UNIVERSAL JURISDICTION:
Belgian prosecutors can investigate crimes under international law committed abroad

AThe Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.@

***Loi relative à la répression des violations graves du droit international humanitaire,* Art. 7**

On 12 February 2003 the day that oral arguments took place before the Belgian *Cour de cassation* (Court of Cassation) in a hastily scheduled hearing at the request of the *Procureur Général près de la Cour de cassation* (Chief Prosecutor of the Court of Cassation), Amnesty International reiterates that Belgian prosecutors and investigating judges have jurisdiction under international law to investigate on behalf of the entire international community crimes under international law such as war crimes, crimes against humanity and genocide committed abroad even if the suspect is not present in the state where the prosecutors or investigating judges are located. The case involves killings of at least 900 Palestinian civilian men, women and children in the Sabra and Chatila refugee camps in the suburbs of Beirut, Lebanon in September 1982.

Amnesty International believes that it is essential for the court and the general public to be aware that the astonishing contention by the *Procureur Général* that international law prohibits national prosecutors from acting on behalf of the international community to investigate crimes under international law committed abroad by suspects not found in the territory where the prosecutors are located is an assertion has no basis whatsoever under international law. As demonstrated below, this assertion is contrary to more than half a century of conventional international law and inconsistent with the nearly uniform state practice that does not prohibit national prosecutors from acting on behalf of the international community to investigate crimes committed abroad even if the suspect is not present in the state where the prosecutor is located. Indeed, if this claim were accepted it would nullify the system of enforcement established more than half a century ago of the Geneva Conventions of 1949. It would also render largely ineffective the system of complementarity in the Rome Statute of the International Criminal Court, which recognizes the primary responsibility of states to exercise their jurisdiction under international law over war crimes, crimes against humanity and genocide. It would mean that impunity for many of these horrific crimes would continue to encourage them around the world. Moreover, as demonstrated in this paper, there is nothing in the recent judgment by the International Court of Justice in the *Democratic Republic of the Congo v. Belgium* judgment that changes long-settled international law permitting such criminal investigations. The ability to conduct such criminal investigations, to obtain indictments and to request extradition of suspects located abroad is an entirely different matter from conducting trials *in absentia*.

I. THE BELGIAN UNIVERSAL JURISDICTION LAW

A law enacted on 16 June 1993, *Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977* (1993 law), was intended to permit Belgian prosecutors and investigating judges to act on behalf of the international community to investigate the worst possible crimes imaginable when other national prosecutors and investigating judges in the states where the crimes were committed were unable or unwilling to do so and to request extradition of suspects to Belgium. The law gives Belgian courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and violations of Protocol II, all of which have been ratified by Belgium. That law was amended in February 1999 by the *Loi relative à la répression des violations graves du droit international humanitaire* (Act Concerning the Punishment of Grave Breaches of International Humanitarian Law) which expanded its scope to include genocide in Section 1 of Article 1 and crimes against humanity in Section 2 of that article.

Section 3 of Article 1 defines the war crimes subject to Belgian jurisdiction.[1] Although the war crimes included in Section 3 includes many of the war crimes listed in Article 8 of the Rome Statute, in a number of respects the definitions provide greater protection to civilians and other protected persons. The definition of genocide is the same as in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and in Article 6 of the Rome Statute of the International Criminal Court, but not all forms of ancillary crimes of genocide under Article III of the Genocide Convention are included. However, possibly through an oversight or possibly because Parliament considered that the definitions in international law - prior to the adoption of the draft Elements of Crimes by the Preparatory Commission of the International Criminal Court - were not sufficiently precise, the 1999 law omitted three crimes against humanity (enforced disappearance, the crime of apartheid and other inhumane acts).

