliament to elucidate the circumstances of this crime. In its final report, the commission came to the conclusion that “some members of the government of Belgium and other Belgian actors bear a moral responsibility in the circumstances that led to the death of Lumumba”.¹¹

Unsatisfied with this timid finding, in June 2011 the family of Patrice Lumumba lodged a criminal complaint with a Brussels-based investigative judge, on grounds of the (Belgian) nationality¹² of ten suspected participants to this crime.¹³ This complaint soon came to raise a debate on the precise characterization of the crime that had been committed against

⁶ Kaleck, p. 28, see above note 1.

⁷ *Ibid.*, p. 27.

⁸ Enquête parlementaire visant à déterminer les circonstances exactes de l’assassinat de Patrice Lumumba et l’implication éventuelle des responsables politiques belges dans celui-ci, Rapport, *Doc. Parl.*, 2001-2002, no. 50-0312/007, pp. 838–839 in particular.

⁹ *Ibid.*, p. 824.

¹⁰ On such mechanism in the Belgian context, see below at Section 14.4.

¹¹ Enquête parlementaire visant à déterminer les circonstances exactes de l’assassinat de Patrice Lumumba et l’implication éventuelle des responsables politiques belges dans celui-ci, Rapport, *Doc. Parl.*, 2001-2002, no. 50-0312/007, p. 839. Our own translation of “certains membres du gouvernement belge et d’autres acteurs belges ont une responsabilité morale dans les circonstances qui ont conduit à la mort de Lumumba”.

¹² Jurisdiction to prosecute international crimes in Belgium based on active nationality is consolidated in Article 6, 1 *bis* of the Preliminary Title to the Belgian Code of Criminal Procedure (Titre préliminaire du Code de procédure pénale).

¹³ At the time of writing, only two of them were still alive.

Patrice Lumumba. Could his assassination indeed qualify as a war crime – especially in the specific forms of murder, torture or inhuman treatment, serious injury to body or health, other outrage upon personal dignity, deprivation of the rights of fair and regular trial, and/or unlawful deportation or transfer? And, in the affirmative, should it be considered a war crime committed in an international or in a non-international armed conflict?

While the classification between international and non-international armed conflicts has, on the face of it, limited significance in the Belgian criminal system (this is because the catalogue of war crimes enshrined since 1993¹⁴ in Article 136*quater* of the Belgian Criminal Code consists of a list that is common to both international and non-international conflicts),¹⁵ the nature of the armed conflict that was ongoing at the time may still be relevant in connection with the requirements of legality and non-retroactivity in criminal proceedings. This is because, under the latter principles, “a person may only be held criminally liable and punished if, at the moment when he performed a certain act, the act was regarded as a criminal offence by the relevant legal order”.¹⁶

In the *Lumumba* case, the firm position of the family of Patrice Lumumba was and still is that, in light of relevant IHL principles,¹⁷ the situation in Congo in January 1961 qualified as an international armed conflict (‘IAC’). In short, this is because Belgian troops were still present in Congo in January 1961, because Belgium was actively contributing to the secessionist movements in both Katanga and Kasai provinces, and because

¹⁴ Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, Belgian Official Journal (Moniteur belge), 5 August 1993.

¹⁵ See, for example, Éric David, *Éléments de droit pénal international et européen*, second edition, Brussels, Bruylant, 2018, vol. 2, p. 1229. This certainly contrasts with what usually applies in other legal systems (see, for example, the duality of ICC Statute, Article 8, see above note 4).

¹⁶ Antonio Cassese, “Nullum Crimen Sine Lege”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 438.

¹⁷ See Article 2 common to the four 1949 Geneva Conventions as interpreted, for example, by International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Tadić*, Appeals chamber, Judgment, 15 July 1999, IT-94-1-A, para. 84 (<https://www.legal-tools.org/doc/8efc3a/>); ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 18 March 2012, ICC-01/04-01/06-2842, para. 541 (<https://www.legal-tools.org/doc/677866/>). For a general commentary, see, for example, Andrew Clapham, “The Concept of International Armed Conflict”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Convention: A Commentary*, Oxford University Press, 2015, pp. 3–26.

United Nations ('UN') and Union of Soviet Socialist Republics ('USSR') troops were also involved on the ground at that time.¹⁸ As it is not seriously disputable that war crimes committed during international armed conflicts were already reflected in customary international law at that time,¹⁹ and because the legality principle under international law does not oppose the prosecution of international crimes based on their customary nature,²⁰ Patrice Lumumba's complaint was, in our view, fully admissible.

When this question was raised before the investigative section of the Brussels Court of Appeal ('chambre des mises en accusation'), the perspective of the office of the federal prosecutor ('parquet fédéral') was slightly different. While agreeing that the murder of Patrice Lumumba could be characterized as a war crime and could lawfully lead to a criminal trial, the prosecutor considered that the situation in Congo, back in January 1961, did not consist of an international but of a non-international armed conflict ('NIAC'). In turn, this alternative position raised the question whether the criminalization of war crimes was already customary, back in 1961, also in time of non-international armed conflicts – which, according to the prosecutor, it was.²¹

¹⁸ See Georges Abi-Saab, *The United Nations Operation in the Congo, 1960-1964*, Oxford University Press, 1978, especially pp. 7–47.

