

# UNIVERSAL JURISDICTION:

## Belgian court has jurisdiction in *Sharon* case to investigate 1982 Sabra and Chatila killings

On the eve of oral arguments before a Belgian court, Amnesty International underscored that a Belgian prosecutor had jurisdiction under international law to investigate 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. The organization declared that a recent judgment by the International Court of Justice stating that certain serving high government officials enjoyed immunity from arrest by foreign courts for war crimes and crimes against humanity could not deprive the Belgian prosecutor of jurisdiction to conduct a criminal investigation of the incident.

### **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), gave 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.<sup>1</sup> Although the war crimes included in Section 3 includes many of the war crimes listed in

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<sup>1</sup> 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).

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 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.”<sup>2</sup> However, certain principles of criminal responsibility applicable to ordinary crimes are applicable to crimes under the 1999 law.<sup>3</sup> Article 8 provides that statutes of limitation do not apply to breaches of Article 1 of the Act.<sup>4</sup>

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<sup>2</sup> *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”.

<sup>3</sup> *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).

<sup>4</sup> *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

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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.*”

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.”<sup>5</sup> Article 9 provides that when Belgium is in a state of war, breaches of the 1999 Act fall within the jurisdiction of military courts.<sup>6</sup>

### **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 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.<sup>7</sup>

### **The history of the proceedings so far**

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<sup>5</sup> *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 où celles-ci auront été commises.*”

<sup>6</sup> *Ibid.*, Art. 9.

<sup>7</sup> The complaint is available in English and in French at: <http://www.indictsharon.net>.

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.<sup>8</sup> 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.<sup>9</sup> 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 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

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<sup>8</sup> 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'incompétence des juridictions belges pour connaître de la plainte déposée le 18.6.2001 sans l'affaire portant le no. 54/1 de Monsieur le juge d'instruction Collignon*.

<sup>9</sup> 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>.

1982 killings.<sup>10</sup> The Indictment Chamber agreed to this request and scheduled a hearing for 15 May 2002 on this matter.<sup>11</sup>

### **The 15 May 2002 hearing**

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<sup>10</sup> *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>.*

<sup>11</sup> *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>.*

The Indictment Chamber will hear 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 part 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 will also 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.<sup>12</sup>

### **The flawed 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, Abdoulaye 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. It recognized only four situations when courts could issue arrest warrants for foreign ministers of other states for such crimes under international law. Although 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, it subsequently withdrew this claim. The ICJ, therefore, abstained from deciding whether Belgium could exercise such universal jurisdiction (para. 43).<sup>13</sup>

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<sup>12</sup> 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.

<sup>13</sup> 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

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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.” (para. 46). The ICJ then went on to decide the question of immunity on the assumption that Belgium did have jurisdiction. 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.

Amnesty International believes that the ICJ judgment was incorrect as a matter of law and that it must, and one day, will, be reversed. 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.

Contrary to the claim in the ICJ judgment (para. 58) that these instruments were limited to providing that there was no immunity for such government officials before international criminal courts, those instruments articulated a customary international law rule and general principle of law. Indeed, several of the international instruments adopted over the past half century were expressly intended to apply to national courts, including the 1945 Allied Control Council Law No. 10, the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal, the 1950 Nuremberg Principles prepared by the International Law Commission, the Draft Code of Offences against the Peace and Security of Mankind of 1954 and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind. Moreover, even the international instruments establishing international criminal courts envisaged that the same rules of international law reiterated in those instruments applied with equal force to prosecutions by national courts.

***International instruments incorporate a rule of international law applicable to national, as well as international, courts.*** As stated in Article 7 of the Nuremberg Charter, "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."<sup>14</sup> The Nuremberg Tribunal made clear that under customary international law and general principles of law the official position of a state official does not protect that official from prosecution for a crime under international law. The Tribunal did not base its decision on the Charter itself:

"It was submitted that ... where the act in question is an act of state, those who carry it out are not personally responsible, are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this argument] must be rejected.

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<sup>14</sup> Charter of the International Military Tribunal (Nuremberg Charter), 8 August 1945, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 U.N.T.S. 279, 59 Stat. 1544, Art. 7.

... The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

. . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."<sup>15</sup>

Article 4 of Allied Control Council Law No. 10, which was adopted to govern trials by Allied national courts in occupied Germany of persons charged with war crimes and crimes against humanity committed on a lesser scale than those committed by the persons tried by the Nuremberg Tribunal, provided:

“The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.”<sup>16</sup>

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<sup>15</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30<sup>th</sup> September and 1<sup>st</sup> October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), at 41-42.