Article 2 provides for punishments, up to a maximum of life imprisonment. Article 3 provides that persons who manufacture, hold or transport instruments, devices or objects used to commit or facilitate the commission of a grave breach identified in Article 1 shall be punished as if they had committed the grave breach. Article 4 defines ancillary crimes of ordering, proposing, inciting, participating, failing to prevent or end and attempting grave

[1] The 1993 law was amended on 10 February 1999 to change its name to *Loi relative à la répression des violations graves du droit international humanitaire* and to expand its scope to include genocide and crimes against humanity. The law renumbered the 1993 section dealing with war crimes. Section 3 of Article 1 of the amended version concerning war crimes defines grave breaches of the Geneva Conventions and of Protocol I in international armed conflict and war crimes in non-international armed conflict, including and violations of common Article 3 of the Geneva Conventions and violations of Protocol II as war crimes. *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law [10 February 1999]*, 38 Int'l Leg. Mat. 918 (English translation and introductory note giving a brief legislative history of the 1999 law by Stefaan Smis and Kim Van der Borght).

breaches, although it does not expressly provide for command and superior responsibility for such breaches. Section 1 of Article 5 excludes political, military or national interest or necessity as a justification of a grave breach. Section 2 of Article 5 provides that superior orders are not a defence to genocide, a crime against humanity as defined in the act or a grave breach of the Geneva Conventions or Protocol, but it fails to exclude superior orders as a defence to violations of common Article 3 or of Protocol II of other international humanitarian law. Section 3 of Article 5 expressly states that "[t]he immunity attributed to the official capacity of a person does not prevent the application of the present Act."[2] However, certain principles of criminal responsibility applicable to ordinary crimes are applicable to crimes under the 1999 law.[3] Article 8 provides that statutes of limitation do not apply to breaches of Article 1 of the Act.[4]

Article 7 expressly provides for universal jurisdiction over any of the breaches in the 1999 Act. The first paragraph of that article states that "[t]he Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed."[5] Article 9 provides that when Belgium is in a state of war, breaches of the 1999 Act fall within the jurisdiction of military courts.[6]

II. THE SABRA AND CHATILA CASE

A. The complaint

On 18 June 2001, 23 survivors of the 1982 killings in the Sabra and Chatila refugee camps filed a complaint alleging that Ariel Sharon, then Minister of Defence and now Prime Minister of Israel, Amos Yaron, then Brigadier General commanding Israeli forces, as well as

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[2] *Ibid.*, Art. 5, § 3. The original French text reads: *"L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi"*.

[3] *Ibid.*, Art. 6 (providing that without prejudice to Articles 4 and 8, provisions of Book I of the Penal Code from Article 70) shall apply to the 1999 Act).

[4] *Ibid.*, Art. 8 ("Article 21 of the Introductory Part of the Code of Penal Procedure and Article 91 of the Penal Code, relative to the statutory limitation of public prosecutions and penalties, shall not be applicable to the breaches listed in Article 1 of the present Act."). The original French text reads: "*Ne sont pas applicables aux infractions prévues à l'article 1er de la présente loi, l'article 21 du Titre préliminaire du Code de procédure pénale et l'article 91 du Code pénal relatifs à la prescription de l'action publique et des peines."*

[5] *Ibid.*, Art. 7. The original French text reads: " *Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu ou celles-ci auront été commises*."

[6] *Ibid.*, Art. 9.

other Israeli military officials and members of the Phalange (Lebanese Christian militia), are responsible for war crimes, crimes against humanity and genocide in connection with the killings.[7]

B. The history of the proceedings so far

In July 2001, the *juge d'instruction* (investigating magistrate), Patrick Collignon, opened a criminal investigation of the 1982 killings. After an intervention by a lawyer acting on behalf of Israel, who contended that Ariel Sharon was immune from prosecution in Belgium, that a prosecution would be contrary to the principle of *ne bis in idem* prohibiting a second prosecution for the same conduct, that the Belgian legislation violated the principle of non-retroactivity of criminal law and that there were no links between the suspect and Belgium, the investigating magistrate suspended the investigation on 7 September 2001.[8] Eventually, the court agreed to the request of the survivors, supported by the prosecution, and the lawyer for the State of Israel was prevented from appearing for the accused. In October 2001, Ariel Sharon and Amos Yaron appointed a personal lawyer to represent them, who further contended that the law treated the immunity of Belgian and foreign government officials in an unequal manner. The acting Attorney General of Brussels, Pierre Morlet, used a provision of Belgian criminal procedure that permits pre-trial discussions of issues that may have a bearing on the admissibility of a case to refer these questions to the *Chambre des Mises en Accusation* (the Indictment Chamber) of the Belgian *Cour d'Appel de Bruxelles* (Court of Appeals of Brussels) The Indictment Chamber hears interlocutory appeals for all matters during the different stages of criminal investigation, including the validity of provisional arrest warrants, search warrants, etc.) and decides whether to refer certain serious cases to the *Cour d'Assises* (Court of Assises).

