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BELGIUM’S UNIVERSAL JURISDICTION LAW: VINDICATION OF INTERNATIONAL JUSTICE OR PURSUIT OF POLITICS?

Malvina Halberstam*

INTRODUCTION

In 1993, Belgium adopted a universal jurisdiction law that permitted Belgian courts to try persons accused of genocide, crimes against humanity and war crimes, regardless of whether there was any link between Belgium and the criminal act, the perpetrator or the victim.1 Although a number of other states adopted “universal jurisdiction” laws, Belgium’s was the broadest.2 Perhaps because of its breadth, and the existence of another Belgian law that permitted anyone (not just the government) to initiate a criminal action, a number of actions were brought under the Belgian law, including several that proved to be problematic. Was the Belgian universal jurisdiction law a remedy that reflected the highest standards of international criminal justice or one that easily could be and was manipulated for political purposes?

This article considers that question in the context of the action against Ariel Sharon, the Prime Minister of Israel, for the 1982 massacre in Sabra and Shatila by Christian Phalange forces allied to Israel,3 and the actions against former President George H.W. Bush,

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1 See Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, translated and reprinted in 38 I.L.M. 918, 921 (1999).


3 See Complaint, available at http://www.mallat.com/articles/complaint.htm (last visited
Vice President Dick Cheney, Secretary of State Colin Powell and General Norman Schwarzkopf for acts in the 1991 Gulf War and against General Tommy Franks and other U.S. military officers for acts in the present war in Iraq. It examines the reaction to those actions by Israel and the United States, respectively; the response of the Belgian government to the criticism by Israel and the United States; and the successive amendments to the law adopted by Belgium.

I. THE INDICTMENTS AGAINST SHARON, BUSH, CHENEY, POWELL, SCHWARTZKOPF AND FRANKS

A. The Action Against Ariel Sharon

On February 12, 2003 the Belgian Court of Cassation issued a ruling interpreting the Belgian Universal Jurisdiction law of 1993 (as amended in 1999) to permit Belgium courts to try Ariel Sharon, the Prime Minister of Israel, and several former Israeli officers, for genocide and war crimes, based on acts by the Lebanese Christian Phalange army in Palestinian refugee camps in Sabra and Shatila in 1982, even though Belgium had no connection to the events, the perpetrators, or the victims, and even if Sharon was not present in Belgium. The Court reversed a lower court ruling that interpreted the 1993 law (as amended in 1999) to require the presence of the defendant in Belgium. The Court of Cassation held, however, that, as Prime Minister, Sharon had immunity and any trial would have to await his departure from office.
The decision of the court of Cassation was hailed by human rights organizations. Human Rights Watch called it a “huge victory.” Amnesty International praised Belgium for taking “a lead role in the fight against impunity to ensure an effective system of international justice;” it expressed “regret” only that the Court held that Sharon cannot be tried while in office.

The decision was denounced by Israel. Benjamin Netanyahu, the Foreign Minister of Israel, characterized it as “a blood libel and harsh blow against truth, justice and morality.” Elyakim Rubenstein, Israel’s Attorney General, said “the criminal indictment” in Belgium against Sharon and other Israeli officers “is an injustice, not a search for justice . . . . It was submitted solely for political reasons.”

In an open letter published in Belgian and Israeli newspapers, Belgian Foreign Minister Louis Michel, bemoaning the deterioration of relations between Belgium and Israel caused by the Court’s ruling, said the law was “the expression of a political will to place [Belgian] foreign policy on a sounder ethical footing” and chided his “Israeli friends” for not recognizing the “ethical underpinnings” of the law. He wrote,

I am very aware that the complaint lodged by Palestinian-Lebanese citizens before a Belgian judge against Prime Minister Ariel Sharon is the cause of incomprehension and even indignation in Israel . . . . So let me clarify: At this stage the complaint has not been judged on its merits, nor even on the issue of its eventual validity, but only on the technical issue of its admissibility . . . . [It is] clearly wrong to portray the complaint as a politically inspired act by the Belgian government aimed at the state of Israel and its prime minister. I am

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15 Id.
saddened that my Israeli friends cannot in good faith accept the ethical underpinnings of the law of 1993 and continue to repeat that this law is aimed specifically against Israel. This is simply not true.\textsuperscript{17}

Even before the highest court decided the case (but after the lower court decision), the Belgium Senate adopted amendments to the law making clear that no connection to Belgium was required and that defendant’s presence in Belgium was not necessary for the assertion of jurisdiction.\textsuperscript{18} The amendment, which was to be retroactive, was supported by Prime Minister Guy Verhofstadt and passed by a large majority of the upper house.\textsuperscript{19}

B. The Actions Against Former President Bush, Vice President Cheney, Secretary of State Powell, General Schwarzkopf, General Franks, and Other U.S. Military Officers

This contrasts starkly with the Belgian government’s reaction several weeks later to complaints filed against high U.S. government and military officials, for war crimes allegedly committed in the 1991 Gulf War and in the current war with Iraq, respectively. On March 18, 2003, seven Iraqis filed a complaint against former President George Bush, Vice-President Richard Cheney, Secretary of State Colin Powell and General Norman Schwarzkopf, charging them with war crimes in

