BELGIUM RULES THE WORLD*:

Universal Jurisdiction over Human Rights Atrocities

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Onder wetenschappelijke begeleiding van de heren Michael Ratner en Reed Brody

Belgian law probably provides for the most extensive exercise of universal jurisdiction over human rights crimes of any country. Under the Act on the Punishment of Grave Breaches of International Humanitarian Law, first enacted in 1993 and amended in 1999, Belgian courts can try cases of war crimes, crimes against humanity and genocide committed by non-Belgians outside of Belgium against non-Belgians, without even the presence of the accused in Belgium.

This paper begins with a general description of the jurisdiction of Belgian courts in criminal matters. Part two discusses the 1993 Act[1] and the 1999 Amendments.[2] Part three addresses the difficult question of whether the Act can be applied to offences committed before its enactment. Part four summarises the ongoing proceedings involving the genocide in Rwanda and crimes against humanity in Chile under Pinochet. Part five deals with a victim's options to bypass possible reluctance of the authorities to prosecute.

1. Criminal jurisdiction of Belgian courts

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[1] 16 June 1993: Loi 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 – Wet betreffende de bestraffing van de ernstige inbreuken op de Internationale Verdragen van Genève van 12 augustus 1949 en op de Aanvullende Protocollen I en II bij die Verdragen, van 8 juni 1977 [Act of 16 June1993 on the Punishment of Grave Breaches of the Geneva Conventions of 12 August1949 and their Additional Protocols I and II of 18 June 1977], *Moniteur Belge - Belgisch Staatsblad*, 8 May 1993. The French version of the 1993 Act can also be found in Eric David, *La Loi Belge sur les Crimes de Guerre*, 28 *Revue Belge de Droit Internationale* 668 (1995), at 680-684.

[2] 10 February 1999: Loi relative à la répression des violations graves de droit international humanitaire – Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht [Act of 10 February 1999 on the Punishment of Grave Breaches of International Humanitarian Law], *Moniteur belge - Belgisch Staatsblad*, 23 March 1993. For an unofficial translation of the 1993 Act as amended through the 1999 Act, *see* Stefaan Smis & Kim Van Der Borght, *Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 *I.L.M.* 918 (1999), at 921-925.

International law recognises five bases for jurisdiction: territoriality, nationality,[3] passive personality, protection principle and universality.[4] All are present in Belgian law.[5]

Firstly, according to the territoriality principle the courts have jurisdiction over all crimes committed on Belgian territory.[6]

According to the nationality personality principle Belgian citizens can be prosecuted for crimes committed abroad if the conduct is punishable in both Belgium and the country in which the crimes were committed.[7] But if the victim is a foreigner, Belgian courts only have jurisdiction pursuant to a complaint by the victim or a formal request by the foreign state.[8] Thus, if the foreign authorities are not interested in prosecution and if the victim is afraid (or otherwise unwilling or unable) to file a complaint, the crimes will remain unpunished.[9]

Thirdly, passive personality confers jurisdiction whenever the victim is a Belgian citizen, and provided the conduct is punishable at the scene of the crime with a minimum sentence of five years.[10]

Under the protection principle Belgian courts have jurisdiction over cases involving national security interests.[11]

Finally, since 1995 Belgian courts have universal jurisdiction in matters involving child prostitution, child pornography and human trafficking, no matter where such offences are committed, by whom or against whom.[12]

2. Universal criminal jurisdiction under the 1993 Act

[3] Also referred to as active personality principle.

[4] Robert Jennings & Arthur Watts, *Oppenheim's International Law*, Vol I, London, Longman, 1992 (9th Ed.), 456-498. Ian Brownlie, *Principles of Public International Law*, London, Clarendon Press, 1991 (4th Ed.), 300-305 (hereinafter "*Brownlie"*); Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1998, 139-141. (hereinafter "*Accountability*").

[5] The basic jurisdictional provisions are stated in the Preliminary Title of the Code of Criminal Procedure (hereinafter 'CCP'). Additional grounds of jurisdiction are found in a number of specific statutes. *See generally* Ch. Hennau & J. Verhaegen, *Droit Pénal Général*, Brussels, Bruylant, 1991, 62-75 No. 61-84 (with further references).

[6] Article 4 of the Criminal Code. This principle applies also if an offense is partly committed in Belgium, *see Ibid.* at 66-69 No. 69-73.

[7] CCP Article 7 §1.

[8] CCP Article 7 §2.

[9] Finally, contrary to the general rule in Belgium that both the victim and the public prosecutor can initiate the criminal prosecution (*see* infra note 119), only the latter has this power here (CCP Article 7 §2).

[10] CCP Article 10 5°.

[11] CCP Article 6 1° and 2°; Article 10 1° and 2°.

[12] CCP Article 10*ter*. By Act of 10 February 1999, *Moniteur Belge – Belgisch Staatsblad*, 23 March 1999, several offenses of corruption were added (CCP Article 10*quarter*).

2.1. Introduction

The four Geneva Conventions of 1949 oblige states to either prosecute or extradite war criminals.[13] Although most States have ratified these Conventions,[14] war criminals have traditionally enjoyed the tacit hospitality of these States. "It is common knowledge that the application of the principle aut dedere aut judicare in practice has been rather difficult…[and] has been the exception rather than the rule."[15] In the last few years, however, states have finally begun to take this obligation seriously.

In 1993, more than forty years after its ratification of the Geneva Conventions, Belgium enacted sweeping new legislation establishing universal jurisdiction over war crimes.[16] The 1999 Amendments added genocide and crimes against humanity.

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[13] Article 49 of the 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 *U.N.T.S.* 31 (hereinafter 'Geneva I'); Article 50 of the 1949 Convention for the Amelioration of the Condition of the Wounded, the Sick and Shipwrecked Members of Armed Forces at Sea, 75 *U.N.T.S.* 85 (hereinafter 'Geneva II'); Article 129 of the 1949 Convention relative to the Treatment of Prisoners of War, 75 *U.N.T.S.* 135 (hereinafter 'Geneva III') and Article 146 of the 1949 Convention relative to the Protection of Civilian Persons in Time of War, 75 *U.N.T.S.* 287 (hereinafter 'Geneva IV'):

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
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> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned provided such High Contracting Party has made out a prima facie case.
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> (…)

[14] Belgium ratified Geneva I-IV by the Act of 3 September 1952.

[15] Chris Van Den Wijngaert, *War Crimes, Genocide and Crimes Against Humanity - Are States Taking National Prosecutions Seriously* in Cherif Bassiouni, *International Criminal law (2d Ed.)*, Vol. II, 227, at 229-230. (hereinafter "*War crimes*") *See also* Court of First Instance (Brussels) (Ordonnance du juge d'instruction), 6 November 1998, 118 *Journal des Tribunaux*, 308 (1999), at 310 (hereinafter "*Ordonnance*"):

> *"Les autorités…ont souvent donné l'impression qu'en matière de crime contre* l'humanité, elles recherchaient davantage les motifs ou les prétextes juridiques pour ne pas poursuivre de tels crimes plûtot que de vérifier dans quelle mesure le droit international et le droit interne leur permettaient d'exercer de telles poursuites."
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> [The authorities…have often given the impression that they were looking for ways to avoid prosecution of crimes against humanity instead of investigating their power under international law and domestic law to conduct such prosecutions.]

See also Luc Reydams, *International Decision: in Re Pinochet*, 93 *A.J.I.L.* 668 (1999), at 700-703 (includes English translation of parts of the order).

[16] Several attempts to adopt legislation before 1993 never materialized, *see* A. Andries, E. David, C. Van Den Wijngaert & J. Verhaegen, *Commentaire de la Loi du 16 Juin 1993 Relative à la Répression des Infractions Graves au Droit Internationale Humanitaire*, 74 *Revue de Droit Pénal et de Criminologie* 1114 (1994), at 1119-1121 (with further references) (hereinafter "*Commentaire*").

2.2. Scope of the 1993 Act

The 1993 Act provides universal jurisdiction over "grave breaches" of the Geneva Conventions and Additional Protocols I and II.[17] While international law (traditionally)[18] does not characterise breaches of Protocol II, which applies to non-international armed conflict,[19] as grave breaches, the Belgian Act does.[20]

The recognition that most armed conflicts today are internal in nature prompted the Parliament to adopt an amendment to include internal conflicts as well.[21] One scholar contends that the amendment is not necessarily limited to those internal conflicts as which meet the Protocol II threshold.[22] Belgium can create extraterritorial or universal jurisdiction beyond what is strictly required by the Geneva Conventions, namely over internal armed conflicts or

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[17] 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 *U.N.T.S.* 3 (1977) (hereinafter 'Protocol I'). 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 *U.N.T.S.* 609 (hereinafter 'Protocol II'). Belgium ratified Protocols I and II by Act of 04.16.1986.

[18] *See* Theodor Meron, *The International Criminalization of Internal Atrocities*, 98 *A.J.I.L.* 554 (1995); Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 *Tex. Int'l. L. J.* 237 (1998).

[19] Article 1 of Protocol II:

> "1. This Protocol…shall apply to all armed conflicts which are not covered by Article 1 of the Protocol I … and which take place in the territory of a High contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
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> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

[20] The original bill did not include breaches of Protocol II, *Parliamentary Documents*, Senate, 1990-1991, No. 1317/1, at 6. Belgium became the first country to explicitly penalize violations of Protocol II, although Swiss law had already done so implicitly. *See* Luc Reydams, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 4 *Eur. J. of Crime, Crim. L. and Crim. Just.* 18 (1996), at 36n. (hereinafter *"Universal Jurisdiction over Atrocities in Rwanda"*).

