

2001

The Exercise of Universal Jurisdiction by Belgium over ICTR Targets

Julia J. Carabillo

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROSECUTION PROJECT
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

(In conjunction with the New England School of Law)

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

ISSUE: THE EXERCISE OF UNIVERSAL JURISDICTION
BY BELGIUM OVER ICTR TARGETS

Prepared by Julia J. Carabillo
December 2001

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2. *Loi relative a la repression des violation graves de droit international humanitaire*, Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, *reprinted in English at* 38 I.L.M. 918 (1999).
3. The Constitution of Belgium, BELG. CONST.

CASES

4. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (2 September 1998).
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6. *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made By the Defence for Protection Measures for Mr. Bernard Ntuyahaga (13 September 1999).
7. *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (18 June 1997).
8. *Prosecutor v. Kanyabashi*, ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings (23 May 2000).
9. *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Protective Measures for Defence Witnesses and their Families (25 November 1997).
10. *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999).

TREATISES

11. 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999 (Andre Klip & Goran Sluiter eds., 2001).
12. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1992).
13. MARION BRIENEN & ERNESTINE HOEGEN, VICTIMS OF CRIME IN 22 EUROPEAN JUSTICE SYSTEMS (2000).
14. PAUL GRAULICH ET AL., GUIDE TO FOREIGN LEGAL MATERIALS: BELGIUM-LUXEMBOURG-NETHERLANDS (1968).
15. INTERNATIONAL COUNCIL ON HUMAN RIGHTS, HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD (1999).
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18. Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

LAW REVIEW ARTICLES

19. Payam Akhavan, *The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment*, 90 A.J.I.L. 501 (1996).
20. Bruce Broomhall, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399 (2001).
21. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383 (1998).
22. Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 425 (2001).

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25. Evo Popoff, Note, *Inconsistency and Impunity in International Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363 (2001).
26. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, (1988).
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28. Naomi Roht-Arriaza, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).
29. Leila Nadya Sadat, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241 (2001).
30. Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-party States: A Critique of the U.S. Position*, 64-WTR LAW & CONTEMP. PROBS. 67 (2001).
31. Michael P. Scharf, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363 (2001).
32. Ruth Wedgwood, *International Conference: Augusto Pinochet and International Law*, 46 MCGILL L. J. 241 (2000).
33. Siegfried Wiessner & Andrew R. Willard, *Symposium on Method in International Law: Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 A.J.I.L. 316 (1999).
34. Mark Zaid, *Universal Jurisdiction: Myths, Realities, and Prospects: Will or Should the United States Ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability*, 35 NEW ENG. L. REV. 447 (2001).

NEWSPAPER ARTICLES

35. *Cubans Use Belgian Law to File Case Against Castro*, N.Y. TIMES, 4 October 2001, at 28.

36. Constant Brand, *Sharon Lawyers to Study Belgium's Jurisdiction*, CHI. TRIB., 4 October 2001, at 12.
37. Alex Duval, *Household Courts to Hear Rwandan Genocide Cases*, INDEP. (London), 5 October 2001.
38. Michael Ignatieff, *The Way We Live Now: 09-09-01: Exhibit A; Blood Sisters*, N.Y. TIMES, 9 September 2001, at 74.
39. Philip Jacobson, *Israeli Victims Sue Arafat Under Belgian War Crime Law*, THE SUNDAY TELEGRAPH (London), 23 September 2001, at 28.
40. Anton LaGuarda, *Nuns Found Guilty of Rwandan War Crimes*, THE DAILY TELEGRAPH (London), 8 June 2001, at 18.
41. Keith B. Richburg, *Rwandan Nuns Jailed in Genocide; Belgian Jury Also Sentences 2 Others*, THE WASHINGTON POST, 9 June 2001, at A1.
42. Marlise Simons, *Mother Superior Guilty in Rwanda Killings*, N.Y. TIMES, 9 June 2001, at 4.

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43. E-mail from Audra Mobberly, Prosecution Counsel, received Friday, 31 August 2001.
44. S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994).
45. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION (1999), <http://www.amnesty.org>.
46. Fiona McKay, UNIVERSAL JURISDICTION IN EUROPE, <http://www.redress.org/unijeur/html>.

I. Introduction and Summary of Conclusions

A. Introduction

This memorandum addresses issues related to Belgium's exercise of universal jurisdiction over targets of the International Criminal Tribunal for Rwanda (ICTR).¹ This memorandum addresses the issues that arise from a conflict between ICTR and Belgian domestic jurisdiction. It describes the theory of universal jurisdiction and how it is implemented in Belgium, by statute, investigations and cases. The history of the Belgian presence in Rwanda is also discussed.

The memorandum then examines the statute of the ICTR along side with the Belgian statute codifying universal jurisdiction. It then discusses the issues of primacy and deferral, double jeopardy and conflict of laws that arise from Belgium's exercise of universal jurisdiction. It gives examples of cases of possible concurrent jurisdiction between the ICTR and Belgium. These cases also examine the issues of primacy of the ICTR and deferral by national courts. Finally, the memorandum addresses the Belgian exercise of universal jurisdiction over Rwandans involved in the genocide and the impact of that case on the further exercise of universal jurisdiction.

B. Summary of Conclusions

i. Legally, the ICTR has primacy over national courts.

Under the ICTR Statute, Article 8(2), the ICTR shall have primacy over all national courts and may, at any stage of the procedure, request the national court to defer to the ICTR's

¹ E-mail from Andra Mobberly, Prosecution Counsel, received 31 August 2001. [Reproduced in the accompanying notebook at Tab 43.]

competence.² As the ICTR was established under the United Nations (U.N.) Security Council's Chapter VII powers, all States are bound by the ICTR Statute.³ Article 8(2) of the Statute grants the ICTR ultimate primacy, while Article 28 demands cooperation with the Tribunal.⁴ Therefore, under the ICTR Statute and the duties imposed upon States by the U.N. Security Council Chapter VII powers, the ICTR would have primacy over any target within the national courts of Belgium.

ii. The ICTR must consistently and appropriately apply its primacy over Belgium to avoid possible conflicts with that State.

The cases involving the exercise of primacy by the ICTR over national courts has established a precedent by which national courts must defer to the competency of the Tribunal. In light of the Belgian exercise of universal jurisdiction over ICTR targets, the Tribunal must maintain the same level of assertions of primacy over leader or figure-head targets it wishes to prosecute. If primacy is not exerted and Belgium does prosecute these leaders or figure-heads, they will, in most instances, not be legally retried in the ICTR.⁵ The national courts are needed to cooperate in the prosecution of persons involved in the genocide, but the Tribunal is needed to

² Statute of the International Criminal Tribunal for Rwanda (hereinafter "ICTR Statute"), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998). [Reproduced in the accompanying notebook at Tab 1.]

³ S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994). [Reproduced in the accompanying notebook at Tab 44.] See also MORRIS & SCHARF, *supra* note 22, at 313. [Reproduced in the accompanying notebook at Tab 17.]

⁴ ICTR Statute Article 8(2), 28. [Reproduced in the accompanying notebook at Tab 1.]

⁵ ICTR Statute Article 9 [Reproduced in the accompanying notebook at Tab 1.]

prosecute the lead offenders, as a deterrent and reconciler.⁶ Thus, the consistent and appropriate application of primacy by the ICTR over targets in national courts will serve to maintain the legitimacy of both the ICTR and its statutorily granted exercise of primacy.

II. Factual Background

A. History of Universal Jurisdiction

Universal jurisdiction is defined as the exercise of jurisdiction of any state over certain offenses of universal concern, regardless of where or by whom the offense was committed.⁷ Persons committing these offenses, so heinous as to offend all of humanity, are considered *hostis humani generis* or the enemy of all humanity.⁸ Piracy is considered the first crime to be subject to universal jurisdiction, as pirates committed acts of violence without regard for nationality while moving throughout the high seas and out of the reach of the territorial jurisdiction of the

⁶ See Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 486 (2001). [Reproduced in the accompanying notebook at Tab 22.]