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} See Evelyn Gordon, \textit{A Belgian Obsession}, JERUSALEM POST, Feb. 18, 2003, at A7 (“When the lower court threw out the case against Sharon ... four senators from different parties promptly introduced an amendment to the ‘universal competence’ law stating that no such connection is necessary.”). \textit{See also} Coalition for the International Criminal Court, Belgium, at http://www.iccnow.org/countryinfo/europecis/belgium.html (last visited Oct. 13, 2003) (discussing “a political agreement” entered into on July 17, 2002 between “the major political parties” that the 1993 law applies “even if the accused are not on Belgian territory”). The amendment as ultimately adopted provides:

\begin{quote}
Art. 7-§1 Except in the event of [a decision of] abstention from jurisdiction as provided in one of the situations set forth in the following paragraphs, Belgian courts shall have jurisdiction over the violations provided by the present law, independently of where they have been committed and even if the alleged offender is not located within Belgium.
\end{quote}

\begin{quote}
Belgium’s Amendment to the Law of June 15, 1993 (As Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law (April 23, 2003), 42 I.L.M. 749, 755 (2003) (emphasis added). \textit{But see THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, supra note 12. Principle 1(2) states: “Universal Jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.” Id. (emphasis added). The commentary states that this language “does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment, or requesting extradition, when the accused is not present.” Id. at 44.}
\end{quote}

\item \textsuperscript{19} See Gordon, \textit{supra} note 18.
\end{itemize}
the 1991 Gulf War, based on the bombing of a Baghdad shelter in which 403 people were killed, including 261 women and 52 children. U.S. officials denounced the lawsuit as “totally baseless” and “clearly political.” Powell characterized the legislation as a “serious problem” and said that the U.S. had warned Belgian authorities about the effect of “legislation that allows suits against foreign leaders on . . . politically motivated charges.” He noted that it was “a matter of concern at NATO headquarters” and that it “affects the ability of people [to] travel to Belgium.” Belgian Foreign Minister Louis Michel denounced the complaint, saying that the law was “being abused by opportunists,” and that “Belgium must not impose itself as the moral conscience of the world.” On April 6, 2003, little more than two weeks after the suit had been filed, the Belgium Parliament approved changes to the law that would enable it to dismiss the action.

A Belgian Foreign Ministry spokesman said the amendment “was a good thing for diplomatic relations . . . . The law was originally passed based

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26 Id.

27 See Belgium Eases Law on Trial of Foreigners, N.Y. TIMES, Apr. 7, 2003 at A8. See also Richard Bernstein, Belgium: Move to Amend War Crimes Law, N.Y. TIMES, Mar. 28, 2003, at A8. The amendment provides:

[T]he federal prosecutor will seek instruction from the judge that he investigate the complaint unless . . . 4) in the concrete circumstances of the matter, it results that, in the interest of administration of justice and in respect of Belgium’s international obligations, this matter should be brought either before international tribunals, or before a tribunal in the place where the acts were committed, or before the tribunals of a State in which the offender is a national or where he may be found, and as long as this tribunal is competent, independent, impartial and fair.

on good intentions but was abused for political reasons."^^

On May 14, 2003, an action was filed in Belgium by seventeen Iraqis and two Jordanians^^ against General Tommy Franks, Commander of Coalition Forces in Iraq, and another U.S. officer, charging them with war crimes. It alleged bombing of civilian targets, indiscriminate shooting by U.S. troops, ordering troops to fire on ambulances, and failure to prevent looting of hospitals.^^ General Richard Myers, Chairman of the U.S. Joint Chiefs of Staff, said that the U.S. government viewed it "as a very, very serious situation" and warned that NATO headquarters may have to be moved from Belgium.^^ Belgian Foreign Minister Louis Michel described the action against Franks as an "abuse of the law" and added that Belgium had "no pretensions to judge the United States."^^ Prime Minister Guy Verhofstadt characterized the action as political and said "[i]t leaves open the possibility of sending back the complaint to the United States and that is what I... aim to do. Next week I will call for a cabinet meeting and... undo this abuse."^^

II. VALIDITY AND APPLICATION OF THE BELGIAN LAW

A. Bases of Jurisdiction Under International Law

Under generally accepted principles of international law a state has jurisdiction to try and punish its citizens, those who act in its territory, those who act outside its territory but intend to and/or cause an effect within its territory, and those who engage in conduct threatening the security or sovereignty of the state.^^ Some states also assert