¹⁹ See, already in 1949, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 49 (<https://www.legal-tools.org/doc/baf8e7/>); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Article 50 (<https://www.legal-tools.org/doc/0d0216/>); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, Article 129 (<https://www.legal-tools.org/doc/365095/>); Geneva Convention (IV) relative to the protection of civilian persons in time of war, 12 August 1949, Article 146 (<https://www.legal-tools.org/doc/d5e260/>).

²⁰ See, for example, ICTY, *Prosecutor v. Tadić*, Appeals chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-A, paras. 128–129 ('Tadic Decision on the defence motion for interlocutory appeal on jurisdiction') (<https://www.legal-tools.org/doc/80x1an/>); ICTY, *Prosecutor v. Hadžihasanović, Alagić and Kubura*, Appeals chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, IT-01-47-AR72, paras. 35, 44–46 and 55 (<https://www.legal-tools.org/doc/608f09/>).

²¹ Brussels Court of Appeal ('chambre des mises en accusation') ('BCA'), *Prosecutor and Lumumba v. Huyghe et al.*, FD.30.99.10/11, Federal prosecutor's submissions to the Brussels Court of Appeal, 7 June 2012.

In its 12 December 2012 decision,²² the Brussels Court of Appeal, while not directly addressing the nature of the armed conflict at that time and place, concurred that, *prima facie*, the complaint and proceedings were admissible and had to carry on.

This decision has been criticized – including in the media²³ – by one commentator.²⁴ According to the latter (who argued that the conflict in Congo was non-international at that time), “[i]t is only from the beginning of the 1990’s that the concept of war crime has been extended to grave breaches of international humanitarian law committed in (...) non-international armed conflicts”.²⁵

Surely, this statement must be nuanced.²⁶ When, in the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) was called upon to decide that during the 1990’s ex-Yugoslavia war NI-AC-based violations of IHL were already recognized as war crimes, the Tribunal also built on many pre-1990’s (and indeed pre-1960’s) declarations, military handbooks and other materials suggesting ancient customary status, for example, in relation to the 1936-1939 Spanish civil war or to the 1947 civil war in China.²⁷

²² BCA, *Prosecutor and Lumumba v. Huyghe et al.*, FD.30.99.10/11, Interlocutory judgment n°. 4358, 12 December 2012.

²³ Pierre d’Huart, “Affaire Lumumba: “il n’y a pas eu crime de guerre””, *La Libre Belgique*, 12 December 2012.

²⁴ Pierre d’Huart, “Affaire Lumumba: vers un non-lieu?”, in *Journal des Tribunaux*, no. 6517, 2013, pp. 282–285.

²⁵ *Ibid.*, p. 282 (our own translation of “[c]e n’est qu’à partir du début des années 1990 que la notion de crime de guerre s’est étendue aux violations graves du droit humanitaire commises dans (...) les conflits armés non internationaux”).

²⁶ See, also of this view, Jacques B. Mbokani, “Le lien de connexité entre le crime et le conflit armé dans la définition des crimes de guerre”, in Diane Bernard and Damien Scalia (eds.), *Vingt ans de justice internationale pénale*, Les dossiers de la Revue de droit pénal et de criminologie, no. 21, La Charte, 2014, p. 44 (noting: “[t]he least we can say is that this statement comes as a surprise. Even more surprising is that [the author] cites Eric David and Antonio Cassese, although this is not what these eminent professors meant to say in the excerpts that the author refers to”; our own translation of “[l]e moins qu’on puisse dire, est que cette affirmation étonne. Plus étonnant encore, c’est qu’il cite à son appui Eric David et Antonio Cassese, alors que ce n’est pas ce que ces éminents professeurs ont voulu dire dans les passages auxquels l’auteur se réfère”).

²⁷ *Tadić* Decision on the defence motion for interlocutory appeal on jurisdiction, paras. 100–102 in particular, see above note 20.

In fact, it very much seems that no international or internationalized criminal body has ever had the chance to question whether, in the early 1960's, grave breaches of IHL committed in time of NIAC could already qualify as war crimes under customary international law. In the context of the *prima facie* assessment that it was called upon to conduct on 12 December 2012, the Brussels Court of Appeal suggested that they could. In the view of Patrice Lumumba's family, this is an important step in filling the accountability gap for colonial wrongs.

14.3. The Non-Applicability of Statutory Limitations for International Crimes

The existence of statutory limitations is a recurring question in efforts to tackle impunity for international crimes. This is certainly true of colonial crimes, which tend to be brought to justice several decades after they were committed – if ever indeed. This is yet another challenge in the *Lumumba* case that deserves some attention.