⁷ See Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 WTR LAW AND CONTEMP. PROBS. 67, 76 (2001). [Reproduced in the accompanying notebook at Tab 30.] See also generally, Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988). [Reproduced in the accompanying notebook at Tab 26.]

⁸ See Leila Nadya Sadat, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001). [Reproduced in the accompanying notebook at Tab 29.] See also Michael P. Scharf, *Symposium: Universal Jurisdiction: Myths, Realities and Prospects: Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 370 (2001). "Crimes subject to the universality principle are so threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender." [Reproduced in the accompanying notebook at Tab 31.]

victim states.⁹ Three hundred years later, the atrocities of World War II brought about the exercise of universal jurisdiction by the Nuremberg and Tokyo tribunals as well as the domestic courts of states.¹⁰ While no positive rule of international law exists for foreign states to punish foreign nationals for crimes against humanity, there has been a growing recognition that the law of mankind has supremacy over the law of the sovereign state.¹¹

In the aftermath of World War II, the United Nations (U.N.) General Assembly, “unanimously affirmed the ‘principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal,’ thereby ‘codifying the jurisdictional right of all [s]tates to prosecute the offenses addressed by the IMT [Nuremberg Tribunal],’ namely war crimes, crimes against humanity, and the crime of aggression.”¹² The U.N. General Assembly adopted the Principles of International Co-operation in the Detection, Arrest,

⁹ See Scharf, *supra* note 7, at 81. [Reproduced in the accompanying notebook at Tab 30.]

¹⁰ See *id.* at 82. “Trials exercising [universal jurisdiction] took place in international tribunals at Nuremberg and Tokyo, as well as domestic courts. Some individuals faced trial in the states in which they had committed their crimes, but others were tried by whatever state in which they were later captured, surrendered, or found – including such far-off countries as Canada and Australia.” [Reproduced in the accompanying notebook at Tab 30.]

¹¹ M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 524-525 (1992). [Reproduced in the accompanying notebook at Tab 12.] See also Mark S. Zaid, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Will or Should the United States Ever Prosecute War Criminals?: A need for Greater Expansion in the Areas of Both Criminal and Civil Liability*, 35 NEW ENG. L. REV. 447, 458 (2001). “However, during the last decade a growing number of States have enacted legislation specifically permitting the prosecution of future war crimes. These actions demonstrate the trend toward ensuring that perpetrators of war crimes do not go unpunished, regardless of where the underlying act may have taken place or to whom it occurred.” [Reproduced in the accompanying notebook at Tab 34.]

¹² See Scharf, *supra* note 7, at 83. [Reproduced in the accompanying notebook at Tab 30.] Belgium joined the United Nations on 27 December 1945. www.un.org/Overview/unmember.html

Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity in Resolution 3074, 3 December 1973.¹³ In it, the U.N. declared that states are *obligated* to bring to justice those persons responsible for grave violations of international law.¹⁴ The four Geneva Conventions also require all state parties to prosecute or extradite persons violating the provisions of the Geneva Conventions, thus imposing a duty on domestic courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions.¹⁵

Since crimes against humanity, including genocide, and war crimes can be considered customary law, each state has the ability to prosecute individuals for these offenses under universal jurisdiction. These crimes are recognized as violations of both national and international law, or crimes *ex jure gentium*.¹⁶ Under the 1948 Genocide Convention, in fact, states are obligated to institute domestic legislation to criminalize genocide and enact appropriate punishments.¹⁷

The United Nations, since World War II, has continually affirmed the ability of states to prosecute war criminals as the state has jurisdiction to punish offenses against the whole of

¹³ *See id.* [Reproduced in the accompanying notebook at Tab 30.]

¹⁴ AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION 13 (1999). <http://www.amnesty.org> [Reproduced in the accompanying notebook at Tab 45.]

¹⁵ *See id.* at 1-2. [Reproduced in the accompanying notebook at Tab 45.]

¹⁶ *See* Theodor Meron, Article, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554, 567 (1995). [Reproduced in the accompanying notebook at Tab 23.]

¹⁷ Siegfried Wiessner & Andrew R. Willard, *Symposium on Method in International Law: Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 A.J.I.L. 316, 328-329 (1999). [Reproduced in the accompanying notebook at Tab 33.]

nations.¹⁸ The crimes over which the International Criminal Tribunals for the Former Yugoslavia and Rwanda “shocked the conscience of the International Community because of their gravity, scale, and effects on international peace.”¹⁹ The U.N. Security Council Resolution 955 creating the International Criminal Tribunal for Rwanda (ICTR) requires states to

cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with request for assistance or orders issued by a Trial Chamber under Article 28 of the Statute[.]²⁰

The Security Council Resolution instructs states to “take any measures necessary under their domestic law” to execute the Resolution and the ICTR Statute.²¹ This includes the codification of universal jurisdiction to have the ability and jurisdiction to prosecute persons involved in the genocide.

B. History of the Belgian Presence in Rwanda

After World War I and the defeat of Germany, Belgium assumed the role of colonial power in Rwanda.²² In 1933, Belgium conducted a census distinguishing the Tutsi and Hutu

¹⁸ See Zaid, *supra* note 11, at 450-451. [Reproduced in the accompanying notebook at Tab 34.]

¹⁹ Danner, *supra* note 6, at 849. [Reproduced in the accompanying notebook at Tab 22.]

²⁰ S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994). [Reproduced in the accompanying notebook at Tab 44.]

²¹ *Id.* [Reproduced in the accompanying notebook at Tab 44.]

²² See 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 49 (1998). (After Germany’s defeat in World War I, many European nations rushed to colonize former German colonies. In Rwanda, the Germans had instituted a system of control with the minority Tutsi’s as puppet leaders and the majority Hutu population as second class

populations and distributed identification cards to maintain a system of apartheid with minority Tutsis in control.²³ The Belgians, and the Germans before them, believed the minority Tutsis to be more European with their “lighter skin, thinner lips, and straighter noses” than Hutu features.²⁴ More than twenty years later, in 1956, Belgium organized elections at the instruction of the United Nations Trusteeship Council.²⁵ The elections of members of local organs were based on universal suffrage and, inevitably, the voting went with party, or ethnic, lines.²⁶ With this universal suffrage, the Hutu “obtained an overwhelming majority and thereby became aware of their political strength.”²⁷ In 1959, a Hutu-lead revolt against the Tutsi government succeeded and Belgium decolonized Rwanda and granted its independence.²⁸ This Hutu-led revolt was followed by a cycle of mass killings of Tutsis, the exodus of surviving Tutsis, invasions of the territory of Rwanda by exiled Tutsis, and reprisal killings in Rwanda after these unsuccessful invasions by the Tutsis.²⁹

citizens. When Belgium colonized Rwanda, it maintained this system of control). [Reproduced in the accompanying notebook at Tab 17.]

²³ *See id.* [Reproduced in the accompanying notebook at Tab 17.]

²⁴ Evo Popoff, Note, *Inconsistency and Impunity in International Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT’L L. REV. 363, 369 (2001). [Reproduced in the accompanying notebook at Tab 25.]

²⁵ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (2 September 1998). [Reproduced in the accompanying notebook at Tab 4.]

²⁶ *See id.* [Reproduced in the accompanying notebook at Tab 4.]

²⁷ *Id.* [Reproduced in the accompanying notebook at Tab 4.]

²⁸ *See id.* at 370. [Reproduced in the accompanying notebook at Tab 4.]

²⁹ MORRIS & SCHARF, *supra* note 1, at 50. [Reproduced in the accompanying notebook at Tab 17.]

At the start of the 1994 genocide in Rwanda, Belgian Peacekeeping troops were present in Rwanda, protecting then-Prime Minister Agathe Uwilingiyimana.³⁰ Both the Prime Minister and ten Belgian Peacekeepers were killed, prompting the withdrawal of the Belgian forces in Rwanda.³¹ At the same time, the genocide in Rwanda continued at an alarming rate.

