CURRENT LEGAL DEVELOPMENTS

Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium*

*Tom Ongena*** & *Ignace Van Daele****

Keywords: crimes against humanity; genocide; international immunities; universal jurisdiction; war crimes.

Abstract. Belgian legislation gives the national criminal justice system far reaching competence to prosecute international core crimes. International and national judicial decisions as well as policy considerations may however dictate restrictions.

1. INTRODUCTION

In May 2001, news coverage in Belgium was dominated by the trial of the so-called "4 of Butare" in Brussels. Four Rwandan civilians were accused of having committed war crimes in the area of Butare in Rwanda in 1994. It was the first real application of the much discussed Belgian "Genocide Act" and the principle of universal jurisdiction embedded in Article 7 of the Act. In his opening statement at the trial, the Attorney-General made it very clear that he represented the international community who has the right and the duty not to tolerate the commission of barbarous acts such as war crimes.[1] With this statement the public prosecutor gave word to the *ratio legis* of the universal jurisdiction in Article 7: giving Belgian courts the possibility to judge war crimes, crimes against

---

* This text was completed on 3 June 2002.

** Research Assistant, Department of Law of the University of Antwerp ('UIA').

*** Research Assistant, Department of Law of the University of Antwerp ('UIA').

1. La loi du 16 janvier 1993 qui attribue aux juridictions belges la compétence universelle fait que je représente aujourd'hui aussi l'ordre public international, la société internationale qui a le droit et le devoir de ne pas tolérer de tels comportements où qu'ils soient commis. La loi estime que la répression de tels crimes ne peut être bloquée par le jeu des frontières. Je suis fier de pouvoir participer à cette justice et de pouvoir, par mes paroles, donner une voix à la communauté internationale, à cette conscience universelle qui rejette cette barbarie.

   The Act of 16 January 1993, by attributing universal jurisdiction to the Belgian courts, makes me a representative today of the international public order, the international society that has the right and the duty not to tolerate such conduct, wherever it may be committed. According to the Act, the repression of such crimes cannot be blocked by means of borders. I am proud to be able to participate in this justice and to give a voice to the international community, the universal conscience that rejects this barbarity.

   Taken from the transcript of the trial session of 22 May 2001, AM, retrievable at http://www.asf.be/AssisesRwanda2/fr/fr_AUDIENCES_0522am.htm.

15 Leiden Journal of International Law 687–701 (2002)

humanity and genocide, regardless of the place where the acts were committed, the nationality of the offender or the nationality of the victim, but simply because of their very (serious) nature. The case of the "*4 of Butare*" elicited many comments. Some welcomed the application of the principle of universal jurisdiction, others criticised the trial as being an utterance of neo-colonialism. Questions were raised by some politicians wondering if the broad jurisdiction in the Genocide Act should not be restricted, thus limiting the risk that Belgian courts would become overwhelmed by complaints relating to crimes committed all over the world. These questions clearly show the scepticism of those who dislike the idea that Belgium, by applying the Genocide Act, would be the "criminal judge of the world."

2. The Belgian Genocide Act

2.1. The crimes

On the fifth of August 1993 the 1993 War Crimes Act[2] was published in the Belgian Official Journal (*Moniteur belge/Belgisch Staatsblad*), thus implementing the Red Cross Conventions – ratified by Belgium in 1952 – and its Additional Protocols[3] into the Belgian legal order.[4] The Act however not only provides for the punishment of grave breaches com-

2. The original version was published in French and Dutch in the Belgian Official Journal: Loi du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions, Moniteur belge, 5 August 1993, at 17751, amended by Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire, Moniteur belge, 23 March 1999, at 9286. An English version has been published *in* 38 ILM 918 (1999). For an extensive commentary, *see* A. Andries, *et al.*, *Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire*, 74 Revue de droit pénal et de criminologie 1114–1184 (1994). *See also* L. Reydams, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 4 European Journal of Crime, Criminal Law and Criminal Justice 18, at 35–38 (1996). Belgian legislation can be consulted on line at http://www.just.fgov.be.
3. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, all (partially) reproduced *in* C. Van den Wyngaert, G. Stessens & I. Van Daele (Eds.), International Criminal Law. A Collection of International and European Instruments, 2nd Ed., 245 *et seq.* (The Hague: Kluwer Law International, 2000).
4. According to Arts. 49 (I), 50 (II), 129 (III) and 146 (IV) of the 1949 Geneva Conventions, all state parties are under the obligation to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to have committed, any of the grave breaches defined in the four Conventions.

mitted in the context of the four 1949 Geneva Conventions, but also of the Additional Protocols I and II (Article 1(3)). Hereby the Act extends its protection to persons or objects protected by Protocol II and thus it does not follow the traditional distinction in the law of Geneva between international and non-international conflicts for the purpose of defining grave breaches. In fact, pursuant to Articles 49 (I), 50 (II), 129 (III) and 146 (IV) of the Geneva Conventions and Article 85(1) of Additional Protocol I, the term "grave breaches" is only applicable to international armed conflicts. The violations of humanitarian law in non-international armed conflicts[5] do not fall within the ambit of the undertaking referred to in the above-mentioned Articles. However, considering the number of violations of international humanitarian law that are committed during non-international conflicts, the Belgian legislator found it wise to extend the application of "grave breaches" to violations of war committed during internal conflicts. One should bear in mind that during the parliamentary debates the conflict in the former Yugoslavia was raging with great intensity.