It is not disputed that, in the Belgian (written) legislative framework, both the existence of war crimes and the suppression of statutes of limitation for their prosecution are the result of a 1993 piece of legislation that entered into force on 15 August 1993.²⁸ As a result of this legislation, and despite its subsequent, profound amendment (especially in 2003),²⁹ Article 21 of the Preliminary Title to the Belgian Code of Criminal Procedure³⁰ provides that the prosecution of war crimes, crimes against humanity and genocide in Belgium cannot become time-barred. The possible challenge with respect to this provision, as we shall see below, pertains to its *ratione temporis* scope.

It should first be recalled that Belgium is far from being isolated on the exclusion of statutory limitations for international crimes. On the international level, important steps have been taken in this direction, especially with a view to preventing impunity for World War II crimes.³¹ On 26 November 1968, the Convention on the non-applicability of statutory

²⁸ Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, Belgian Official Journal (Moniteur belge), 5 August 1993.

²⁹ Loi du 5 août 2003 relative aux violations graves du droit international humanitaire, Belgian Official Journal (Moniteur belge), 7 August 2003.

³⁰ Titre préliminaire du Code de procédure pénale (“Preliminary Title”).

³¹ See Florence Bellivier, Marine Eudes and Isabelle Fouchard, *Droit des crimes internationaux*, Paris, Presses Universitaires de France, 2018, p. 351.

limitations to war crimes and crimes against humanity was adopted under the auspices of the UN.³² A similar initiative was replicated a few years after that within the Council of Europe, with the adoption in 1974 of the Convention on the non-applicability of statutory limitation to crimes against humanity and war crimes.³³ Although it is true that neither of these instruments gained much support (Belgium still became a party to the 1974 Council of Europe Convention in 2003), many legislators decided to go along and to adopt ‘imprescriptibility’ clauses for international crimes. This is how Article 21 of the Preliminary Title to the Belgian Code of Criminal Procedure came into existence – along with, for example, Article 213-5 of the French criminal code³⁴ and Article 29 of the Statute of the International Criminal Court.³⁵

The *ratione temporis* scope of this provision, which entered into force on 15 August 1993, must then be questioned. Does it apply to all crimes, whenever committed and whether or not they would have normally become time-barred before 15 August 1993? Does it apply to past crimes, but only insofar as they had not reached statutory limitation by 15 August 1993? Or does it apply to crimes committed after 15 August 1993 only? In other words, can Article 21 of the Preliminary Title be applied in relation to the assassination of Patrice Lumumba – a crime for which, if it were not for Article 21, the statutory limitation would have normally expired after 10 years under Belgian law as it applied at that time?³⁶

The international and comparative experience reveals important differences in approach on this issue. To only mention one obvious contrast

³² United Nations, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 11 November 1970, *Treaty Series*, vol. 754, p. 73 (<https://www.legal-tools.org/doc/4bd593/>).

³³ Council of Europe, European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 27 June 2003, ETS No. 082 (<https://www.legal-tools.org/doc/302b1c/>).

³⁴ This provision, which was introduced pursuant to a law no. 64-1326 of 26 December 1964, provides for the non-applicability of statutory limitation to crimes against humanity and genocide. War crimes, on the other hand, may still become time-barred after 30 years under Article 462-10 of the French Criminal Code (<https://www.legal-tools.org/doc/418004/>).

³⁵ “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”.

³⁶ Loi du 17 avril 1878 contenant le titre préliminaire du Code de procédure pénale, telle que modifiée par la loi du 30 mai 1961, Belgian Official Journal (Moniteur belge), 10 June 1961, Article 21.

at treaty level: while the 1968 UN Convention applies to all crimes “irrespective of the date of their commission” (Article 1), the 1974 European Convention is limited to crimes “committed after its entry into force” or “committed before such entry into force in those cases where the statutory limitation period had not expired at that time” (Article 2). The question, in short, is thus whether Article 21 of the Preliminary Title should be interpreted in accordance with the UN or European conventional model.

Under common principles of Belgian judicial law and practice, when norms of a procedural character are newly adopted, they normally apply immediately to all new situations, but also to all continuing effects of situations that arose prior to the legislative amendment in question.³⁷ Theoretically, this would seem to suggest that, insofar as it entered the Belgian legislative framework on 15 August 1993, the ban on statutory limitations for international crimes should normally apply to crimes committed after 1993, to older crimes for which the statutory limitation had not been reached by 15 August 1993, but – *prima facie* – not to crimes which had already become time-barred by that date. As far as ordinary crimes are concerned, this position has been confirmed in Belgium both by the Cour de cassation and by the Cour constitutionnelle.³⁸

This general position, however, may not be in line with international and comparative practice as far as *international crimes* are specifically concerned. As other precedents indicate, and although human rights practice seems to generally echo the general solution described above,³⁹ sev-

³⁷ Article 2 and 3 of the Belgian Code of Civil Procedure, as interpreted by consistent case law (see, for example, Cour de cassation, 24 April 2008, *Pasicrisie*, 2008, p. 993; for many further references, see Franklin Kuty, *Principes généraux du droit pénal belge – Tome 1: la loi pénale*, third edition, Brussels, Larcier, 2018, p. 294).