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29 The wife and father of a Jordanian correspondent for Al Jazeera who was killed when a U.S. shell hit a Baghdad hotel. See Belgian Court Throws Out War Crimes Case Against U.S. General Franks, AGENCE FRANCE PRESSE, Sept. 23, 2003, available at LEXIS, News Library, News Group File.
34 See generally ROSALYN HIGGINS, International Law And the Avoidance, Containment And Resolution of Disputes: General Course on Public International Law, in RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1991); Malvina Halberstam, TERRORISM ON THE HIGH SEAS: THE ACHILLE LAURO, PIRACY AND THE IMO CONVENTION ON
jurisdiction to try an offender if the victim is a national of that state.\(^{35}\)
Although that basis of jurisdiction was not widely used years ago,\(^{36}\) it is
becoming more widely accepted now, particularly for certain acts, such as terrorism.\(^{37}\) What all these bases of jurisdiction have in common is
that the state asserting jurisdiction has a particular interest in seeing the
perpetrator brought to justice. In addition, it has long been accepted
that some crimes are so heinous that any state in which the offender is
found has a right to try and punish him.\(^{38}\) Piracy is the classic example,
but the principle of universality now applies to a number of other
crimes, including genocide, war crimes, apartheid and terrorism.\(^{39}\) A
number of treaties obligate a state \textit{in which the offender is found} to
submit the case to its authorities for prosecution, even if it has no
jurisdictional link to the case, if it does not extradite him to a state that
otherwise has jurisdiction under the treaty.\(^{40}\) Thus, jurisdiction is

\begin{footnotesize}
\begin{itemize}
\item \textit{Maritime Safety}, 82 A.J.I.L. 269, 296 (1988). See also The Harvard Research in International
\item \textit{See} Halberstam, supra note 34, at 297; \textit{Higgins, supra} note 34, at 100.
\item \textit{The Comment to the Draft Convention on Jurisdiction with Respect to Crime, supra} note 34,
listed some twenty-eight states that provided for penal jurisdiction based on nationality of the
victim. 29 A.J.I.L. at 578-79.
\item \textit{See} \textit{Higgins, supra note} 34, at 101. See also \textit{Blakesley et al., The International
jurisdiction over certain terrorist acts against U.S. nationals abroad. See, e.g., 18 U.S.C. § 1203
(2003) (criminalizing hostage taking inside and outside the United States, but providing that
hostage taking outside the United States is not punishable under that section unless one of several
conditions is satisfied, including that \textit{the offender or the person seized or detained is a national of
the United States}).
\item In 1986, Congress added a section to the United States Code, making it a crime to kill,
attempt to kill, or engage in a conspiracy to kill \textit{a national of the United States, while such
national is outside the United States}, but limited prosecution to cases in which the Attorney
General or certain other designated officials certified that the offense \textit{was intended to coerce,
imolate or retaliate against a government or a civilian population}. 18 U.S.C. § 2332. Some
State constitutions apparently even require prosecution if one of their nationals is the victim.
Several States recently objected to a provision in a Security Council resolution on peacekeeping
forces in Liberia on the ground that it would prevent them from trying persons who committed
offenses against their nationals in Liberia. The German ambassador is quoted as saying, \"[Under
the resolution as proposed,] a German court could not prosecute somebody who murders a German
citizen [in Liberia]. . . [a]nd that is in contravention of our constitution.\" Colum Lynch, \textit{Security
Council Backs Nigerian-Led Force in Liberia: Three Abstain Due to Immunity Provision}, WASH.
\item \textit{See} \textit{Damrosch et al., International Law: Cases and Materials} 1140-41 (4th ed.
2001); \textit{Halberstam, supra} note 34, at 299.
\item \textit{See} \textit{Restatement (Third) of Foreign Relations Law of the United States} § 404
(1986). Section 404, entitled Universal Jurisdiction to Define and Punish Certain Offenses,
provides:
\begin{quote}
A state has jurisdiction to define and prescribe punishment for certain offenses
recognized by the community of nations as of universal concern, such as piracy, slave
trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts
of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.
\end{quote}
\end{itemize}
\end{footnotesize}
generally based either on a state’s links to the case that give it a special interest in seeing the offender brought to justice or on his presence in that state.

Belgian law went further; it gave Belgian courts jurisdiction to try persons for certain crimes, such as genocide and war crimes, even if there were no links to Belgium and even if the alleged offender was not present in Belgium. It is not clear whether such a broad assertion of jurisdiction by the courts of one state, over nationals of another state, not present in the state asserting jurisdiction, in a matter with which it has no connection, is permissible under international law. The question arose recently in a case before the International Court of Justice (“ICJ”) involving another case under the Belgian universal jurisdiction law. In that case, Congo challenged the legality of an arrest warrant issued by Belgium under the 1993 law against Abdulaye Yerodia Ndombasi, the Minister for Foreign Affairs of Congo. The Court ruled that the issuance of the arrest warrant (it was never enforced) violated

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

Id. (emphasis added). For a summary of multilateral and regional treaties that include such a provision, see AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION, ch. 13, 1 (2001), available at http://web.amnesty.org/library/print/ENGIOR530162001 (last visited October 16, 2003). The extradite or prosecute provision differs from universal jurisdiction in two respects. Under the universality principle all states have jurisdiction; under the extradite or prosecute treaty provision (1) only states party to the treaty have jurisdiction and (2) only the state “in the territory of which the alleged offender is found” has jurisdiction. There is some disagreement on whether this constitutes universal jurisdiction. Amnesty International believes that it does. See id. Rosalyn Higgins takes the position that it does not. She states:

In so far as this provides for the jurisdiction of all parties to the Convention (now standing at over 140) it is perhaps understandable that it is spoken of as universal jurisdiction. But it is still not really universal jurisdiction stricto sensu, because in any given case only a small number of contracting parties would be able to exercise jurisdiction on the basis of Articles 2, 4 and 7. All that is “universal” is the requirement that all ratifying parties do whatever is necessary to be able to exercise jurisdiction should the relatively limited bases of jurisdiction arise in the circumstances.