In light of Belgium's history as a colonial power in Rwanda, their exercise of universal jurisdiction could be interpreted as just another form of that colonialism, thus taking credibility away from the decisions of Belgian courts.³² In turn, that lack of credibility could affect the credibility of the Tribunal itself, since the ICTR Statute specifically included the concurrent jurisdiction of national courts to work in cooperation with the Tribunal.³³

³⁰ *See id.* at 54. Belgium wished to prosecute Bernard Ntuyahaga for the deaths of the ten Belgian Peacekeepers. *See infra* at ___. [Reproduced in the accompanying notebook at Tab 17.]

³¹ *See id.* [Reproduced in the accompanying notebook at Tab 17.] *See also* Popoff, *supra* note 24, at 378 (discussing a general lack of intervention in the Rwanda genocide by the international community, including Belgium's withdrawal of its troops on 15 April 1994, nine days after the start of the genocide). [Reproduced in the accompanying notebook at Tab 25.]

³² INTERNATIONAL COUNCIL ON HUMAN RIGHTS, *HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD* 21 (1999). [Reproduced in the accompanying notebook at Tab 15.]

³³ *See Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999). [Reproduced in the accompanying notebook at Tab 10.]

C. History of the Belgian Use of Universal Jurisdiction

i. Rationale and Legislative History of “Loi relative a la repression de violation graves de droit international humanitaire” or Act Concerning the Punishment of Grave Breaches of International Humanitarian Law

In 1993, Belgium passed a statute codifying the Geneva Conventions and Additional Protocols to maintain jurisdiction over grave breaches of the Geneva Conventions and crimes against humanity.³⁴ It appears that Belgium is one state that has fully adopted the responsibilities of the Geneva Conventions.³⁵ Since the crimes enumerated in the Geneva Conventions are considered customary law, or *jus cogens*, Belgium’s codification of universal jurisdiction supports this norm of *jus cogens* and the obligations, *erga omnes*, that arise from it.³⁶ Belgium

³⁴ Luc Reydam, *International Decision: Belgian Tribunal of First Instance in Brussels (investigating magistrate), November 8, 1998*, 93 A.J.I.L. 700 (1999). The 1993 law was later amended and retitled “Loi relative a la repression des violation graves de droit international humanitaire.” The law was also clarified to apply to crimes committed before the adoption of the statute, as crimes against humanity and the Geneva Conventions are considered customary international law. *See id.* at fn. 7. [Reproduced in the accompanying notebook at Tab 27.] *See also* Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, *reprinted in English* at 38 I.L.M. 918 (1999). [Reproduced in the accompanying notebook at Tab 2.]

³⁵ Mark Zaid, *Universal Jurisdiction: Myths, Realities, and Prospects: Will or Should the United States Ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability*, 35 NEW ENG. L. REV. 447, 462 (2001). [Reproduced in the accompanying notebook at Tab 34.]

³⁶ *See id.* at 405. The obligations, for example, include prosecute or extradite or the general maintenance of international justice. [Reproduced in the accompanying notebook at Tab 34.]

has moved past the international standard of obeying humanitarian law to enforcing that law as it applies to all persons, Belgian or not.³⁷

The legislative history of this law indicates a fear that Belgium would become a refuge for perpetrators of the genocide in Rwanda.³⁸ Therefore, it became important to codify universal jurisdiction to positively deal with cases involving non-nationals of Belgium.³⁹

The Act had a dual purpose of punishment and prevention; Belgian legislators believed that the criminalization of genocide, war crimes, and crimes against humanity would have a greater deterrent effect and would expand the preventative force against these crimes.⁴⁰ The act also explicitly excluded a difference between internal and international armed conflict, noting the number of human rights violations that do not occur in international conflicts, but rather in internal conflicts.⁴¹ This Act codifies the principle of universal jurisdiction for use by Belgium, regardless of where, to whom, or by whom the atrocities occurred.⁴²

If the goal, however, of universal jurisdiction is to maintain justice and fundamental principles of the international community, one nation endowing itself with this task could lead to

³⁷ Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW* 405, (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000). [Reproduced in the accompanying notebook at Tab 15.]

³⁸ *See Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, reprinted in English at 38 I.L.M. 918, fn. 14 (1999)*. [Reproduced in the accompanying notebook at Tab 2.] *See also* Fiona McKay, *UNIVERSAL JURISDICTION IN EUROPE*, <http://www.redress.org/unijeur/html>. [Reproduced in the accompanying notebook at Tab 46.]

³⁹ *See Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, reprinted in English at 38 I.L.M. 918, fn. 14 (1999)*. [Reproduced in the accompanying notebook at Tab 2.]

⁴⁰ *See id.* at 918. [Reproduced in the accompanying notebook at Tab 2.]

⁴¹ *See id.* [Reproduced in the accompanying notebook at Tab 2.]

⁴² *See Meron, supra* note 16, at 577. [Reproduced in the accompanying notebook at Tab 23.]

“jurisdictional imperialism.”⁴³ Each individual state may become “de facto agents” over international crime, prosecuting certain persons in reflection of political, rather than legal, considerations.⁴⁴ In fact, Belgium is earning an embarrassing reputation from its multiple investigations into alleged human rights violations by world leaders.⁴⁵ Therefore, Belgium’s exercise of universal jurisdiction could color the government as “jurisdictional imperialists,” thus taking away credibility of the national courts and the Tribunal. Because there is a possible risk of prosecutions being politically motivated or possibly initiated under bias,⁴⁶ the ICTR must be careful to monitor these investigations in national courts if the concurrent jurisdiction enunciated

⁴³ Bruce Broomhall, *Universal Jurisdiction: Myths, Realities, and Prospects: Toward the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 416. *See id.* at 403. Bruce Broomhall is the Senior Coordinator for the International Justice Program, Lawyers Committee for Human Rights and is a Ph.D. Candidate at King’s College, London. [Reproduced in the accompanying notebook at Tab 20.] *See also* INTERNATIONAL COUNCIL ON HUMAN RIGHTS, *HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD* (1999). [Reproduced in the accompanying notebook at Tab 15.]

⁴⁴ *See id.* at 403. [Reproduced in the accompanying notebook at Tab 20.] *See also* Meron, *supra* note 16, at 571. “Some governments will protest foreign prosecutions based on activities that may reflect their state policy, And probably, legal advisers of many foreign ministries will discourage the justice departments of their countries from prosecuting foreign officers for their conduct during a civil war in their own country.” [Reproduced in the accompanying notebook at Tab 23.]

⁴⁵ *See* Cubans Use Belgian Law to File Case Against Castro, N.Y. TIMES, 4 October 2001, at 28. The case against Ariel Sharon, discussed *infra* at ___, “has embarrassed the Belgian government, which currently hold the rotating EU presidency, and caused Sharon to shun visiting European Union headquarters in Brussels.” *Id.* Regarding the charges against Fidel Castro, discussed *infra* at ___, Belgium responded “‘We hope and trust this will not affect the good relations between Belgium and Cuba,’ Foreign Ministry spokesman Koen Vervaeke told Reuters.” *Id.* [Reproduced in the accompanying notebook at Tab 35.]

⁴⁶ Madeleine H. Morris, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 338 (2001). [Reproduced in the accompanying notebook at Tab 24.]

in the ICTR Statute Article 8(1?) will continue to function as a supplement to the jurisdiction of the ICTR.

ii. Belgian Cases Employing the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law

Belgium has employed this law of universal jurisdiction in a number of cases. In March of 2000, an investigating magistrate began investigating former Iranian president Ali Akbar Hashemi Rafsanjani for torture and unlawful detention of a Teheran-born Belgian citizen.⁴⁷ No extradition request has been made for President Rafsanjani, but Belgium has instituted proceedings against other world leaders.⁴⁸

Abdoulaye Yerodia, acting foreign minister of the Democratic Republic of Congo, was indicted for grave violations of international humanitarian law by the same Belgian investigating magistrate.⁴⁹ Yerodia had instigated violence against Tutsis in Kinshasa by broadcasting on the radio for “eradication and the crushing of the Rwandan... invaders” describing them as “vermin”

⁴⁷ Ruth Wedgwood, *International Conference: Augusto Pinochet and International Law*, 46 MCGILL L. J. 241, 250 (2000). [Reproduced in the accompanying notebook at Tab 32.]