A series of pre-trial hearings took place to consider these questions on 23 October 2001, 28 November 2001, 26 December 2001 and 23 January 2002.[9] At the close of these hearings, the President of the Indictment Chamber ordered that all written submissions, notes and evidence were to be submitted by 30 January 2002, with a ruling on the admissibility of the case on 6 March 2002. After the ICJ judgment in the *Democratic Republic of the Congo v. Belgium* on 14 February 2002, the Attorney General and the lawyers for the 23 survivors

[7] The complaint is available in English and in French at: http://www.indictsharon.net.

[8] Decision of the Investigating Magistrate, Patrick Collignon, Court of First Instance, Brussels, Dossier No. 56/01, *Case against Ariel Sharon and Amos Yaron*, in response to Note by Michele Hirsh, *Etat d'Israel - Considerations sur l'incompetence des juridictions belges pour connâitre de la plainte deposée le 18.6.2001 sans l'affaire portant le no. 54/1 de Monsieur le juge d'instruction Collignon.*

[9] For a summary of the arguments at these hearings prepared by one of the lawyers for the 23 survivors and another author, see Michael Verhaeghe & Laurie King-Irani, *Outline and Explanation of Court Hearings during the Pre-Trial Procedure, June 2001-2002, available at:* http://www.indictsharon.net.

asked the Indictment Chamber to re-open the proceedings to permit them to argue that the ICJ judgment had no bearing on the jurisdiction of the investigating magistrate to conduct the criminal investigation of the 1982 killings.[10] The Indictment Chamber agreed to this request and scheduled a hearing for 15 May 2002 on this matter.[11]

C. The 15 May 2002 hearing

The Indictment Chamber heard arguments on Wednesday, 15 May 2002 about whether a Belgian prosecutor may resume the suspended criminal investigation of the 1982 killings by the Phalange as well as allegations that the Phalange had carried out large-scale "disappearances" with the knowledge of or under the supervision of Israeli forces after the killings. The prosecutor had opened an investigation of the killings based on a complaint filed in June 2001 by 23 survivors, based on a Belgian law enacted in 1993 providing for universal jurisdiction over war crimes and amended in 1999 to include crimes against humanity and genocide. The lawyers for the 23 survivors sought the hearing in party to argue that a recent judgment by the International Court of Justice (ICJ) in the *Democratic Republic of the Congo v. Belgium* case did not have any bearing on the criminal investigation of the 1982 killings at this stage of the proceedings. One additional issue was also expected to be addressed at the hearing: whether, in the light of a recent decision by the Indictment Chamber of another Court of Appeals in Belgium, Belgian prosecutors may open a criminal investigation under this law for crimes under international law committed abroad at a time when the suspect is outside the country.[12] On the eve of the 15 May 2002 hearing, Amnesty International issued a paper demonstrating that Belgian prosecutors and investigating judges may conduct criminal investigations of persons suspected of crimes under international law

[10] *Lawyers for Sabra and Chatila Plaintiffs Ask to Re-open Debate before Belgian Court following ICJ Ruling of 14 February (statement in English), Press statement,* 1 March 2002, *available at:* http://www.indictsharon.net.

[11] *Belgian Appeals Court agrees to New Hearing, Re-Opening of Arguments, in War Crimes Case against Ariel Sharon and other Israelis and Lebanese, Press release,* 6 March 2002, *available at:* http://www.indictsharon.net.

