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Fall 2009

Universal Jurisdiction and the Case of Belgium: A Critical Assessment

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UNIVERSAL JURISDICTION AND THE CASE OF BELGIUM: A CRITICAL ASSESSMENT

*Roozbeh (Rudy) B. Baker**

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I. INTRODUCTION

Praised in some quarters as a useful tool for bringing criminal perpetrators to justice, criticized by others as a threat to state sovereignty, *universal jurisdiction* has certainly emerged as a heated topic within international criminal law. The term *universal jurisdiction* itself refers to a form of jurisdiction in international law which grants the courts of any state, the ability to bring proceedings with respect to certain (internationally defined)¹ crimes, without regard to the location of the crime, the nationality of the offender, or the nationality of the victim.² This form of jurisdiction in effect opens up certain international crimes for prosecution (within domestic national courts) anywhere in the world. First introduced in relation to one of the first international crimes on record, piracy,³ *universal jurisdiction* today has been extended to include the specific international offences of war crimes,⁴ crimes against humanity,⁵ and genocide.⁶ While the

1. Such crimes can be defined as crimes under the international (as opposed to domestic) legal system either through custom or treaty.

2. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L. REV. 785, 789 (1987-1988); ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 85 (3d ed. 2007).

3. See *In Re Piracy Jure Gentium*, [1934] A.C. 586 (U.K.).

4. See THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 232 (1st ed. 1948); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 308 (5th ed. 1998); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 520 (2d ed. 1999).

5. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention IV].

6. See Convention on the Prevention and Punishment of the Crime of Genocide, art. 6, Dec. 9, 1948, 78 U.N.T.S. 277; Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 51 (1997); BASSIOUNI, *supra* note 4, at 234-235; Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 426-427 (2001).

principle of *universal jurisdiction* has been lauded in some quarters, it has also faced heavy criticism.⁷

In 1993, the Kingdom of Belgium enacted a domestic statute, the *Loi du 16 Juin*,⁸ which codified (in domestic Belgian law) the use and application of *universal jurisdiction* (for international crimes) in Belgian courts. The statute, which went through two major revisions in February 1999⁹ and April 2003,¹⁰ granted Belgian courts jurisdiction over war crimes, crimes against humanity, and genocide, regardless of where in the world they took place. While the idea of *universal jurisdiction* within international law is not a new one, it has been argued, with justification, that Belgium's *universal jurisdiction* statute was the most extensive and far reaching attempt to date of a domestic state within the international system sanctioning the wide-scale use (rather than specific case by case application) of its courts for trying international crimes.

The Belgian *universal jurisdiction* statute predictably opened the country's courts to a flood of litigation; hosts of past and current world leaders, ranging from President George Bush Sr., to Fidel Castro, to Yasser Arafat and Ariel Sharon, found themselves being pursued in the Belgian courts for alleged international criminal offences. In August 2003, bowing to intense international pressure, the Belgian Government repealed the country's far reaching *universal jurisdiction* statute, and instead incorporated limited provisions for *universal jurisdiction* into the country's criminal code (*Code Pénal Belge*) and preliminary title of the code of criminal procedure (*Titre préliminaire du Code de procédure pénale*).¹¹ The repealing of Belgium's *universal jurisdiction* statute elicited howls of protest across the world by

7. See, e.g., Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug. 2001, at 86, (where the author offers up a broad general critique of universal jurisdiction); Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003, at 47, (where the authors, in discussing the general concept of universal jurisdiction, warn that it has the potential to engender international conflict).

8. *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions* [Law of June 16, 1993], June 16, 1993 (Moniteur Belge, Aug. 5, 1993) (Belg.).

9. See *Loi relative à la répression des violations graves du droit international humanitaire* [Law of February 10, 1999], Feb. 10, 1999 (Moniteur Belge, Mar. 23, 1999) (Belg.).

10. See *Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*. [Law of April 23, 2003], Apr. 23, 2003 (Moniteur Belge, May 7, 2003) (Belg.).

11. See *Loi relative à la répression des violations graves du droit international humanitaire* [Law of Aug. 5, 2003], Aug. 5, 2003 (Moniteur Belge, Aug. 7, 2003) (Belg.).

many in the human rights field who lamented at how a powerful tool for bringing international criminals to dock had been lost.¹² Legal scholars were more sanguine in their post-mortems, with many arguing that Belgium's *universal jurisdiction* statute, while laudable in theory, ultimately put the country in an impossible situation vis-a-vis the other countries within the international system.¹³

The purpose of this Article is to present a detailed survey on the history and process of *universal jurisdiction* as practiced in Belgium from 1993 to the present. Through this detailed presentation, this Article will conclude with a much more sobering and critical analysis on Belgium's *universal jurisdiction* statute than that which has been provided to date by other legal scholars. This Article will argue that, far from presenting a powerful tool for justice, Belgium's *universal jurisdiction* statute violated fundamental norms of not only international law, but domestic Belgian law as well. In correcting some of these more egregious violations, the new Belgian *universal jurisdiction* scheme that was created by the August 2003 annulment of the country's specialized statute (and subsequent incorporation of limited provisions for *universal jurisdiction* into the Belgian *Code Pénal* and *Titre préliminaire du Code de procédure pénale*) represents a step forward for fundamental justice.

Part II of this Article will provide a brief summary of the basic sources (*i.e.* custom and treaty) of international law. Building on the background provided in Part II on international law generally, part III of this Article shall explain the basis for *universal jurisdiction* in international law. Part IV of this Article will survey the history of *universal jurisdiction* in Belgium through a detailed presentation and explanation of the various *universal jurisdiction* schemes the country has employed from 1993 to the present day; it will conclude with a survey of the range of punishments and the types of specific defenses possible for alleged commissions of international crimes under the current system of *universal jurisdiction* in Belgium. Part V of this Article will present a critical assessment of the various *universal jurisdiction* schemes employed by Belgium and explain why the schemes employed up until August 2003 violated fundamental norms of not only

12. See, e.g., Lauri King-Irani, *On Learning Lessons: Belgium's Universal Jurisdiction Law Under Threat*, COMMON DREAMS, Jun. 25, 2003, available at <http://www.commondreams.org/views03/0625-10.htm> (last visited Oct. 29, 2009); *Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS WATCH, Aug. 1, 2003, available at <http://www.hrw.org/en/news/2003/08/01/belgium-universal-jurisdiction-law-repealed> (last visited Oct. 9, 2009).

13. See, e.g., Luc Reydam, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT'L CRIM. JUST. 679, 679 (2003); Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 401 (2005).

international law, but domestic Belgian law as well; it will end by making a case why the current *universal jurisdiction* scheme in place in Belgium post August 2003 represents a step forward, not backwards, for fundamental justice.

II. SOURCES OF INTERNATIONAL LAW (CUSTOM AND TREATY)

Before one can delve into any meaningful discussion of *universal jurisdiction*, either in the international context generally, or more specifically in the context of the domestic Belgian experience, a brief introduction to the sources of international law must be provided, for only with such background knowledge firmly understood, can one then go on to investigate the basis for *universal jurisdiction* in international and domestic Belgian law.