³⁸ Cour de cassation, 12 November 1996, no. P.95.1171.N (available at www.juridat.be); Cour constitutionnelle, 4 April 2019, no. 54/2019, *Revue de droit pénal et de criminologie*, 2019, no. 6, pp. 824–828.

³⁹ Though the European Court of Human Rights (‘ECtHR’) clearly accepts the extension of a limitation period before its expiry (ECtHR, *Coëme and others v. Belgium*, Judgment, 22 June 2000, no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 149 (‘ECtHR *Coëme v. Belgium*’) (<https://www.legal-tools.org/doc/0f1fd3/>)), the Court seems more careful and less consistent when it comes to “restoring the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation”. Compare ECtHR, *Kononov v. Latvia*, Judgment, 24 July 2008, application no. 36376/04, para. 144 (<https://www.legal-tools.org/doc/56dc40/>); ECtHR, *Kononov v. Latvia*, Grand Chamber, Judgment, 17 May 2010, application no. 36376/04, paras. 228–233 (<https://www.legal-tools.org/doc/ed0506/>); ECtHR *Coëme v. Belgium*, para. 149.

eral arguments have been successfully put forward in judicial history to support the assertion that this general model does not apply, as such, to prosecution for international crimes.⁴⁰

When faced with similar challenges, the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), for instance, have decided that the principles of legality and non-retroactivity do not apply at all to limitation periods and to other procedural matters, but only to purely substantive issues.⁴¹ Another chamber within the ECCC further suggested that, in any case, limitation periods do not run for the time during which the State's prosecutorial and investigative machinery has not been functioning properly.⁴²

In our view, however, the most convincing argument rests with general international law – especially in the form of custom.⁴³ This has been the French Court de cassation's approach in the *Barbie* case, when it decided that the non-applicability of statutory limitation for crimes against humanity was not only the result of Article 213-5 of the French Criminal Code (mentioned above), but that it also stemmed from a pre-existing norm of international law – as such, there was thus no retroactivity and the principle merely confirmed by Article 213-5 could rightfully apply to the crimes committed by Claus Barbie during World War II.⁴⁴

In the *Lumumba* case, neither the office of the federal prosecutor nor the Brussels Court of Appeal raised the *ratione temporis* scope of Article 21 of the Preliminary Title to the Belgian Code of Criminal Proce-

⁴⁰ On the non-applicability of statutory limitations in light of the specific nature of international crimes, see Yasmin Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, The Hague, T.M.C. Asser Press, 2010, pp. 211–214.

⁴¹ Extraordinary Chambers in the Courts of Cambodia ('ECCC'), *Prosecutor v. NUON Chea et al.*, Pre-Trial Chamber, 15 February 2011, no. 002/19-09-2007-ECCC/OCIJ (PTC 145 and 146) D427/2/15, para. 183 (<https://www.legal-tools.org/doc/592afb/>). Also of this view, see Claus Kreß, "Nullum poena nullum crimen sine lege", in Rudiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2010, para. 20 (<https://www.legal-tools.org/doc/f9b453/>).

⁴² ECCC, *Prosecutor v. Kaing Guek Eav (Duch)*, Trial Chamber, Decision on the defence preliminary objection concerning the statute of limitations of domestic crimes, 26 July 2010, no. 001/18-07-2007-ECCC/TC (E187), para. 14 (<https://www.legal-tools.org/doc/2466c7/>).

⁴³ For a detailed analysis on the notion that customary international law precludes the use of statutes of limitation over international crimes, see Naqvi, 2010, pp. 192–209, see above note 40.

⁴⁴ French Cour de cassation (crim.), 26 January 1984, no. 83-94.425.

ture as a possible impediment to the admissibility of the criminal prosecution initiated by Patrice Lumumba's family. The prosecutor observed that "under Article 21, para. 1, of the Preliminary Title to the Belgian Code of Criminal Procedure, criminal prosecution for [international crimes] cannot become time-barred",⁴⁵ and the court concurred that "the Belgian [trial] judge might indeed be competent over these facts [which] cannot become time-barred under Article 21, paragraph 1, of the law of 17 April 1878 containing the Preliminary Title to the Belgian Code of Criminal Procedure".⁴⁶

This is, to the best of our knowledge, the first and only court decision in Belgian judicial history in relation to this issue. In 1999, however, a Belgian investigating judge called upon to investigate crimes committed by Augusto Pinochet had already decided as follows: "it must be concluded that there exists a customary norm of international law establishing the non-applicability of statutory limitations for crimes against humanity and that this norm is applicable in the domestic legal order".⁴⁷ The 12 December 2012 Court of Appeal decision in the *Lumumba* case strongly suggests – as does the latter investigating judge's order and as other domestic courts have also done before – that the ban on statutory limitations for serious colonial crimes also applies to any past offence, as this principle not only results from the relevant legislative framework in Belgium, but also, has some superior roots in the international legal order.