[21] *Parliamentary Documents*, Senate, Session Extraordinaire, 1991-1992, No. 481/4, at 1-4. *See* Eric David, *La Loi belge sur les crimes de guerre*, 28 *Revue Belge de Droit Internationale* 668 (1995), at 668-671. *See generally Commentaire*, supra note 16, at 1123-1135 (defining the concepts 'international', 'internal', 'armed' and 'conflict').

[22] Eric David, *Principes de Droit des Conflits Armés*, Brussels, Bruylant, 1994, 647-649, No. 4.201. (hereinafter *"Droit des Conflicts Armés"*) *But see Parliamentary Documents*, Senate, Session Extraordinaire, 1991-1992, No. 481/5, at 9-12 (legislative history suggests the Act is limited to internal conflicts as described in Protocol II); Judgement of the Military Court of 28 April 1998, *Journal des Tribunaux*, 1998, 286-289; *78 Revue de Droit Pénal et de Criminologie* 1132 (1998), at 1160-1161; *Yearbook of International Humanitarian Law*, 1998, I, 415-416 (holding the 1993 Act inapplicable to the case of two Belgian soldiers of UNOSOM accused of crimes against the civilian population because the conflict in Somalia was not an internal conflict as defined by Article 1 of Protocol II because of the absence of organized armies, responsible command and control over part of the territory).

conflicts otherwise not covered by the Geneva Conventions, without violating international law.[23] In a landmark decision, the International Tribunal for the Former Yugoslavia (hereinafter 'ICTY') referred to the Belgian Act as an example that today war crimes committed in internal armed conflict constituted grave breaches under customary international law and were subject to universal jurisdiction.[24]

Article 1 of the 1993 Act enumerates the breaches of the Geneva Conventions, closely following the language of the Conventions.[25]

2.3. The 1999 Amendments

Although Belgium was quick to ratify the 1948 Genocide Convention,[26] it never adopted legislation to give effect to the Convention.[27] Shocked by the genocide in Rwanda, in which ten Belgian UN peace keepers and several

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[23] *Commentaire*, supra note 16, at 1174-1175; *Droit des Conflits Armés*, supra note 22, at 644, No. 4.196; *War Crimes*, supra note 15, at 231-232. But referring to the famous "Lotus" case of the Permanent Court of International Justice, 1927 P.C.I.J. (ser. A) No. 10 (holding that Turkey could try a French officer on watch duty at the time of a collision between a French and Turkish vessel on the high seas, because international does not contain *"a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory*."), they argued the Belgian legislator had this power, *see Droit des Conflits Armés*, supra note 22, at 645-649, No. 4.197-4.201. *See also Commentaire*, supra note 16, at 1175 (arguing that in cases of violations of Protocol II, prosecution should be subject to the 'double criminality rule', according to which the conduct ought to be an offense both under Belgian law and under the laws of the country where it was committed). However, the condition of double criminality does not apply to offenses subject to universal jurisdiction. *See* Theodor Meron, *The International Criminalization of Internal Atrocities*, 98 *A.J.I.L.* 554 (1995), at 576 *("[O]nce internal atrocities are recognized as international crimes and thus as matters of major international concern, the right of third states to prosecute violators must be accepted.")*

[24] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Judgement of 10.02.1995, 35 *I.L.M.* 32, at 71, §132. *See Universal Jurisdiction over Atrocities in Rwanda*, supra note 20, at 25-27 and 36.

[25] Commenting all those provisions goes beyond the scope of this paper. *See generally Commentaire*, supra note 16, at 1136-1161 (with further references, esp. note 101 on p.1141). We limit our observations to two brief remarks:

1. The legislative history did explicitly recognize rape as a war crime, but only as an example of "willfully causing great suffering or serious damage to physical integrity or heath" (Article 1 §3 3°), and not as an example of torture (Article 1 §3 2°). Recently, rape has also been recognized as torture. *See generally* Louis Henkin, Gerald Neuman, Diane Orentlicher & David Leebron*, Human Rights*, New York, Foundation Press, 1999, 372-383; Kelly D. Askin*, Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 *A.J.I.L.* 97 (1999).

2. The Belgian Act goes beyond the Geneva Conventions by incriminating persons facilitating, aiding or inciting to commit war crimes (Articles 3 and 4).

[26] Ratified by Act of 26 June 1951.

[27] Article 5 of the 1948 Convention on the Prevention and Suppression of the Crime of Genocide, 78 *U.N.T.S.* 277 (hereinafter 'Genocide Convention"):

> *"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the Present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III."*

But see infra note 33 and Part III.5.

dozen Belgian civilians were killed as well,[28] and worried that Belgium might become a safe haven for those who perpetrated the genocide,[29] several senators proposed an amendment to the 1993 Act to include genocide.[30] The Government reacted by proposing to include crimes against humanity as well.[31] Both amendments were adopted. The 1999 Amendments also changed the title of the original 1993 Act.[32]

a. Genocide

Technically, genocide could already be punished under the 1993 Act insofar as it was also a war crime.[33] But it would be illogical not to include the most heinous crime of all in an Act concerning the Punishment of Grave Breaches of International Humanitarian Law. The Act adopts the language of the Genocide Convention.[34]

b. Crimes against humanity

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[28] The death of the Belgian soldiers triggered a parliamentary investigation. *See* Report of the Commission of Inquiry, *Parliamentary Documents*, Senate, 1997-1998, No. 611/7. Moreover, the commanding Belgian officer, Colonel Luc Marchal, was tried for wrongful death on the ground of lack of caution or precaution and subsequently acquitted. *See Yearbook of International Humanitarian Law*, 1998, I, 413-415.

[29] *Parliamentary Documents*, Senate, 1997-1998, No. 749/1, at 3.

[30] *Ibid.*, No. 749/1.

[31] *Ibid.*, No. 749/2 and 749/3, at 7.

[32] *See* supra note 2.

[33] Replying to concern among senators that the principle of non-retroactivity would bar prosecution of genocide committed before the amendments would become law, the Justice Minister said Belgian courts had the power to judge cases of genocide and crimes against humanity committed prior to the amendments to the 1993 Act. When the Government proposed the ratification of the Genocide Convention in 1951, it stated that no new implementing legislation was required to punish genocide. *Parliamentary Documents*, Senate, 1997-1998, No. 749/3, at 5 and 15-21. This statement seems to suggest that the jurisdiction of Belgian courts over crimes of genocide is directly derived from the Convention without the need for any domestic legislation (*see* infra Part III. 5). However, Article VI of the Genocide Convention does not explicitly provide national courts with universal jurisdiction over genocide:

> *"Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction to those Contracting Parties which shall have accepted its jurisdiction."*

[34] Article 1 §1: (identical to Article 2 of the 1948 Genocide Convention)

> "[G]enocide means any of the following acts, committed with the intent to destroy in whole or in part, a national, ethnic, religious or racial group, as such:
> 1. killing members of the group;
> 2. causing serious bodily or mental harm to members of the group;
> 3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> 4. imposing measures intended to prevent births within the group;
> 5. forcibly transferring children of the group to another group."

The Act's definition of crimes against humanity is largely based on the Statute of the International Criminal Court, which had been adopted in 1998.[35] Indeed, the Act states "In accordance with the Statute of the International Criminal Court, a crime against humanity means…."[36] However, for some unexplained reason the Act then limits itself to eight of the eleven offences listed as crimes against humanity in the ICC Statute. Missing from the list are enforced disappearance and apartheid as well as the general category of 'other inhumane acts of a similar character.'[37]

There had been a long-standing controversy over whether crimes against humanity required a connection to an armed conflict. Today the need for such a war link is almost unanimously rejected.[38] The Act itself is overtly clear that no nexus to an armed conflict is needed: "qu'il soit commis en temps de paix ou en temps de guerre [regardless of whether committed in peacetime or in time of war]."[39]

2.4. Penalties

Article 2 contains the penalties, ranging from ten years imprisonment to life imprisonment. In 1993 Belgium had not officially abolished the death

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[35] Article 7 of the ICC Statute, 37 *I.L.M.* 999 (1998). *See generally* Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 *A.J.I.L.* 43 (1999).

[36] Article 1 §2.

[37] Article 7 (i), (j) and (k) of the ICC Statute. What is the effect of this striking omission?

1. No international treaty in place for Belgium provides for universal jurisdiction over forced disappearance. If there exits such a norm under customary international, the 1993 Amendments could be seen as evidence that Belgium objects to it.

The offense of forced disappearance is considered to continue until the authorities give information on the whereabouts of the disappeared person. *See* Article 17 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance, 32 *I.L.M.* 903 (1993). Hence, if *arguendo* the 1993 Amendments would not apply retroactively, disappearance would in any event, have fallen under the Act if the fate of the disappeared remained unresolved after 1999.

2. Belgian courts still have universal jurisdiction over apartheid by virtue of Article 5 of the 1973 Convention on the Suppression and Punishment of Apartheid, 1015 *U.N.T.S.* 243.