A. Customary International Law

Customary international law finds its source in the widespread consistent practice of states.¹⁴ International custom is seen as a source of international law because the idea is that if states act in a particular consistent manner, then such states may be acting in such a manner because they have a sense of legal obligation—dubbed *opinio juris*. If enough states act in said consistent manner for a long enough period of time, out of a sense of legal obligation, then a new rule of international law is said to be created.¹⁵ The system can thus be seen as circular in that states are in effect creating a rule, through acting in conformance to said rule, due to the reason that they feel legally obligated to do so. Evidence of the development of customary international law can consist of the statements of foreign ministers, the statements of international organizations, diplomatic correspondence, the opinions of respected legal scholars, etc. Customary international law also depends upon the consent of nation-states. Consent can either be explicit or implicit.¹⁶ Thus, if a nation-state does not wish to be bound by a new rule of customary international law, then it must vocally object and (in effect) announce

14. THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 24–25 (3d ed. 2002).

15. Note that there can also exist regional customary law that is binding on a group of nation-states in a particular region, but not upon the international system as a whole. See *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20, 1950).

16. I.e., if a rule of customary international law is emerging and a nation-state remains silent, then this can be seen as giving implicit consent that the nation-state will be bound by the new customary rule, see Restatement (Third) of the Foreign Relations Law of the United States § 102 comment d (1987).

that it does not view itself as so bound.¹⁷ This objection must be consistently reiterated, lest it be lost.¹⁸ New nations, it is generally accepted,¹⁹ cannot choose between the various rules of customary international law—they are bound by all of the accepted customary rules (at the point of independence).²⁰ It matters not that such newly independent states were unable to object to rules of customary international law as they were being formed.

Notwithstanding the above, it is important to note, that there are certain rules of customary international law that are considered so vital, that they cannot be contracted out by individual states through treaty—such rules are dubbed *jus cogens* norms.²¹ Running parallel to *jus cogens* norms are what are called obligations *erga omnes*. Obligations *erga omnes* are obligations considered so vital and important within the international system (usually in the form of *jus cogens* norms), that any state (whether directly affected or not) may sue another state in order to compel that the obligation be met.²²

B. Conventional International Law

Conventional international law finds its source in “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.”²³ Bilateral treaties are seen as creating obligations specific to the two states that signed them. Usually, such conventions or treaties, if only entered into between two states, are binding on the two states in question, but are not generally a source of international law. Multilateral treaties, on the other hand, can transform into sources of customary international law, binding on all states in the international system, whether they are parties to the particular treaty or not, if a large enough portion of non-

17. See Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18, 1951).

18. See Lisa Kline Arnett, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 260 n.113 (1988).

19. For the minority-held contra view see Michel Virally, *The Sources of International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 138 (Max Sorensen ed., 1968).

20. Restatement (Third) of the Foreign Relations Law of the United States), *supra* note 16, at § 102 comment d.

21. Vienna Convention on the Law of Treaties, arts. 53, 64, 71, May 23, 1969, 155 U.N.T.S. 331; DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 23 (1st ed. 2001).

22. Case Concerning the Barcelona Traction, Light and Power Company, Limited. (Belg. v. Spain), 1970 I.C.J. 4, 33 (Feb. 5, 1970); BEDERMAN, *supra* note 21, at 23.

23. Statute of the International Court of Justice, art. 38(1)(a), June 26, 1945.

signatory states in the international system adhere to their provisions out of a sense of legal obligation, *i.e. opinio juris*.²⁴

III. THE BASIS OF UNIVERSAL JURISDICTION IN INTERNATIONAL LAW

Before one undertakes a serious discussion on the basis of *universal jurisdiction* in international law, it is useful to quickly survey the other recognized theories of jurisdiction within the system. In addition to *universal jurisdiction*, international law traditionally has recognized four other basic theories of jurisdiction whereby states may claim a legal right to prosecute alleged crimes. The first, *territorial jurisdiction*, rests on the traditional notion of state sovereignty, and holds that a state may assert jurisdiction over an offence that has taken place on its territory.²⁵ The second, *personnalité active* jurisdiction rests on the idea that a state has an interest in regulating the behavior of its nationals, and holds that a state may assert jurisdiction over an offence (even if committed abroad) if the alleged perpetrator is a national of said state.²⁶ The third, *personnalité passive* jurisdiction, is the opposite of *personnalité active* jurisdiction, and holds that a state may assert jurisdiction over an offence (even if committed abroad) if the alleged *victim* is a national of said state.²⁷ The fourth and final theory of jurisdiction is based on what is known as the *protective principle*—the *protective principle* rests on the idea that states have a right to protect their security and holds that a state may assert jurisdiction over an offence (even if committed abroad) if said alleged offence is deemed prejudicial to the state's security (e.g. an alleged coup plot planned abroad, etc.).²⁸ Of all of these theories of jurisdiction discussed, *universal jurisdiction* is perhaps the most primitive in that there is still some disagreement (amongst scholars and commentators) in regards to how exactly it operates.²⁹ These disagreements ultimately boil down to two competing interpretations within international law of how *universal jurisdiction* can be asserted.

The first interpretation of how *universal jurisdiction* can be asserted, which will henceforth be labeled as the *expansive interpretation* of *universal jurisdiction*, holds that if an international offence violates

24. BUERGENTHAL & MURPHY, *supra* note 14, at 24–25.

25. BEDERMAN, *supra* note 21, at 175–177; MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 320 (4th ed. 2003).

26. BEDERMAN, *supra* note 21, at 178; Janis, *supra* note 25, at 325–326.

27. BEDERMAN, *supra* note 21, at 181; Janis, *supra* note 25, at 325–326.

28. BEDERMAN, *supra* note 21, at 180; Janis, *supra* note 25, at 324.

29. See BANTEKAS & NASH, *supra* note 2, at 86.

accepted *jus cogens* norms of international law, then automatically *universal jurisdiction* (by any state within the international system) can be attached.³⁰ This view has grown out of the idea that once an international offence crosses the threshold into a violation of a *jus cogens* norm, then *universal jurisdiction* automatically attaches through the *erga omnes* obligations of states.³¹ While influential, this first interpretation is by no means accepted unanimously.³²

The second interpretation of how *universal jurisdiction* can be asserted, which will henceforth be labeled as the *limited interpretation* of *universal jurisdiction*, holds that for *universal jurisdiction* to attach to an international offence, there must be some type of consent on the hand of domestic states within the international system (*i.e.* states must be given the option to consent to exercise *universal jurisdiction*—it is not an obligation that they are necessarily obligated to assert).³³ Whether the offence in question need necessarily be a *jus cogens* norm, or rather simply any point of customary or conventional international law, is not a settled question under the *limited interpretation* of *universal jurisdiction*. What is settled is that the domestic state in question must consent to exercise *universal jurisdiction* over a hypothetical offence through either its signature on an international treaty or domestic enabling legislation, either of which must contain an express grant and acknowledgment of *universal jurisdiction*.³⁴ The natural conclusion of this *limited theory* of *universal jurisdiction* would then seem to be that domestic states which have consented to the exercise of *universal jurisdiction* (either through international treaty or domestic enabling legislation) could then also limit and control (*i.e.* through the establishment of set rules of criminal procedure and the like) the extent to which the jurisdiction could be utilized.

30. See *Regina v. Bow St. Stipendiary Magis.*, [1999] 2 ALL E.R. 97, 177 (H.L.) (appeal taken from Spain) (where Lord Millet presents this interpretation).

31. See RANDALL, *supra* note 2, at 831; Mark R. von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 BROOK. J. INT'L L. 111, 151 (1996).