The 1993 War Crimes Act was amended in 1999 by the Act of 10 February 1999.[6] The field of application *ratione materiae* was extended to crimes against humanity and genocide. Consequently the name of the former "War Crimes Act," changed into "Genocide Act." The new Article 1 no longer only contains a definition of war crimes, but also a definition of genocide and one of crimes against humanity.[7] For the crime of genocide, the Act closely follows the definition in Article 2 of the 1948 Genocide Convention.[8] The definition of crimes against humanity in the Act is directly taken from Article 7 of the 1998 Rome Statute of the International Criminal Court ('ICC').[9]

2.2. Universal jurisdiction

The Act recognizes universal jurisdiction for the Belgian courts to deal with grave breaches irrespective of the place where the criminal offence

5. It has to be noted that the Act of 16 June 1993 does not mention Common Art. 3 of the Geneva Conventions.
6. Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire, *supra* note 2.
7. For a commentary to the extended Act, *see* L. Reydams, *Universal Jurisdiction: The Belgian State of Affairs*, 11 Criminal Law Forum 183–216 (2000); and S. Smis & K. Van der Borght, *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 ILM 918–920 (1999).
8. Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 December 1948, 78 UNTS 277, reprinted *in* Van den Wyngaert, Stessens & Van Daele, *supra* note 3, at 411.
9. Statute of the International Criminal Court, Rome, 17 July 1998, reprinted *in* Van den Wyngaert, Stessens & Van Daele, *supra* note 3, at 139. Surprisingly, the incriminations found in Art. 7(1)(i) (forced disappearances); (j) (apartheid); and (k) (other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health) cannot be found in the Belgian Act.

has been committed, the nationality of the offender or the victim (Article 7). This universal jurisdiction is based on the above-mentioned articles of the Geneva Conventions and Additional Protocol I that are a reflection of the principle *aut dedere aut judicare*, obliging the High Contracting Parties to extradite or to prosecute the offenders of the grave breaches.[10] The exercise of universal jurisdiction with regard to the grave breaches is not permissive but clearly mandatory.[11] With regard to war crimes committed during an armed conflict not of an international character, there is no obligation for contracting parties to provide for universal jurisdiction. However, increasing support can be found for the view that it is no longer tenable to deny permission under international law for states to adopt universal jurisdiction for these crimes.[12] The Belgian Genocide Act provides for universal jurisdiction for both categories of war crimes, independent of the nature of the conflict.

As noted before, the original 1993 War Crimes Act was extended to include genocide and crimes against humanity. Article 7 remained unchanged, providing therefore for universal jurisdiction not only with regard to war crimes, but also for genocide and crimes against humanity. As far as the crime of genocide is concerned, Article 6 of the Genocide Convention only provides for the jurisdiction of territorially competent states or an international criminal court. The International Court of Justice ('ICJ') has, however, confirmed that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" and "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention,"[13] lending support to the widely held view that universal jurisdiction for genocide is in conformity with modern international law. Crimes against humanity on the other hand, have not been subject to a general codification before the advent of the Rome Statute. A number of authors sustain that crimes

10. In fact, the Geneva Conventions of 1949, uniquely, provide for a mechanism which goes even further than the "*aut dedere, aut judicare*" model and which could be described as "*aut judicare, aut dedere*," or, even more poignantly, as "*primo prosequi, secundo dedere*." For an argumentation *see*, respectively, R. van Elst, *Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions*, 13 LJIL 815, at 818–819 (2000); M. Henzelin, Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité 353, nr. 1112 (Brussel: Bruylant, 2000).
11. *See* International Law Association, Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences 6 (2000), as well as the previous footnote.
12. *See*, *inter alia*, *id.*, at 6–7; T. Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554–577 (1995); T. Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts*, 80 International Review of the Red Cross 29–56 (1998).
13. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, 1996 ICJ Rep. 595, at para. 31, available at http://www.icj-cij.org.

against humanity are subject to universal jurisdiction under international customary law.[14] This is reflected in the fact that a growing number of countries are incriminating these crimes and establishing universal jurisdiction over them.[15]