HIGGINS, supra note 34, at 98. The United States Court of Appeals for the Second Circuit agrees with Higgins. It notes that “confusion on this point is common among commentators and advocacy groups,” citing as an example the Amnesty International study cited above. See U.S. v. Ramzi Ahmed Yousef, 327 F.3d 56, 96 n.29 (2d Cir. 2003). For a discussion of whether a convention that has an extradite or prosecute provision applies to a national of a state that has not ratified the convention, found in a state that has ratified the convention, see Halberstam, supra note 34, at 271 n.10.

41 See supra note 18 and accompanying text.

international law and required Belgium to cancel it.\textsuperscript{43} The ICJ did so, however, on the ground that a foreign minister is entitled to diplomatic immunity and that the mere issuance of an arrest warrant by one state against the foreign minister of another state violated that immunity.\textsuperscript{44} The majority decided not to rule on the question of jurisdiction.\textsuperscript{45} Thus, the legality of Belgium’s universal jurisdiction law under international law was never decided.

B. Application of the Belgian Law to Sharon

Was Belgium’s assertion of jurisdiction in the action against Sharon a reflection of its high ethical standards in foreign policy or a misuse of the judicial process for political purposes? Whatever the merits of the Belgian law in general, its application to Ariel Sharon was inappropriate.

First, Belgium had no special interest or connection to this matter. Under the amendments adopted by the Belgian parliament on April 6, 2003 (after the complaint against former President Bush and other U.S. officials had been filed), a link with Belgium would be required “before a victim can file a case directly in the future.”\textsuperscript{46} Thus, even Belgium

\textsuperscript{43} Id.

\textsuperscript{44} Id.

\textsuperscript{45} Id. Judges Higgins, Kooijmans and Buergenthal disagreed with the majority’s approach and, in a separate joint opinion, specifically addressed “the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State’s territory.” Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belg.), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal ¶ 19, available at http://www.icj-cij.org/icjwww/idocket/ICOBELCOBEjudgment/icobe_ijudgment_20020214_higgins-kooijmans-buergenthal.pdf. While acknowledging that “virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction,” they concluded that “a State may choose to exercise a universal criminal jurisdiction in absentia” provided “certain safeguards are in place,” id. ¶¶ 45, 59. Belgian Judge Van den Wyngaert, in her dissenting opinion, also addressed the jurisdictional question at great length and concluded that the Belgian assertion of jurisdiction was consistent with international law. See Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belg.), Dissenting Opinion of Judge ad hoc Van den Wyngaert, available at http://www.icj-cij.org/icjwww/idocket/ICOBELCOBEjudgment/icobe_ijudgment_20020214_vdwyngaert.pdf.

\textsuperscript{46} The amendment provides that:

[B]efore a victim can file a case directly in the future, there must be some link with Belgium, either because the suspect is on Belgian soil, because the crimes took place in Belgium or because the victim is Belgian or has lived in Belgium for three years. If there is no such link, the victim can take the case to the state prosecutor who must bring the case unless it appears unfounded or unless an international court or the courts where the crimes took place or of the suspect’s home state offer a fair, independent and more effective avenue to justice.

recognized the need for a link. Since the rationale for requiring such a link obviously applies regardless of when the complaint is filed, logic would suggest that this requirement should apply to all actions not yet tried, not only to future complaints.

Second, the massacre in Sabra and Shatila was perpetrated by the Lebanese Christian Phalangia army, not by forces under Sharon’s command. No one has ever been convicted of war crimes for acts committed by the armed forces of another state, not under his command. Nor does international law make the political and military leaders of one state criminally responsible for offences committed by the military forces of another state—even those of an ally—not under its command. A contrary rule would, for example, make the United States Secretary of Defense criminally responsible for atrocities committed by various Afghan factions in the war in Afghanistan.