32. See ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 57 (Oxford Univ. Press 1994); Alfred P. Rubin, *Actio Popularis, Jus Cogens, and Offences Erga Omnes*, 35 NEW ENG. L. REV. 265, 277 (2000–2001).

33. BANTEKAS & NASH, *supra* note 2, at 86.

34. *Id.*

IV. UNIVERSAL JURISDICTION AS PRACTICED IN BELGIUM (1993–PRESENT)

A. Background on the Belgian Political and Legal System

1. Political Background

The Kingdom of Belgium is a constitutional monarchy located at the western tip of Europe. Politically, the Kingdom functions as a federal state, with economic, educational, and cultural powers devolved to the three recognized linguistic communities: Walloon (French speaking), Flemish (Dutch speaking), and German speaking.³⁵ The criminal law, however, is handled at the federal level.³⁶

2. Legal Background

a. Initiation of a Criminal Case and Structure of the Courts

A criminal case in Belgium begins with a police inquiry which can be undertaken by the police independently or at the request of a prejudiced party (this unique feature is known as the *constitution de partie civile*³⁷). The police inquiry is under the nominal control of the Public Prosecutor (*Procureur du Roi*).³⁸ It is on the basis of this inquiry that

35. ANDRE ALEN & BERNARD TILLEMANS, *BELGIAN CONSTITUTIONAL LAW* ¶29 (1st ed. 1992).

36. Lieven Dupont & Cyrille Fijnaut, *Criminal Law (Belgium)*, in *INT'L ENCYCLOPEDIA OF LAWS, (CRIMINAL LAW)* ¶ 9 (R. Blanpain & M. Colucci eds., Supp. Aug. 2009) (1993).

37. CODE D'INSTRUCTION CRIMINELLE BELGE [CODE D'INST. CRIM.], art. 63, 66–68 (Belg.). The *constitution de partie civile* allows for the alleged victim of a crime to declare themselves a “civil party” in a written report sent to the Public Prosecutor. The report must contain a request for damages. The person claiming *partie civile* status must pay a deposit (to cover legal costs incurred as the result of the investigation), and must either reside in the district where the claim is being made, or domicile himself (through the clerk's office) at the Court of First Instance in the district where the claim is being made. The actual constitution of *partie civile* status is made before an investigative judge. By assuming “civil party” status a person can require that the authorities instigate an investigation (*i.e.* into the alleged crime), affect the investigatory and procedural actions of the judge assigned to the case, gain access to case evidence and records, and even propose procedural steps (*i.e.* when to obtain a search warrant, when to initiate an arrest) to the authorities. See also Luc Walley, Paper presented at the Social Science Research Council Workshop on International Justice: *The Sabra & Shatila Massacre and the Belgian Universal Jurisdiction* (Nov. 2003) (transcript available at the Social Science Research Council).

38. The Public Prosecutor can be thought of as the equivalent of a District Attorney in the United States. There are twenty-six Public Prosecutor's in the Kingdom of Belgium (one for each judicial district the county is divided into), who are in turn assisted by Substitutes (the equivalent of assistant District Attorney's in the United States). See Dupont & Fijnaut, *supra* note 36, at ¶ 24. CODE D'INST. CRIM. art. 22 (Belg.). It should also be noted that the control of the Public Prosecutor in initiating a case is not absolute, in that under Article 151 of the Belgian Constitution, the Minister of

the Public Prosecutor decides whether to initiate criminal action or drop the inquiry.³⁹ There is no defined procedure for this inquiry. Rather the Public Prosecutor is charged with simply "identifying the infraction, collecting the evidence, and delivering the perpetrator."⁴⁰ If the decision is made to initiate a case, the Public Prosecutor will either summon the accused to court in order to begin proceedings, or, if he feels a more detailed investigation is warranted, summon the assistance of an investigative judge.⁴¹ At the end of this investigation a decision is made, based on the evidence collected, whether to put the case on trial or to declare a *nonsuit*.⁴² A key point to understand here is that the Public Prosecutor has very little personal discretion, within this process, on whether to put a case on trial. If the Public Prosecutor determines that a crime has been committed he must refer the case for prosecution.⁴³ If the decision is made to put the case on trial, the case is then referred to the competent jurisdiction, which has the final decision on the matter.

Minor offences are tried by the Police Courts, misdemeanors holding a penalty of imprisonment from eight days to five years are tried by the Criminal Chamber of the Courts of First Instance; and serious offences that carry a penalty of death, hard labor, or imprisonment over five years are tried by the Court of Assizes (in this jurisdiction, trial by jury is guaranteed).⁴⁴ In principle, an appeal is almost always possible.⁴⁵ Appeals are lodged within one of the five Courts of Appeal. Appeals from the decisions of the Courts of Appeal are lodged with the Court of Cassation, Belgium's highest judicial body for non-constitutional affairs. The Court of Cassation is not empowered to deal with the facts of the case submitted to it; rather it may only look to issues of law and procedure.⁴⁶ Aside from the Court of Cassation, sits the Court of Arbitration (the country's

Justice while unable to *prevent* the Public Prosecutor from undertaking an investigation, can force the Public Prosecutor to *initiate* one.

39. Dupont & Fijnaut, *supra* note 36, at ¶¶ 377–378.

40. CODE D'INST. CRIM. art. 8 (Belg.).

41. Dupont & Fijnaut, *supra* note 36, at ¶¶ 380–381.

42. A *nonsuit* can be thought of as a dismissal of charges.

43. Dupont & Fijnaut, *supra* note 36, at ¶¶ 389–392.

44. ALEN & TILLEMANN, *supra* note 35, at ¶ 206.

45. *Id.* at ¶ 207.

46. Dupont & Fijnaut, *supra* note 36, at ¶ 356.

constitutional court),⁴⁷ which is the only court in the country empowered to annul laws passed by either the Federal Parliament or Regional Councils.⁴⁸

b. A Civil Law System

In that the Belgian legal system is a civil or Roman law system, legislation has more legal significance than past judicial decisions. Belgian courts are strictly limited to the application of legislation. Court decisions naturally involve interpretation, but the interpretation is not precedent that is binding on future courts that must consider the same legislation.⁴⁹ The theory then is that Belgian courts look at legislation anew, and in a vacuum, each time they consider a law.⁵⁰ In reality however, similar decisions made by earlier courts are important and persuasive authority, though of course, not controlling.⁵¹ Also, there has evolved in Belgian jurisprudence a legal principle called *jurisprudence constante*. *Jurisprudence constante* holds that when five judicial decisions regarding a similar subject reach the same result, they acquire the status of a *written authority*.⁵² Such a status does not mark the decisions as controlling precedent, but it does cement their position as persuasive authority.

The Belgian Constitution contains several general protections that relate to the application of criminal law and should thus be kept in mind: a person may not be prosecuted save in a manner laid down by law, and in the manner proscribed by said law.⁵³ No prosecution may be commenced and no penalty may be applied in the absence of a law.⁵⁴ The two above protections constitute what is known in Belgian Constitutional Law as the *principle of legality*.⁵⁵

47. In 2007 the Court of Arbitration was re-named the Constitutional Court. This being said, the Court will nevertheless be referred to by its *previous* name (*i.e.* the Court of Arbitration) throughout this Article.

48. Dupont & Fijnaut, *supra* note 36, at ¶¶ 8–9.

49. MONITEUR BELGE, THE CONSTITUTION AND THE BELGIAN CIVIL CODE 3 (John H. Crabb trans., Fred B. Rothman & Co. 1982).

50. *Id.* at 3–4.