14.4. The Establishment of Parliamentary Commissions of Inquiry and Possible Implications on Criminal Proceedings

On 9 December 1999, a proposition to establish a Parliamentary Commission of inquiry in charge of determining the exact circumstances of the

⁴⁵ *Prosecutor and Lumumba v. Huyghe et al.*, FD.30.99.10/11, Federal prosecutor's submissions to the Brussels Court of Appeal, 7 June 2012 (our own translation of "conformément à l'article 21 § 1^{er} du titre préliminaire du code d'instruction criminelle, l'action publique relative à des [crimes internationaux] ne peut être prescrite").

⁴⁶ *Prosecutor and Lumumba v. Huyghe et al.*, FD.30.99.10/11, Brussels Court of Appeal (chambre des mises en accusation), Interlocutory judgment no. 4358, 12 December 2012 (our own translation of "le juge belge pourrait en effet (...) être compétent pour connaître de ces faits [qui] sont imprescriptibles en application de l'article 21, paragraphe 1^{er}, de la loi du 17 avril 1878 contenant le titre préliminaire du Code d'instruction criminelle").

⁴⁷ Brussels Investigating Judge, 6 November 1998, *Revue de droit pénal et de criminologie*, 1999, p. 289 (our own translation of "il y a lieu de conclure à l'existence d'une règle coutumière de droit international consacrant l'imprescriptibilité des crimes contre l'humanité et que cette règle est applicable en droit interne").

assassination of Patrice Lumumba and the possible involvement of Belgian politicians was submitted to the Belgian Chamber of Representatives. On 2 February 2000, the establishment of the said commission was approved and eventually, on 16 November 2001, a report of almost one thousand pages regarding the parliamentary inquiry was published.⁴⁸ As mentioned above,⁴⁹ this commission came to the timid conclusion that “some members of the government of Belgium and other Belgian actors bear a moral responsibility in the circumstances that led to the death of Lumumba”. The implications of this parliamentary commission of enquiry on the ongoing criminal proceedings regarding the assassination of Lumumba in Belgium have not yet come to light. However, some procedural concerns may already be raised based on the Belgium *Transnuklear* case (see below).

By virtue of Article 56 of the Belgian Constitution and the law of 3 May 1880 on parliamentary inquiries (‘the law of 3 May 1880’), the Chamber of Representatives and the Senate⁵⁰ may establish commissions of inquiry. A member of Parliament can request that an inquiry be held. This request is handled in the same manner as a bill. After a debate in committee, the request goes to the plenary meeting for discussion and voting. If the request is approved, the branch of Parliament in which the request was made must appoint the commission of inquiry, upon which the investigation can proceed. According to the law of 3 May 1880, the inquiry may be held by the Chamber or the Senate in plenary or by a special commission. In practice, a special commission always conducts inquiries. The commission of inquiry and its chairperson hold the same powers as an investigating judge. This means that they can, amongst other things, call on and hear witnesses and experts. For some investigative measures such as a restriction of the freedom of movement, a seizure of material goods, a house search, perception and recording of private communication and telecommunication, a judge has to be appointed under the law of 3 May 1880.⁵¹ Upon completion of the inquiry, the rapporteur designated by the commission gives an account of the results of the inquiry to the plena-

⁴⁸ Enquête parlementaire visant à déterminer les circonstances exactes de l’assassinat de Patrice Lumumba et l’implication éventuelle des responsables politiques belges dans celui-ci, Rapport, *Doc. Parl.*, 2001-2002, no. 50-0312/006 and no. 50-0312/007.

⁴⁹ See above at Section 14.2.

⁵⁰ These are the two branches of the Belgian Parliament.

⁵¹ Article 4, para. 4, of the law of 3 May 1880.

ry session. The plenary examines the report and makes a statement about the possible conclusions, recommendations or resolutions of the commission of inquiry.⁵²

An inquiry initiated by the Chamber of Representatives or the Senate does not replace possible investigations by the judiciary. The law of 3 May 1880 provides that in case a parliamentary inquiry coexists with a judicial investigation, the parliamentary inquiry must not hinder the course of the judicial investigation.⁵³

Belgium has an ancient practice of establishing parliamentary commissions of inquiry in relation to sensitive issues such as colonial matters.⁵⁴ In the past, the power of inquiry was used primarily for legislative initiatives that should allow a more efficient functioning of the legislative bodies and lead to legislative initiatives. Over the years, parliamentary commissions of inquiry have been used in response to certain heavily, emotionally charged files, such as the *Parliamentary commission of inquiry into the events in Rwanda*,⁵⁵ the *Parliamentary commission investigating the legal and illegal exploitation and trade of natural resources in the Great Lakes region in view of the current conflict situation and Belgium's involvement*,⁵⁶ the parliamentary commission of inquiry to investigate the murder of Patrice Lumumba and possible Belgian responsibilities, and, more recently, the more comprehensive and newly-established parliamentary commission on Belgium's colonial past.⁵⁷

⁵² The mechanism of parliamentary commissions of enquiry as explained by the Belgian Senate. Belgian Senate, "Parliamentary committees of inquiry" (available on its web site).