2.3. Non-recognition of immunities

The modification of the original 1993 War Crimes Act in 1999 was not limited to the extension of the list of crimes, but contained also the inclusion of a new paragraph in Article 5, stating that: "the immunity attributed to the official capacity of a person, does not prevent the application of the present Act." With this new paragraph, the Government wanted to reflect Article 27 of the Rome Statute in the Belgian legal order.[16] This "reflecting" of Article 27 has been heavily criticized.[17] Because of the general nature of the provision, the Article disregards not only the immunities granted by the Belgian Constitution,[18] but also those granted by international law. International conventional and customary law grants some categories of persons an immunity from prosecution before courts of another state (*e.g.*, diplomats, incumbent Heads of State, etc.).[19] A state has to respect these immunities, otherwise it can be held internationally responsible. The question arises, however, whether international law itself does not provide for an exception to the inviolability/immunity for certain categories of persons when these persons are suspected of having committed an international crime. Reference can be made to various interna-

14. *See*, most notably, M.C. Bassiouni, Crimes against Humanity in International Criminal Law (The Hague: Kluwer Law International, 1999).
15. *See*, *inter alia*, the Canadian Crimes against Humanity and War Crimes Act (2000); New Zealand's International Crimes and International Criminal Court Act (2000); and the draft for an International Criminal Code adopted by the German Government and shortly to be adopted by the Bundestag (Bundesministerium der Justiz, *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, retrievable at http://www.bmj.bund.de/images/11222.pdf).
16. *See* Proposition de loi relative à la répression du crime de génocide, en application de la Convention internationale pour la répression du crime de génocide du 9 décembre 1948, Doc. Parl. Sénat 1998-1999, n° 1-749/2, at 5. During the parliamentary debates the Pinochet case was dominating the international scene. *See* R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 25 November 1998, 4 All ER 897 (1998); R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 24 March 1999, 2 All ER 97 (1999).
17. P. D'Argent, *La loi du 10 Février 1999 relative à la répression des violations graves du droit international humanitaire*, 118 Journal des Tribunaux 552–553 (1999).
18. The Constitution provides for absolute inviolability of the King and (under specific circumstances) for immunity from prosecution for members of governments or parliaments.
19. *See* A. Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247-III Receuil des Cours 9–130 (1994).

tional instruments that provide for such an exception.[20] Some argue that these exceptions only apply to *international* tribunals or courts and therefore cannot be applied by national judges.[21] In its Judgment of 14 February 2002 the ICJ joined this opinion.[22]

2.4. Penalties

For the criminal offences named in the Act, it enumerates the penalties in Article 2. The penalties vary from penal reclusion for ten years to life-imprisonment. Punished with the same penalties as the completed breaches, are the order, the proposal or offer, the incitement to commit, the participation, the failure to act and the attempt to commit such grave breach (Article 4). Justifications such as political, military or national interest or necessity are explicitly excluded. Similarly the claim to have acted on the order of one's government or a superior does not absolve the author of the crime of his/her responsibility (Article 5). Finally, the grave breaches are not subject to statutory limitations of public prosecutions and penalties (Article 8).

2.5. Applications

On 23 March 1999 the new Act was published in the Official Journal: the original War Crimes Act was renamed to "*Loi relative à la répression des violations graves du droit international humanitaire*," usually referred to as Genocide Act. The new Act is unique in the world: the universal jurisdiction in Article 7, taken together with the non-recognition of immunities in Article 5, gives Belgian courts *quasi* unlimited jurisdiction. Moreover, Belgian criminal procedure gives victims of crimes the possibility to seize directly an investigating judge, who is then obliged to investigate the case and to submit his findings to a (preliminary) court. It is

---

20. *See*, *inter alia*, the 1919 Treaty of Versailles, the Nuremberg and Tokyo Charters, Control Council Law No. 10, the Nuremberg Principles, the 1948 Genocide Convention, the Statutes for the *Ad Hoc* Tribunals for the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') and the 1996 Draft Code of Crimes of the International Law Commission. *See also* the Dissenting Opinion of Judge *ad hoc* Van den Wyngaert (at 12 *et seq.*) to the Yerodia Judgment, Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), 14 February 2002, available at http://www.icj-cij.org.
21. *See*, however, Control Council Law No. 10 and the famous Eichmann case in Israel. *See also* Art. 7 of the above-mentioned 1996 Draft Code of Crimes and the Judgment of the ICTY in the Prosecutor *v.* Furundžija, Judgment, Case No. IT-95-17/1-T, T.Ch. II, 10 December 1998. In its report on universal jurisdiction the International Law Association ('ILA') concludes from this latter Judgment that "the rule therefore apparently also applies in proceedings before domestic courts." *See* International Law Association, Committee on International Human Rights Law and Practice, *supra* note 11, at 13. According to the ILA this is not only true for torture (Furundžija case) but also for "other crimes subject to universal jurisdiction."
22. *See infra*.

this cocktail of universal jurisdiction, refusal of immunities and the possibility for victims to seize a judge directly, which has led to some famous applications of the new Genocide Act, causing the Belgian Foreign Service a lot of headaches.