51. *Id.* at 4.

52. *Id.*

53. CONSTITUTION BELGE [CONST. BELG.] art. 12 (Belg.).

54. *Id.* at art. 14.

55. Alain De Nauw & Joelle Rozie, *Criminal Law*, in INTRODUCTION TO BELGIUM LAW 402 (Hubert Bocken & Walter De Bondt eds., Kluwer Law International 2001).

c. The Domestic Statutory Basis for Extra-territorial Jurisdiction

As with any typical sovereign nation-state, Belgium reserves the right to exercise jurisdiction over crimes committed on its territory (whether committed by citizens or non-citizens).⁵⁶ This being said, the *Code Pénal* allows for the extra-territorial application of Belgian criminal law following the principle of *universal jurisdiction*,⁵⁷ but such application must be governed by a domestic statute.⁵⁸ This way it can be seen that the domestic practice of Belgium conforms to the *limited interpretation of universal jurisdiction* discussed earlier.

B. Universal Jurisdiction

1. *Loi du 16 Juin*

The push for a *universal jurisdiction* in Belgium was actually a long one, beginning in earnest in the early 1950s when the Ministry of Foreign Affairs began the process of drafting a *universal jurisdiction* statute to meet the country's obligations to prosecute war crimes under the Geneva Conventions.⁵⁹ This push eventually stalled, only to revive again in the late 1980s and early 1990s in the shadow of the destructive civil wars in Yugoslavia and Somalia, and the genocide in Rwanda.⁶⁰ The movement culminated in the Federal Parliament with the passage of the *Loi du 16 Juin* in 1993 which granted domestic Belgian courts jurisdiction over war crimes.⁶¹ In 1999, the *Loi du 16 Juin* was replaced by the *Loi du 10 Février*.⁶² The *Loi du 10 Février* duplicated the *Loi du 16 Juin* in every respect save that it extended the international offences covered from just war crimes to also crimes against humanity and genocide; and that it did not recognize the official immunity enjoyed (by foreign heads of state and members of government) under international law.

56. CODE PÉNAL BELGE [CODE PEN. BEL.] art. 3 (Belg.).

57. Dupont & Fijnaut, *supra* note 36, at ¶ 93.

58. CODE PEN. BEL. art. 4 (Belg.).

59. See Geneva Convention I, *supra* note 5, at art. 49; Geneva Convention II, *supra* note 5, at art. 50; Geneva Convention III, *supra* note 5, at art. 129; Geneva Convention IV, *supra* note 5, at art. 146. Walley, *supra* note 37, at ¶¶ 3–4.

60. Walley, *supra* note 37, at ¶¶ 5–6.

61. *Law of June 16, 1993*, *supra* note 8, (Belg.).

62. *Law of February 10, 1999*, *supra* note 9, (Belg.).

2. Loi du 10 Février

The *Loi du 10 Février* granted Belgian courts the *universal jurisdiction* to try any of the listed offences (*i.e.* war crimes,⁶³ crimes against humanity,⁶⁴ and genocide⁶⁵) that were brought before them, regardless of where the crime was committed.⁶⁶ Jurisdiction under the statute was based primarily upon subject matter, rather than the physical presence of either party, or where the offence occurred. This of course raises the question then of whether the statute allowed for trials in absentia. In one case brought before it testing this proposition,⁶⁷ the statute was interpreted by the Court of Cassation to allow for trials in absentia.⁶⁸ The physical presence of the accused was thus not required for judicial proceedings to commence.⁶⁹

The *Loi du 10 Février* was unusual under Belgian law because it expressly did not recognize the official immunity enjoyed (by foreign heads of state and members of government) under international law (unlike its predecessor, the *Loi du 16 Juin*, which had).⁷⁰ As such, foreign sitting heads of state and government ministers could be prosecuted under the statute. This being said, in one case brought before it testing this proposition,⁷¹ the Court of Cassation held

63. *Id.* at art. 1(3).

64. *Id.* at art. 1(2).

65. *Id.* at art. 1(1).

66. *Id.* at art. 7.

67. The term "one case" is stressed here. If we recall from § IV (A)(2)(a) of this article, the Court of Cassation does not have the power to judicially review legislation (only the Court of Arbitration has this power); if we also recall from § IV (A)(2)(b) of this article, Belgium is a civil or roman law legal system, where the decisions of courts in individual cases are not controlling on others.

68. Court of Cassation, Case No. P.02.1139.F, at 02.1139.F/4–02.1139F/6, (Feb. 12, 2003) (Belg.), *available at* http://www.ulb.ac.be/droit/cdi/Site/Developpements_judiciaires_files/Cass12Fevrier2003.pdf (last visited Oct. 29, 2009).

69. *Id.*

70. *Law of February 10, 1999*, *supra* note 9, at art. 5 (3) (Belg.). The reason why the *Loi du 10 Février*, unlike the *Loi du 16 Juin*, did not recognize official immunities rests primarily with the timing of the revision, 1998–1999, which coincided with the adoption of the Rome Statute of the International Criminal Court. The Belgian minister of justice at the time was specifically influenced by article 27 of the Rome Statute, in which the International Criminal Court expressly refused to recognize the traditional immunity enjoyed by sitting heads of state and members of government. See *Rapport de la Commission de la Justice du Sénat*, Dec. 1, 1998 (Doc. No. 1–749/3).

71. Court of Cassation, at 02.1139.F/6–02.1139.F/9 (Feb. 12, 2003) (Belg.), *available at* http://www.ulb.ac.be/droit/cdi/Site/Developpements_judiciaires_files/Cass12Fevrier2003.pdf (last visited Oct. 29, 2009).

members of foreign national governments could not be prosecuted whilst still in office, but instead could only be prosecuted once they had left office.⁷² The Court of Cassation based its decision on the understanding that customary international law had afforded members of national governments immunity for official acts and thus a shield from prosecutions whilst in office (immunity *ratione materiae*⁷³).⁷⁴

The definitions of war crimes, crimes against humanity, and genocide covered in the *Loi du 10 Février* were designed to demonstrate that the statute, though a domestic Belgian construction, was very much an instrument of international law.⁷⁵ In its identification of the covered offences, the statute sought to incorporate those definitions accepted in international law. As such, in its definition of the covered offence of war crimes, the statute referred to and replicated the definitions provided by the relevant sections of the Geneva Conventions.⁷⁶ In its definition of the covered offence of crimes against humanity, the statute referred to and replicated the definitions provided by the relevant sections of the Rome statute of the International Criminal Court (which itself was a codification of the relevant international law up to that point).⁷⁷ Finally, in its definition of the covered offence of genocide, the statute referred to and replicated the definitions provided by the relevant sections of the Genocide Convention.⁷⁸

Despite the fact that it had only been used successfully once, in the so-called “Butare Four” case,⁷⁹ by 2003 the *Loi du 10 Février* was

72. *Id.*

73. For a detailed comparison of the absolute immunity *ratione personae* (which grants heads of state, and certain diplomatic officials absolute criminal immunity for all actions committed whilst in office, both official and otherwise) to the more limited immunity *ratione materiae* (which grants state officials immunity for official actions committed while in office), see BANTEKAS & NASH, *supra* note 2, at 100-02.