⁴⁸ *See id.* Belgium has been asked to investigate world leaders such as Augusto Pinochet, Ariel Sharon, Yasser Arafat, and Fidel Castro. [Reproduced in the accompanying notebook at Tab 32.] *See infra* at ___.

⁴⁹ *See id.* at 251. [Reproduced in the accompanying notebook at Tab 32.]

and “cockroaches.”⁵⁰ In this case, Belgium issued an arrest warrant and sent it to the Democratic Republic of Congo, and also sent copies to other countries.⁵¹

While the above cases related to a Belgian citizen and events related to the Rwandan genocide, Belgium has also exercised its universal jurisdiction over world leaders. In 1998, Chilean exiles living in Belgium filed a criminal complaint against former Chilean dictator Augusto Pinochet, charging him with crimes under international law.⁵² Pinochet argued head-of-state immunity, legality and double-criminality requirement, to which the investigating magistrate did not find that Belgium’s exercise of universal jurisdiction violated any of these doctrines.⁵³

More recently, complaints against Israeli Prime Minister Ariel Sharon were submitted to the Belgian courts on behalf of twenty-three Palestinian survivors of a 1982 massacre in Lebanon.⁵⁴ A Belgian magistrate agreed to open the investigation into Sharon after ruling that two complaints may warrant prosecution.⁵⁵ A hearing regarding Belgium’s exercise of jurisdiction has been postponed until November 2001.⁵⁶

⁵⁰ *Id.* [Reproduced in the accompanying notebook at Tab 32.]

⁵¹ *See id.* The implications of these “international warrants” is that world leaders will be unable to travel outside their own country and/or that other states will not recognize their validity. [Reproduced in the accompanying notebook at Tab 32.]

⁵² Reydam, *supra* note 34, at 700. [Reproduced in the accompanying notebook at Tab 27.]

⁵³ *See id.* at 700-701. [Reproduced in the accompanying notebook at Tab 27.] *See also generally* Naomi Roht-Arriaza, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311 (2001). [Reproduced in the accompanying notebook at Tab 28.]

⁵⁴ Constant Brand, *Sharon Lawyers to Study Belgium’s Jurisdiction*, *CHI. TRI.*, 4 October 2001, at 12. [Reproduced in the accompanying notebook at Tab 36.]

⁵⁵ *See id.* [Reproduced in the accompanying notebook at Tab 36.]

The Terror Victims' Association, a group of Israeli victims of Palestinian attacks, have filed a complaint against Palestinian leader Yasser Arafat.⁵⁷ The complaint addresses Arafat's command responsibility and encouragement of "incitement against the Israeli people."⁵⁸ The Terror Victims' Association, a group formed fourteen years ago, noted that this legal action was the first concerted attempt to bring Arafat to justice in front of a court.⁵⁹

Criminal charges against Cuban dictator Fidel Castro were also submitted to the Belgian court on behalf of Cuban exiles living in the United States.⁶⁰ The complaint alleged false imprisonment, torture and murder as violations of crimes against humanity.⁶¹ An investigating magistrate will decide whether Belgium has jurisdiction over the case and whether the case is admissible under Belgian law.⁶²

⁵⁶ *See id.* [Reproduced in the accompanying notebook at Tab 36.]

⁵⁷ Philip Jacobson, *Israeli Victims Sue Arafat Under Belgian War Crime Law*, THE SUNDAY TELEGRAPH (London), 23 September 2001, at 28. The article also mentioned the investigation of charges brought under Belgian law against Saddam Hussein. [Reproduced in the accompanying notebook at Tab 39.]

⁵⁸ *Id.* [Reproduced in the accompanying notebook at Tab 39.]

⁵⁹ *See id.* [Reproduced in the accompanying notebook at Tab 39.]

⁶⁰ *Cubans Use Belgian Law to File Case Against Castro*, N.Y. TIMES, 4 October 2001, at 28. [Reproduced in the accompanying notebook at Tab 35.]

⁶¹ *See id.* [Reproduced in the accompanying notebook at Tab 35.]

⁶² *See id.* [Reproduced in the accompanying notebook at Tab 35.]

III. Legal Discussion

A. Statutory Considerations

i. ICTR Statute: Codification of Concurrent Jurisdiction and Primacy

The ICTR Statute states:

The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, beginning on 1 January 1994 and ending on 31 December 1994.⁶³

The Statute also states “The International Tribunal for Rwanda shall have primacy over the national courts of all States.”⁶⁴ While the ICTR Statute confers jurisdiction to national courts, it maintains supremacy over those national courts and can, “at any stage in the procedure,” request a national court to defer jurisdiction to the ICTR.⁶⁵

The primacy of the Tribunal functions to resolve any dispute between the national courts and the Tribunal.⁶⁶ Primacy also functions to deter state parties from initiating “sham proceedings absolving their own nationals”⁶⁷ while at the same time, promoting fair trials where fair trials are not possible; “belligerents who will not give a fair trial to their adversaries in the midst or immediate aftermath of the conflict.”⁶⁸

⁶³ ICTR Statute, Article 8(2). [Reproduced in the accompanying notebook at Tab 1.]

⁶⁴ *Id.* [Reproduced in the accompanying notebook at Tab 1.]

⁶⁵ *Id.* [Reproduced in the accompanying notebook at Tab 1.]

⁶⁶ MORRIS & SCHARF, *supra* note 22, at 313. [Reproduced in the accompanying notebook at Tab 17.]

⁶⁷ *See* Wedgwood, *supra* note 47, at 394. [Reproduced in the accompanying notebook at Tab 32.]

⁶⁸ *Id.* [Reproduced in the accompanying notebook at Tab 32.]

The Tribunal itself ruled on the issue of primacy in *The Prosecutor v. Bernard*

Ntuyahaga. It stated,

WHEREAS the Chamber, although it accepts the submissions of the Prosecutor and the Belgian Government inasmuch as the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions, it wishes to underscore that, in its opinion, and as submitted by the Defence, the principle of concurrent jurisdiction as provided in paragraph 1 of Article 8 of the Statute, which recognizes the complementary nature of the judicial work performed by the Tribunal and national courts, must be read together with the provisions of paragraph 2 of said Article 8, which confers upon the Tribunal primacy over the national courts of all states.⁶⁹

Simply put, the Tribunal enjoys primacy over all national courts, regardless of concurrent cases arising under national courts' jurisdictions. National courts, like Belgium's, can exercise jurisdiction over ICTR targets.⁷⁰ The Tribunal, however, maintains the ability to exercise primacy over these targets and the national courts must comply.⁷¹

Since the ICTR was created through the Security Council's Chapter VII powers, all nations bound by the U.N. Charter are likewise bound by the provisions of the ICTR Statute. Therefore, Belgium would be bound by the ICTR Statute, and any request for deferment to the Tribunal should be granted. Also, as Security Council Resolution 955 requires "all States shall cooperate fully with the International Tribunal... and the Statute of the International Tribunal,"⁷²

⁶⁹ *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999). [Reproduced in the accompanying notebook at Tab 10.]

⁷⁰ ICTR Statute, Article 8(1). [Reproduced in the accompanying notebook at Tab 1.]

⁷¹ ICTR Statute, Article 8(2). [Reproduced in the accompanying notebook at Tab 1.] *See also* *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999). [Reproduced in the accompanying notebook at Tab 10.]

⁷² S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994). [Reproduced in the accompanying notebook at Tab 44.]