3. The vague category of 'other inhumane acts of a similar character' may be in conflict with the requirement that norms of a criminal statute must be formulated clearly. *See* Pierre d'Argent, *La Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire*, 118 Journal des Tribunaux 549 (1999), at 551 (hereinafter "*La Loi du 02.10.99*"); P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague, Kluwer, 1998, 481 (hereinafter "*Theory and Practice*")

[38] Cherif Bassiouni, *Crimes Against Fundamental Human rights* in Cherif Bassiouni., *International Criminal law (2d Ed.)*, Vol. I, 522, at 571-574 ("[T]here is enough evidence of customary international law, 'general principles of law' and 'the writings of the most distinguishing publicists' to support the proposition that 'crimes against humanity' do not need the war-connection link."(p.573)) (notes omitted); *Accountability*, supra note 4, at 49-57. *See also Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Judgement of 2 October 1995, 35 *I.L.M.* 32, at 72 §141 ("It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed… customary international law may not require a connection between crimes against humanity and any conflict at all.").

[39] Article 1 §2 first sentence.

penalty.[40] Back in 1993, the Act cryptically provided "la peine la plus élévée prevue en matière criminelle par le Code pénal militaire [the highest penalty provided in criminal matters by the military penal code]" for the most heinous offences.[41] After the abolition of the death penalty in 1996,[42] the death penalty was replaced by life imprisonment.[43]

2.5. Inadmissible defences

Political, military or national interest or necessity cannot serve as justifications.[44] Neither does the Act allow the accused to claim that she acted under orders of a superior or the government.[45] A 1999 amendment explicitly denied any defence based on official immunity.[46] These provisions were seen as implementing existing international law.[47]

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[40] Because the death penalty was still in the Criminal Code, several countries refused to extradite persons to Belgium if they were technically eligible for the death penalty. At the time, a bill on the abolition of the death penalty was being considered by the Parliament.

[41] Article 2 (old).

[42] Act of 10 July1996, *Moniteur Belge – Belgisch Staatsblad*, 1 August 1996. Meanwhile, Belgium also ratified the Sixth Additional Protocol to the ECHR concerning the Abolition of the Death Penalty, Act of 4 December 1998, *Moniteur Belge – Belgisch Staatsblad*, 21 October 1999.

[43] Article 2 (new).

[44] Article 5 §1:

> *"Aucun intérêt, aucune nécessité d'ordre politique, militaire ou national, ne peut justifier, même à titre de représailles, les infractions…"*
> *[No political, military, or national interest or necessity, even on grounds of reprisals, can justify the offenses…]*

[45] Article 5 §2:

> *"Le fait que l'accusé a agi sur l'ordre de son gouvernement ou d'un supérieur hiérarchique ne dégage pas sa responsabilité si, dans les circonstances existantes, l'ordre pouvait manifestement entraîner la perpétration d'une infraction grave aux Conventions de Genève du 12 août 1949 et à leur premier [sic] Protocole additionnel du 8 juin 1977."*
> *[The fact that the defendant acted on the order of his government or a superior shall not absolve him from responsibility where, in the prevailing circumstances, the order could clearly result in the commission of a crime of genocide or of a crime against humanity, as defined in the present Act, or a grave breach of the Geneva Conventions of 12 August 1949 and their Additional Protocol I [sic] of 8 June 1977*]

[46] Article 5 §3:

> *"L'immunité attachée a la qualité officielle d'une personne n'empêche pas l'application de la presente loi."*
> *[The immunity attributed to the official capacity of a person does not prevent the application of the present Act]*

The legislative history states that this provision also denies immunity to serving officials, *see Parliamentary Documents*, Senate, 1997-1998, No. 749/3 ("même lorsque la personne considerée est encore en fonction"). But immunity has a different status in international courts than in domestic courts. Several treaties provide immunity from domestic jurisdiction for diplomats and high officials of international organizations (most notably NATO and the EU). *See* Joe Verhoeven, *Observations* under *Ordonnance*, supra note 15, at 312; *La Loi du 02.10.99*, supra note 37, at 553. Could Belgium arrest Javier Solana, former secretary-general of NATO, who is now a high official with the EU, for the illegal bombing of Yugoslavia?

2.6. Universal jurisdiction

Universal jurisdiction means that a state can punish "certain offences recognised by the community of nations as of universal concern" though that state has no links of territory with the offence, or of nationality with the offender or even with the victim.[48] "The basic premise of universal jurisdiction holds that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern."[49]

Following international treaty law, states not only have a right to exercise universal jurisdiction over certain crimes but are sometimes required to

Moreover, the constitutionality of the provision is doubtful, *see La Loi du 02.10.99*, supra note 37, at 552 (arguing that such a general prohibition on official immunity violates the Belgian Constitution, which provides (partial) immunity for ministers and members of parliament and absolute immunity for the King, even if they are not carried out in his official function). The French Constitution contains similar provisions. The French *Conseil Constitutionel* held that France could not ratify Article 27 of the ICC Statute without changing its Constitution. *See* Judgement No. 98-408 DC, 22 January 1999, www.conseil-constitutionnel.fr (visited on 11.18.99)

[47] *Parliamentary Documents*, Senate, 1997-1998, No. 749/3, at 15.

[48] *See* Restatement (Third) of the Foreign Relations Law of the United States, § 404 and §423. The Restatement mentions by name "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism" as subject to universal jurisdiction. Crimes against humanity and apartheid are notably absent. But this list is not exhaustive (§404: "…such as…"). *See also* §404 Comment a. (describing the class of "universal offenses" as expanding).

[49] Kenneth C. Randall *Universal Jurisdiction under International Law*, 66 Texas Law Review 785 (1988), 814 (hereinafter "*Universal Jurisdiction*"). The purpose of universal jurisdiction is most accurately expressed in its German translation: *Weltrechtspflegeprinzip*. *See* Dietrich Oehler, *Internationales Strafrecht*, Cologne, Carl Heymanns Verlag, 1983, 147seq and 519seq.

exercise universal jurisdiction.[50] Additionally, universal jurisdiction may be derived from customary international law.[51]

Article 7 of the 1993 Act allows the prosecution of a foreigner for offences committed abroad against another foreigner.[52] This is equally true even if the

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[50] Conventions that *permit* universal jurisdiction:
- 1948 Genocide Convention, supra note 27: Article 6;
- 1973 Apartheid Convention, supra note 37: Article 5;
- 1982 Convention on the Law of the Sea: Article 105 (which is identical to Art. 19 of 1958 Convention on the Law of the High Seas, 450 *U.N.T.S.* 82).

Conventions that *require* universal jurisdiction:
- 1949 Geneva I: Article 49; Geneva II: Article 50; Geneva III: Article 129, Geneva IV: Article 146. (*see* supra note 13);
- 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 10 *I.L.M.* 133 (1971): Article 7;
- 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 10 *I.L.M.* 1151 (1971): Article 7;
- 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1035 *U.N.T.S.* 167: Article 7;
- 1979 International Convention against the Taking of Hostages, 18 *I.L.M.* 1456 (1979): Article 8 (1);
- 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 23 *I.L.M.* 1027 (1984), as modified, 24 *I.L.M.* 535 (1985): Article 7(1).

See generally Cherif Bassiouni. & E. M. Wise*, Aut Dedere aut Judicare: the Duty to Extradite or Prosecute in International Law*, Deventer, Kluwer, 1995.

[51] Customary international law traditionally recognized universal jurisdiction over piracy and slavery, *see Universal Jurisdiction*, supra note 49, at 791-798 and 798-800. A State, who has no treaty-based right to exercise universal jurisdiction, can derive such from customary international law. *See generally Ibid.*, at 823-834. Today customary international law even imposes an obligation to assert universal jurisdiction over certain crimes. *See* M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 Law & Contemp. Prob. 63 (1996) ("International crimes that rise to the level *of jus cogens* [such as genocide and crimes against humanity] constitute *obligatio erga omnes* which are inderogable. Legal *obligations* which arise from the higher status of such crimes include…universal jurisdiction over perpetrators of such crimes."(p.63)) (last emphasis added); *Ordonnance*, supra note 15, at 310:

> *"…même en dehors de tout lien conventionnel, les autorités nationales ont le droit et même dans certaines circonstances, l'obligation de poursuivre les auteurs de tels crimes indépendamment du lieu où ils se trouvent." (emphasis added)*
> *[…even in the absence of a treaty, national authorities have the right–and in some circumstances the obligation–to prosecute the perpetrators independently of where they hide."]*

But see Universal Jurisdiction, supra note 49, at 833-834 (denying such an obligation as "premature, in light of the recentness of…criminal law developments and the frequent failure of parties and non-parties alike to act as if bound by an obligation to prosecute today's *hostis humani generis*"); Lyal S. Sunga, *The emerging system of international criminal law*, The Hague, Kluwer, 1997, 256 ("Although the doctrine of universal jurisdiction shows potential for future development…, to this point it remains only a theoretical construct unsupported by general state practice. It does not currently qualify as a rule of customary law, much less, one of mandatory import; it permits or authorizes a state to prosecute, but does not require the state to do so.")

[52] Article 7:

> *"Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu où celles-ci auront été commises…"*
> *[The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed]*

accused is not found in Belgium.[53] Moreover, as opposed to the U.S., the Belgian criminal system allows trials in absentia.[54]

2.7. Imprescriptability

Several treaties prescribe imprescriptability for genocide, crimes against humanity and war crimes, but have not been ratified widely.[55] Sometimes imprescribtability is also considered a provision of customary international law.[56] Article 8 of the 1993 Act provides the abolition of statutory limitations for offences under the Act.