<sup>16</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Art. 4 (a), published in Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946.

In 1946, the UN General Assembly “[a]ffirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal” and directed its Committee on Codification of International Law, established on the same day, “to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal”. The General Assembly did not limit the applicability of these principles to international criminal courts and, indeed, did not even mention the establishment of an international criminal court before 12 May 1947, when it was proposed for the first time in the UN by France.<sup>17</sup> The Charter of the International Military Tribunal for the Far East, which was established to try the major Japanese suspected war criminals, contained a similar formulation of the basic principle of international law concerning the absence of immunity of government officials.<sup>18</sup> Trials of other suspected Japanese war criminals were conducted by Allied national courts.

Principle III of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Nuremberg Principles) adopted by the International Law Commission in 1950 also articulates principles of international law applicable at all times rather than principles applicable only by international criminal courts. Principle III states:

“The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.”<sup>19</sup>

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<sup>17</sup> G.A. Resolution of 11 December 1946 (Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal). On 13 May 1947, Henri Donnedieu de Vabres, formerly a Judge on the Nuremberg Tribunal, proposed in the Committee on the Progressive Development of International Law and its Codification that certain matters should be tried in a special international criminal chamber of the International Court of Justice and others in a permanent international criminal court. A formal proposal was submitted two days later. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification, U.N. Doc. A/AC.10/21, 15 May 1947.

<sup>18</sup> The Tokyo Charter, which was established by military order in contrast to the Nuremberg Charter established by treaty, provided:

“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he was charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, T.I.A.S. 1589, Art. 6.

<sup>19</sup> Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, in International Law Commission, Report on Principles of the Nuremberg

Article 3 of the 1954 draft Code of Offences against the Peace and Security of Mankind prepared by the International Law Commission and intended to be applied by national courts, as well as by a permanent international criminal court when it was established, provided:

“The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code.”<sup>20</sup>

Article 13 of the 1991 Draft Code of Crimes against the Peace and Security of Mankind, intended to be applicable in both national and international criminal courts, provided:

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Tribunal, 29 July 1950, 5 U.N. G.A.O.R. Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950).

<sup>20</sup> International Law Commission, Draft Code of Offences against the Peace and Security of Mankind, 28 July 1954, 9 U.N. G.A.O.R. Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954). In the Introduction to the 1954 Draft Code, the International Law Commission explained: “Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts.” (para. 58 (d)).

“The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.”<sup>21</sup>

The 1996 Draft Code of Crimes against the Peace and Security of Mankind, which also was intended to be applied by national courts on the basis of universal jurisdiction, as well as by the International Criminal Court, reaffirms the principle of law recognized in the Nuremberg Charter by providing that “[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”<sup>22</sup>

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<sup>21</sup> International Law Commission, Report on the Draft Code of Crimes against the Peace and Security of Mankind, 19 July 1991, 46 U.N. G.A.O.R. (Supp. No. 10) at 238, U.N. Doc. A/46/10 (1991). Article 9 (4) of the 1991 Draft Code stated:

“Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

- (a) if the act which was the subject of the previous judgment took place in the territory of that State; or
- (b) if that State has been the main victim of the crime.”

The requirement of a link to the territory of the forum state was dropped in the 1996 Draft Code and numerous provisions in the 1991 Draft Code indicate that the link applied only to the question of *ne bis in idem*, not to an initial prosecution. For example, Article 6 provides for universal jurisdiction over persons suspected of committing crimes in the Draft Code.

<sup>22</sup> International Law Commission, Report on the Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session 6 May - 26 July 1996, 51 U.N. G.A.O.R. Supp. (No. 22), U.N. Doc. A/51/22 (1996), Art. 7. The Commentary to Article 1 of the 1996 Draft Code emphasized that “national courts are expected to play an important role in the implementation of the present Code”. *Ibid.*, Commentary to Art. 1, para. 13.