Belgium is bound by the Resolution to comply with any assertion of primacy by the ICTR over the national courts of Belgium.

ii. The Belgian Statute: Codification of Universal Jurisdiction

Chapter II, Article 7 of Belgium's law codifying universal jurisdiction, Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, states "The Belgian Courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed."⁷³ These breaches include:

- the crime of genocide as defined under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;⁷⁴
- crimes against humanity as defined in the Statute of the International Criminal Court or Rome Statute;⁷⁵
- crimes caused by acts or omissions against protected persons as defined by the Geneva Conventions and Additional Protocols I and II;⁷⁶
- crimes facilitating any breaches of the above mentioned crimes.⁷⁷

⁷³ Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, *reprinted in English at* 38 I.L.M. 918, 924 (1999). [Reproduced in the accompanying notebook at Tab 2.]

⁷⁴ *See id.* at 921. [Reproduced in the accompanying notebook at Tab 2.]

⁷⁵ *See id.* at 921-922. [Reproduced in the accompanying notebook at Tab 2.]

⁷⁶ *See id.* at 922-924. [Reproduced in the accompanying notebook at Tab 2.]

⁷⁷ *See id.* at 924. [Reproduced in the accompanying notebook at Tab 2.]

The universal jurisdiction codified by this law is based upon the Geneva Conventions and the Additional Protocols I and II, in accordance with “the principle of *aut dedere aut judicare*, obliging the High Contracting Parties to extradite or to prosecute the offenders of grave breaches.”⁷⁸ The Belgian statute grants jurisdiction over non-nationals for grave breaches of the Geneva Conventions, yet it does not require the prosecution of the violations.⁷⁹ Thus, Belgium is under no statutory obligation to prosecute each and every person who violates the Geneva Conventions and their Protocols, but has the legal ability to do so.

The effect of this codification of universal jurisdiction is to give a statutory basis for the jurisdiction of Belgian national courts to prosecute persons involved in the genocide in Rwanda and also any other persons committing crimes against humanity.⁸⁰ It also satisfies any question regarding legality and customary international law, as the Act is the codification of customary international law.⁸¹

⁷⁸ Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, *reprinted in English* at 38 I.L.M. 918, fn. 14 (1999). [Reproduced in the accompanying notebook at Tab 2.]

⁷⁹ *See id.* at 924. [Reproduced in the accompanying notebook at Tab 2.]

⁸⁰ *See id.* [Reproduced in the accompanying notebook at Tab 2.]

⁸¹ *See Danner, supra* note 6, at 432-433. (discussing the ICTY and ICTR use of only firmly established customary international law). [Reproduced in the accompanying notebook at Tab 22.]

B. Legal Considerations of Belgium's Use of Universal Jurisdiction

i. Primacy of the Tribunal and Deferral by National Courts

Primacy is used to “ensure minimum standards of justice and impartial adjudications will be met in cases of great international concern.”⁸² In the International Criminal Tribunal for the Former Yugoslavia (ICTY) case against Dusko Tadic, a request for deferral was made by the Tribunal to the government of Germany in an exercise of primacy.⁸³ The Prosecutor, Richard Goldstone, “argued that the Tribunal was the ‘only proper forum for trying those accused of playing leading roles in’ the ethnic cleansing in Bosnia-Herzegovina.”⁸⁴ Tadic argued that the primacy of the ICTY violated domestic courts jurisdiction and the sovereignty of the state of Germany.⁸⁵ The Appeals Chamber rejected this argument and “asserted that primacy was a functional necessity for an international criminal tribunal.”⁸⁶

The Appeals Chamber went on to strongly endorse their primacy over all domestic courts:

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as “ordinary crimes”...

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an

⁸² Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE INT’L L. 383, 398 (1998). [Reproduced in the accompanying notebook at Tab 21.]

⁸³ *See id.* at 403-404. [Reproduced in the accompanying notebook at Tab 21.]

⁸⁴ *Id.* at 403. [Reproduced in the accompanying notebook at Tab 21.]

⁸⁵ *See id.* at 404. [Reproduced in the accompanying notebook at Tab 21.]

⁸⁶ *Id.* [Reproduced in the accompanying notebook at Tab 21.]

international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the *strict limits* of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal [which are almost identical to the ICTR statute].⁸⁷

While the language of the ICTY and ICTR Statutes are similar, the ICTR has stronger language regarding primacy.⁸⁸ Therefore, the same “strict limits” of the ICTR Statute should be followed.⁸⁹ The ICTR has consistently affirmed this stance on Primacy in its own decisions.⁹⁰ Both the ICTY and the ICTR have successfully employed primacy over national courts and should continue to do so.⁹¹

⁸⁷ *Id.* (emphasis added) [Reproduced in the accompanying notebook at Tab 21.]

⁸⁸ *See* Brown, *supra* note 82, at 402. “The Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) is quite similar to that of the ICTY, but there is a key difference in its primacy clause. The ICTR Statute accords it ‘primacy over national courts of all States,’ language that is stronger than the more ambiguously worded grant of ‘primacy over national courts’ in the ICTY Statute.” [Reproduced in the accompanying notebook at Tab 21.]

⁸⁹ *See id.* [Reproduced in the accompanying notebook at Tab 21.]

⁹⁰ Discussed *infra* at ___.

⁹¹ Discussed *infra* at ___. *See also* Brown, *supra* note 82, at 407. “[T]he primacy of the ad hoc tribunals retains the mandatory legal force it was granted in the Statute despite the efforts of a few Security Council members to limit its scope. This conclusion is supported by the text of the ICTY and ICTR Statutes; by the practice of the ICTY’s Judges and prosecutors, who have reaffirmed the general primacy of the International Tribunal at every turn; and even by the recent practice of the Security Council itself in approving the Statute of the Rwanda Tribunal.” [Reproduced in the accompanying notebook at Tab 21.]

ii. Non Bis In Idem (Double Jeopardy) Situations Can Be Avoided Through the Use of Primacy Over National Courts

The ICTR Statute states “No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.”⁹² In the alternative, the ICTR Statute allows persons tried by national courts to subsequently be tried in the ICTR only if the prior act charged was an ordinary crime or the national court proceedings were sham proceedings or not impartial.⁹³ Therefore, the Tribunal can only retry persons who were merely charged with an “ordinary crime” or who were involved in sham proceedings in the national courts. This could narrow the field of possible indictments if Belgium and other countries continue to prosecute ICTR targets. However, as the primacy clause of the ICTR Statute tells us, the Tribunal may exercise its jurisdiction over those targets it wishes to that are being tried in national courts.⁹⁴

The ICTY has also addressed the issue of *non bis in idem* in the *Tadic* case. *Tadic* challenged the primacy of the ICTY by alleging that he was being retried by the ICTY.⁹⁵ The ICTY declined from linking primacy and *non bis in idem*, and instead ruled on *non bis in idem*

⁹² ICTR Statute, Article 9(1). [Reproduced in the accompanying notebook at Tab 1.]

⁹³ ICTR Statute, Article 9(2)(a) & (b). “A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
(a) The act for which he or she was tried was characterized as an ordinary crime; or
(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.” [Reproduced in the accompanying notebook at Tab 1.]

⁹⁴ ICTR Statute, Article 8(2). [Reproduced in the accompanying notebook at Tab 1.]

⁹⁵ See Brown, *supra* note 82, at 405. [Reproduced in the accompanying notebook at Tab 21.]

alone; because there had been no previous trial in Germany, or elsewhere, there was no conflict of *non bis in idem* in the ICTY's deferral request.⁹⁶ Since "[t]he notion of primacy is intended to resolve any conflict that may arise as a result of the concurrent jurisdiction of the Rwanda Tribunal and national courts," it could be used to avoid situations of *non bis in idem*.⁹⁷

Belgium has since brought the argument to the Rwanda Tribunal: since the ICTR Statute also includes the concurrent jurisdiction provision, the Tribunal must equally respect the concurrent exercise of jurisdiction over ICTR targets.⁹⁸ This argument was flatly rejected by the Tribunal.⁹⁹ The primacy clause of the ICTR Statute requires national courts to defer jurisdiction over ICTR targets as requested.¹⁰⁰ This deferral can be employed to avoid *non bis in idem* problems over wanted targets being tried in domestic courts.

⁹⁶ *See id.* [Reproduced in the accompanying notebook at Tab 21.]

⁹⁷ MORRIS & SCHARF, *supra* note 22, at 313. [Reproduced in the accompanying notebook at Tab 17.]