The new act did not remain dead letter. Complaints were filed rapidly which led to criminal investigations and – in one case – to an actual prosecution and punishment. At the time of writing, investigations were opened against public figures such as the former dictator of Chili, Pinochet,[23] the former Foreign Minister of the Congo, Ndombasi Yerodia (*see* below), the President of Rwanda, Paul Kagame, the ex-dictator of Tchad, Hissein Habré, the former Iranian leader Rafsanjani, three former leaders of Cambodia, the former and incumbent Presidents of the Ivory Coast, Robert Guëi en Laurent Gbagbo, the Minister of Internal Affairs of the Ivory Coast, Emile Boga Doudou, and his colleague of National Defence, Moïse Lida Kouassi, the former Minister of Internal Affairs of Morocco and Saddam Hussein, the Iraqi President. The most famous cases are, however, the complaints brought against the current Prime Minister of Israel, Ariël Sharon, the Palestinian leader Arafat and the Cuban President Fidel Castro. Some of these charges were already found inadmissible.

In June 2001, several Palestinian and Lebanese persons filed complaints with an investigating magistrate in Brussels against the Israeli Prime Minister for his alleged involvement, as former Minister of Defence, in the massacres in the Palestinian refugee camps Sabra and Chatila during the Israeli invasion in the Lebanon in 1982. The alleged crimes include genocide, war crimes and crimes against humanity.[24] The investigating judge did, however, have doubts regarding his competence to investigate these allegations. The case was therefore referred to the *Chambre des mises en accusation/Kamer van Inbeschuldigingstelling*, the pre-trial chamber of the Court of Appeal. Defence lawyers acting for Ariël Sharon challenged the jurisdiction of the Belgian judiciary for several reasons: Sharon's immunity as an acting Prime Minister, the fact that an Israeli commission of enquiry had already dealt with the case, supposedly triggering an effect of *ne bis in idem* (referral was also made to a Lebanese amnesty law), the principle of non-retro-activity of criminal laws (the alleged crimes dating from the early eighties) and finally the absence of any link between the alleged crimes and the Belgian legal order. The future of the case is still undecided. Following the judgment of the ICJ in the *Yerodia* case, the arguments now concentrate on the issue of immunity (*see* below).

In one case the charges brought before the investigating judge led to a conviction. In the before mentioned "*4 of Butare*" case, complaints were filed against four Rwandan citizens (two nuns, a professor and a busi-

23. *See* L. Reydams, *International Decisions:* In re *Pinochet – Belgian Tribunal of First Instance of Brussels (investigating magistrate), 8 November 1998*, 93 AJIL 700–703 (1999).
24. For detailed information, *see* http://www.sabra-shatila.be/english and http://www.indictsharon.net.

nessman). On the Minister of Justice's orders, criminal investigations were started on their possible involvement in a series of crimes committed during the Rwandan genocide in 1994. Vincent Ntezimana, Alphonse Higaniro and the two nuns, Sister Consolata Mukangango and Sister Julienne Mukabutera, were accused of having murdered Rwandan citizens in the Butare area or having incited to the killings. These acts were qualified as breaches of the Geneva Conventions and their Additional Protocols, punishable before Belgian courts according to Article 1(3) of the Genocide Act. No charges of genocide or crimes against humanity were brought, as the Belgian Act did not incriminate those offences at the time when the events in Rwanda took place and, more importantly, because the crime of genocide presupposes a special intention on the part of the accused, which complicates the task of the prosecution. The four accused had to appear before the Brussels *Cour d'assises/Hof van Assisen* and were convicted by the jury on 8 June 2001.[25] Sentences were pronounced ranging from 12 to 20 years of imprisonment.[26] After their conviction, Alphonse Higaniro and the nuns demanded a judicial review (*pourvoi en cassation*) from the Supreme Court (*Cour de Cassation/Hof van Cassatie*). Interestingly, Higaniro claimed that the Belgian courts could not decide his case without violating the principle of *ne bis in idem*. In fact, the investigation concerning his case was transferred to the ICTR in 1996. However, the Tribunal decided in August of the same year that a *prima facie* case had not been established by the Prosecutor on all counts, therefore dismissing the indictment.[27] After this decision, the Belgian investigating judge took up the case again. The Court of Cassation dismissed the appeal, considering that the review of the indictment by the Rwanda Tribunal does not constitute a decision on the merits of the case, so it could not trigger the principle of *ne bis in idem*.[28]