See Commentaire, supra note 16, at 1170-1176. A complaint by the victim or a request by the foreign State (*see* supra note 8) is not required (Article 7 cl.2).

[53] This is not clear from the text of Article 7 but follows conclusively from legislative history, *see Parliamentary Documents*, Senate, 1990-1991, No. 1317/1, at 16 ("même dans le cas ou l'auteur de l'infraction n'est pas trouvé sur le territoire belge.")[even in cases in which the accused is not found on Belgian soil]. *See Commentaire*, supra note 16, at 1173.

[54] *See generally* Raf Verstraeten, *Handboek Strafvordering*, Antwerp, Maklu, 1994, 445-448 (with further references).

[55] 1968 UN-Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, 754 *U.N.T.S.* 73; 1974 European Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, *E.T.S.* No. 82, www.coe.fr/eng/legaltxt/82e.htm (visited on 11.30.99). Belgium only signed the latter (05.04.1984) but has not ratified it. *See generally Droit des Conflits Armés*, supra note 22, at 652-655, No. 4.207-4.211. *See also Ordonnance*, supra note 15, at 311.

[56] *See* infra Part III.4 ; *See also* P. Mertens, *L'imprescribilité des crimes de guerre et contre l'humanité*, Brussels, Ed. de l'Université de Bruxelles, 1974.

3. Retroactivity

3.1. Introduction

Does the Act apply to conduct that occurred before it came into force?[57] Generally, the principle of non-retroactivity applies only to substantive provisions and not to procedural ones. But a statute may contain both substantive and procedural provisions, which must be considered separately. Moreover, different countries draw the line between substance and procedure in different ways.

First, rules providing new crimes are universally considered non-retroactive. Second, there is a deep divide among Belgian judges and scholars over the question whether a provision creating extraterritorial jurisdiction is substantive or procedural. Third, Belgian law considers a statute of limitation as procedural.

Now that the Act has been adopted, it seems odd to ask whether the Act was necessary in the first place. This does not mean we are against international human rights litigation in domestic courts, as is Dr. Henry Kissinger.[58] What it asks is whether the 1993 Act and the 1999 Amendments are merely declaratory of a power the Belgian judicial authorities already had by virtue of self-executing provisions of international law. If this is the case, and we argue it is, the question of retroactivity of the Act never arises.

3.2. No retroactivity of a provision creating a new crime

Internationally, the principles of nullum crimen sine lege and nulla poena sine lege are enshrined in Article 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms[59] (hereinafter 'ECHR') and Article 15 of the International Covenant on Civil and Political Rights[60] (hereinafter 'ICCPR'). These forbid punishment of conduct "which did not constitute a criminal offence under national or international law at the time when it was committed."[61] But these principles "shall not prejudice the trial and punishment of any person for any act or omission, which at the time when

[57] The 1993 Act entered into force on 15 August 1993. The Amendments only came into force on 2 April 1999.

[58] Chris Tomlinson, *Diplomat Looks at Today's World and Events he Shaped*, *Dayton Daily News*, July 11, 1999, at 18A. ("I…think the procedure, where a magistrate in one country–where the alleged crime did not occur–can issue an arrest warrant for a former leader of a country elsewhere…is extremely dangerous.") (available on Lexis)

[59] 213 *U.N.T.S.* 221. The ECHR is directly applicable in the Belgian domestic legal order.

[60] 7 *I.L.M.* 368 (1967).

[61] Article 7(1) ECHR and Article 15(1) ICCPR.

it was committed, was criminal according to the general principles of law recognised by the community of nations."[62]

Domestically, the principle of non-retroactivity is stated in Article 2 of the Criminal Code. It contains no reference to the international law exceptions of Articles 7(2) ECHR or 15(2) ICCPR. Therefore, Belgian law seems more protective towards the accused.[63]

Hence, we cannot apply Articles 1 and 2 of the Act to conduct that occurred before its enactment unless this conduct was already an offence under existing domestic legislation or by way of directly applicable international law.[64]

3.3. Retroactivity of a provision creating universal jurisdiction?

The Belgian courts and leading scholars are divided over whether a provision extending the extraterritorial jurisdiction of Belgian courts is procedural or

[62] Article 7(2) ECHR and Article 15(2) ICCPR. In its early days, the European Commission on Human Rights held several complaints of persons convicted under post WW II statutes for collaboration with the Germans during WW II, inadmissible. The Commission applied Article 7(2), though it never investigated whether the acts were "criminal according to the general principles of law recognized by the community of nations." *See* Jochen A. Frowein & Wolfgang Peukert, *Europaeische MenschenRechtsKonvention*, Kehl, Engel, 1996, 327-328. There have been no cases before the European Court of Human Rights or the Human Rights Committee on this matter. *See also Theory and Practice*, supra note 37, at 486-488.

[63] It is noteworthy that the non-retroactivity principle only appears in an ordinary statute and not in the Constitution. Therefore, a later statute can override this principle. Neither the 1993 nor the 1999 Amendments, however, include such a specific provision.

[64] *See* infra Part III.5. The principle of non-retroactivity also relates to the penalties. International law providing for universal jurisdiction (*see* supra Part II.6) contains no penalties. Therefore, the courts will have to apply the penalties that were provided in domestic law for similar offenses at the time the offense was committed. *See Ordonnance*, supra note 15, at 308-309 ; Chris Van den Wijngaert, *De Toepassing van de Strafwet in de Ruimte. Enkele Beschouwingen* in *Liber Amicorum F. Dumont*, Antwerp, Kluwer, 1983, 501, at 507 and 521-522; Chris Van den Wijngaert, *Structures et Méthodes de la Coopération Internationale et Régionale en Matiére Pénale (première partie: droit des compétences)*, 64 *Revue de Droit Pénal et de Criminologie* 517 (1984), 519-520; *Parliamentary Documents*, Senate, 1997-1998, No. 749/3, at 19. *Compare* Judgement of the *Chambre criminelle* of the French *Cour de Cassation*, 1 June 1995, discussed in 42 *Annuaire Français de Droit International* 1005 (1996). *But see La Loi du 02.10.99*, supra note 37, at 553. (noting that Article 2 of Criminal Code applies to the 1993 Act and prevents retroactivity, in the absence of a clear provision to the contrary); Joe Verhoeven, *Observations* under *Ordonnance*, supra note 15, at 314.

not.[65] The rules on extraterritorial jurisdiction appear in the CCP and not in the Penal Code.[66] But we think this is not conclusive.

The 1993 Act was not Belgium's first special legislation to punish war crimes. Several Acts were adopted following World War II extending the jurisdiction of Belgian courts over certain crimes committed abroad.[67] In one case, the highest Belgian court, the Cour de Cassation, held that such a statute did not punish conduct that previously could not be punished, but, rather, that it only extended the extraterritorial competence of the Belgian judge.[68] The view that the matter is purely procedural also finds some support among scholars.[69]

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[65] Chris van den Wijngaert, *Structures et Méthodes de la Coopération Internationale et Régionale en Matiére Pénale (première partie: droit des compétences)*, 64 *Revue de Droit Pénal et de Criminologie* 517 (1984), 519 ("En Belgique la plupart des auteurs penchent vers la reconnaissance d'un caractère procédural, ce qui résulte probablement du fait que la plupart des dispositions régissant la matière ont été insérées dans le code de procédure pénal…") [In Belgium the majority of scholars tends towards recognition of the matter as procedural, probably because most of the provisions concerning the matter can be found in the CCP].

[66] *War Crimes*, supra note 15, at 236. The territoriality principle, however, is stated in the Penal Code. In the 1993 Act the provision on universal jurisdiction appears under the title 'competence and procedure' ("Chapitre II. De la compétence, de la procédure et de l'exécution des peines").

[67] Belgian courts only acquired jurisdiction over foreigners who had committed war crimes against Belgians abroad by virtue of the Act of 20 June 1947 on the jurisdiction of military tribunals over war crimes. (Loi relative à la compétence des jurisdictions militaires en matière de crimes de guerre, *Moniteur Belge*, 26-27 June 1947). The Act allowed prosecution on the condition of double criminality, meaning that the conduct was criminal both under Belgian penal law and the laws and customs of war. Article 2 of the Act states:

> "Sont jugées par les jurisdictions militaires…les infractions tombant sous l'application de la loi pénale belge commises en violation des lois et coutumes de la guerre…"
> [Will be judged by the military courts…the offenses that are both a violation of Belgian criminal law and the laws and customs of war]

See J. Verhaegen, *La Répression des Crimes de Guerre en Droit Belge* in *Festschrift für H.-H. Jeschek*, Berlin, Duncker & Humbolt, 1985, Vol. II, 1441, at 1442-1446. The Act then limited the prosecution to those who collaborated with the enemy, a limitation for which the Act was vigorously condemned, *Ibid.* at 1146 ("ce texte hautement contestable"). In a number of cases convictions were quashed on the grounds that the conduct was no crime under domestic penal law. *Ibid.* at 1443.