74. Court of Cassation, at 02.1139.F/6–02.1139.F/9 (Feb. 12, 2003) (Belg.), available at http://www.ulb.ac.be/droit/cdi/Site/Developpements_judiciaires_files/Cass12Février2003.pdf (last visited Oct. 29, 2009).

75. Stefaan Smis & Kim Van der Borgh, *Belgium: Act Concerning The Punishment of Grave Breaches of International Humanitarian Law*, 38 INT'L. LEGAL MATERIALS 918, 919 (1999).

76. *Law of February 10, 1999*, *supra* note 9, at art. 1(3) (Belg.).

77. *Id.* at art. 1(2).

78. *Id.* at art.1(1).

79. The “Butare Four” case involved four Rwandans who had been accused in taking part in the Rwandan Genocide of the early 1990s. The four had, in the years since the Genocide, taken up residence in Belgium. In 2001 the four accused were found guilty under the *Loi du 10 Février* and

causing the Belgian Government many problems. Many advocacy groups had taken advantage of the *constitution de partie civile*⁸⁰ to initiate criminal investigations in the Belgian courts against numerous heads of state and international personages.⁸¹ As several of these investigations involved current or past American Government officials,⁸² the U.S. Government warned the Belgian Government that the status of Brussels as NATO⁸³ Headquarters could be imperiled if its former and current government officials continued to be targeted.⁸⁴

In a bid to end such actions, which were causing damage to Belgium's foreign relations with several countries (aside from the U.S.), the Belgian Parliament decided to radically amend the *Loi du 10 Février*. The *Loi du 10 Février* was amended through the passage of the *Loi du 23 Avril*⁸⁵ in mid-2003.

3. Loi du 23 Avril

The *Loi du 23 Avril* amended the *Loi du 10 Février* in several key respects. Under the new amendments the Federal Attorney General of Belgium (*Procureur fédéral*) functioned as a gatekeeper of sorts. For alleged offences (*i.e.* war crimes, crimes against humanity, and genocide) which occurred outside of Belgium and in which the victim or alleged perpetrator were not Belgian citizens and did not live in the country, the decision of whether to initiate a case would no longer follow the regular prescribed course of criminal procedure (*i.e.* in the hands of individual Public Prosecutors),⁸⁶ and would instead rest in the hands of the Federal Attorney General.⁸⁷ As such, any requests for the initiation of a criminal case made by alleged victims through

sentenced to lengthy prison terms. See Luc Reydam, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST. 428 (2003), for a detailed discussion of the case.

80. See sources cited and accompanying text, *supra* note 37.

81. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 890 (2003).

82. *Id.* A list which included former President George Bush Sr., former secretary of Defense and current Vice-President Dick Cheney, and former chairman of the joint chiefs of staff and current Secretary of State Colin Powell.

83. The North Atlantic Treaty Organization.

84. See Richard Bernstein, *Belgium Rethinks Its Prosecutorial Zeal*, N.Y. TIMES, Apr. 1, 2003, at A8.

85. See *Law of April 23, 2003*, *supra* note 10 (Belg.).

86. See *supra* § IV (A)(2)(a).

87. See *Law of April 23, 2003*, *supra* note 10 at art. 5 (Belg.).

the *constitution de partie civile* process would also be controlled through the Federal Attorney General. The result of this provision was to, in effect, strip away the option of *constitution de partie civile* from alleged victims. Under normal Belgian criminal procedure, the process for obtaining *partie civile* status is to simply file the relevant report⁸⁸ with the Public Prosecutor of one's district—if the report is properly filed *partie civile* status must be granted.⁸⁹ By granting the Federal Attorney General control (and veto) over the process, the *Loi du 23 Avril* amendments to the *Loi du 10 Février* were annulling the option of *constitution de partie civile* through the back door.

Under the *Loi du 23 Avril* amendments to the *Loi du 10 Février*, once presented with a complaint, the Federal Attorney General was required to request that an investigative judge investigate it unless it was determined to be unfounded or not actionable under the statute.⁹⁰ In addition, the Federal Attorney General could decide to transfer the charges at issue to either the state in which the crime was committed or to the state where the alleged perpetrator lived as long as either state was judged to have “competent, independent, impartial, and fair” courts.⁹¹ These states would also have to guarantee the parties the “right to due process” and have legislation in place that criminalized the alleged offence(s).⁹² A third option allowed the Federal Attorney General to transfer the case to a competent international tribunal (including the International Criminal Court).⁹³

The *ratione materiae* immunity granted to the officials of foreign state governments under international law was recognized by the amendments provided by the *Loi du 23 Avril*.⁹⁴ This being said however, it should bear noting that the more expansive *ratione personae* immunity granted by international law to sitting heads of state was not recognized.⁹⁵

The intended effects of the amendments made by the *Loi du 23 Avril* to the *Loi du 10 Février* were to filter out of the Belgian judicial system the great majority of criminal suits that had been filed against various heads of state and international personages under the *Loi du 10 Février* (through utilizing the Federal Attorney General to act as a gatekeeper for all actions brought under the statute).

88. See sources cited and accompanying text, *supra* note 37.

89. CODE D'INST. CRIM. art. 66 (Belg.).

90. See *Law of April 23, 2003*, *supra* note 10 at art. 5 (Belg.).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at art. 4(3).

95. See sources cited and accompanying text, *supra* note 73.

Despite the limiting provisions added to the *Loi du 10 Février* by the amendments provided by the *Loi du 23 Avril*, the Belgian Government decided to, in August 2003, completely repeal the *Loi du 10 Février*, and instead incorporated limited provisions for *universal jurisdiction* into the country's criminal code (*Code Pénal*) and preliminary title of the code of criminal procedure (*Titre préliminaire du Code de procédure pénale*) through the *Loi du 5 Août*.⁹⁶

4. Loi du 5 Août

The *Loi du 5 Août* radically altered the *universal jurisdiction* scheme in place in Belgium up to that point. The act completely repealed the *Loi du 10 Février*⁹⁷ and instead incorporated selected provisions from it into the *Code Pénal* and *Titre préliminaire du Code de procédure pénale*. The *universal jurisdiction* scheme employed by Belgium from this point onwards would be much more restrictive in scope than what had preceded it.

The *Loi du 5 Août* folded in the offences of war crimes, crimes against humanity, and genocide originally covered by the now repealed *Loi du 10 Février* into Article 136 of the *Code Pénal*.⁹⁸ The definitions of what constituted the listed offences (*i.e.* war crimes, crimes against humanity, and genocide) were the same as those employed by the *Loi du 10 Février* (which, recall, sought to incorporate those definitions accepted in international law).

Much like the amendments made to the *Loi du 10 Février* by the *Loi du 23 Avril*, the *Loi du 5 Août* also sought to draft the Federal Attorney General of Belgium as a gatekeeper for complaints. The key difference, however, was that the universe of complaints open to the Federal Attorney General to monitor was reduced considerably. No longer could Belgian courts claim jurisdiction over international offences (*i.e.* war crimes, crimes against humanity, and genocide) which occurred outside of Belgium and in which the victim or alleged perpetrator were not Belgian residents. The newly amended Article 6 of the *Titre préliminaire du Code de procédure pénale* granted Belgian courts jurisdiction for offences only if committed abroad by a Belgian citizen or resident;⁹⁹ whilst the newly amended Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale* granted

96. See Law of August 5, 2003, *supra* note 11 (Belg.).

97. *Id.* at art. 27.

98. *Id.* at arts. 6–8.