Third, the action was clearly instituted for political purposes. If one has any doubt that the action was brought for political reasons, one need only consider that the prosecution was not instituted in 1993, when Belgium adopted the universality law, but only after Sharon became Prime Minister. Further, only Ariel Sharon and Israeli officers were named in the complaint. Neither those who actually perpetrated the massacre nor their leaders (who ordered or permitted the massacre) were named in the complaint. Admittedly, Belgium did not institute the prosecution and the proceedings may not be “a politically inspired act by the Belgium government,” as Michel’s letter argued—though the rush by the Belgian Senate to amend the law when a lower court held that Sharon could not be tried raises some questions even on that score, particularly when compared to the Belgian parliament’s swift amendment of the law to enable the government to bar the action against former President Bush and other U.S. government officials. In any event, it was Belgian law that made the prosecution possible and Belgian courts that would hear the case. Belgium cannot avoid responsibility for an action by its courts under its laws simply because it was instituted by private parties. Belgium has an obligation not to permit its laws and courts to be misused for political purposes. Belgium apparently realized that and quickly decided to amend the law when the action against U.S. officials was instituted and the U.S. protested, even though the massacre was committed by the Lebanese Christian Phalangia army.

47 See Philips, supra note 13.
48 See The Complaint Against Ariel Sharon, Lodged in Belgium on June 18, 2001, supra note 3.
49 See supra note 17 and accompanying text.
50 See supra note 18.
51 See supra note 27 and accompanying text.
though, in this action, as in the action against Sharon, "the complaint ha[d] not been judged on its merits, nor even on the issue of its eventual validity."

Moreover, if Belgium placed such importance on fighting impunity that it decided to provide a forum in Belgium for actions that had absolutely no connection to Belgium, it is puzzling that Belgium did not indict Yassir Arafat for an action that has a strong connection to Belgium: the murder of Guy Eid, a Belgian diplomat, who was kidnapped, brutally beaten and killed in Khartoum in 1973, together with the U.S. Ambassador to the Sudan, Cleo A Noel, Jr., and the U.S. Chargé d'Affaires, George C. Moore. The operation was carried out by Fatah, Arafat's military arm, and according to Vernon Walters, the Deputy Director of the CIA at the time of the murders, they were killed on Arafat's personal orders. The U.S. Justice Department took the position in 1985 (when the existence of a tape in which Arafat personally ordered the murders was revealed) that his indictment would violate the ex post facto clause of the U.S. Constitution because the law giving U.S. courts jurisdiction was adopted after the murders. While the Justice Department's conclusion that an indictment of Arafat is barred by the ex post facto clause is, at least in this writer's opinion, incorrect, Belgian law clearly does not bar retroactive application of its 1993 law, as evidenced by the actions against Sharon and former President Bush, both of which were based on events that predate the 1993 law.

Finally, the allegations against Sharon had already been investigated by Israel. At the time of the events in question the government of Israel set up a Commission, headed by Justice Kahan, then the President of the Israeli Supreme Court, to investigate the matter. Justice Barak, the present President of the Supreme Court,

53 See supra note 17 and accompanying text.
55 See Muravchik, supra note 54, at 12.
56 See U.S. CONST. art. I, § 9, cl. 2. ("No bill of attainder or ex post facto Law shall be passed.").
58 See Malvina Halberstam, How Serious Are We About Prohibiting International Terrorism And Punishing Terrorists, 11 JEWISH L. 1, 9-12 (1996).
was a member of the Commission. The Commission held 60 sessions, heard 58 witnesses, and received documentary evidence, including 180 statements from 163 witnesses. The Commission issued a report over 100 pages long. It concluded that while the massacre was carried out by a Phalangist unit and no Israeli was directly responsible, Israel had indirect responsibility. The Commission made a number of recommendations, including that Sharon, then the Defense Minister, resign and that several high officers in the military and intelligence be removed. These recommendations were implemented.

Even the International Criminal Court, established to ensure that those responsible for the most serious crimes against humanity are brought to justice, does not have jurisdiction in a case that was investigated by the state concerned absent a showing of bad faith. The Rome Statute, which established the International Criminal Court, provides that a case is inadmissible if it has been investigated by a state that has jurisdiction and that state has decided not to prosecute the person concerned, unless the “proceedings were . . . undertaken or the national decision was made, for the purpose of shielding the person concerned from criminal responsibility.” This reflects a judgment by the international community that the investigation should be done by the state concerned unless that state is unwilling to do so in good faith. If the state investigation is done in good faith no further prosecution is permissible. A contrary approach would seriously interfere with national systems of justice. For example, a person who appeared before the Truth and Reconciliation Commission in South Africa could be prosecuted in Belgium, or any other state that decided to give its courts jurisdiction, even if the Commission decided not to prosecute.

60 Id.
61 Id.
62 Id.
63 Id.
64 Id.
67 Philippe Kirsch, President of the ICC, said in an interview:
In the case of a country that has a perfectly well-functioning judicial system, such as the United States, the court has to apply the principle of complementarity. That means that if the judicial institutions in that country work normally, whether or not they lead to prosecution, the court has no interest to take over.
68 See infra note 103 and accompanying text.
69 Among the States that give their courts “universal jurisdiction” over specified crimes are Australia, Canada, the United Kingdom, Spain, New Zealand and South Africa. For a brief review of some of these laws, see A. Hays Butler, supra note 2 (manuscript at 67-76). See also
The Kahan Commission was not established for the purpose of "shielding the person concerned from criminal responsibility." It was established in response to outrage in Israel at what had happened. The members of the Commission are eminent jurists. They held extensive hearings, reviewed a great deal of evidence, issued a report and made far-reaching recommendations. If the International Criminal Court, established by the international community, cannot try someone where there have been proceedings in the state concerned absent a showing of bad faith, surely, the domestic courts of a state that has no connection with the matter should not do so.