At that time Belgian courts were equally without jurisdiction over crimes committed by Belgians abroad against a foreigner that were not extraditable crimes according to Belgian law. Jurisdiction was only established by virtue of the Act of 30 April 1947 modifying the Executive Act of 15 August 1943 conferring exceptional powers to Belgian courts concerning certain crimes committed abroad in wartime. (Loi modifiant l'arrête-loi du 5 août 1943 conférant compétence exceptionelle aux jurisdictions belges concernant certains crimes ou délits commis en temps de guerre hors du territoire national, *Moniteur Belge*, 15 May 1947). The Court of Cassation considered this Act to be merely procedural (*see* next note).

[68] Cass, 5 June 1950, *Pasicrisie*, 1950, I, 695-698:

> "[La loi] ne punit pas des faits qui antérieurement n'étaient pas punissables et n'apporte aucune modification aux peines établies précédemment;…elle [la loi] a uniquement pour but d'attribuer aux jurisdictions belges une compétence extraordinaire en matière de certains crimes et délits commis hors du territoire national en temps de guerre."
> [The Act does not punish conduct that was previously not punishable and does not alter the previously prescribed penalties,…the Act has the sole purpose of conferring special jurisdiction upon the Belgian courts over certain crimes and misdemeanors committed outside its national boundaries in time of war]

According to this view, Belgian courts would have universal jurisdiction over events that occurred before 1993 because the rule establishing universal jurisdiction is procedural, provided the conduct was an offence under both domestic and international law.

But more recently the Cour de Cassation held that a provision extending the extraterritorial jurisdiction of the Belgian judiciary could not be applied retroactively.[70] Some scholars adopted the same view.[71]

According to this interpretation, Belgian courts would have no universal jurisdiction over events that occurred before 1993 (war crimes) or 1999 (genocide and crimes against humanity), unless the universal jurisdiction directly flows from international law.[72]

3.4. Retroactivity of the abolition of statute of limitation

The 1993 Act abolishes the statutory limitation for war crimes and the 1999 Act does the same for genocide and crimes against humanity. As long as prescription is not reached, an extension of the statutory limitation, and a fortiori its abolition, is applicable to ongoing and future prosecutions of

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However, an anonymous note to the judgment already doubted whether the law was really procedural, *Ibid.* at 695n. *See also Ordonnance*, supra note 15, at 308 (holding that Article 7 of the 1993 Act is procedural and thus applicable to offenses committed before its enactment). However, the two judgements of the *Cour de Cassation* [Cass., 24 Dec. 1973, Pasicrisie, 1974, I, 447 and Cass., 16 October 1985, 66 *Revue de Droit Pénal et de Criminologie* 406 (1986)] cited in the decision favoring this view do not relate to expansion of extraterritorial jurisdiction.

[69] C.J. Vanhoudt & W. Calewaert, *Belgisch Strafrecht*, Gent, Story Scientia, 1968, I, 167 No. 348; R. Grévy, *La Répression des crimes de guerre en droit belge*, *Revue de Droit Pénal et de Criminologie*, 1947-1948, 806, at 814-815, §§16-18.

[70] Cass., 12 October 1964, *Pasicrisie*, 1965, I, 154-155. The case did not involve an offense of universal concern. The court raised this argument *proprio motu*, though plaintiff did not invoke it. But rather than giving us a glimpse of its reasoning, the court simply states:

> "Attendu que, dans la mesure où elle étend la répression en Belgique à des faits qui, commis hors du territoire du royaume, ne pouvaient pas être punis en Belgique…[under the old statute, the new statute]…n'est pas, *en l'absence de dispositions dérogatoires*, applicable aux faits commis avant son entrée en vigueur."
>
> [Held that, to the extent that the law expands the domestic [Belgian] prosecution to certain acts, committed abroad, that were not punishable under the old statute, the new statute cannot, *in the absence of provisions to the contrary*, be applied to acts committed prior to its entry into force] *Ibid.* at 155 (emphasis added).

What does the Court mean by "in the absence of provisions to the contrary"? As we pointed out earlier (supra note 63) the principle of the non-retroactivity is enacted in an ordinary statute. Thus, a previous statute can be overridden by a new statute. And, considering the date of the judgment, such practice was under the domestic legal order not contrary to Article 7 of the ECHR because before the famous 1971 *Fromagerie Franco-Suisse le Ski*-judgement (infra note 82) Belgium was dualistic. In contrast to its 1950 judgement (supra note 68) the Court saw the question here as a question of admissibility ("récévabilité").

[71] Lieven Dupont, *Beginselen van Strafrecht, Leuven*, Acco, 1994, Vol. I, 53.

[72] The latter implies that the 1993 Act is not necessary to constitute universal jurisdiction but is only declaratory to it. *See* infra Part III.5.

offences that happened prior to the enactment of the Act.[73] Or, stated otherwise, under Belgian law statutes of limitation are undoubtedly procedural.[74]

One can question whether this interpretation violates the principle of non-retroactivity as laid down in Articles 7(1) of the ECHR and 15 (1) of the ICCPR. But as was already said, these do not prevent the prosecution of offences that are criminal "according to the general principles of law recognised by the community of nations."[75]

3.5. Declaratory or constitutive nature of the Act?

In this part we investigate whether Belgian courts already had universal jurisdiction over genocide, crimes against humanity and war crimes by virtue of self-executing provisions of international law. If so, the 1993 Act and the 1999 Amendments are declaratory and offences committed before its enactment are punishable. If not, universal jurisdiction was only introduced by the 1993/1999 Act and offences prior to its enactment would not be punishable in Belgium.

a. Greenpeace: "hostis humani generis" ?

Throughout the 1980s, the environmental organisation Greenpeace campaigned against the dumping of waste in the sea. Using the boat 'Sirius,' Greenpeace tried to prevent two Belgian vessels from dumping toxic waste in the North Sea. The owner of the two vessels sought injunctive relief. The Antwerp Court of Appeals ordered the Sirius not to interfere with the dumping.[76] It held it had jurisdiction because Greenpeace was waging piracy.

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[73] But what happens if the statute of limitations (in Belgium, 5 years for offenses that carry a sentence of 5 years or more, and subject to extension in certain circumstances) had already expired before 1993 (war crimes) or 1999 (genocide and crimes against humanity) ? Belgium did not ratify any treaty concerning the abolition of statutes of limitation, supra note 55. For crimes against humanity the argument is made that they are imprescribtable according to customary international law. See *Ordonnance*, supra note 15, at 313; Eric David, *Eléments de Droit Pénal International*, Brussels, P.U.B., 1997-98, 438 and 555. *Compare* the judgement of the *Chambre criminelle* of the French *Cour de Cassation*, 26 Jan. 1984, *Journal de Droit International*, 1984, 308. *See also* André Huet & Renée Koenig-Joulin, *Droit Pénal Internationale*, PUF, Paris, 1994, 251-252.

[74] *See* Cass., 3 June 1987, 67 *Revue de Droit Pénal et de Criminologie* 981 (1987) (with note by J.S.); Cass., 7 May 1980, 60 *Revue de Droit Pénal et de Criminologie* 975 (1980) (with note by Ph. Qaurré); *See also* P.-L. Bodson, *Manuel de Droit Pénal*, Liège, 1986, 87; Lieven Dupont, *Beginselen van Strafrecht, Leuven*, Acco, 1994, Vol. I, 53 n7; *War Crimes*, supra note 15, at 235-237. *See also* Ch. Hennau & J. Verhaegen, *Droit Pénal Général*, Brussels, Bruylant, 1991, 80 No. 90 ("Dès le siècle dernier, la question a fait l'objet de controverse.") The statute of limitation appears in the CCP (Articles 21-28).

[75] Articles 7(2) of the ECHR and 15 (2) of the ICCPR. *See* supra Part III.2.

[76] Court of Appeals (Antwerp), 19 July 1985, *European Transport Law*, 1985, 536-543, *aff'd*, Cass., 19 December 1986, *Arresten van het Hof van Cassatie*, 1986-87, I, 539-541, No. 246

In other words, the civil court based its jurisdiction solely on the jurisdiction of the criminal courts.[77]

Moreover, the court did so although domestic penal law only makes piracy a crime for ships under Belgian flag.[78] The flag-state of the Sirius was the Netherlands. Thus, the Court implicitly asserted universal jurisdiction upon a treaty[79] or customary international law. Professor David draws the following conclusion:

"Il n'y aurait donc rien d'excessif ni d'exhorbitant au droit commun que le juge belge exerce une compétence universelle à l'égard de crimes contre l'humanité dont la Belgique a reconnu l'incrimination au plan international."

[Accordingly, there is nothing extraordinary in the fact that a Belgian judge asserts universal jurisdiction over crimes against humanity, the criminality of which has been recognised by Belgium on the international level].[80]

b. Expanding the precedent

We have to distinguish between universal jurisdiction under international law and universal jurisdiction under Belgian law. Domestic courts have universal jurisdiction under international law over certain crimes.[81] But has domestic law given Belgian courts this jurisdiction?