99. *Id.* at art. 14.

Belgian courts jurisdiction for offences committed against Belgian citizens or residents.¹⁰⁰ For such cases, the decision of whether to initiate a case would no longer follow the regular prescribed course of criminal procedure (i.e. in the hands of individual Public Prosecutors),¹⁰¹ but would instead rest in the hands of the Federal Attorney General.¹⁰² As such, any requests for the initiation of a criminal case made by alleged victims through the *constitution de partie civile* process would also be controlled through the Federal Attorney General. Much like in the case of the similar provision in the *Loi du 23 Avril*,¹⁰³ the net effect of this provision was to strip away the option of *constitution de partie civile* from alleged victims. Recall that under normal Belgian criminal procedure, the process for obtaining *partie civile* status is to simply file the relevant report¹⁰⁴ with the Public Prosecutor of one's district—if the report is properly filed *partie civile* status must be granted.¹⁰⁵ By granting the Federal Attorney General control (and veto) over the process, the *Loi du 5 Août* amendments to Article 10 of the *Titre préliminaire du Code de procédure pénale* were annulling the option of *constitution de partie civile* through the back door.

Under the *Loi du 5 Août* amendments to Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale*, once presented with a complaint, the Federal Attorney General was required to request that an investigative judge investigate it unless it was determined to be unfounded or not actionable.¹⁰⁶ In addition, the Federal Attorney General could decide to transfer the charges at issue to either the state in which the crime was committed or to the state where the alleged perpetrator lived as long as either state was judged to have “competent, independent, impartial, and fair” courts.¹⁰⁷ A second option allowed the Federal Attorney General to transfer the case to a competent international tribunal (including the International Criminal Court).¹⁰⁸ The net effect of these new amendments was to create a more flexible, fair, and rational system of *universal jurisdiction*. Unlike Public Prosecutors who, recall,¹⁰⁹ have very little discretion in choosing whether to refer

100. *Id.* at art. 16, 18.

101. *See supra* § IV (A)(2)(a).

102. *See Law of August 5, 2003, supra* note 11 at art. 16, 18 (Belg.).

103. *See supra* § IV (B)(3).

104. *See* sources cited and accompanying text, *supra* note 37.

105. *See* CODE D'INST. CRIM. art. 66 (Belg.).

106. *See Law of August 5, 2003, supra* note 11, at art. 16, 18 (Belg.).

107. *Id.* at art. 16, 18.

108. *Id.* at art. 18.

109. *See supra* § IV (A)(2)(a).

a case for prosecution, and must prosecute if evidence of a crime is uncovered during the course of the initial investigation; the Federal Attorney General under the new scheme could (subject to judicial oversight) pursue other options.

Unlike the *Loi du 23 Avril* amendments to the *Loi du 10 Février* which, recall, while recognizing the narrower *ratione materiae* immunity granted to officials of foreign state governments under international law, did not recognize the more expansive *ratione personae* immunity granted by international law to sitting heads of state,¹¹⁰ the *Loi du 5 Août* amendments to Article 1 of the *Titre préliminaire du Code de procédure pénale*, recognized both *ratione materiae* and *ratione personae* immunity for the listed offences.¹¹¹

In late March 2005, responding to a suit launched by the *Ligue des droits de l'homme*, and the *Liga voor Mensenrechten*, a pair of Walloon and Flemish human rights organizations respectively, Belgium's Court of Arbitration, the country's constitutional court (which is the only court in the country empowered to annul laws passed by either the Federal Parliament or Regional Councils),¹¹² annulled Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale* as amended by the *Loi du 5 Août*.¹¹³

The plaintiffs argued that by folding violations of international criminal law (*i.e.* war crimes, crimes against humanity, and genocide) into the *Code Pénal*, the Belgian government had expressed a willingness to treat such crimes in the same manner in which all other crimes in the *Code Pénal* were governed.¹¹⁴ Given this, the plaintiffs argued that it was not unreasonable to expect that the *constitution de partie civile*¹¹⁵ process would be available to prejudiced parties (*i.e.* just as it was available for other offences in the *Code Pénal*).¹¹⁶ The plaintiffs argued that the different treatment afforded to victims of war crimes, crimes against humanity, and genocide versus the treatment afforded to the victims of other *Code Pénal* offences was contrary to both the European Convention of Human Rights (Article 6) and the Constitution of Belgium (Articles 10 and 11).¹¹⁷

The Court of Arbitration found that indeed Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale* as amended by the *Loi du 5*

110. See *supra* § IV (B)(3).

111. See *Law of August 5, 2003*, *supra* note 11, at art. 13 (Belg.).

112. See *supra* § IV (A)(2)(a).

113. See Court of Arbitration, Case No. 62/2005, at 16 (Mar. 23, 2005) (Belg.).

114. *Id.* at 3.

115. See sources cited and accompanying text, *supra* note 37.

116. Court of Arbitration, Case No. 62/2005, at 3 (Mar. 23, 2005) (Belg.).

117. *Id.* at 4.

Août had created a difference in the way different victims were treated (*i.e.* through the preclusion of the *constitution de partie civile* for alleged victims of war crimes, crimes against humanity, and genocide).¹¹⁸ This being said, the Court also found that the Federal Parliament had the right to limit *universal jurisdiction* prosecutions in the country (given the adverse affect they could have on the country's international relations).¹¹⁹ However, in not allowing for any judicial oversight of the Federal Attorney General's power to allow for or reject prosecutions of war crimes, crimes against humanity, and genocide committed abroad,¹²⁰ the Federal Parliament had not tailored a solution that narrowly fit the goal it wished to pursue.¹²¹ While it was not unreasonable to give the Federal Attorney General control over the process,¹²² it was unreasonable not to provide some judicial oversight over the Federal Attorney General's role.¹²³

In response to the Court of Arbitration's decision to annul Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale* as amended by the *Loi du 5 Août*, the Belgian Government passed additional amendments to Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale* which would put them in line with the requirements requested by the Court of Arbitration (*i.e.* the gatekeeper role of the Federal Attorney General be subject to judicial oversight). The new amendments to Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale* were made by the *Loi du 22 Mai*¹²⁴ passed in mid-2006.

5. Loi du 22 Mai

The *Loi du 22 Mai* added more amendments (in addition to those already made by the *Loi du 5 Août*) to Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale*. The amendments were designed to add significant judicial oversight to the role of the Federal Attorney General in deciding whether to prosecute complaints arising out of offences (listed within Article 136 of the *Code Pénal* as amended by the *Loi du 5 Août*) committed abroad by Belgian citizens/residents or involving Belgian citizens/residents as victims. Under the new amendments, the decision of

118. *Id.* at 11.

119. *Id.* at 13.

120. *I.e.* where Belgian citizens/residents were either the perpetrators or victims.

121. Court of Arbitration, Case No. 62/2005, at 13 (Mar. 23, 2005) (Belg.).

122. *Id.* at 13–14.

123. *Id.* at 14–15.

124. See *Loi modifiant certaines dispositions de la loi du 17 avril 1878 contenant le Titre préliminaire du Code de procédure pénale, ainsi qu'une disposition de la loi du 5 août 2003 relative aux violations graves de droit international humanitaire*, [Law of May 22, 2006]. May 22, 2006 (*Moniteur Belg.* Jul. 7, 2006) (Belg.).

the Federal Attorney General not to pursue a case was subject to review by an appellate panel of judges.¹²⁵ In this way, the procedure for *universal jurisdiction* in Belgium was brought into balance. A happy medium was reached between the need to provide flexibility in the decision of whether to initiate a criminal prosecution and the very real need to guard against concentrating too much power over the process in the hands of a single judicial officer (*i.e.* the Federal Attorney General).