3. THE *YERODIA* JUDGMENT OF 14 FEBRUARY 2002

In November 1998 complaints were filed before a Brussels Investigating Judge by a number of Congolese victims, some of them also having the Belgian nationality, against Ndombasi Yerodia. He was charged with

25. *See* T. Scheirs, *Het Rwanda-proces: De Belgische wet ter bestraffing van inbreuken op het Internationaal Humanitair Recht in actie*, 31 Zoeklicht 22–25 (2001).
26. For more information (including the verdict) on this case *see* the website of the advocacy organisation Avocats sans frontières, http://www.asf.be. *See also* Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, September 2001, AI Index IOR 53/006/2001, at 27. For press reports covering each day of the trial, *see La Libre, Le génocide rwandais aux assises* (retrievable at http://www.lalibre.be).
27. Decision on the review of the indictment in the matter of Alphonse Higaniro, Case No. ICTR-96-18-I, 8 August 1996, retrievable at http://www.ictr.org.
28. Cour de Cassation, 9 January 2002, http://www.cass.be.

incitement to commit war crimes and crimes against humanity[29] based on alleged public appeals in August 1998 to chase down and kill enemy forces in a manner which indicated that he meant all persons of Tutsi origin, including civilians, as well as combatants.[30] On 11 April 2000, the investigating judge, Mr Vandermeersch, issued an international Arrest Warrant against Yerodia, then Minister of Foreign Affairs of the Democratic Republic of the Congo ('DRC'). The Arrest Warrant was internationally signalled in June 2000. As a reaction to this the DRC filed an application with the ICJ on 17 October 2000. First, it claimed that Belgium had violated

> the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the Organization of the United Nations, as laid down in Art. 2, para. 1 of the Charter of the United Nations.

Second, it contended that Belgium had violated "the diplomatic immunity of the Minister of Foreign Affairs of a sovereign State."[31] The DRC also asked for provisional measures pending the outcome of the investigation, specifically: "an order for the immediate discharge of the arrest warrant."[32] In its order of 8 December 2000 the ICJ, however, declined this request for provisional measures.[33]

Oral arguments on the merits were held in October 2001. In its final submissions to the Court the DRC limited the case to one legal question: did the arrest warrant violate international law and more specifically the inviolability and immunity of Yerodia as a Minister of Foreign Affairs. The question on the permissibility of universal jurisdiction (*in absentia*) was dropped.[34] On 14 February 2002, the ICJ ruled that Belgium had violated international law by allowing a Belgian investigating judge to issue and circulate an arrest warrant *in absentia* against the then Foreign

---

29. *See* Art. 1(2) and (3) *juncto* Art. 4 of the Genocide Act.
30. At a press conference on 27 August 1998 Yerodia said: "Pour nous, ce sont des déchets et c'est même des microbes qu'il faut qu'on éradique avec méthode. Nous sommes décidés à utiliser la médication la plus efficace." ("To us, they are waste and even microbes that have to be methodically exterminated. We are determined to use the most effective medication.") On 4 August he already used the words "vermine qu'il fallait éradiquer avec méthode" ("vermin that had to be exterminated in a methodical manner"). *See* the pleadings before the ICJ in the Yerodia case of 21 November 2000 (Provisional Measures), http://www.icj-cij.org. *See also* (in Dutch), T. Ongena & I. Van Daele, *De zaak COBE voor het Internationaal gerechtshof: gaat onze Wet Oorlogsmisdaden te ver?*, 2 Tijdschrift voor Strafrecht 178–193 (2001).
31. *See* the Application of the Democratic Republic of the Congo (DRC), available at http://www.icj-cij.org.
32. *See* the Request for the indication of provisional measures of the DRC, available at http://www.icj-cij.org.
33. Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), Provisional Measures, Order of 8 December 2000, at para. 72, available at http://www.icj-cij.org.
34. *See* the pleadings of the DRC of 19 October 2001, available at http://www.icj-cij.org.

Minister of the Congo. The ICJ held, by 13 votes to three, that Belgium thereby failed to respect the immunity from criminal jurisdiction and the inviolability that the incumbent Foreign Minister enjoyed under customary international law. By way of remedy, the Court found, by 10 votes to six, that Belgium must by means of its own choosing, cancel the arrest warrant and so inform all the authorities to whom the warrant was circulated.[35] Consequently the Arrest Warrant was withdrawn.