There is no provision in the Belgian Constitution on the relationship between the international legal order and the domestic legal order. Rather, the issue was decided by the Cour de Cassation in 1971.[82] Contrary to most other states (such as the U.S. and the U.K.) Belgium recognises the primacy of international law over all domestic legislation, including the Constitution,

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(French translation: *Pasicrisie*, 1987, I, 497). Whereas the court of first instance had denied the extension of the injunction to include interference on the high seas because it held itself without jurisdiction as regards the high seas (Court of first instance, 12 June 1985, *European Transport Law*, 1985, 543-547), the Court of Appeals extended the injunction to include the high seas as well, reasoning that Greenpeace were pirates and hence, subject to universal jurisdiction. For a critical analysis of all three judgements, *see* Eric David, *Greenpeace: des Pirates*, 22 *Revue Belge de Droit Internationale* 295 (1989) (convincingly arguing that the courts misinterpreted the words "jurisdiction" and "piracy" (296-300), and that the courts could have found jurisdiction on other grounds (300-306)).

[77] *Ibid.*, at 301-302. *See also* Part V.

[78] Articles 3 and 68 of the Maritime Penal Code (Loi du 5 juin 1928 portant révision du code disciplinaire et pénal pour la marine marchande et la pêche maritime).

[79] Presumably Article 19 of the 1958 Convention on the Law of the High Seas (now Article 105 of the 1982 Convention on the Law of the Sea).

[80] *Droit des Conflits Armés*, supra note 22, at 649-650, No. 4.202.

[81] *See* supra Part II.6.

[82] *Belgium v S.A. Fromagerie Franco-Suisse Le Ski*, Cass., 27 May 1971, *Journal des Tribunaux*, 1971, 460 (holding that a self executing treaty (here the EC treaty) prevails over acts adopted before and after the ratification of the treaty and hence, that the courts should give effect to the treaty).

provided the provision of international law is self-executing.[83] Hence, we have to determine whether the provisions that create universal jurisdiction are self-executing.[84]

c. Self-executing treaties

Brownlie distinguishes two meanings of self-executing.[85] First, it is a principle of domestic law.[86] A treaty is self-executing if it does not need incorporation to have effect in the domestic legal order.[87] Secondly, it is a principle of international law.[88] It focuses on the character of the treaty provision itself.[89]

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[83] In the conclusions of the *Procureur-Général* [Attorney General], which were followed by the Court:

> "[*T]out* traité international ne prime pas la loi interne; ainsi assurément le traité qui n'imposerait aux parties contractantes que de légiférer suivant des principes déterminés dans le traité ne créerait, même pas dans cette mesure, de conflit. Mais, par contre, toute règle de droit international directement applicable dans l'ordre interne doit prévaloir sur la norme de droit interne."(note omitted) (emphasis in original), *Journal des Tribunaux*, 1971, 465.

See generally André Alen (ed.), *Treatise on Belgian Constitutional Law*, The Hague, Kluwer, 1992, 29-30.

[84] The same question arises regarding customary international law establishing universal jurisdiction. If there is no treaty provision, universal jurisdiction can be derived directly from customary international law. Jurisdiction in the Belgian prosecution of Pinochet is based on customary international law. *See* infra Part IV.2. *See generally*, Jean Salmon, *Le rôle de la Cour de Cassation belge à l'égard de la coutume internationale*, in *Miscellanea W.J. Ganshof van der Meersch*, Brussels, Bruylant, 1972, Vol. I, 217-267. (giving numerous examples of the direct applicability of customary international law, though none involving extraterritorial jurisdiction). Hungary equally allows a prosecution based on customary international law, *see* Peter Mohacsi & Peter Polt, *Estimation of war crimes and crimes against humanity according to the decision of the Constitutional Court of Hungary*, 67 *Revue Internationale du droit Pénal* 333 (1996).

[85] *Brownlie*, supra note 4, at 52. Others have tried to resolve the ambiguity by using other terms for both meanings. But none has gained universal acceptance. A common distinction (derived from European law) is made between "direct applicability", which is to be decided by the domestic legal order, and "self-sufficiency", which is considered to be a matter of international law. *See* Marc Bossuyt, *The Direct Applicability of International Instruments on Human Rights*, 15 *Revue Belge de Droit Internationale* 317 (1980), at 317-320. *Compare* with the US position, C. M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 *A.J.I.L.* 695 (1995) (distinguishing four interpretations of self-executing in American case-law).

[86] Except for the rare occasions where the treaty itself provides that it is self-executing, e.g. Article 189 of the EC-Treaty.

[87] The 1984 Torture Convention contains the following provision: "Each State Party shall take such measures *as may be necessary* to establish its jurisdiction…" (Article 5 §§1 and 2) (emphasis added). Other treaties contain very similar provisions. This provision relates to the first meaning of self-executing. For a monistic country it means mere ratification of the treaty. But for a dualistic country it means that the provisions of the treaty have to be enacted in a domestic statute.

[88] And, therefore, can be resolved for all states in the same way, according to the rules for the interpretation of treaties codified in the Vienna Convention on the Law of Treaties, 8 *I.L.M.* 679 (1969), Articles 31 and 32.

[89] In this sense a treaty needs implementing legislation if it does not contain provisions that are sufficiently clear and complete.

But at the same time the distinguished scholar writes: "The whole subject resists generalisation, and the practice of states reflects the characteristics of the individual constitution."[90]

How does this relate to Belgium?[91] International law is self-executing in Belgium within the first meaning.[92] Whether it is self-executing in Belgium in the second meaning will, of course depend on the nature of the specific provision.

Therefore, we have to establish for each treaty provision whether it is sufficiently clear and complete. The provisions of the Geneva Conventions concerning universal jurisdiction are sufficiently clear and complete to give the Belgian courts universal jurisdiction.[93] Hence, at least in this regard, the 1993 Act and the 1999 Amendments are merely declaratory of an already long established rule. Therefore, a Belgian judge has jurisdiction over offences committed before 1993 or 1999.

However, the 1993 Act is constitutive of universal jurisdiction over offences committed in non-international armed conflict because Additional Protocol II does not–however deplorable–create universal jurisdiction.

Several scholars have called for the insertion in the CCP of a general provision that would give the courts jurisdiction over all crimes, which Belgium is required to prosecute under international law.[94]

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[90] *Brownlie*, supra note 4, at 52. This comment should be limited to the first meaning of self-executing.

[91] *See generally*, J. Verhoeven, *La Notion d'"Applicabilité Directe" du Droit International*, 15 *Revue Belge de Droit Internationale* 243 (1980); Jacques Velu, *Les effects Directs des Instruments Internationaux en Matière de Droits de l'Homme*, 15 *Revue Belge de Droit Internationale* 293 (1980); Marc Bossuyt, *The Direct Applicability of International Instruments on Human Rights*, 15 *Revue Belge de Droit Internationale* 317 (1980).

[92] *See* supra note 82.

[93] Chris Van den Wijngaert, *De Toepassing van de Strafwet in de Ruimte. Enkele Beschouwingen* in *Liber Amicorum F. Dumont*, Antwerp, Kluwer, 1983, 501, at 507 and 521-522; Chris Van den Wijngaert, *Structures et Méthodes de la Coopération Internationale et Régionale en Matiére Pénale (première partie: droit des compétences)*, 64 *Revue de Droit Pénal et de Criminologie* 517 (1984), 519-520 (arguing (at a time the 1993 Act was only a bill) that for grave breaches of the Geneva Conventions that are criminal under domestic law (jurisdiction *ratione materiae*), the court can find its jurisdiction *ratione loci* directly on the treaty); Michel Franchimont, *Manuel de Procédure Pénale*, Liège, 1989, 1070-1074 (giving additional examples). *But see* M. Bothe, *Prevention and repression of breaches of international humanitarian law*, *International Institute of humanitarian Law: Yearbook 1986-87*, 115, at 117.

[94] Chris Van den Wijngaert, *De Toepassing van de Strafwet in de Ruimte. Enkele Beschouwingen* in *Liber Amicorum F. Dumont*, Antwerp, Kluwer, 1983, 501, at 522; Marie-Anne Swartenbroekx, *Moyens et limites du droit belge* in Alain Destexhe & Michel Foret, *Justice Internationale: De Nuremberg à La Haye et Arusha*, Brussels, Bruylant, 1997, 121, at 127-128. Similar provisions have been adopted by a dozen of European and Latin American countries, *see* Amnesty International, *UK: Universal Jurisdiction and absence of immunity for crimes against humanity*, at 14-18, www.amnesty.org (visited on 9 October 1999).

4. Current proceedings in the Belgian courts based on the 1993 Act

Currently the Belgian authorities are investigating the Rwandan genocide and Pinochet's crimes against humanity. In at least three other cases complaints have been filed with the authorities under the Act.

4.1. Rwanda

As early as July 1994, several complaints were filed with the Belgian judicial authorities over the Rwandan genocide.[95] Nine persons named in the complaints were living in Belgium.[96] One of them even was a visiting professor at a Belgian university.[97] But no arrests were made. This fuelled rumours that certain power circles in the Belgian establishment were protecting the accused.[98]

Finally, in March 1995, an investigating judge was appointed and the case progressed.[99] He conducted several investigatory missions to Africa, arrested a number of suspects in Belgium and issued several international arrest

[95] *Les gestes d'apaisement se multiplient à Kigali*, Le Soir, 28 July 1994, at 7, www.lesoir.com (visited on 28 October 99). The complaints were filed with the public prosecutor and not with an investigating judge. The former leaves the decision to initiate the criminal prosecution to the discretion of the public prosecutor. The latter automatically initiates the criminal prosecution. *See* infra note 119 and Part V.