[12] After the ICJ judgment in the *Democratic Republic of the Congo v. Belgium,* the Indictment Chamber considering the case of the former Foreign Minister decided on 16 April 2002 that the investigating magistrate did not have jurisdiction to continue to investigate the accused or issue a new arrest warrant on the ground that an examination of legislative history of the 1993 law, as amended in 1999, demonstrated in its view that the Parliament intended that Belgian courts could only open a criminal investigation for conduct abroad when the suspect was present in Belgium. *Arrêt de la Cour d'Appel de Bruxelles, Chambre des Mises en Accusation,* 16 April 2002. This decision was appealed to the *Cour de Cassation* (Court of Cassation), Belgium's highest court.

even if they might have immunity while in office – a position that the organization does not accept as correct under international law - pending the departure of the suspect from office.13

D. The 26 June 2002 judgment of the Cour d'appel *and subsequent developments in Parliament*

On 26 June 2002, the Indictment Chamber of the *Cour d'appel* ruled that the complaint was inadmissible on the ground that Parliament did not intend to give prosecutors and investigating judges jurisdiction to investigate crimes under international law when the suspect was not present in Belgium.14 The court did not address the question whether the prosecutor had jurisdiction under international law. The 23 survivors sought review by the *Cour de cassation*. That court scheduled a hearing for 27 November 2002, but it was postponed without setting any date after steps were taken in Parliament to correct the interpretation of the Belgian universal jurisdiction law.

Members of Parliament moved immediately after the decision of 26 June 2002 to rectify the erroneous interpretation of the universal jurisdiction legislation, a move that met with the support of the Prime Minister.15 On 30 January 2003, the Senate approved an interpretive law by a vote of 34 to 6, with 6 abstentions, making clear that the intent of Parliament when it enacted the law was to permit investigations of war crimes, crimes against humanity and genocide committed outside Belgium, even if the suspect was not present in the country.16

13 Amnesty International, *Universal jurisdiction: Belgium has jurisdiction in* Sharon *case to investigate 1982 Sabra and Chatila killings*, AI Index: IOR 53/001/2002, May 2002.
14 Amnesty International does not have an official text of the judgment of the Cour d'appel. However, it has stated that the restrictive interpretation of the Belgian universal jurisdiction law was inconsistent with international law and the intention of the drafters to implement Belgium's obligations under the Geneva Conventions of 1949. Amnesty International, *Israel/Belgium: Dismay at Sharon case decision*, AI Index: MDE 15/101/2002, 26 June 2002. *See also* Robert Fisk, *Court rules Sharon cannot be indicted for slaughter, The Independent,* 27 June 2002; Gareth Smyth, *Belgian court drops Sharon human rights case, Financial Times,* 26 June 2002; Anthony Dworkin, *Belgian Court Rules that Sharon cannot be tried in absentia,* Crimes of War Project, 1 July 2002)obtainable at: http://www.crimesofwar.org)
15 For a brief summary of these steps, see the press release issued by Amnesty International Belgium, Avocats Sans Frontières, la Fédération Internationale des Ligues des Droits de l'Homme, Human Rights Watch, la Ligue Belge des Droits de l'Homme and Liga voor Mensenrechten, *The Belgian law of Universal Jurisdiction gets a second wind,* 19 July 2002 (obtainable at: http://www.indictsharon.net) . A separate proposal was also introduced in the Senate to modify the universal jurisdiction legislation in some respects, but without affecting in any way the ability of Belgian authorities to investigate crimes committed abroad even if the suspect was not present in Belgium at the time of the investigation.
16 *Proposition de loi modifiant la loi du 16 juin 1993 relative à la répressioni des violations graves du droit international humanitaire, Texte adopté par la Commission de la justice après renvoi par la*