⁹⁸ *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999). "Whereas, according to the Belgian Government, the cooperation provided for by the Security Council of the United Nations in the Statute, whereby all States must fully cooperate with the Tribunal, implies necessarily a reciprocal cooperation of the Tribunal with States, although this is not expressly provided for in the Statute or the Rule, the Tribunal can co-operate with States and thus facilitate the due process of Justice." The Tribunal went on to remind the Government of Belgium that the concurrent jurisdiction provisions of the Statute "must be read together" with the provisions conferring primacy to the Tribunal. [Reproduced in the accompanying notebook at Tab 10.]

⁹⁹ *See id.* [Reproduced in the accompanying notebook at Tab 10.]

¹⁰⁰ ICTR Statute, Article 8(2). [Reproduced in the accompanying notebook at Tab 1.]

iii. Conflict of Law Considerations

Since the Belgian law is merely the codification of the Geneva Conventions and its Additional Protocols, there is no conflict of law question regarding the substance of the charges. However, there may be problems regarding the differences in appeal procedures between the ICTR and Belgium.

In a trial in Belgium, all pretrial hearings are secret and under the authority of the investigative courts, while all trials are public and are under the authority of the trial courts.¹⁰¹ An examining magistrate first investigates serious offenses once formally requested to investigate by the public prosecutor.¹⁰² The trial court has fact-finding jurisdiction over misdemeanors, serious misdemeanors, and felonies.¹⁰³ The “top of the judicial hierarchy” is the *Cour de Cassation*, or the Supreme Court.¹⁰⁴

At a criminal trial in Belgium, the accused is informed of the charges against him with an introductory summons.¹⁰⁵ The burden of proof rests with the prosecution and the trial is

¹⁰¹ ERNESTINE HOEGEN & MARION BRIENEN, VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS 110-111, 114-115 (2000). [Reproduced in the accompanying notebook at Tab 13.]

¹⁰² *See id.* at 114. [Reproduced in the accompanying notebook at Tab 13.]

¹⁰³ *See id.* at 115. [Reproduced in the accompanying notebook at Tab 13.]

¹⁰⁴ *Id.* at 116. [Reproduced in the accompanying notebook at Tab 13.] *See also generally* the Constitution of Belgium, for the role of the judiciary. [Reproduced in the accompanying notebook at Tab 3.]

¹⁰⁵ *See* HOEGEN & BRIENEN, *supra* note 101, at 116. [Reproduced in the accompanying notebook at Tab 13.]

adversarial.¹⁰⁶ The Court plays an active part in the trial and may examine witnesses or call experts.¹⁰⁷ This is similar to the procedure of the ICTR.¹⁰⁸

In the national courts of Belgium, a person may not appeal a decision on facts of a case, only on questions of law.¹⁰⁹ In the ICTR, appeal may be taken on the issue of error of fact or law.¹¹⁰ A remedy to a charge of an unequal standard of justice may be afforded by the Tribunal's assumption of jurisdiction over a proceeding, since primacy may be exercised at any point in the proceedings.¹¹¹ A remedy may also be afforded to a defendant in a new trial, as prescribed under Article 9 (1) of the ICTR Statute.¹¹²

¹⁰⁶ *See id.* [Reproduced in the accompanying notebook at Tab 13.]

¹⁰⁷ *See id.* [Reproduced in the accompanying notebook at Tab 13.]

¹⁰⁸ *See generally* ICTR Rules of Procedure 80, 89, 90. [Reproduced in the accompanying notebook at Tab 1.]

¹⁰⁹ PAUL GRAULICH ET AL., *GUIDE TO FOREIGN LEGAL MATERIALS: BELGIUM-LUXEMBOURG-NETHERLANDS* (1968). [Reproduced in the accompanying notebook at Tab 14.]

¹¹⁰ ICTR Statute, Article 24(1). [Reproduced in the accompanying notebook at Tab 1.]

¹¹¹ *See Wedgwood, supra* note 47, at 403 (discussing issues of differences in punishment and anomalies in justice created by both concurrent jurisdiction and the right of primacy). [Reproduced in the accompanying notebook at Tab 32.]

¹¹² ICTR Statute, Article 9(1). [Reproduced in the accompanying notebook at Tab 1.]

C. Cases of Possible Concurrent Jurisdiction Between Belgium and ICTR and Their Resolutions

i. The Prosecutor v. Theoneste Bagosora

On 17 May 1996, Trial Chamber I of the ICTR ruled on the Application for a Formal Request for Deferral by the Kingdom of Belgium regarding Colonel Theoneste Bagosora.¹¹³ An investigation and criminal proceedings had been initiated against Colonel Bagosora in Belgian national courts regarding his “direct responsibility” for the genocide.¹¹⁴ The ICTR Prosecutor had also been conducting an investigation of Colonel Bagosora for crimes under the jurisdiction of the Tribunal.¹¹⁵ The Prosecutor submitted that to further investigate Colonel Bagosora’s responsibility for serious violations of international law, access to Belgium’s evidence, statements, documents and other findings should be transferred to the Tribunal.¹¹⁶

In its decision, the Trial Chamber noted that the

¹¹³ *Prosecutor v. Bagosora*, ICTR-96-7-D, Decision on the Application by the Prosecutor for a Formal Request for Deferral (17 May 1996). [Reproduced in the accompanying notebook at Tab 5.] The Tribunal granted a request for deferral two months earlier, on 12 March 1996, in *Prosecutor v. Bagosora*, ICTR-96-6-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Radio Television Libre des Mille Collines Sarl (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence) (12 March 1996), which was complied with by the Government of Belgium. See 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999 88-91 (Andre Klip & Goran Sluiter eds., 2001). [Reproduced in the accompanying notebook at Tab 11.]

¹¹⁴ 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999 88-91 (Andre Klip & Goran Sluiter eds., 2001). Colonel Bagosora was being investigated for his involvement and responsibility for the massacres following the attack on President Habyarimana, for the murder of ten Belgian Peacekeeping soldiers, and for the effective control over the military. [Reproduced in the accompanying notebook at Tab 11.]

¹¹⁵ See *id.* [Reproduced in the accompanying notebook at Tab 11.]

¹¹⁶ See *id.* [Reproduced in the accompanying notebook at Tab 11.]

continuation of parallel investigations by the Belgian courts and the International Tribunal might be detrimental to the investigations, including the testimonies. As they are repeated, testimonies can indeed lose their credibility, not to mention the risk of causing the witnesses to be distrustful; moreover the witnesses might be traumatized and even threatened of bodily harm.¹¹⁷

The Trial Chamber also discussed the principle of *non bis in idem*, or double jeopardy, and stated that since the ICTR Statute Article 9, paragraph 2, sets limits on those who may be retried by the Tribunal, Colonel Bagosora would *not* be eligible to be retried by the Tribunal if he was first tried in Belgium.¹¹⁸ This, in turn, would violate the purpose of the ICTR to investigate and prosecute “persons in position of authority, who were responsible for serious violations of international humanitarian law.”¹¹⁹

The Trial Chamber ruled that the request for referral should be granted and formally requested the Kingdom of Belgium “to defer to the International Tribunal all investigations and criminal proceedings currently being conducted against Theoneste Bagosora.”¹²⁰ In the request, the Prosecutor also noted that “the Kingdom of Belgium has always been cooperative and it is expected that the latter would not be reluctant to accede to this request” and that the Belgian Ministry of Justice had already indicated its willingness to comply with the request.¹²¹

¹¹⁷ *Id.* [Reproduced in the accompanying notebook at Tab 11.]

¹¹⁸ *See id.* [Reproduced in the accompanying notebook at Tab 11.]

¹¹⁹ 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999 88-91 (Andre Klip & Goran Sluiter eds., 2001). [Reproduced in the accompanying notebook at Tab 11.]

¹²⁰ *Id.* [Reproduced in the accompanying notebook at Tab 11.]

¹²¹ *Id.* [Reproduced in the accompanying notebook at Tab 11.]