⁵³ Article 1 of the law of 3 May 1880.

⁵⁴ See, for example, Chambre des Représentants de Belgique, Commission parlementaire, chargée de faire une enquête sur les événements qui se sont produits à Léopoldville en janvier 1959, 27 March 1959, 1958-1959, no. 3.

⁵⁵ Sénat de Belgique, Commission d'enquête parlementaire concernant les événements du Rwanda, 6 December 1997, 1997-1998, no. 1-611/7.

⁵⁶ Sénat de Belgique, Commission d'enquête parlementaire chargée d'enquêter sur l'exploitation et le commerce légaux et illégaux de richesses naturelles dans la région des Grands Lacs au vu de la situation conflictuelle actuelle et de l'implication de la Belgique, 20 February 2003, 2002-2003, no. 2-942/1.

⁵⁷ Chambre des représentants de Belgique, Commission spéciale chargée d'examiner l'état indépendant du Congo (1885-1908) et le passé colonial de la Belgique au Congo (1908-1960), au Rwanda et au Burundi (1919-1962), ses conséquences et les suites qu'il convient d'y réserver, 17 juillet 2020, 2019-2020, no. 55-1462/001.

The Belgian practice of establishing parliamentary inquiries raises some concerns which may hinder effective and fair criminal proceedings, and which might contribute to fostering an accountability gap.

Procedural issues and tension between a parliamentary inquiry and a judicial investigation – when both are investigating the same matter at the same time – were illustrated in the Belgian *Transnuklear* case. This case concerned two industrialists who were suspected of having made profit out of scams with hazardous nuclear waste. The two industrialists were eventually acquitted by the Antwerp Court of Appeal in May 1993 because of a serious violation of their right to a fair trial, which led according to the Court of Appeal to the inadmissibility of the criminal proceedings. This decision was based on the fact that the two industrialists had in fact been obliged to make confessions under oath before a parliamentary commission of inquiry and that, afterwards, an investigating judge had built on those statements made under oath to further interrogate the two industrialists. The Court considered that questioning under oath persons who are subject to a criminal investigation on facts that are the object of the criminal investigation is a clear violation of defence rights, if the statements made before the commission of inquiry are then used to incriminate the concerned persons in the context of the criminal investigation.⁵⁸

The question must therefore be raised whether the practice of parliamentary commissions of inquiry may lead to an accountability gap in the sense that the defence can rely on this case law to evade criminal responsibility in case information from parliamentary commissions of inquiry are subsequently used in criminal proceedings.

After this judicial precedent, the law of 3 May 1880 has been modified by a law of 30 June 1996 amending the law of 3 May 1880 on parliamentary inquiries and Article 458 of the Criminal Code.⁵⁹ Article 8 of the law of 3 May 1880 now provides that “he who is summoned to be heard as a witness is obliged to appear and to comply with the summons, under penalty of imprisonment of eight days to six months and a fine of five hundred francs to ten thousand francs”, but that the professional secrecy referred to in Article 458 of the Belgian Criminal Code can be in-

⁵⁸ See also Cour de cassation, 6 May 1993, *Pasicrisie*, 1993, I, no. 225.

⁵⁹ Loi du 30 juin 1996 modifiant la loi du 3 mai 1880 sur les enquêtes parlementaires et l'article 458 du Code pénal, Belgian Official Journal (Moniteur belge), 16 July 1996.

voked, and that any witness may invoke the fact that, by making a truthful statement, he could expose himself to criminal prosecution and therefore will refuse to testify.⁶⁰ However, a refusal to answer during a parliamentary inquiry based on the fact that the concerned person could expose himself or herself to criminal prosecution, could raise a negative suspicion and could still lead to the public prosecutor pressing an investigation. It has been advocated⁶¹ that the possibility of having parallel parliamentary inquiries and criminal investigation on the same facts, should be made impossible in Belgian law.

The legislative amendment after the *Transnuklear* case does not, in our opinion, address all the possible procedural impediments that could be thought of regarding the correlation between Belgian parliamentary inquiries and criminal investigations.

It is not clearly established by current Belgian legislation, for instance, whether information considered as confidential during a parliamentary commission of inquiry⁶² may be used in a criminal proceeding if

⁶⁰ Under the French, original version of Article 8 of the law of 3 May 1880:

Toute personne autre qu'un membre de la Chambre qui, à un titre quelconque, assiste ou participe aux réunions non publiques de la commission, est tenue, préalablement, de prêter le serment de respecter le secret des travaux. Toute violation de ce secret sera punie conformément aux dispositions de l'article 458 du Code pénal.

Les témoins, les interprètes et les experts sont soumis devant la Chambre, la commission ou le magistrat commis, aux mêmes obligations que devant le juge d'instruction.

Tout un chacun peut être appelé comme témoin. La convocation se fait par écrit et, au besoin, par citation. [...]

Les témoins et les experts prêtent ensuite le serment de dire toute la vérité et rien que la vérité. [...]