III. JURISDICTION UNDER INTERNATIONAL LAW OVER CRIMES COMMITTED ABROAD

A. The erroneous statement of international law by the Procureur général

Despite the emphatic reaffirmation by the Senate and by the Prime Minister of the original intent of the parliament to permit Belgian prosecutors and investigating judges to investigate crimes under international law committed abroad, even if the suspect was not present in Belgium, the *Procureur général* sought a ruling by the *Cour de cassation* in the Sabra and Chatila case that such investigations on behalf of the international community were contrary to Belgian law and that they were also prohibited by international law. In his submission to the court on 23 January 2003, he contended that the *travaux préparatoires* (legislative history) of the 1993 law demonstrated that the parliament did not intend that investigations could take place when the suspect was not present (pages 4 to 6). Lawyers for the survivors had previously demonstrated in their oral and written submissions to the *Cour d'appel* that this claim was not correct and these submissions have been confirmed by the recent actions of the Senate and Prime Minister. In addition, the *Procureur général* contended that under international law universal jurisdiction is limited to the situation when a suspect is present in the jurisdiction where the prosecutor or investigating judge is located and the forum state is under an *aut dedere aut judicare* (extradite or try) obligation. He asserted:

> "Implementing the principle of universal jurisdiction, which expresses the saying, "*Ubi invenero, ibi te judicabo* (where I will find you, there I will try you)", traditionally implies three conditions: the possibility of carrying out prosecutions, the judge or of the forum where the suspect was apprehended having jurisdiction, and above all the respect for the obligation *aut dedere aut judicare,* considered as a principle of customary international law." (page 2)

B. Lawfulness under international law of investigations of crimes committed abroad when the suspect is not present in the forum

The *Procureur général* is not correct to say that universal jurisdiction is based solely on the concept of *aut dedere aut judicare*. This principle is simply one basis for imposing an obligation under customary international law, conventional international law and general principles of law.

séance plénière, Sénat de Belgique, Session de 2002-2003, 2-1256/9, 30 janvier 2003 (obtainable at: http://www.senat.be).

As shown in an Amnesty International study published in September 2001, the Geneva Conventions of 1949 provided more than half a century ago for three types of jurisdiction.17 These are:

1. an obligation to search for and bring suspects before their own courts (or to hand them over to another state). States parties are obliged to search for and to bring persons suspected of grave breaches of the Conventions before their own courts (unless it is decided to hand such persons over to another state party for trial, provided that the other state party has made out a prima facie case):

> "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."18

States parties are also obliged to implement this obligation in their national law:

2. permissive universal jurisdiction for states that had made out a *prima facie* case against a person suspected of a grave breach, without any requirement of a link to the forum state. This provision was designed to ensure that when states were unable or unwilling to fulfil their obligations to bring to justice those responsible for grave breaches of the Geneva Conventions of 1949, other states could step in on behalf of the international community to enforce international law. This provision was deemed essential at a time when the only method of investigating and prosecuting crimes under international law was in national courts and less than a year after the effort to establish an international criminal court with jurisdiction over genocide was rejected. Indeed, national courts will remain for the indefinite future the primary method of enforcing international law.

3. surrender to an international criminal court. Although this form of jurisdiction was not expressly provided for in the Geneva Conventions, the ICRC commentary makes clear that the common article was worded in a way not to preclude surrender to an international criminal tribunal.

In addition to the historical argument for permissive universal jurisdiction to investigate persons suspected of committing grave breaches of the Geneva Conventions and other crimes under international law abroad without any link and the pragmatic one about ensuring other states in the international community will be able to step in when one part of the international criminal justice system at the national level fails, is the pragmatic argument that a state cannot be defenceless when it knows that a person suspected of a horrible crime may come to visit. It has to be able to open an investigation and obtain an indictment ahead of time. It takes time

17 Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001.
18 Common Article 49 – 50 -129 – 146 of the four Geneva Conventions of 1949.

to open an investigation and obtain an indictment - the recent visit by an Algerian general to France illustrates the problem. Just as in the case of ordinary crimes of international concern, such as money laundering, drug trafficking, football hooliganism and trafficking in women and children where ministries of justice want to be able to open investigations when persons suspected of these crimes are likely to visit and it is obvious that the territorial state is not able or willing to do so, national police, prosecutors and investigating judges need to be able to protect law and order in their states by being able to open investigations before persons suspected of crimes under international law reach their countries.