IV. THE NEED FOR AND PROBLEMS WITH UNIVERSAL JURISDICTION

For centuries, it was accepted black letter law that international law regulated the conduct of states, not individuals. With some exceptions (e.g. piracy), international law did not criminalize acts by individuals nor did it protect individuals against their states. That changed dramatically in the latter part of the 20th century and particularly in the last few decades. The Universal Declaration of Human Rights and a number of treaties, such as the Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Human Rights Watch, Belgium: Questions and Answers on the Anti-Atrocity Law (June 2003), available at http://www.hrw.org/campaigns/icc/Belgium-qna.pdf.

70 See supra note 66 and accompanying text.

71 See Gillian Reynolds, Truth About the Refugee Camp Massacres—and Questions Too Big to Answer on Radio, DAILY TELEGRAPH (London), Sep. 24, 2002, at 17.

72 See DAMROSCH, supra note 38, at 404. To the extent that international law protected individuals whose rights were violated by other states, it was on the theory that those acts violated the rights of the state of which they were nationals and only that state could seek redress for the violation. Id. at 405. This principle was recently reiterated by the German Supreme Court in the Distomo Massacre Case, BGH – III ZR 245/98 (June 26, 2003). See German Supreme Court: Distomo Massacre Case, INT’L L. IN BRIEF, July 25, 2003, at http://www.asil.org/ilib/ilib0613.htm (last visited Oct. 17, 2003) (The German Supreme Court rejected claims by Greek plaintiffs for reparation payments in relation to the massacre in the village of Distomo, Greece, caused by SS-troops in 1944, holding that "international law as of 1944 did not provide individuals with a cause of action but conferred upon States the right to diplomatic protection").


Child,77 all protect individual rights. The Genocide Convention,78 the Convention Against Torture79 and a number of treaties dealing with specific acts of terrorism, such as airplane hijacking80 and sabotage,81 hostage taking,82 attacks on diplomats,83 seizure of ships on the high seas,84 financing of terrorism85 and terrorist bombings,86 all provide for the imposition of criminal liability on individuals.

But, even as a large body of substantive law developed, the implementing mechanisms remained few and weak. In many instances, there were no courts (international or municipal) that had jurisdiction to punish the perpetrators. Although that began to change in the last decade with the establishment of international courts to try those allegedly responsible for war crimes, crimes against humanity and genocide, such as the International Criminal Tribunal for the former Yugoslavia87 and the International Criminal Tribunal for Rwanda,88 the adoption of the Rome Statute for an International Criminal Court,89 and

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77 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990). This convention has still not been ratified by the U.S.
the provision in a number of treaties that an offender may be tried in any state in which he is found, there remain, unfortunately, many instances of war crimes, crimes against humanity and genocide, in which there is no court that has and can realistically be expected to exercise jurisdiction.

It was hoped that Belgium’s universal jurisdiction law, and similar laws in several other states, would fill that void. And, in at least one prominent case, the Belgian law was used to prosecute persons who had committed terrible atrocities and who might otherwise not have been prosecuted. In 2001, the law was used to convict two Catholic nuns who aided in the slaughter of several thousand Tutsis in Rwanda who sought sanctuary in their Convent, including “provid[ing] the petrol used to incinerate many hundreds of Tutsis sheltering in a barn at the Sovu monastery on April 22, 1994.”

However, the Belgian law, even as amended following the action against former President Bush and other high U.S. government officials for alleged war crimes in the 1991 Gulf War, was problematic. First, it would have deterred high-ranking officials of other states from traveling to Belgium, thus seriously impeding the conduct of foreign relations. For example, shortly after the complaint against Sharon was filed, he was scheduled to meet with European Union (“EU”) ministers at an EU meeting in Belgium. Because of the action instituted against him, he was advised not to go to Belgium and did not do so. Following the actions against U.S. officials, Secretary of State Colin Powell and Chairman of the Joint Chiefs of Staff Richard Myers went so far as to warn Belgium that if the law was not changed, NATO headquarters would have to be moved. Another problem was the misuse of the law.


91 See supra note 69.

92 Rupert Shortt, Catholics and Collusion in Genocide: The Vatican is Still Thwarting Trials of Rwandan Clerics. It’s Inexcusable, GUARDIAN (London), July 21, 2001, at 22, See also Keith B. Richburg, Rwandan Nuns Jailed in Genocide; Belgian Jury Also Sentences 2 Others, WASH. POST, June 9, 2001, at A1. However, Rwanda was a former Belgian colony and the nuns were living in Belgium when the charges were brought. There was no indication that the prosecution was initiated for political reasons. Nor did their arrests and trial impede the conduct of international relations.