Toute personne citée pour être entendue en témoignage sera tenue de comparaître et de satisfaire à la citation sous peine d'un emprisonnement de huit jours à six mois et d'une amende de cinq cents francs à dix mille francs. Les dispositions du livre I du Code pénal, sans exception du chapitre VII et de l'article 85, sont applicables.

Sans préjudice de l'invocation du secret professionnel visé à l'article 458 du Code pénal, tout témoin qui, en faisant une déclaration conforme à la vérité, pourrait s'exposer à des poursuites pénales, peut refuser de témoigner.

⁶¹ For example, by Jacques Velu, Attorney General at the Cour de cassation, during the solemn opening session of the Court on 1 September 1993.

⁶² Article 3, para. 4, of the law of 3 May 1880 provides that:

Les membres de la Chambre sont tenus au secret en ce qui concerne les informations recueillies à l'occasion des réunions non publiques de la commission. Toute violation de ce secret sera sanctionnée conformément au règlement de la Chambre [...].

necessary for the establishment of the truth, whether declarations made under oath during a parliamentary commission of inquiry can be subjected in some situations to an adversarial debate in order to protect the equality of arms during the criminal proceedings, whether the outcome of such commissions might lead to situations where the *ne bis in idem* principle would or could be raised by the defendant, etc.

Other questionable consequences of parliamentary inquiries on criminal proceedings could include possible leaks of information from the parliamentary inquiry⁶³ that would be detrimental to the (necessary) secrecy of criminal investigations, and the obligation of undergoing questioning under oath during a parliamentary inquiry which is not always compatible with the right to remain silent.

On the other hand, the law of 3 May 1880 does not provide specific guarantees pertaining to effective legal assistance during the parliamentary inquiry, regarding questions such as access to the case file and equality of arms. Not only do parliamentary commissions raise concerns regarding the rights of the concerned persons during the inquiry, but also regarding the consequences of the parliamentary inquiry on any parallel judicial investigations.

As the *Transnuklear* case has shown, establishing parliamentary commissions of inquiry may arguably, paradoxically, reinforce the accountability gap. In case a parliamentary inquiry and a judicial investigation are ongoing at the same time or relate to the same facts, the practice of parliamentary inquiry commissions in Belgium may result in judicial investigations not having any effect or might raise some risks as to the (in)admissibility of criminal proceedings,⁶⁴ as a result of remaining gaps in Belgian legislation regarding procedural rights during parliamentary inquiry and criminal proceedings.

14.5. The Criminal Liability of Belgium as a State

On 30 July 2018, the law of 11 July 2018 amending the Criminal Code and the Preliminary Title of the Code of Criminal Procedure as regards

La commission peut lever l'obligation de secret sauf si elle s'est expressément engagée à le préserver.

⁶³ Despite the above-mentioned provision of Article 3 of the law of 3 May 1880.

⁶⁴ Like it was the case in the *Transnuklear* case.

the criminal liability of legal persons entered into force in Belgium.⁶⁵ The most significant changes implemented by this legislation concern the alignment of the criminal regime for legal and individual persons, making both liable for any criminal offense to which they contributed, and the abrogation of the criminal immunity of legal entities governed by public law.

Since July 2018, legal entities governed by public law can thus be held criminally responsible for offenses committed in their name or on their behalf. With respect to this specific category of legal persons, however, only a simple declaration of guilt can be pronounced, in accordance with the amendment of Article *7bis* of the Belgian Criminal Code.⁶⁶

Prior to this legislative reform, Article 5 of the Belgian Criminal Code excluded certain legal entities governed by public law from its scope, namely: the Belgian federal State, the regions, the communities, the provinces, rescue zones, pre-zones, agglomeration of Brussels, municipalities, multiple municipality zones, intra-municipal territorial bodies, the French Community Commission, the Flemish Community Commission, the Common Community Commission, the public social welfare centres, associations without legal form and non-profit organizations in the course of incorporation. Some of these legal entities of public law had been until then qualified as political, given that they have an organ directly elected according to democratic rules. They therefore enjoyed criminal immunity.

The new law of July 2018 can be considered a small but important step towards covering certain existing accountability gaps regarding the criminal responsibility of the Belgian State – including, possibly, for colonial wrongs –, in two ways in particular.

⁶⁵ Loi du 11 juillet 2018 modifiant le Code pénal et le titre préliminaire du Code de procédure pénale en ce qui concerne la responsabilité pénale des personnes morales, Belgian Official Journal (Moniteur belge), 20 July 2018.

⁶⁶ Article *7bis*, last paragraph, of the Belgian Criminal Code provides that: “En ce qui concerne l’Etat fédéral, les Régions, les Communautés, les provinces, les zones de secours, les prézones, l’Agglomération bruxelloise, les communes, les zones pluricommunales, les organes territoriaux intracommunaux, la Commission communautaire française, la Commission communautaire flamande, la Commission communautaire commune et les centres publics d’aide sociale seule la simple déclaration de culpabilité peut être prononcée, à l’exclusion de toute autre peine”.