Indeed, the recent implementing legislation for the Rome Statute of the International Criminal Court enacted in Germany and New Zealand expressly provide for investigation of persons suspected of committing crimes under international law who are likely to come to the country and other states, including Ecuador and Panama, are intending to follow suit in their legislation implementing the Rome Statute.

It is particularly troubling that the *Procureur général* fails to bring to the attention of the court the well-known study by Amnesty International of state practice at the national and international level in more than 125 states around the world with universal jurisdiction. The failure to mention this study is all the more surprising because it was cited by the government of Belgium in the International Court of Justice in the *Democratic Republic of the Congo* case and by lawyers for the survivors in the Sabra and Chatila case in the hearing before the *Cour d'appel.* A careful review of that study demonstrates that there are almost no countries with universal jurisdiction legislation where that legislation expressly prohibits opening an investigation, obtaining an indictment and requesting extradition of persons suspected of crimes abroad without a link to the state. Although many states have legislation that impose an *aut dedere aut judicare* obligation if a suspect is found within the territory of the forum state, that legislation generally does not prohibit police, prosecutors or investigating judges from taking precautionary measures when the suspect has not yet entered the country or from acting on behalf of the international community when the authorities of states where the crime occurred or of other states are unable or unwilling to fulfil their obligations under international law.

The most common form of legislation providing for universal jurisdiction is the Geneva Convention Act, used in several dozen states, to implement the Geneva Conventions by providing universal jurisdiction over grave breaches of those conventions and, in some cases, over grave breaches of Additional Protocol I. Not a single one of those acts is known to prohibit police, prosecutors or investigating judges from opening an investigation, obtaining an indictment or seeking extradition. It would be astonishing if they did in the light of common Article 49 – 50 – 126 – 149 of the Geneva Conventions, which expressly provides for states to seek extradition of suspects where they have made out a *prima facie* case, which could only be done after a criminal investigation. It would be unlikely that states parties to the Geneva Conventions would wish to undermine a fundamental component of the jurisdictional regime for repressing these crimes. Indeed, the 1991 explanatory memorandum indicates the intent of the Belgian parliament to implement the principle of universal jurisdiction found in the Geneva Conventions.

It is possible that the *Procureur général* was led astray by the repeated use of the unfortunate term "universal jurisdiction *in absentia*" to cover the preliminary stages of criminal proceedings before a trial. The term 'in absentia' properly applies only to the actual trial, not to the period of investigation. A person who has been investigated and indicted while he or she is abroad will have a full opportunity after arrest and extradition to prepare for trial and to conduct a defence at trial.

C. The irrelevance of the International Court of Justice judgment

On 14 February 2002, the ICJ ruled that Belgium could not issue a warrant for the arrest of the incumbent Foreign Minister of the Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi, because, in its view, under customary international law foreign ministers, as well as prime ministers and heads of state, were immune from arrest by foreign courts for war crimes and crimes against humanity while in office.19 It recognized only four situations when courts could issue arrest warrants for foreign ministers of other states for such crimes under international law.20

Amnesty International believes that the ICJ judgment on the question of immunity for the worst possible crimes in the world was incorrect as a matter of law and that it must, and one day, will, be reversed. As demonstrated in its paper issued in May 2002, there is no convincing evidence of a customary international law rule that such government officials are immune from prosecution in a foreign court for war crimes and crimes against humanity while in office and the ICJ itself cited no evidence of state practice or *opinio juris* (belief that the practice is a legally binding rule). Indeed, the evidence of instruments adopted by the international community shows a consistent rejection of immunity from prosecution for crimes under international law for *any* government official since the Second World War.