93 See Marlise Simons, Human Rights Cases Begin to Flood Into Belgian Courts, N.Y. TIMES, Dec. 27, 2001, at A8 (“Already Mr. Sharon has canceled a planned visit to Brussels in July while Belgium held the rotating presidency of the European Union.”).

94 See supra notes 22-24 and accompanying text. Secretary of Defense Donald H. Rumsfeld went even further, threatening to withhold American financing for a new North Atlantic Treaty Organization headquarters in Belgium if “the country did not scrap its law.” Craig S. Smith, Belgium Plans to Amend Law on War Crimes, N.Y. TIMES, June 23, 2003, at A9. An amendment
for political purposes, as the complaint against Sharon and the complaints against former President Bush, Vice President Cheney and Secretary of State Powell, alleging war crimes in the 1991 Gulf War, and against General Tommy Franks, alleging war crimes in the current Iraqi war, demonstrated. That each of these complaints was filed for political reasons\footnote{This problem is apparently also already arising with respect to complaints to the International Criminal Court. The Athens Bar Association filed twenty-two charges against Tony Blair, the Prime Minister, Jack Straw, the Foreign Minister, Geoff Hoon, the Defense Secretary and other British cabinet ministers, alleging war crimes and crimes against humanity for recent military action in Iraq. See Ambrose Evans-Pritchard, Blair Accused by Greeks of Crimes Against Humanity, DAILY TELEGRAPH (London), July 29, 2003, at 12. The Daily Telegraph quoted a commentator as saying that: 

[T]he Athens Bar was playing into the hands of those who wished to stop the court gaining credibility before it had prosecuted its first case. "People with a political axe to grind can do great damage to this institution. It reminds me of the case in the Belgium courts against [President George W.] Bush and [the Israeli Prime Minister, Ariel] Sharon where every bunch of crazies tried to take advantage."} is clear from their timing. The one against Sharon was brought after he became Prime Minister; the one against former President Bush, Vice-President Cheney, Secretary of State Colin Powell and other U.S. government officials was brought after the U.S. commenced the current military action against Iraq.

Although the Belgian government rejected Israel’s claim that its universal jurisdiction law was being misused for political purposes,\footnote{See supra notes 16-17 and accompanying text.} it recognized the problem when the complaint against former President Bush was filed\footnote{See supra notes 25-26 and accompanying text.} and it amended the law.\footnote{See supra note 27 and accompanying text.} The amendment provided that the Belgian court could defer action if “in the interest of the administration of justice and in respect of Belgium’s international obligations,” the matter should be brought “before the tribunals of a State in which the offender is a national or where he may be found, and as long as this tribunal is competent, independent, impartial and fair.”\footnote{See supra note 27.}

However, the amendment is also problematic in several respects. First, it would require the Belgium government to sit in judgment on the quality of justice in other States, something that may prove very awkward.\footnote{U.S. courts have tried to avoid sitting in judgment on actions of foreign governments. The act of state doctrine and the rule of non-inquiry, two judicially created rules, are examples of that. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Supreme Court said that the act of state doctrine “precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory,” and that the} Secondly, it is unlikely that transferring a case to the state
of which the defendant is a national would accomplish anything. The implicit assumption appears to have been that if that state has a tribunal that is “competent, independent, impartial and fair,” it would deal with the complaint. That is highly unlikely, however. Surely, Belgium did not expect the U.S. to charge former President Bush, Vice-President Cheney and Secretary of State Powell with war crimes for their roles in the 1991 Gulf War, or General Tommy Franks for war crimes in the present war with Iraq. Nor is it likely that Israel, which has already investigated the matter at length and decided not to charge Sharon criminally for the events in Sabra and Shatilla would do so now.

The Belgian law also made no provision for the decision by a state to forego prosecution in order to achieve another end, such as the South African law permitting the Commission for Truth and Reconciliation to decide not to prosecute those who voluntarily make full disclosure, or even the Chilean law, giving Pinochet immunity in exchange for his agreement to yield power, thereby putting an end to the horrors he perpetrated, without further bloodshed. While such decisions raise profound moral and legal questions, about which people can legitimately disagree, it is not at all clear why the decision should be made by a state that has no connection to the matter, rather than by the

“Judiciary Branch ‘will not examine the validity of a taking of property within its own territory by a foreign sovereign... even if the complaint alleges that the taking violates customary international law.’”

Id. at 401, 428. In extradition proceedings, the non-inquiry rule bars U.S. courts “from ‘investigating the fairness of a requesting nation’s justice system... and from inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country.’” United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (internal citations omitted).

101 See supra note 27.
102 See supra notes 59-64 and accompanying text.

The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by... facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act.

Id. See also UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (July 13, 2001), available at http://www.un.org/peace/etimor/untaetR/Reg10e.pdf. Section 32.1 provides that a “person who has fully complied with all obligations arising under a CRA shall have no criminal liability for acts disclosed therein....”