[96] Véronique Kiesel, *Des responsables présumés des massacres vivent en Belgique sans être inquiétés. Génocide rwandais mais que fait la justice belge?*, Le Soir, 2 February 1995, at 8; *Enlisement des dossiers en Belgique, exclusion des parties civiles à Arusha. Rwanda: rage et ténacité des victimes "belges"*, Le Soir, 22 January 1997, at 7, www.lesoir.com (visited on 28 October 1999) (an additional complaint was brought against Leo Delcroix, who was Belgium's Defense Minister at the time of the genocide, for failing to act, although intelligence reports allegedly discovered that a genocide was being prepared).

[97] *Id.* Back in Butare, it is alleged Dr. Ntezimana drafted a list of professors who wanted to leave the country. The list was later used to search and execute them. *See also Vincent Ntesimana* [sic] *remis en liberté*, Le Soir, 27 December 1995, at 6; Jean-Pierre Borloo, *Les assises pour le professeur rwandais? Vincent Ntezimana divise la hiérarchie judiciaire*, Le Soir, 28 June 1996, at 7; Jean-Pierre Borloo, *Son cas sera revu en juillet. Vincent Ntezimana est libérable*, Le Soir, 29 June 1996, at 10; *Le professeur rwandais dans la mire de la jusitice belge. Vincent Ntezimana: pas de non-lieu*, Le Soir, July 24, 1996, at 5, www.lesoir.com (visited on 28 october 1999).

[98] Eric Gillet, *La Compétence Universelle* in Alain Destexhe & Michel Foret, *Justice Internationale: De Nuremberg à La Haye et Arusha*, Brussels, Bruylant, 1997, 113, at 117-118 (The author is also one the lawyers representing the victims). Several senators viewed Belgium as a safe haven for Rwandan "génocidaires," *see Parliamentary Documents*, Senate, 1997-1998, No. 749/1, at 2. Before a Senate Justicial Committee hearing, the Justice minister strongly disagreed with those statements, *Ibid.*, No. 749/3, at 6.

[99] *Universal Jurisdiction over Atrocities in Rwanda*, supra note 20, at 37.

warrants.[100] Subsequently, a number of arrests were made in different African countries.[101]

The Belgian investigation alarmed the International Tribunal for Rwanda (hereinafter 'ICTR'), which launched its own investigation.[102] The ICTR has priority over domestic courts. In 1996, Belgium adopted legislation to smoothen co-operation with the ICTR.[103] Subsequently, Belgium handed over one of the key organisers of the genocide to the ICTR.[104]

On the domestic level, none of the suspects has yet been put on trial, although the Justice Minister recently announced the trial against three of them would start before June 2000.[105] These cases will be the first application of universal jurisdiction under the 1993 Act.

4.2. Pinochet

[100] Colette Braeckman, *Fin de l'impunité: deux Rwandais arrêtes á Bruxelles, Georges Ruggiu recherché. Génocide: la Justice belge enquête à Butare*, Le Soir, May 3, 1995, at 1; *"Monsieur Georges" dans le viseur. Mandat d'arrêt international contre Georges Ruggiu*, Le Soir, May 4, 1995, at 7 (Ruggiu worked with "Radio Mille Collines", the radio station that incited to the genocide and called for the murder of the Belgian peacekeepers); *L'enquête sur le génocide rwandais progresse. Double arrestation en Belgique*, Le Soir, 30 June 1995, at 10, www.lesoir.com. (visited on 28 October 1999). Although some suspects are also wanted for the murder of the ten Belgian peacekeepers, others have no connection with Belgium at all. *See Universal Jurisdiction over Atrocities in Rwanda*, supra note 20, at 37.

[101] Véronique Kiesel, *Inculpé du massacre des paras belges. Le colonel Bagasora arrêté au Cameroun*, Le Soir, 12 March 1996, at 1, www.lesoir.com. (visited on 28 October 99).

[102] Véronique Kiesel, *Bruxelles, Kigali, le TPR et même Yaoundé seraient compétents. Qui jugera le colonel Bagosora*, 15 March 1996, at 8, www.lesoir.com (visited on 28 October 1999)

[103] 22 March 1996 Loi relative à la reconnaissance du Tribunal international pour l' ex-Yugoslavie et du Tribunal international pour le Rwanda, et à la coopération avec ses Tribunaux – Wet betreffende de erkenning van en de samenwerking met het Internationaal Tribunaal voor voormalig Jugoslavie en het Internationaal Tribunaal voor Ruanda, *Belgisch Staatsblad / Moniteur Belge*, 27 April 1996. [Act of 22 March 1996 concerning the recognition and the cooperation with the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda]. The Act regulates the discontinuance of the domestic prosecution (Articles 6 and 7), the arrest and transfer of suspects (Articles 12 and 13) and other means of cooperation (Article 9-11). After a decision of the Tribunal not to prosecute a suspect the domestic prosecution is reopened (Article 8). On 19 March 1999, the ICTY decided to withdraw the indictment against Bernard Ntuyahaga. (38 *I.L.M.* 866 (1999)). Belgium again asked Tanzania for his extradition, *see Bruxelles demande son extradition à la Tanzanie. Génocidaire présumé réarrêté*, Le Soir, March 31, 1999, at 8; *S'il était jugé en Belgique Bernard Ntuyahaga répondrait aussi de l'assasinat de citoyens rwandais. Extradition d'un major suspecté de génocide Bruxelles rassure Kigali*, Le Soir, 3 April 1999, at 9, www.lesoir.com (visited on 28 October 99

[104] Colette Breackman, *Génocide rwandais: priorité au tribunal d'Arusha. Bruxelles se dessaisit de Bagosora*, 10 July 1996, at 1, www.lesoir.com (visited on 28 October 1999).

[105] Bart Beirlant, *Nog dit gerechtelijk jaar assisenproces Rwanda-genocide*, De Standaard, 25 September 1999 (one of those going on trial is Vincent Ntezimana) www.standaard.be (visited on 25 September 1999). Recently, charges against one of them were dropped. The trial of the other two is planned for June 2000, *see* Yves Barbieux, *Twee verdachten Rwanda-genocide voor assisen*, De Standaard, 16 December 1999, www.standaard.be (visited on 16 December 1999).

After the 1973 military coup by General Augusto Pinochet in Chile, some of his left-wing opponents fled to Belgium. Following his arrest in London on 16 October 1998 at the request of Spain, they saw their chance to bring Pinochet to justice.

On 1 November 1998, six complaints were filed against Pinochet for arbitrary detention, murder and torture. The victims were Chilean and the offences were committed in Chile. Strictly speaking, the investigating judge had no extraterritorial jurisdiction over these offences.[106] In an order of 6 November 1998, the investigating judge redefined these offences as crimes against humanity.[107] He held that Pinochet enjoyed no official immunity for crimes against humanity.[108] He based his jurisdiction on customary international law, which gives each state the right to exercise universal jurisdiction over crimes against humanity.[109] At this moment, the 1999 Amendments had not yet been adopted. He equally held that crimes against humanity are imprescribtable.[110]

On 24 November 1999, he issued an international arrest warrant against Pinochet.[111] The Belgian authorities subsequently asked for his extradition from the U.K.[112]

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[106] Belgium ratified the Torture Convention by Act of March 28th 1999, *Moniteur Belge – Belgisch Staatsblad*, 28 october 1999.

[107] *Ordonnance*, supra note 15, at 309 (the investigating judge is not bound by the legal characterization alleged in the complaint).

[108] *Ibid*., at 308 (holding that a former head of state enjoys no immunity neither *ratione personae* because crimes against humanity cannot be considered as falling within the official functions of a head of state, for which a former head of state enjoys immunity, nor (if one assumes that crimes against humanity are official state policy) *ratione materiae* because immunity of a head of state does not apply to international crimes such as genocide and crimes against humanity). *See also* opinion of Lord Phillips of Worth Matravers in *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet*, 24 March 1999, 2 W.L.R. 827 ("I do not [think] that assisting in genocide can never be a function of a state official. … [but] that no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime.") *See generally* Frederik Naert, *Zijn (ex-) staatshoofden immuun inzake misdaden tegen de menselijkheid? Kanttekeningen bij de zaak Pinochet*, *Rechtskundig Weekblad*, 1998-99, 1500-1505.

[109] *Ordonnance*, supra note 15, at 309-311 (customary international law concerning crimes against humanity is directly applicable in the Belgian domestic legal order, including the creation of universal jurisdiction). S*ee also* Eric David, *L'Actualité Juridique de Nuremberg* in *Le Procès de Nuremberg, Conséquences et Actualisation*, Brussels, Bruylant, 1988, 168-173 (writing in 1988 that customary international law gives Belgian courts jurisdiction over Pinochet for crimes against humanity). *But see* Joe Verhoeven, *Observations* under *Ordonnance*, supra note 15, at 311 (arguing that 1. crimes against humanity lack a clear content (312-313); 2. that clear absence of official immunity (312), retroactivity (314) and imprescribtablity (314) concerning such offenses are far from established; 3. that, even if customary international would allow universal jurisdiction, the separation of powers requires that the legislator first regulates the matter (313-314) and; 4. that universal jurisdiction poses all kinds of practical concerns (315)).

[110] *Ordonnance*, supra 15, at 311.

[111] Mandat d'arrêt internationale [international arrest warrant] (on file with author). *See Ook Brussels gerecht wil Pinochet*, De Financieel-Economische Tijd, 25 November 1999, at 4 (available on Lexis).