*Instruments establishing international criminal courts envisaged trials by national courts implementing their principles.* Each of the five international criminal courts established since the Second World War were set up with the understanding that the principles of international law reflected in their constituent instruments would be applied without qualification by national courts. Indeed, despite the claim by the ICJ that “the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals . . . which are specifically applicable to the latter” (para. 58), there is no evidence to the contrary. As mentioned above, the Nuremberg and Tokyo Tribunals were established to try only the most significant suspects and the vast majority of trials for war crimes and crimes against humanity were conducted by national courts applying the principles of law in the Nuremberg and Tokyo Charters. In addition, the International Criminal Tribunals for the former Yugoslavia and for Rwanda also were designed to try only a small proportion of the total number of persons suspected of crimes within their jurisdiction and it was always recognized that others would have to be tried by national courts, either in the regions where the crimes occurred or elsewhere, based on universal jurisdiction. These courts were expected to apply the principles of international law incorporated in the Statutes of the two Tribunals and, indeed, the Tribunals could remove cases from national courts that did not conduct fair trials that were not a sham. The Statutes of both Tribunals reiterated the basic principle of international law that officials are not immune from prosecution for war crimes, crimes against humanity or genocide.<sup>23</sup>

Most recently, Article 27 (Irrelevance of official capacity) of the Rome Statute incorporated this principle. It provides:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

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<sup>23</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Statute), Art. 7; Statute of the International Criminal Tribunal for Rwanda (Rwanda Statute), Art. 6.

As the Preamble, Article 1 and Article 17 of the Rome Statute make clear, states have the primary responsibility to prosecute persons for crimes within the International Criminal Court's jurisdiction.<sup>24</sup> When they are unable or unwilling to do so, the Court can assert jurisdiction and the failure to investigate or prosecute a government official for such crimes solely on the ground that the official enjoyed immunity in his or her own country would demonstrate an inability or unwillingness of the state to act.

The International Law Commission has explained why an official may not plead immunity as a bar to a prosecution in a national court or an international criminal court for crimes under international law:

"... crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security."<sup>25</sup>

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<sup>24</sup> The Preamble states in part:

"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, . . ."

Article 1 states that the Court "shall be complementary to national criminal jurisdictions". Article 17 provides under this principle that cases are inadmissible except when states are unwilling or unable genuinely to carry out investigations or prosecutions.

<sup>25</sup> 1996 ILC Report, commentary on Article 7, p. 39.

Similarly, "[i]t would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."<sup>26</sup>

#### **The four limited exceptions to the ICJ rule**

The four exceptions posited by the ICJ to its principle of immunity of serving foreign ministers, prime ministers and heads of state for war crimes and crimes against humanity (para. 61) would, contrary to the claim of the ICJ (para. 60), be a recipe for impunity for the worst possible crimes in the world in most cases. The first two of the four exceptions - the possibility of prosecutions in the official's own state and the possibility of the official's own state waiving immunity in the context of a foreign prosecution - are simply not realistic. Indeed, the very reason for opening a criminal investigation in another state based on universal jurisdiction is because the official's own state is unable or unwilling to investigate such crimes by officials.

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<sup>26</sup> *Ibid.*, p. 41.

The third exception - prosecution after the official leaves office for “acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity” - could be misinterpreted as accepting the outdated distinction between official acts and private acts resoundingly rejected by the United Kingdom House of Lords in 1999 in the *Pinochet* case.<sup>27</sup> It is to be regretted that the ICJ did not make clear that the commission of crimes under international law by officials can never be seen as official acts.

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<sup>27</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), 2 All ER 97 [1999].

The fourth exception - that "an incumbent of former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction" - fails to recognize the limited scope of the jurisdiction of international criminal courts. The jurisdiction of the Yugoslavia and Rwanda Tribunals is limited to certain time periods, to certain crimes under international law and to crimes committed in two limited geographic areas.<sup>28</sup> The jurisdiction of the Rwanda Tribunal is further limited when the conduct occurred outside Rwanda to crimes committed by Rwandan citizens.<sup>29</sup> The jurisdiction of the International Criminal Court is limited to only certain crimes under international law and to crimes committed after the Rome Statute of the International Criminal Court enters into force on 1 July 2002. It is also limited to jurisdiction over crimes committed in the territory of a state party or a state making a special declaration recognizing the Court's jurisdiction, or by the national of one of these states, except when the Security Council refers a situation to the Court pursuant to its powers under Chapter VII of the United Nations Charter. Although as of 14 May 2002, 66 states had ratified the Rome Statute, almost two-thirds of all states had yet to do so. Moreover, it is unlikely that there will be many more ad hoc international criminal tribunals established in the future.<sup>30</sup>

### **The inapplicability of the ICJ judgment to the Sharon case**

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<sup>28</sup> Yugoslavia Statute, Arts 1 to 5; Rwanda Statute, Arts 1 to 4.