This case sets out the mechanisms by which to request a successful deferral, while noting that prior diplomatic relations had been used to effectuate the cooperation of the deferring state of Belgium.¹²²

The Trial Chamber ruled on another motion by the Defence on 13 September 1999.¹²³ The Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga addressed the issue of cooperation with the Tribunal, as at that time, Belgium had planned on exercising jurisdiction over Ntuyahaga while his testimony might be used in the present case against Colonel Bagosora.¹²⁴ The decision stated “Article 28 obliges States to cooperate with the Tribunal in its investigation and prosecution of accused persons, and requires States to comply with any request for assistance or order issued by a Trial Chamber.”¹²⁵

¹²² *Prosecutor v. Bagosora*, ICTR-96-7-D, Decision on the Application for a Formal Request for Deferral (17 May 1996). “In order to meet the conditions for a deferral, the Prosecutor therefore must demonstrate:

a) that national investigations or criminal proceedings have been instituted against said Theoneste Bagosora by the Kingdom of Belgium respecting crimes which come under the jurisdiction of the International Tribunal;

b) that investigations are being conducted by the Prosecutor on serious violations of international humanitarian law allegedly committed in the territory of Rwanda or in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in particular in respect of violations allegedly committed by Theoneste Bagosora;

c) that these investigations or criminal proceedings are closely related and otherwise involve a significant factual or legal questions which may have implications for the prosecutor’s investigations or prosecutions.” *Id.* [Reproduced in the accompanying notebook at Tab 5.]

¹²³ *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made By the Defence for Protection Measures for Mr. Bernard Ntuyahaga (13 September 1999). [Reproduced in the accompanying notebook at Tab 6.]

¹²⁴ *See id. Discussed infra* at ___. [Reproduced in the accompanying notebook at Tab 6.]

¹²⁵ *Id.* [Reproduced in the accompanying notebook at Tab 6.]

The Trial Chamber, in the case of Colonel Theoneste Bagosora, reaffirmed its primacy, the duty of domestic courts to defer to the Tribunal, and the duty of states to cooperate with the Tribunal.

ii. The Prosecutor v. Joseph Kanyabashi

On 18 June 1997, Trial Chamber II ruled on the Defence Motion on Jurisdiction in the case of *The Prosecutor v. Joseph Kanyabashi*.¹²⁶ The Defence motion accused the Tribunal itself of violating the principle of *jus de non evocando*: the right, in civil law jurisdictions, to be tried in one's own domestic court.¹²⁷ On 11 January 1996, the Tribunal requested Belgium defer its criminal proceedings against Kanyabashi.¹²⁸ Kanyabashi had been arrested in Belgium on 28 June 1995 and was subsequently transferred to the Tribunal on 8 November 1996.¹²⁹

The Tribunal soundly responded to the Defence motion regarding a lack of jurisdiction:

It is true that the Tribunal has primacy over domestic criminal Courts and may at any stage request national Courts to defer to the competence of the Tribunal pursuant to Article 8 of the Statute of the Tribunal, according to which the Tribunal may request that national Courts defer to the competence of the Tribunal at any stage of their proceedings. The Tribunal's primacy over national Courts is also reflected in the principle of non bis in idem as laid down in Article 9 of the Statute and in Article 28 of the Statute which establishes that States shall comply

¹²⁶ *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (18 June 1997). [Reproduced in the accompanying notebook at Tab 7.]

¹²⁷ *See id.* [Reproduced in the accompanying notebook at Tab 7.]

¹²⁸ *Prosecutor v. Kanyabashi*, ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings (23 May 2000). [Reproduced in the accompanying notebook at Tab 8.]

¹²⁹ *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Protective Measures for Defence Witnesses and their Families (25 November 1997). [Reproduced in the accompanying notebook at Tab 9.]

without undue delay with any request for assistance or an order issued by a Trial Chamber.¹³⁰

In the Trial Chamber's deliberation of 23 May 2000 regarding Kanyabashi's transfer to the Tribunal from Belgium, it reaffirmed this stance:

The Chamber recalls that Article 8(2) of the Statute grants the Tribunal primacy over the national courts of all States. At any stage of the procedure, the Tribunal may formally request national courts to defer to its competence in accordance with the Statute and the Rules.¹³¹

The Tribunal has reiterated in this series of cases its primacy over domestic courts and the validity of that jurisdiction. Under these cases, a request for deferral to the Tribunal could not legally be rejected by the national courts of Belgium.

iii. The Prosecutor v. Bernard Ntuyahaga

In the ICTR decision on the Prosecutor's motion to withdraw the indictment in *The Prosecutor v. Bernard Ntuyahaga*, the Government of Belgium was amicus curiae.¹³²

Ntuyahaga was originally indicted by the ICTR for the murder of Prime Minister Agathe Uwilingiyimana and ten Belgian Peacekeeping soldiers.¹³³ The ICTR Prosecutor in this case was willing to drop the indictment against Ntuyahaga on the condition that he would be released into the custody of the Tanzanian government, an arrangement supported by Belgium, as the

¹³⁰ *Id.* [Reproduced in the accompanying notebook at Tab 9.]

¹³¹ *Prosecutor v. Kanyabashi*, ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings (23 May 2000). [Reproduced in the accompanying notebook at Tab 8.]

¹³² *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999). [Reproduced in the accompanying notebook at Tab 10.]

¹³³ *See id.* [Reproduced in the accompanying notebook at Tab 10.]

government there hoped to obtain jurisdiction over Ntuyahaga from Tanzania.¹³⁴ Belgium had, in fact, already initiated proceedings against Ntuyahaga for his involvement in the death of the ten Belgian Peacekeepers.¹³⁵ The Prosecutor argued that this withdrawal would “promote the exercise of concurrent jurisdiction as provided for under Article 8(1) of the Statute by allowing national courts to prosecute the accused.”¹³⁶ The Government of Belgium argued that the “the activities of the Tribunal and national jurisdictions are complementary” and “whereby all States must fully cooperate with the Tribunal, [that] implies necessarily a reciprocal cooperation of the Tribunal with the States.”¹³⁷ The Tribunal responded to these arguments in favor of Ntuyahaga, noting that the concurrent jurisdiction provision of the Statute must be read along with Article 8, paragraph 2 of the Statute which gives primacy to the Tribunal over the national courts of all states.¹³⁸ This case is yet another example of the Tribunal asserting and maintaining its primacy over national courts.

¹³⁴ *See id.* “CONSIDERING the addendum to said motion, filed on 10 March 1999, whereby the Prosecutor additionally requested that the Chamber order the release of the accused Bernard Ntuyahaga from the Tribunal’s custody to the authorities of the United Republic of Tanzania.” [Reproduced in the accompanying notebook at Tab 10.]

¹³⁵ *See id.* [Reproduced in the accompanying notebook at Tab 10.]

¹³⁶ *Id.* [Reproduced in the accompanying notebook at Tab 10.]

¹³⁷ *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor’s Motion to Withdraw the Indictment (18 March 1999). [Reproduced in the accompanying notebook at Tab 10.]

¹³⁸ *See id.* [Reproduced in the accompanying notebook at Tab 10.]

D. Belgian Exercise of Universal Jurisdiction Over Rwandans Involved in the Genocide

In the first case of its kind, four Rwandans were convicted of war crimes committed in Rwanda in the Belgian court.¹³⁹ Two Benedictine nuns (Sister Gertrude and Sister Maria Kisito), a physics professor (Vincent Ntezimana), and a factory manager (Alphonse Higaniro) were convicted of war crimes by twelve Belgian men and women; the first time a jury of citizens sat in judgment over war crimes committed in another nation, whose victims were not nationals of Belgium.¹⁴⁰ The two nuns were found guilty of conspiring with Hutu militia as up to 7,000 Tutsis were murdered in and around the convent buildings the two nuns had forced fleeing Tutsis away from.¹⁴¹ Ntezimana was found guilty of complicity of the killing of at least six Tutsi.¹⁴² Higaniro, who was a close friend of former President Habyarimana, was convicted of killing eight people and was also accused of financing and organizing the local Hutu militia by skimming funds off his factory which was partly state-owned.¹⁴³

¹³⁹ Marlise Simons, *Mother Superior Guilty in Rwanda Killings*, N.Y. TIMES, 9 June 2001, at 4. [Reproduced in the accompanying notebook at Tab 42.]