[112] But it is unlikely the General will ever stand trial in Belgium. Prior to Belgium, Spain, France and Switzerland had already asked for his extradition. *See Quatres demandes d'extradition*, Le

4.3. Other cases

Complaints have been filed against three leading figures of the Khmer Rouge, who recently gave over to the Cambodian Government, charging them with genocide and crimes against humanity[113] and against Laurent Kabila, president of the Democratic Republic of Congo (formerly Zaire).[114] Kabila came on an official visit to France and Belgium in November 1998, but only after receiving assurances that he would not be arrested.[115] Recently, a complaint was brought against Driss Basri, former Moroccan Interior Minister, for crimes against humanity.[116]

5. Civil claim

If the authorities are unwilling to prosecute a case of genocide, crimes against humanity or war crimes, can a victim still get her day in a Belgian court? At first glance, the 1993 Act does not give the victim an opportunity to sue her torturer in a civil court.[117] But inasmuch as the Act does not provide otherwise, general criminal law and criminal procedure apply.[118]

Monde, 27 November 1998 (available on Lexis). The British Home Secretary, Jack Straw, has given priority to the Spanish request. Theoretically, however, Belgium could try Pinochet *in absentia*, supra note 54.

[113] *La justice belge saisie du génocide khmer rouge*, Le Soir, Febr. 5, 1999, at 8, www.lesoir.com (visited on 28 October 1999).

[114] *Plainte à Belgique contre Kabila pour crimes de droit international*, Agence France Presse, 21 November 1998 (available on Lexis).

[115] The Belgian Foreign Minister declared Kabila enjoyed immunity as an acting head of state, *see Kabila op fotosafari in Belgie. Kinshasa vreest gerechtelijke actie tegen Kabila*, Financieel-Economische Tijd, 25 November 1998, at 4 (available on Lexis). *But see* supra note 46.

[116] Patrice Leprince, *L'ex-ministre morocain Basri face à la justice belge*, Le Soir, 18 November 1999, www.lesoir.com (visited on 18 November 1999) (complaint by a Moroccan, now a Belgian citizen, who was tortured and arbitrarily detained in 1984 by the Moroccan authorities). Basri had just been discharged as Interior Minister by the new Moroccan king, *see* Jean-Pierre Tuquoi, *La presse morocaine salue la chute de Driss Basri*, Le Monde (édition électronique), Nov. 12, 1999, www.lemonde.fr (visited on 18 November 1999).

[117] Article 7 of the 1993 Act refers to Belgian courts in general. *See* supra note 52. It does not make a distinction between criminal courts and civil courts. Hence, we argue the jurisdiction of the civil courts can also be based directly on the 1993 Act. *Compare* Restatement (Third) of the Foreign Relations Law of the United States, § 404 Comment b. (universal jurisdiction is not limited to criminal law). The U.S. has been a prominent example thereof, starting with *Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[118] Article 6 of the 1993 Act.

The victim 's participation in a criminal trial as a separate party is unknown to the common law system. Yet several civil law countries, such as Belgium and France, not only allow it, but also permit the victim to initiate a criminal prosecution[119] and sometimes even to summon the accused before the courts.[120] Moreover, Article 4 of the CCP offers the victim a choice between a forum in a criminal court and one in a civil court, which will usually take the form of a tort claim against the offender.[121]

Normally a civil court will have jurisdiction based on the Code of Civil Procedure and a criminal court will have jurisdiction according to the CCP. But in cases of true universal jurisdiction, where there is no link with Belgium, the Code of Civil procedure offers no jurisdiction to a civil court to hear such case. As we saw in the "Greenpeace" case, however, the civil court derives its jurisdiction from Article 4 of the CCP. The civil courts based their jurisdiction on piracy. They did not invoke any provision of the Code of Civil Procedure.[122] Hence, the jurisdiction of a civil court was based exclusively on that of a criminal court.[123]

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[119] The victim and the public prosecutor have an equal right to *initiate* a criminal prosecution. Technically, the victim constitutes herself as private party with an *investigating judge* (Article 63 of the CCP: "se constituer partie civile près d' un juge d'instruction"). The prosecution of Pinochet, the three Khmer Rouge officials and Basri was initiated in that way. A victim can also file a complaint with the *public prosecutor*, as happened in the Rwandan cases and the Kabila case. *See* supra note 95.

The criminal investigation is conducted by the public prosecutor together with the investigating judge. The victim plays (played) no role here. Recently, several high profile cases demonstrated that victims' interests are often disregarded in the course of a criminal investigation. This prompted new legislation creating new rights for victims. For instance, if the victim becomes *partie civile*, she has the right to look into the dossier pending a criminal investigation (Article 61*ter* of the CCP) or to ask additional investigation (Article 61*quinquies* of the CCP).

[120] This right only exists for offenses that are punishable with penalties up to 5 years (Articles 145 & 182 of the CCP). If the offense carriers a penalty of more then 5 years (which is always the case for offenses under the 1993 Act), only the public prosecutor can summon the offender before the courts.

[121] Article 4 of the CCP:

> L'action civile peut être poursuivie en même temps et devant les mêmes juges que l'action public. Elle peut aussi l'être séparément; dans ce cas l'exercise en est suspendu tant qu'il n'a pas été prononcé definitivement sur l'action publique, intentée avant ou pendant la poursuite de l'action publique.
> (…)
> [The private action can be undertaken at the same time and before the same judges {the criminal court} as the public action. The private action can also be brought separately {before the civil court}; in this case it {the private action} is suspended until a final decision has been reached in the public action, and provided it {the private action} was initiated prior to or pending the public action]

The victim even has the right to start both proceedings at the same time (Cass., 2 Nov. 1993, *Arresten van het Hof van Cassatie*, 1993, 910, No. 440). But the civil court cannot deliver a judgement before the proceedings before the criminal courts have ended. And the decision of the criminal court is binding upon the civil court with regard to all parties appearing before the criminal court. Both are expressed in the classic adagio "le criminel tient le civil en état."

[122] Although, in that case the civil courts could have done so, *see* supra note 76.

[123] *See* supra note 77.

A comparative perspective: France

In many respects the Belgian and French systems are alike. Article 4 of the Belgian CCP is similar to Article 4 of the French Code of Criminal Procedure. French views are divided on this matter.

Lombois considers it anomalous that the French judiciary would have jurisdiction by virtue of its criminal courts, yet at the same time a French civil court would have to declare itself without jurisdiction.[124] He argues the victim's choice between pursuing a claim civilly or attached to the criminal proceedings must be understood as a choice between a French civil court and a French criminal court.[125]

Huet, on the other hand, denies jurisdiction of the civil courts based on jurisdiction of the criminal courts.[126] He counters Lombois' argument holding that the choice of the victim is served equally well by a non-French civil court as it is by a French civil court. However, we think this choice is highly theoretical and materially impossible precisely because the victim has no chance to pursue his claim before the courts of his own country.[127] Hence, in order to preserve the choice of the victim it definitely makes sense to interpret Article 4 as granting him the right to choose between a French criminal court and a French civil court.

Huet contends further that the case law cited in favour of Lombois' view is irrelevant because in all those cases the civil court also found jurisdiction on other grounds.[128] But he does not offer us a decision denying civil jurisdiction based on Article 4 either. Finally, Huet argues Lombois' view prevents the fair administration of justice and that it also is contrary to the interest of the victim.[129]

Therefore, we endorse the view inherently present in the "Greenpeace" case and find further support for this view in parts of the French doctrine.

6. Conclusion

[124] Claude Lombois, *Droit Pénal Internationale*, Dalloz, Paris, 1979, 448.

[125] *Ibid.* at 448-449.

[126] André Huet & Renée Koenig-Joulin, *Droit Pénal Internationale*, PUF, Paris, 1994, 234-235; André Huet, *Compétence des Tribunaux Français à l'égard des Litiges Internationaux* in *Juris-Classeur de Droit Internationale*, Vol 10, Fasc. 581-20, §44 (referring to two doctoral theses (El Masri, *L'option de la victime d'une infraction au droit international et la loi applicable à l'action civile*, Nancy, 1975 and Fournier, *L'action civile née d'une infraction à la loi pénale en droit international*, Strasbourg, 1991) favoring his view).

[127] Beth Stephens & Michael Ratner, International Human Rights Litigation in US Courts, New York, Transnational Publishers Inc., 1996, 146-147 (describing the difficulties of plaintiffs in Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) to get their day in court in Guatemala).

[128] André Huet & Renée Koering-Joulin, *Droit Pénal Internationale*, PUF, Paris, 1994, 235.

[129] *Ibid.* at 235.

Universal jurisdiction is justified because serious violations of human rights are everybody's business. International treaties and international customary law permit and sometimes even require states to assert universal jurisdiction over grave breaches of international humanitarian law.

The 1993 Act as amended in 1999 provides Belgian courts with jurisdiction over war crimes, crimes against humanity and genocide, no matter where such offences are committed, by whom or against whom. Partly, it makes explicit a competence the Belgian courts already had by virtue of self-executing treaties and customary international law. But, it is also one of the first statutes in its kind to treat internal and international armed conflict equally.

The Belgian authorities have, reluctant at first, but overtaken by events, begun to investigate the genocide in Rwanda and human rights abuse in Pinochet 's Chile. They launched an international arrest warrant against General Pinochet for crimes against humanity.