Firstly, the new legal regime provides for the possible coexistence of criminal liability for both natural and legal persons. Prior to the legislative amendment, Article 5 of the Belgian Criminal Code did not provide systematically that a natural person and a legal person could be convicted at the same time. When the legal person's liability was incurred due to the intervention of a natural person exclusively, only the one person (either the natural or the legal person) who had committed the most serious offence could be held criminally responsible. Article 5 of the Belgian Criminal Code thus previously provided for an exoneration of responsibility for the person who had committed the least serious fault (this was unless the offence was committed "knowingly and intentionally"; in such a case, coexistence of criminal liability remained possible). Since 30 July 2018, this principle of non-concurring liability has been abolished. Article 5 of the Belgian Criminal Code now stipulates that "the criminal liability of legal persons does not exclude that of natural persons who have committed or participated in the same acts". The general rules on liability and participation in criminal offences as provided in Article 66 *et seq.* of the Belgian Criminal Code now apply in those situations.⁶⁷

Secondly, the law of 11 July 2018 introduced a form of criminal liability for legal persons governed by public law. The Belgian State and its many decentralized entities – such as the regions, the communities, the provinces, and the Brussels agglomeration – are now considered as legal persons who may be criminally liable. This means that the law now allows victims to file a criminal complaint in Belgium, against the Belgian State, including for colonial wrongs.

Despite these two amendments, we have to note that with respect to legal entities governed by public law, such as the Belgian State, only a penalty consisting of a "mere declaration of guilt" may be imposed pursuant to Article 7*bis*, paragraph 3, of the Belgian Criminal Code. Other penalties existing for natural persons as well as other legal persons (such as fines, confiscation, dissolution, and prohibition from practicing) are explicitly excluded by the Belgian Criminal Code for legal entities governed by public law. In the context of colonial wrongs, this may be problematic for achieving an effective reparation for victims before a criminal court. Measures which plaintiffs may expect to be taken by a State who is con-

⁶⁷ "La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs des mêmes faits ou y ayant participé."

sidered criminally responsible for a colonial wrong usually do not only consist in a *mere declaration of guilt*, but may also consist in taking steps to prevent a recurrence of the colonial wrongdoing, the payment of compensation for the caused loss, the restitution of colonial objects, etc. Victims could, however, consider trying to obtain some of these measures through civil proceedings subsequent to a criminal *declaration of guilt*. Furthermore, it is questionable whether a ‘mere declaration of guilt’ can be considered as an effective criminal sentence given that it is neither privative nor restrictive of freedom, of private property or of any other right.

At last, pursuant to Article 2 of the Belgian Criminal Code, no crimes can be punished with penalties that were not prescribed by law at the time when the crime was committed. In addition, if the penalty determined at the time of the judgment differs from that determined at the time of the crime, the least severe penalty will be applied.⁶⁸ Article 2 of the Belgian Criminal Code prohibits the retroactive application of criminal law when it is to an accused’s disadvantage. The principle of non-retroactivity of criminal law⁶⁹ applies both to the provisions defining the offence and to those setting the penalties incurred. Bearing these principles in mind, the law of 11 July 2018, which entered into force on 30 July 2018, will only apply to crimes committed after that date. Criminal liability of the Belgian State can thus only exist for criminal offences committed after the date of the entry into force of the new law. This means that an accountability gap in relation to the criminal liability of the Belgian State still exists for any colonial wrongs committed before 30 July 2018 (which certainly applies to a big part of colonial wrongdoing) given that the old rules continue to govern this period. The Belgian State thus continues to enjoy criminal immunity for any colonial or post-colonial wrongs committed prior to 30 July 2018. The future will tell if arguments can be raised successfully before courts with a view to countering this accountability gap, as has been the case in relation to the non-applicability of statutory limitations for international crimes.⁷⁰

⁶⁸ See also above at Section 14.1.

⁶⁹ Also embodied in Council of Europe, European Convention on Human Rights, 4 November 1950, Article 7 (<https://www.legal-tools.org/doc/8267cb/>), and UN, International Covenant on Civil and Political Rights, 23 March 1976, Article 15 (<https://www.legal-tools.org/doc/2838f3/>).

⁷⁰ See also above at Section 14.3.

14.6. Conclusion

There is still a long way to effective justice for colonial crimes within the Belgian legal system. As exposed above, different impediments might still be faced by victims in their quest for accountability. Also important are the procedural questions regarding the correlation between Belgian parliamentary inquiries and criminal investigations discussed above.

A potential recommendation to tackle impediments mentioned earlier in the chapter, with a view to countering existing accountability gaps, would relate to the difficulties concerning the *ratione temporis* scope of different mechanisms in the context of colonial wrongs. Given the fact that most of the cases concerning colonial crimes tend to be brought to justice several decades after they were committed, it could be envisaged by the Belgian legislator to provide specific regulations with a view to duly addressing the temporal impediments and to better taking into account the particular historical and practical reasons which often place victims of colonial wrongs in an uneasy position to seek justice after several years or decades have lapsed.

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