C. Punishment and Defenses (under Belgium's Current Universal Jurisdiction Scheme)

As the admittedly lengthy survey of Belgium's experience with *universal jurisdiction* has shown, the country has moved from a formerly expansive scheme, governed by special statute, to one more limited in scope, governed by Articles 6 (listing the class of perpetrator punishable) and 136 (listing the offenses that can be prosecuted) of the *Code Pénal*; and Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale* (listing the class of victims covered, and the procedure through which prosecution can commence). Given this, a survey can now be undertaken of the range of punishments and the types of specific defenses possible for alleged commissions of war crimes, crimes against humanity, and genocide under the current *universal jurisdiction* scheme in place in Belgium.

1. Punishment

Article 136 of the *Code Pénal* (as amended by the *Loi du 5 Août*) enumerates specific mandatory minimum sentences for the offences covered; the penalties range from sentences of ten to fifteen years imprisonment to life imprisonment.¹²⁶ However, just because Article 136 of the *Code Pénal* contains mandatory minimum sentences does not mean that the sentencing judge must apply said sentences. The criminal law of Belgium requires the sentencing judge to reduce the punishment if there are mitigating factors that ought be considered.¹²⁷ Along this same vein, extenuating circumstances can also be taken into account,¹²⁸ as can considerations relating to the personality of the defendant.¹²⁹

125. *Id.* at art. 2.

126. *See Law of August 5, 2003, supra* note 11, at art. 9 (Belg.).

127. CODE PEN. BEL. art. 78 (Belg.).

128. *Id.* at arts. 79–85.

129. De Nauw & Rozie, *supra* note 55, at 417.

Article 136 of the *Code Pénal* also covers a range of defendants. It covers those responsible for the commission of the offences covered, as well as those contributors whose role is limited to aiding in the commission of the offence by facilitating their commission or by manufacturing, constructing, transporting, converting any construction with the knowledge that said construction is intended to be used in the commission of the covered offences.¹³⁰

Article 136 of the *Code Pénal* provides for the punishment of non-completed breaches (attempt). It makes it a crime to issue orders to commit a covered offence, give proposals to commit a covered offence, partake in incitement to commit a covered offence, and fail to act to prevent a covered offence.¹³¹

The criminal law of Belgium holds that attempts to commit an offence are indeed punishable, but that they require three elements: the commencement of execution, a criminal intent, and a non-voluntary withdrawal (*i.e.* in the event withdrawal occurs).¹³² The first two elements are self explanatory, but the last element bears some discussion. If a withdrawal is undertaken voluntarily by the offender, then the offender cannot be held guilty of attempt.¹³³ Thus, if an offender gives a proposal to commit a covered offence, but then voluntarily retracts the proposal (*i.e.* before they have been acted upon); he cannot be found guilty of having committed a punishable attempt.

Article 136 of the *Code Pénal* provides for the punishment of participators in a covered offence by making it a crime to participate in the commission of such an offence.¹³⁴ Note that Belgian criminal law marks a distinction between contributors to the commission of an offence and participators to the commission of an offence.

The criminal law of Belgium holds that those who play a crucial participatory role in the commission of a crime are labeled as *coauteurs*.¹³⁵ Those who play a secondary participatory role in the commission of a crime are labeled as *complices*.¹³⁶ *Coauteurs* contribute directly to the commission of a crime, while *complices*

130. See *Law of August 5, 2003*, *supra* note 11, at art. 10 (Belg.).

131. *Id.* at art. 11.

132. CODE PEN. BEL. art. 51 (Belg.).

133. *Id.*

134. See *Law of August 5, 2003*, *supra* note 11, at art 11 (Belg.).

135. CODE PEN. BEL. art. 66 (Belg.).

136. *Id.* at art. 67.

grant useful aid and assistance.¹³⁷ *Coauteurs* are subject to the same punishment as the actual perpetrators of a crime,¹³⁸ while *complices* are subject to a lesser punishment.¹³⁹

2. Defenses

a. Available Defenses

The criminal law of Belgium provides for numerous criminal defenses: self defense and the defense of others,¹⁴⁰ physical duress,¹⁴¹ psychological duress,¹⁴² mistake and ignorance,¹⁴³ insanity,¹⁴⁴ and consanguinity and affinity.¹⁴⁵ These defenses are available to defendants charged under Article 136 of the *Code Pénal* (as amended by the *Loi du 5 Août*) for war crimes, crimes against humanity, and genocide.

b. Restricted Defenses

Article 136 of the *Code Pénal* explicitly restricts several of the defenses found in other sections of the *Code Pénal* and related jurisprudence. The defense of necessity to act in the national interest is expressly prohibited.¹⁴⁶ Thus, a defendant would be unable to argue that even though he committed a covered offence, he was justified in doing so because he was protecting the national interests of his country (e.g. fighting terrorism, fighting invasion, etc.). The defense of obedience to set law and command of authority¹⁴⁷ is expressly prohibited.¹⁴⁸ Thus, a defendant would be unable to argue that even though he committed a covered offence, he was justified in

137. De Nauw & Rozie, *supra* note 55, at 414.

138. CODE PEN. BEL. art. 80 (Belg.).

139. *Id.* at art. 81.

140. *Id.* at art. 416.

141. *Id.* at art. 71.

142. *Id.*

143. Not found in the *Code Pénal* but recognized by jurisprudence, see De Nauw & Rozie, *supra* note 55, at 414.

144. De Nauw & Rozie, *supra* note 55, at 412.

145. CODE PEN. BEL. art. 462 (Belg.).

146. See *Law of August 5, 2003*, *supra* note 11, at art 12 (Belg.).

147. CODE PEN. BEL. art. 70 (Belg.).

148. See *Law of August 5, 2003*, *supra* note 11, at art, 12 (Belg.).

doing so because he was acting in accordance to set law or because he was simply obeying the orders of a legal authority or superior.

V. AN ASSESSMENT OF UNIVERSAL JURISDICTION AS PRACTICED IN BELGIUM

Despite protests in some quarters,¹⁴⁹ the repeal of the *Loi du 10 Février* and subsequent radical restructure of Belgium's *universal jurisdiction* scheme which followed, produced a new scheme (*i.e.* Articles 6 and 136 of the *Code Pénal* coupled with Articles 10 and 12 of the *Titre préliminaire du Code de procédure pénale*) that was, on the whole, a big improvement over all that had preceded it. Aside from the much needed judicial discretion that the new scheme introduced, the old scheme (*i.e.* the *Loi du 10 Février*) violated fundamental norms of not only international law, but domestic Belgian law as well, and as such, was rightly repealed by the Belgian Government.

A. Trials in Absentia

In international law, the general distaste for trials in absentia is clearly present. Article 14 (3)(d) of the International Covenant on Civil and Political Rights expressly prohibits trials in absentia.¹⁵⁰ Article 63 of the Rome Statute of the International Criminal Court requires that the accused be present at his trial.¹⁵¹

Recall that the *Loi du Février* had been interpreted, at least in one case,¹⁵² to allow for trials in absentia¹⁵³ (*i.e.* the presence of accused

149. See, e.g., HUMAN RIGHTS WATCH, *supra* note 12.

150. *International Covenant on Civil and Political Rights*, art. 14(3)(d), Mar. 23, 1976, 999 U.N.T.S. 171. Article 14(3)(d) reads as follows:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . [t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Id.