¹⁴⁰ *See id.* [Reproduced in the accompanying notebook at Tab 42.]

¹⁴¹ *See id.* Sister Gertrude was also accused of summoning the local mayor and the police in order to drive 22 family members of Tutsi nuns who were hiding in the convent. All 22 were killed as they were forced to leave their hiding place in the convent. [Reproduced in the accompanying notebook at Tab 42.]

¹⁴² *See id.* [Reproduced in the accompanying notebook at Tab 42.]

¹⁴³ *See id.* [Reproduced in the accompanying notebook at Tab 42.]

The four defendants had fled to Belgium at the end of the genocide.¹⁴⁴ While in Belgium, the government exercised universal jurisdiction over the defendants, indicted and tried all four.¹⁴⁵ The Belgian court was successful in its prosecution of the four defendants, yet it received both praise and criticism for the proceedings and for its exercise of universal jurisdiction. Human rights activists saw the case as a victory in the expansion of common principles of international law.¹⁴⁶ Belgium's history as a former colonial ruler in Rwanda, however, offended some Hutus who questioned the lack of investigations into European governments regarding their knowledge of the genocide in Rwanda, and possible failure to act.¹⁴⁷ One reporter described the trial as "not an allegory of innocence, after all, but a study in the unimaginable disguises of evil."¹⁴⁸

The significance of this trial is twofold: 1) the targets were not high level authorities, better suited for prosecution at the Tribunal, yet were involved in the atrocities that still impacted the genocide; and 2) the success of the trial in the national court of Belgium may serve to

¹⁴⁴ Anton LaGuarda, *Nuns Found Guilty of Rwandan War Crimes*, THE DAILY TELEGRAPH (London), 8 June 2001, at 18. [Reproduced in the accompanying notebook at Tab 40.]

¹⁴⁵ *See id.* [Reproduced in the accompanying notebook at Tab 40.]

¹⁴⁶ *See id.* [Reproduced in the accompanying notebook at Tab 40.]

¹⁴⁷ Keith B. Richburg, *Rwandan Nuns Jailed in Genocide; Belgian Jury Also Sentences 2 Others*, THE WASHINGTON POST, 9 June 2001, at A1. One Hutu man who had fled to Congo noted the nonintervention of Belgian Peacekeepers when the genocide began. It should be pointed out that the Peacekeeping troops in Rwanda had no authorization from the Security Council to use any force whatsoever and, therefore, could not intervene with force. [Reproduced in the accompanying notebook at Tab 41.]

¹⁴⁸ Michael Ignatieff, *The Way We Live Now: 09-09-01: Exhibit A; Blood Sisters*, N.Y. TIMES, 9 September 2001, at 74. [Reproduced in the accompanying notebook at Tab 38.]

encourage other national courts to prosecute the same types of perpetrators,¹⁴⁹ thus lessening the burden on the ICTR so it may focus on high level authorities.

The sheer number of persons arrested for their involvement in the Rwandan genocide makes it impractical for the ICTR to prosecute all those indicted.”¹⁵⁰ Even the most “well-designed international criminal tribunal has sharp limitations, especially in handling a high volume of criminal prosecutions.¹⁵¹ This is one of the reasons why the concurrent jurisdiction provisions were included in the ICTR Statute.¹⁵² The national courts can work in conjunction with the Tribunal “to ensure that the greatest number of the so-called *genocidaires* are brought to justice.”¹⁵³ Belgium’s codification of the Geneva convention serves to guarantee that perpetrators of war crimes and crimes against humanity do not go unpunished.¹⁵⁴

¹⁴⁹ See Roht-Arriaza, *supra* note 53, at 315-317. [Reproduced in the accompanying notebook at Tab 28.]

¹⁵⁰ See Popoff, *supra* note 24, at 373. “There were over 80,000 people sitting in Rwandan prisons awaiting trial in 1996. The tribunal consisted of only six justices and the appellate court was shared with the already busy ICTY. In addition, the tribunals also shared the same prosecutor to ensure the same prosecutorial approaches.” [Reproduced in the accompanying notebook at Tab 25.] See also Alex Duval, *Household Courts to Hear Rwandan Genocide Cases*, INDEP. (London), 5 October 2001. “In a unique experiment in grassroots justice, millions of Rwandans went to the polls yesterday to elect the 260,000 men and women who will preside over the community courts that judge thousands of suspected perpetrators of the genocide of 1994.” [Reproduced in the accompanying notebook at Tab 37.]

¹⁵¹ Wedgwood, *supra* note 47, at 394. [Reproduced in the accompanying notebook at Tab 32.]

¹⁵² See MORRIS & SCHARF, *supra* note 22, at 312-320. “the notion of primacy confirms the prosecutorial discretion of the Rwanda Tribunal to determine which cases should be handled by the international tribunal rather than by national courts. It provides for a selective approach to international criminal jurisdiction in view of the limited resources of the Rwanda Tribunal compared to the resources of most national judicial systems.” *Id.* at 316. [Reproduced in the accompanying notebook at Tab 17.]

¹⁵³ Payam Akhavan, *The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment*, 90 A.J.I.L. 501, 510 (1996). Payam Akhavan was Legal Advisor, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia and Rwanda. [Reproduced in the accompanying notebook at Tab 19.]

The symbolic effect of prosecuting leaders and figure-heads in the Tribunal gives respect and validity to the Tribunal, while working toward national reconciliation.¹⁵⁵ Transplanting the very system which is to foster this reconciliation, especially 3000 miles away to Belgium, may serve to weaken the authority of the Tribunal, and possibly the United Nation as its forming body. The national courts, including Belgium's, can serve as a supplemental arena for the execution of justice. However, the Tribunal is a more appropriate place for the prosecution of the main instigators and sources of the genocide in Rwanda: the leaders and figure-heads.

It has been said that “the ultimate success or failure of the Rwanda Tribunal depends on the financial and political support of the international community, which, in turn, depends on a firm resolve to vindicate the most elementary norms of humanity.”¹⁵⁶ Belgium has the opportunity to support the international community with its exercise of universal jurisdiction, but must be careful not to undermine the success of the Tribunal by prosecuting main targets of the ICTR, like leaders and figure-heads.¹⁵⁷ A consistent exercise of primacy by the ICTR over key targets being investigated or prosecuted in national courts can serve to strengthen the ICTR

¹⁵⁴ See Zaid, *supra* note 11, at 458. [Reproduced in the accompanying notebook at Tab 34.]

¹⁵⁵ See *id.* at 509. “Nevertheless, the symbolic effect of prosecuting even a limited number of the perpetrators, especially the leaders who planned and instigated the genocide, would have considerable impact on national reconciliation, as well as on deterrence of such crimes in the future.” [Reproduced in the accompanying notebook at Tab 34.]

¹⁵⁶ Akhavan, *supra* note 153, at 510. [Reproduced in the accompanying notebook at Tab 19.]

¹⁵⁷ See Philip Jacobson, Israeli Terror Victims Sue Arafat Under Belgian War Crime Law, THE SUNDAY TELEGRAPH, 23 September 2001, p. 28. “Many international lawyers however believe that Belgium should not be taking responsibilities better suited to the war crimes tribunal in the Hague, where Slobodan Milosevic, the former Yugoslavian president, is currently facing trial. One Belgian lawyer, Eric David, said the law, which was fiercely opposed by sections of the country's political and legal establishment, would provoke so many complaints that the courts would not be able to cope.” [Reproduced in the accompanying notebook at Tab 39.]

itself. Allowing national courts to investigate and prosecute individuals who were not leaders or figure-heads in the genocide, yet should nonetheless be prosecuted, can only help to bring the most numbers of *genocidaires* to justice.