However, the ICJ judgment has no relevance to the issues presented by the *Procureur Général* to the court in the Sabra and Chatila case. He does not raise the question of immunity in his 23 January 2003 submission. The question whether Belgian prosecutors or investigating judges could investigate on behalf of the international community crimes under international law committed abroad when the suspects were not present in Belgium was expressly *not* addressed in the judgment of the *Cour d'appel*. The Democratic Republic of the Congo originally contended that Belgian courts lacked jurisdiction to issue arrest warrants for persons accused of war crimes and crimes against humanity abroad who were not present in Belgium at the time the arrest warrant was issued. However, it subsequently withdrew this claim after Belgium submitted its counter-memorial annexing the Amnesty International study of universal jurisdiction that cited a section in the penal code of the Democratic Republic of the Congo providing for universal jurisdiction over ordinary crimes in the penal code carrying a sentence of more than two months. Proceedings could be brought under this

19 *Democratic Republic of the Congo v. Belgium*, I.C.J. Rep. (2002) (judgment), para. 58 (obtainable at: http://www.icj-cij.org)
20 *Ibid.*, para. 61.

provision for certain crimes even if the suspect was not present in the country. In effect, the Democratic Republic of the Congo conceded that presence was not necessary to open a criminal investigation based on universal jurisdiction. The ICJ, therefore, abstained from deciding whether Belgium could exercise such universal jurisdiction.21

It could be argued that the ICJ implicitly accepted that Belgium did have jurisdiction to issue arrest warrants in such circumstances, since it said that, "[a]s a matter of logic, the second ground [immunity] should be addressed only once there has been a determination of the first [the existence of universal jurisdiction], since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction."22 The ICJ then went on to decide the question of immunity on the assumption that Belgium did have jurisdiction.

Indeed, a number of judges concluded in separate opinions that national prosecutors and investigating judges do have jurisdiction to investigate crimes under international law committed abroad, even when the suspect is not present at the time of the investigation. In their separate opinion, Judges Higgins, Kooijmans and Buergenthal squarely rejected the contention subsequently advanced by the *Procureur général* in the Sabra and Chatila case that universal jurisdiction to investigate crimes may only be exercised when a suspect is present in the forum state on a basis of an *aut dedere aut judicare* obligation. They noted that although some national legislation implementing *aut dedere aut judicare* obligations under treaties might require the presence of a person for a prosecution, such legislation "cannot be interpreted *a contrario so as to exclude a voluntary exercise of a* universal jurisdiction.23 They made clear that there was no prohibition in international law preventing states from investigating crimes under international law and then seeking the extradition of persons suspected of those crimes:

> "If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere aut judicare* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction."24

Ad hoc Judge Van den Wyngaert, after an extensive review of state practice and the relevant literature, concluded that international law did not prohibit, but actually permits, the exercise of universal jurisdiction to investigate crimes under international law.25 She stated:

> "Article 7 of Belgium's 1993/1999 Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to

21 *Ibid.*, para. 43.
22 *Ibid.*, para. 46
23 *Ibid.* (joint and separate opinion of Higgins, Kooijmans & Buergenthal, J.J.), para. 57 (obtainable at: http://www.icj-cij.org) (emphasis in original).
24 *Ibid.*, para. 58.
25 *Ibid.* (dissenting opinion of Van den Wyngaert, J.), paras 52 – 67.

> international law. International law does not prohibit States from asserting prescriptive jurisdiction of this kind. On the contrary, international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens."26

Judge Koroma declared that "[t]he Judgment implies that while Belgium can initiate criminal proceedings in its jurisdiction against anyone, an incumbent Minister for Foreign Affairs of a foreign State is immune from Belgian jurisdiction" and that "[i]nternational law imposes a limit on Belgium's jurisdiction where the Foreign Minister in office of a foreign State is concerned", thus indicating that he believed that investigations could take place for crimes under international law committed abroad, even when the suspect was not present.27 Moreover, he added:

> "Against this background, the Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide."28

Although Judge Al-Khasawneh did not directly address the question of jurisdiction, he appeared to accept that national prosecutors and investigating judges could investigate crimes under international law when the suspect was not present in the forum state when he declared that foreign ministers did not have absolute immunity from both jurisdiction and enforcement in foreign courts for such crimes. Indeed, there is nothing in his separate opinion to suggest that he thought that investigations of such crimes could not take place when the suspect was not present.29 Judge Oda thought that the issue of universal jurisdiction was not ripe for decision.30