104 General Pinochet enacted several legal mechanisms to shield himself from criminal prosecution in Chile... General Pinochet was declared a senator-for-life in 1988. As a senator-for-life Pinochet is entitled to immunity from criminal prosecution for acts committed while he was head of state because he is still functioning in official capacity... Thus, General Pinochet has virtual impunity from judicial prosecution in Chile.

state concerned.105

On August 5, 2003, Belgium adopted a further amendment to the law, which (1) limits jurisdiction of Belgian courts to cases in which (a) the accused is a national of Belgium or has his primary residence in Belgium, or (b) the victim is a national of Belgium or has resided in Belgium for at least 3 years; and (2) provides that criminal actions under this law may only be initiated by the federal prosecutor, who will evaluate individual complaints, and that the decision of the federal prosecutor is not subject to review.106 The amendment also specifically provides for immunity for heads of State and other government officials, and bars criminal action against certain persons officially invited by Belgian authorities or international organizations based in Belgium.107 Human Rights Watch criticized the amendment as “a step backwards in the global fight against the worst atrocities.” It said, “[w]ith its universal jurisdiction law, Belgium helped destroy the wall of impunity.... It is regrettable that Belgium has now forgotten the victims to whom it gave a hope of justice.”108


[Argentina] made the difficult and distasteful choice to give immunity to many of the people who had terrorized the country during military rule. In return Argentina made a peaceful return to civilian government and democracy, and avoided further military coups.

It is neither the right nor the place of the Spanish Judiciary to deny the validity of Argentina’s laws, any more than it is, say, Britain’s right to correct perceived deficiencies in the American judicial system. Argentina is no longer a colony. It made a choice. Perhaps it chose badly. Perhaps it paid too high a price for democracy. (In fact, Argentina’s new president, Nestor Kirchner, is seeking to have these amnesty laws overturned.) That, however, is for Argentina, not Judge Garzon or anybody else, to decide.


106 Legislation and Regulation: Belgium’s Amendment, supra note 106. The amendment provides that “no act in furtherance of initiating a criminal action may take place during the period of stay of anyone who has been officially invited by Belgian authorities or by an international organization based in Belgium with whom Belgium has entered into a location arrangement.” Legislation and Regulation, supra note 27.

SUMMARY AND CONCLUSION

Two conclusions emerge.

First, the Belgian government reacted very differently to the protests by Israel and by the United States that the respective actions were politically motivated. The difference is most striking when one looks at the statements of Belgian Foreign Minister Louis Michel. His response to Israel was a condescending letter published in the Israeli and European newspapers, in which he talked about the law as "the expression of a political will to place the [Belgian] foreign policy on a sounder ethical footing" and expressed "sad[ness] that [his] Israeli friends cannot in good faith accept the ethical underpinnings of the law." He responded to the U.S. protest by stating, "Belgium must not impose itself as the moral conscience of the world," and calling for an amendment to the law. But the difference was not limited to declarations. Following the Sharon indictment (and the decision by a lower court interpreting the law to require the defendant's presence in Belgium), Belgium quickly amended the law to ensure that the action could proceed even if Sharon was not present. Following the actions against U.S. officials, Belgium twice amended the law to ensure that those actions could not proceed and that no similar actions could be brought in the future.

Second, the Belgian law as originally drafted lent itself to political

109 See supra notes 16-17 and accompanying text.
110 See supra note 26.
manipulation and abuse. Even the lawyer for the Sabra and Shatila complainants conceded that the law “was an opportunity for every lunatic to have the Belgian government decide their [sic] case.”\(^{111}\) Even accepting that the International Criminal Court and the several courts established to deal with specific conflicts will not be able to handle all the cases, and that the exercise of jurisdiction by national courts is necessary if those responsible for egregious crimes are not to escape punishment, the experience under the Belgium law demonstrates that some limitations are necessary. Laws establishing such jurisdiction must make some provision to prevent misuse of the law for political purposes and to ensure that it does not make impossible or seriously impede the conduct of international relations. Some deference also needs to be given to national decisions to forego prosecution in order to further other national interests.

The Belgian law, as most recently amended, addresses some of these concerns: It requires a link between Belgium and the accused or the victim. The federal prosecutor, rather than private parties, decides whether an investigation is instituted, and no actions may be brought against persons who are in Belgium at the invitation of the government or an international organization. There are no explicit references to politically motivated actions or actions against nationals of States that have decided to forego prosecution, but the provision giving the federal prosecutor the final decision on whether an action goes forward can be used to deal with such cases. It remains to be seen whether the most recent amendments will succeed in eliminating the problems without eviscerating the law.\(^{112}\)

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\(^{111}\) See Glenn Frankel, supra note 25.

\(^{112}\) Although the indictments against Sharon and against the U.S. officials have been dismissed, see Belgium: War Crime Cases Dropped, N.Y. TIMES, Sept. 25, 2003, at A6, cases involving the Rwandan genocide, the killing of two Belgian Priests in Guatemala, and the complaints filed against ex-Chadian dictator Hissène Habré are proceeding, see Press Release, Human Rights Watch, supra note 106.