151. *Rome Statute of the International Criminal Court*, art 63, Jul. 1, 2002, 2187 U.N.T.S. 90. Article 63 reads as follows: "The accused shall be present during the trial."

152. See sources cited and accompanying text, *supra* note 67.

153. See *supra* § IV (B)(2).

not being required).¹⁵⁴ While trials in absentia are not expressly prohibited in Belgian law, they are considered highly extraordinary and rare.¹⁵⁵ Indeed, in the case just referenced (*i.e.* where the Court of Cassation allowed for a trial in absentia under the *Loi du 10 Février* to proceed), the Public Prosecutor expressly argued against such a judgment, reasoning that trials in absentia were per se violative of international law and would violate the right of the accused to a fair trial.¹⁵⁶ With the new *universal jurisdiction* scheme in place in Belgium, the decision whether to pursue and investigate an alleged offence, subject to judicial oversight, is in the hands of the Federal Attorney General and not the alleged victims through the *constitution de partie civile*.¹⁵⁷ With such wide-ranging discretion placed in the hands of a national judicial officer, one can expect that the traditional rarity in Belgian law of absentia trials will continue in respect to the international offences now covered by Article 136 of the *Code Pénal*. Such a development can only be welcomed as it will ensure that any future *universal jurisdiction* prosecutions undertaken in Belgium will conform to the minimum procedural standards of international law. That any future trials in Belgium adhere to these minimum standards is important, as it will help counter backdoor criticism, by those seeking to mask their absolute opposition to the investigation and bringing to justice of those accused of violating international criminal law, through a critique of the procedures through which any accused are tried.

B. Official Immunities

The absolute *ratione personae* immunity enjoyed by heads of state and certain diplomatic officials, and the more limited *ratione materiae* immunity enjoyed by other various government members¹⁵⁸ is a well entrenched norm of international law.¹⁵⁹ The International Court of Justice, in no uncertain terms, has confirmed the absolute bar to prosecution that immunity *ratione personae* confers upon the holder.¹⁶⁰ While national

154. Court of Cassation, at 02.1139.F/4–02.1139.F/6 (Feb. 12, 2003) (Belg.), available at http://www.ulb.ac.be/droit/cdi/Site/Developpements_judiciaires_files/Cass12Février2003.pdf (last visited Oct. 29, 2009).

155. Walley, *supra* note 37, at ¶¶28–29.

156. *Id.*

157. See sources cited and accompanying text, *supra* note 37.

158. See sources cited and accompanying text, *supra* note 73.

159. See BANTEKAS & NASH, *supra* note 2, at 96–111.

160. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20–22 (Feb. 14, 2002).

courts have upheld immunity *ratione materiae* for official acts with narrow exceptions for violations of international crimes (e.g. torture), which have been held, by some national courts, as not constituting official acts.¹⁶¹ This understanding of international law, as related to the well entrenched place of sovereign immunities in international law, is not only accepted in domestic Belgian law¹⁶² but has also been affirmed by the Court of Cassation.¹⁶³

Recall that the *Loi du 10 Février* did not recognize, prior to the amendments provided by the *Loi du 23 Avril*, *ratione personae* immunity (as defined under international law); nor did it recognize, prior to the amendments provided by the *Loi du 5 Août*, *ratione materiae* immunity (as defined under international law).¹⁶⁴ Such a seeming violation of a well established norm of international law led directly to an International Court of Justice decision in February 2002 when the Court, addressing a suit by the Democratic Republic of Congo (D.R.C.) against Belgium for an international arrest warrant (filed under the *Loi du 10 Février*) issued by Belgium for the D.R.C.'s sitting foreign minister, found that immunity *ratione personae* was a well established norm of customary international law (resulting in the

161. See generally *Regina v. Bow St. Metro. Stipendiary Magis.*, [1999] 2 All E.R. 97, (H.L.) (appeal taken from Spain) but see *Al-Adsani v. U.K.*, 34 Eur. Ct. H.R. 11, ¶¶ 55–66 (2002) (where the Court held that the prohibition against violations of fundamental norms of international law, including *jus cogens*, must be interpreted in a way that did not violate other accepted norms of international law, such as state immunities.).

162. See Dupont & Fijnaut, *supra* note 36, at ¶¶ 102–104.

163. See Court of Cassation, at 02.1139.F/4–02.1139.F/6 (Feb. 12, 2003) (Belg.), available at http://www.ulb.ac.be/droit/cdi/Site/Developpements_judiciaires_files/Cass12Fevrier2003.pdf (last visited Oct. 29, 2009). Given the well established historical acceptance of the concept of official immunities in customary international law, the question can be posed of why the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as the International Criminal Court (ICC) do not recognize official immunities in their respective criminal procedures? The answer to this question is a simple one—well rooted in international law. Both the ICTY and ICTR were established up by the United Nation's executive arm (the Security Council) through a binding Chapter VII resolution. As members of the United Nations, Rwanda, Yugoslavia, and their assorted neighbors were treaty bound to comply with the Security Council's "opt-out" from the accepted customary international law on official immunities. This same reasoning applies to the ICC, an organization created via a treaty (*i.e.* the Rome Statute of the International Criminal Court) ratified by all of its members which, amongst other things, specifically states that the ICC will not recognize official immunities.

164. It is interesting to note that while the *Loi du 10 Février* did not recognize official immunities for foreign leaders and government officials, domestic Belgian law provided absolute *ratione personae* immunity for the King of Belgium, and *ratione materiae* immunity for Belgian government officials. See Dupont & Fijnaut, *supra* note 36, at ¶¶ 100–101.

Belgian arrest warrant being quashed).¹⁶⁵ With the new *universal jurisdiction* scheme in place in Belgium, the International Court will hopefully rest easy for, as has been discussed, the *Loi du 5 Août* amendments to Article 1 of the *Titre préliminaire du Code de procédure pénale* means that both *ratione personae* and *ratione materiae* immunity are recognized in Belgium (*i.e.* for complaints arising out of alleged war crimes, crimes against humanity, and genocide committed abroad by Belgian citizens/residents or involving Belgian citizens/residents as victims).

VI. CONCLUSION

Far from being a step backwards, the new *universal jurisdiction* scheme in place in Belgium post 2003 represents a positive step not only for international law, but, as has been seen, domestic Belgian law as well. The use of *universal jurisdiction* is an evolving norm of international law and as such must be carefully nurtured by the international community of states if it is to survive and prosper as a functional and accepted addition to the law of nations. In their rush to punish, admittedly abhorrent, international criminals, the community of nations should be careful not to violate the accepted rules of the international system. As has been seen with Belgian *universal jurisdiction* scheme during the 1993–2003 period, it is often quite easy for states to fall into this trap. Yet, just as Belgium provides a cautionary tale, it also illuminates a way out of the darkness. The *universal jurisdiction* scheme in place in the country today is a model of conformity both to international legal rules, and the domestic Belgian norms as well. Ultimately, the story of *universal jurisdiction* in Belgium has turned out to be a positive one. It is on these positives that current legal scholars should focus on and future legal scholars can learn from.

165. See Arrest Warrant of 11 April 2000, 2002 I.C.J. at 24–25.