Only four judges (Guillaume, Ranjeva, Rezek and Bula-Bula) of the 16 members of the Court expressly stated that international law clearly prevented Belgium from issuing an arrest warrant on the basis of universal jurisdiction for a crime committed abroad when the accused was outside the country. In each case, however, the judges either misstated international law or ignored state practice clearly demonstrating that there is no rule of conventional or customary international law prohibiting states from investigating in these circumstances. Judge Guillaume stated that national legislation and jurisprudence cited in the case file did not support the existence of a rule of customary international law providing for universal jurisdiction permitting investigations of crimes under international law at a time when the suspect was not present in the forum state, citing only three jurisdictions: France, Germany and the Netherlands.31 However, he did not note that Germany was in the process

26 *Ibid.* para. 67
27 *Ibid*. (separate opinion of Koroma), para. 7.
28 *Ibid.*, para. 9.
29 *Ibid.* (separate opinion of Al-Khasawneh, J.), para. 8 (a).
30 *Ibid.* (dissenting opinion of Oda, J.), para. 16.
31 *Ibid.* (separate opinion of Guillaume, J.), para. 12.

of amending its legislation to provide for universal jurisdiction over war crimes, crimes against humanity and genocide as defined in the Rome Statute of the International Criminal Court and to make clear that no link was required to Germany before opening a criminal investigation as long as there was a reasonable likelihood that courts could at some point obtain custody of the suspect. Similarly, Judge Guillaume cited a dissenting opinion in the first judgment in the *Pinochet* case that concluded that under customary international law "[t]here was no universality of jurisdiction for crimes against international law" – a proposition that has been manifestly incorrect for several centuries - in support of his view that states could not investigate crimes under international law on the basis of universal jurisdiction at a time when the suspect was not present in the forum state.32 He also ignored all the examples of legislation in states cited in the Amnesty International study provided to the International Court of Justice by Belgium, other than legislation and jurisprudence in Israel, that do not prohibit investigations when the suspect is not present.

The declaration by Judge Ranjeva, who asserted that customary international law prohibited the exercise of universal jurisdiction in the absence of any link to the forum state, except for piracy, is similarly flawed. He claimed that the absence of provisions in the national legislation cited in the Amnesty International study *expressly* authorizing the opening of investigations of crimes under international law at a time when the suspect was not present meant that that customary international *prohibited* such investigations. 33 This strained interpretation of state practice ignores the intent of the drafters of the Geneva Conventions of 1949 to permit states to continue to exercise such jurisdiction. Moreover, despite his attempt to distinguish the judgment of the Permanent Court of International Justice in the *Lotus* case, this interpretation is completely inconsistent with that judgment, which concluded that in the absence of a rule to the contrary, states could exercise any jurisdiction not prohibited by international law.34

Judge Rezek also ignored state practice and suggested, contrary to overwhelming scholarly authority, that the Geneva Conventions of 1949 do not permit states to investigate grave breaches committed abroad if the suspect is abroad.35 He also claimed erroneously in the first version of his separate opinion that Spanish law is based on passive personality rather than universal jurisdiction.36 After it was brought to his attention that his understanding of the Spanish law was not correct, he issued a revised separate opinion that eliminated the paragraph where this erroneous statement occurred, although this change is not noted on the International Court of Justice website. *Ad Hoc* Judge Bula-Bula, nominated by the Democratic Republic of the Congo, indicated that he did not believe that Belgium had

32 *Ibid.*, para. 12.
33 *Ibid.* (declaration of Ranjeva, J.), para. 8.
34 *Ibid.*, para. 9.
35 *Ibid.* (separate opinion of Rezek, J.) (original version, subsequently withdrawn without notice), para. 7.
36 *Ibid.*, para. 8.

jurisdiction to investigate crimes under international law, but he did not develop anyn legal argument in support of this view.37

37 Ibid. (separate opinion of Bula-Bula, J.), para. 40.