4. Developments After the *Yerodia* Judgment

4.1. Modification of the Genocide Act?

The *Yerodia* ruling reopened the debate in Belgium on the question whether the Genocide Act should remain untouched and whether Belgium therefore should remain the "criminal judge of the world." This debate is not limited to the question of exclusion of immunities, but also pertains to the aspect of universal jurisdiction, despite the fact that the ICJ did not rule on this. A reason for this renewed discussion can be found in the 60th ratification of the Rome Statute, consequent to which the ICC will shortly start functioning. Some politicians[36] and academics argue that with an ICC, a broad universal jurisdiction for national judges such as provided for by the Genocide Act, is no longer necessary. This argumentation falls short, however. Taking into account the rather limited jurisdiction *ratione loci*[37] and *ratione temporis*[38] of the future Court, national prosecutions on the basis of universal jurisdiction remain necessary to fill the gap in the jurisdiction of the ICC.[39] Moreover, the practice of the *Ad Hoc* Tribunals shows that *international* prosecutions are not always the best solution. With approximately 30 persons convicted in its 9 years of functioning with a cost of approximately 400 million US dollars, the ICTY is not really an example of an efficiently functioning criminal court. One must recognize

35. Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), *supra* note 20. For a more detailed commentary, *see* P.H.F. Bekker, *World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister*, ASIL Insights, February 2002.
36. *See* the idea to exclude Belgian universal jurisdiction over citizens of countries that are party to the Rome Statute (A. Buyse, *Vande Lanotte stelt hervorming Belgische genocidewet voor*, De Standaard Online, 11 April 2002, retrievable at http://www.standaard.be; and the reaction by T. Ongena, *Genocidewet handhaven, graag*, De Standaard Online, 15 April 2002, *id.*).
37. According to Art. 12 of the Statute, the ICC will only have jurisdiction when either the territorial state or the state of which the person accused is a national, has ratified the Statute. This means that the "world" of the "world criminal court" could possibly be much smaller than many think. The "size" depends on the number of states ratifying the Rome Statute.
38. *See* Art. 11 of the Statute: the future court will only have jurisdiction for crimes committed after the entry into force of the Rome Statute (*i.e.*, 1 July 2002).
39. *See* T. Ongena, *Universele rechtsmacht versus de complementariteit van het toekomstige Strafhof: een noodzakelijke aanvulling*, 17 De Orde van de Dag 29–38 (2002).

that the ICC alone will not be able to deal with all the "core crime-cases" of the world. This is a compelling argument why universal jurisdiction for national judges remains necessary.

Other proposals tend to bring genocide cases to a "higher judiciary level." In December 2001, a bill was introduced in the Belgian Chamber of Representatives to change some procedural aspects of the Genocide Act.[40] According to this bill, all criminal investigations in cases within the ambit of the 1993/99 Act would be transferred to the Court of Appeal, applying the procedure applicable in Belgium in cases implicating persons enjoying a jurisdictional privilege, such as members of the judiciary (Articles 483–503*bis* of the Code of Criminal Procedure). This would mean that the investigation would no longer be conducted by an investigating judge (*onderzoeksrechter/juge d'instruction*) of the Tribunal of First Instance, but by a judge (*raadsheer/counseiller*) designated by the Court of Appeal from amongst its members. Any coercive measure would have to be ordered by a council of three appeal judges. Although the author of the bill, Mr Fred Erdman, denied this was his intention, an adoption of the bill in its present form would exclude the possibility for victims to initiate criminal proceedings by way of a *constitution de partie civile/ burgerlijke partijstelling*. Indeed, the mechanism of the *constitution de partie civile* is inextricably linked to the figure of the investigating judge (Article 63 of the Code of Criminal Procedure). Because of the inexistence of a similar mechanism in military criminal procedure, the Genocide Act even specifically introduced this possibility in its Article 9(3).[41] The inability of victims to trigger the criminal investigation would severely inhibit the application of the Act. The future of this bill is, however, unclear, and it is probable that reforms to the Genocide Act will be taken as a response to judicial rulings.

One point, however, can be stated with great certainty: the "non-immunity" clause in Article 5(3) of the Genocide Act can hardly be retained. As regrettable as it is, the ICJ Judgment of 14 February 2002 will most probably lead to the modification of the Genocide Act, in the sense that compulsory measures against persons enjoying an international immunity will no longer be possible.

4.2. Effects on pending procedures

The ICJ Judgment will probably also have its effects on pending procedures, such as the *Sharon* case. This case is currently under consideration before the Brussels (pre-trial) *Chambre des mises en accusation/Kamer van Inbeschuldigingstelling*. Because of the *Yerodia* Judgment the parties

40. Proposition de loi modifiant, sur le plan de la procédure, la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, Doc. Parl. Chambre 2001–2002, nr. 1568/001.
41. *See* Andries, *et al.*, *supra* note 2, at 1181–1183.