<sup>29</sup> Rwanda Statute, Art. 1 ("The International Criminal Tribunal for Rwanda shall have the power to prosecute . . . Rwandan citizens responsible for such violations committed in the territory of neighbouring States . . .").

<sup>30</sup> Efforts for more than a decade to persuade the Security Council to set up an *ad hoc* international criminal tribunal for Iraq have failed. The recent trend has been to establish mixed tribunals - national courts or panels of national courts with foreign or international components as in East Timor, Cambodia and Sierra Leone. It is not clear from the ICJ judgment whether these courts or panels would be considered as international criminal courts under its fourth exception.

Moreover, these special courts are often designed to investigate and prosecute only a small number of those suspected of responsibility for crimes under international law, such as senior leaders and those suspected of the most serious crimes, and, in the case of the failed attempt to establish such a court in Cambodia, primarily targeting persons from only one faction in one particular period. Law on the Establishment of Extra-Ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (unofficial translation by the Legal Assistance Unit, UNCOHCHR), Art. 1 ("The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of the Cambodian penal law, international humanitarian laws and custom, and international Conventions recognized by Cambodia, that were committed during the period from April 17, 1975 to January 6, 1979."). The Special Court for Sierra Leone established pursuant to an agreement between the UN and Sierra Leone expressly provides for no immunity for government officials and does not limit the scope of this provision by nationality.

In any event, for a number of reasons the ICJ judgment in the *Democratic Republic of the Congo v. Belgium* has no bearing on the criminal investigation pending in Belgium against Ariel Sharon and other suspects concerning the 1982 killings.<sup>31</sup>

First, the ICJ judgment was clearly limited to the issuance of an arrest warrant after a criminal investigation (para. 70). The ICJ did not accept the contention of the Democratic Republic of the Congo that “any act of investigation undertaken with a view to bringing [the official] to court” would violate the official’s immunity (para. 47). The current stage of the proceedings in relation to the 1982 killings is limited to a criminal investigation. There has not yet been a decision whether there is sufficient evidence for the issuance of an arrest warrant against any of the officials, former officials or other suspects in the criminal investigation. Therefore, any decision on the applicability of the ICJ judgment at this stage of the proceedings would be premature.

Second, only one of the suspects, Ariel Sharon, is an official who, in the view of the ICJ, would fall within the categories of persons who enjoy immunity from jurisdiction in a foreign court. None of the other suspects fall within the categories of persons whom the ICJ claimed were immune from prosecution for war crimes and crimes against humanity in foreign national courts. Even if the ICJ judgment were held to prevent not merely the issuance of an arrest warrant against Ariel Sharon, but also any criminal investigation of him, the ICJ judgment would permit the investigation of the other suspects and, if there was sufficient evidence, the issuance of arrest warrants.

Third, in contrast to the criminal investigation in the *Democratic Republic of the Congo v. Belgium* case, the criminal investigation of the 1982 killings in the Sabra and Chatila refugee camps involves allegations that the killings constituted genocide. In contrast to war crimes and crimes against humanity, states have expressly provided that no government official enjoys immunities from prosecution in national courts for genocide or ancillary crimes. Article IV of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) states:

“Persons committing genocide or any of the other acts enumerated in article III [conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide] shall be

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<sup>31</sup> In addition to the reasons cited below in the text, under Article 59 of the ICJ’s Statute, “The decision of the Court has no binding force except between the parties and in respect of that particular case.” The drafters of the ICJ Statute, like the drafters of its predecessor, the Statute of the Permanent Court of International Justice, wanted to be sure that customary international law remained free to evolve and not to establish a system of binding precedent foreclosing such evolution. Moreover, they also wished to ensure that ICJ judgments did not bind states, such as Israel, that did not accept the ICJ’s jurisdiction.

punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

Although the Genocide Convention does not expressly require states parties to exercise universal jurisdiction, there is overwhelming evidence that not only may states exercise universal jurisdiction over genocide, but that the drafters of the Genocide Convention did not intend to prevent states parties from exercising such jurisdiction.<sup>32</sup>

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<sup>32</sup> Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/010/2001, September 2001, Chapter Seven (Genocide: The legal basis for universal jurisdiction). The entire memorandum on universal jurisdiction, which includes state practice concerning genocide, is available on a CD-ROM from: [ijp@amnesty.org](mailto:ijp@amnesty.org) and on the Amnesty International web site: <http://www.amnesty.org>. The memorandum was formally submitted to the Belgian court by the lawyers for the survivors in support of their arguments.