in the case had requested the judges to fix a date for a new hearing. This has been granted and the hearing was held on 15 May 2002. The public prosecutor pleaded that the investigation into the massacres in Sabra and Chatila can be continued, except with regard to the person of Ariël Sharon who, in his capacity of acting Prime Minister of the State of Israel, enjoys immunity.[42] Thus, the public ministry gives effect to the Judgment of the ICJ of 14 February 2002 (*see* above). The final outcome of this case will be known on 26 June, when the verdict of the *Chambre des mises en accusation/Kamer van Inbeschuldigingstelling* is expected. The judges might just suspend the case until the resignation of Sharon as minister, but they can also decide to decline the whole case concerning the Israeli Prime Minister. It will be interesting to see if, in the event of a suspension of the investigation, certain investigating measures not of a coercive nature would still be deemed admissible by the Brussels pre-trial court. Indeed, some argue that international immunities do not exclude "less spectacular" investigating measures, such as the opening of an investigation. The Judgment of the ICJ does, however, consecrate quite an absolute immunity, implying that "the mere risk" of legal proceedings would amount to an (inadmissible) act of authority by the investigating state.[43] It is therefore most probable that the Brussels Court, following the pleadings of the Advocate-General, will accept an absolute immunity for Ariël Sharon. Recently, however, a much more controversial point of law was raised concerning the application of the Genocide Act.

The most recent (Belgian) judicial decision in the *Yerodia* case had indeed a rather unexpected outcome: in its decision of 16 April 2002 the *Chambre des mises en accusation/Kamer van Inbeschuldigingstelling* found the complaints against Yerodia and his co-suspects inadmissible because of his absence in Belgium.[44] The judges held that for the application of the Genocide Act, the suspect has to be present on Belgian territory. The Court based its decision on Article 12 of the Preliminary Title of the Belgian Code of Criminal Procedure (*Titre préliminaire du Code de procédure pénale/Voorafgaande Titel van het Wetboek van Strafvordering*). This Article states that, except in the case of explicit derogation, offences committed outside the Belgian territory will not be prosecuted in the absence of the accused. The Court considers that, in the

42. *See Immunité pour Ariel Sharon*, La Libre Belgique, 15 May 2002, retrievable at http://www.lalibre.be; *Openbaar Ministerie roept immuniteit Sharon in*, De Standaard Online, 15 May 2002, retrievable at http://www.destandaard.be; *Affaire Sharon: décision le 26 juin*, Diplomatie Judiciaire, 17 May 2002, retrievable at http://www.diplomatie judiciaire.com/Nouvelles.htm#décision.
43. Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), *supra* note 20, at paras. 54–55. *See also* J. d'Aspremont Lynden & F. Dopagne, *La loi "de compétence universelle" devant la Cour internationale de justice*, 120 Journal des Tribunaux 286 (2002); J. Verhoeven, *Mandat d'arrêt international et statut de ministre*, 435 Journal des Procès 21 (2002).
44. Bruxelles (Chambre des Mises en Accusation), 16 April 2002, KABILA Laurent-Désiré et consorts (unpublished).

absence of an explicit derogation in the Genocide Act, Article 12 is applicable to prosecutions for extra-territorial crimes under the Act. The judges find support for this interpretation in the new Article 12*bis* of the Preliminary Title of the Belgian Code of Criminal Procedure, which concerns the jurisdiction of Belgian courts for crimes that Belgium is under an obligation to investigate pursuant to an international convention. According to the parliamentary preparations, Article 12*bis* has to be read together with Article 12.[45]

The Judgment of 16 April 2002 conflicts with a unanimous jurisprudence. Indeed, Article 12 of the Preliminary Title of the Belgian Code of Criminal Procedure has always been considered inapplicable in the context of the Genocide Act.[46] Not only does the Act of 1993/99 constitute an example of special legislation to which the general rule of Article 12 is not applicable,[47] but it also clearly was the will of the legislator to enable the prosecution of suspects of war crimes *in absentia*. The only reason why no explicit derogation was made from Article 12 in the Act of 1993/99, was that Article 12 was expected to be abolished by a bill then pending.[48] It is disturbing that the Court relies on the parliamentary preparations to link Article 12*bis* of the Preliminary Title of the Belgian Code of Criminal Procedure to Article 12, whereas it neglects to do so to interpret Article 7 of the Genocide Act. Moreover, one can hardly sustain that Article 12*bis* is relevant to the context of the Genocide Act. This Article was introduced as a "catch-all" phrase to avoid the necessity of adopting specific implementing legislation for each and every single treaty binding on Belgium and containing an obligation "to submit the case to its competent authorities for the purpose of prosecution." For the crimes incriminated by the Act of 1993/99, specific implementing legislation clearly exists. Furthermore, not all of these crimes can be found in international treaties containing an obligation to establish criminal jurisdiction (*i.e.*, crimes against humanity). While the Judgment of the Preliminary Chamber

45. *See* Projet de loi portant modification de l'article 12bis de la loi du 17 avril 1878 contenant le Titre préliminaire du Code de procédure pénale, Exposé des Motifs, Doc. Parl., Chambre 2000–2001, nr. 1178/001, at 5, nr. 9.
46. *See*, *inter alia*, Andries, *et al.*, *supra* note 2, at 1173; D'Argent, *supra* note 17, at 554; d'Aspremont Lynden & Dopagne, *supra* note 43, at 287; Reydams, *supra* note 7, at 190–191; T. Scheirs, *Enkele bedenkingen bij de universele bevoegdheid tot vervolging op grond van de Wet Oorlogsmisdaden*, 2000 Panopticon 487, at 489 and 493; D. Vandermeersch, *Les poursuites et le jugement des infractions de droit international humanitaire en droit belge*, *in* H.D. Bosly, *et al.* (Eds.), Actualité du droit international humanitaire 150 (Bruxelles: La Charte, 2001); D. Vandermeersch, *La compétence universelle en droit belge*, *in* Union Belgo-Luxembourgeoise de Droit Pénal (Ed.), Poursuites Pénales et Extraterritorialité 60 *et seq.* (Bruges: La Charte, 2002).
47. *See* B. Spriet, *(Extra)territoriale werking van de Belgische strafwet, met enkele "klassieke" extraterritoriale jurisdictiegronden uit de Voorafgaande titel van het Wetboek van Strafvordering*, *in* Union Belgo-Luxembourgeoise de Droit Pénal, *id.*, at 38.
48. *See* Projet de loi relatif à la répression des infractions graves au Conventions internationales de Genève du 12 août 1949 et au Protocole I du 8 juin 1977 additionnel à ces conventions, Exposé des motifs, Doc. Parl., Sénat 1990–1991, nr. 1317/01, at 16.

of the Court of Appeal of Brussels thus clearly seems to be uncalled for, this case has not come to an end. Since the *parties civiles* in the *Yerodia* case have expressed their intention to file for review (*pourvoi en cassation*), a (final) decision of the Supreme Court (*Cour de Cassation/Hof van Cassatie*) is expected.[49] Meanwhile, a judgment is expected from another chamber of the Brussels Court in the case concerning Ariël Sharon (*see* above). In its pleadings on 15 May, the Brussels Public Ministry explicitly supported the inapplicability of Article 12 of the Preliminary Title of the Belgian Code of Criminal Procedure to cases under the Genocide Act, only invoking the immunity of the acting Israeli Prime Minister.

5. CONCLUSION

The Belgian Genocide Act of 1993/99 is clearly a very progressive instrument in the field of international humanitarian law. Progressively, however, it has come under fire for being overly ambitious or even constituting a downright violation of international law. Where the ICJ has indeed judged this to be the case as far as the exclusion of international immunity is concerned, more recent threats to the universal applicability of the Genocide Act are of a purely national nature. The most important question in this regard is if the point of view of the Brussels Court of Appeal in its Judgment of 16 April 2002 will be followed by other judges and – more importantly – confirmed by the Supreme Court (*Cour de Cassation/Hof van Cassatie*). If this would prove to be the case, legislative action would be necessary to dictate a proper interpretation of the applicability of Article 12 of the Preliminary Title of the Belgian Code of Criminal Procedure to cases under the Genocide Act.[50] Human rights organisations already advocate such steps now.[51] In this context, one should not oversee the fact that there is also a number of Belgian citizens who have filed complaints and initiated judicial investigations on the basis of the Genocide Act, such as the families of Belgian paratroopers killed in Rwanda in 1994. Some members of parliament would seem prepared to take the initiative, as the government does not seem to consider this matter a priority and is currently leaving it in the hands of the judiciary. A politically undesirable outcome may yet force it to take the delicate issue of Belgian jurisdiction for grave violations of international humanitarian law to heart again. It

49. *See Yerodia: plaintes irrecevables*, Le Soir en Ligne, 16 April 2002, retrievable at http://www.lesoir.be; *Plaintes irrecevables dans l'affaire Yerodia*, La Libre Belgique, 16 April 2002, retrievable at http://www.lalibre.be; *Klacht tegen Yerodia niet ontvankelijk (update)*, De Standaard Online, 16 April 2002, retrievable at http://www.standaard.be.
50. This could possibly be done by way of a so-called "interpretative law," or, perhaps more elegantly, by amending existing proposals to change the Genocide Act.
51. B. Beirlant, *Parlement moet genocidewet redden*, De Standaard Online, 15 May 2002, retrievable at http://www.standaard.be.

cannot be denied that a difficult balancing act is in order to reconcile the high hopes of Belgian and other victims in the fight against impunity for heinous crimes, with the need to prevent frivolous and politicised complaints and to use the limited resources of the Belgian judiciary to their best effect.

https://doi.org/10.1017/S0922156502000316 Published online by Cambridge University Press