

**SUBMISSION TO THE COURT OF APPEALS OF BRUSSELS ON THE
AUTHORITY AND JURISDICTION OF BELGIUM TO CRIMINALLY
PROSECUTE ARIEL SHARON, PRIME MINISTER OF ISRAEL, FOR
ALLEGED ACTS OF GENOCIDE, CRIMES AGAINST HUMANITY,
AND VIOLATIONS OF THE GENEVA CONVENTIONS**

**PREPARED BY
THE WORLD ORGANIZATION AGAINST TORTURE USA**

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SUBMISSION TO THE COURT OF APPEALS OF BRUSSELS ON THE AUTHORITY AND JURISDICTION OF BELGIUM TO CRIMINALLY PROSECUTE ARIEL SHARON, PRIME MINISTER OF ISRAEL, FOR ALLEGED ACTS OF GENOCIDE, CRIMES AGAINST HUMANITY, AND VIOLATIONS OF THE GENEVA CONVENTIONS

I. STATEMENT OF PURPOSE

The purpose of this submission is to provide the Court of Appeals of Brussels with an analysis of several of the international legal principles applicable to the Belgian domestic prosecution of Israeli Prime Minister Ariel Sharon for alleged acts of genocide, crimes against humanity, and violations of the Geneva Conventions, occurring when Prime Minister Sharon was Minister of Defense for the Government of Israel. The World Organization Against Torture USA (WOAT) offers this submission because we believe that the human rights issues raised by this proceeding are of profound importance, and have a substantial impact on the development of the principles of universal jurisdiction and criminal accountability embodied in human rights treaties and customary international law. This case represents one of the first cases instituted under the principle of universal criminal jurisdiction, based on the alleged commission of internationally recognized crimes committed by a non-national of the prosecuting state who is: 1. not currently present in that country; 2. whose alleged victims were not nationals of the prosecuting country; and, 3. where the crime did not occur within that country's territorial jurisdiction. As such, it raises a number of important legal questions and issues regarding the allowable scope of the exercise of universal criminal jurisdiction under certain human rights instruments, the ability of these criminal standards to deal with conduct of high-level government officials, including heads of state, and the effect of domestic amnesty laws on these types of criminal prosecutions.

The present submission is intended to provide the Court with legal analysis and support on two of the most critical legal issues and questions raised by the case. While many fundamental issues are present, this legal brief addresses two initial concerns raised by the investigating magistrate with the Court of Appeals for clarification: 1) whether Belgium can exercise jurisdiction over alleged acts of genocide, crimes against humanity, and war crimes, based solely on the principle of universality, where the alleged perpetrator is not present in Belgium; and 2) whether a 1991 Lebanese amnesty law bars such a prosecution in Belgian courts. If the investigation continues, it may be necessary to address other critical issues such as

head-of-state immunity, suitability of forum, and retroactivity, and we would be pleased to address that at the proper time.

It is important to emphasize the distinction that must be made between investigation and indictment for alleged crimes under the principle of universal jurisdiction, and the initiation of a criminal trial for such violations. While we believe there is adequate basis under the principle of universal jurisdiction and Belgium's Universal Jurisdiction Law for the Belgian courts and prosecutors to investigate alleged crimes and indict alleged perpetrators, we also believe that it is firmly established in international and Belgian law that no criminal trials can take place in absentia. Applying this distinction to the Sharon case, we believe there is a firm legal basis under the principle of universal jurisdiction for investigation of grave abuses of human rights standards related to the Sabra and Shatila massacres in 1982, but that a criminal trial can not be initiated against Prime Minister Sharon without his personal presence in the jurisdiction of the court.

II. STATEMENT OF INTEREST

This legal analysis was prepared by the World Organization Against Torture USA, with the assistance of a legal intern from Yale Law School's Human Rights Clinic. WOAT is a non-profit human rights monitoring, reporting, and legal support group, serving as the U.S. affiliate of the international World Organization Against Torture (OMCT), a worldwide network of over 200 human rights organizations, each focusing primary attention on their own government's compliance with international human rights standards. We also are a member of the SOS Torture Network, an electronic information clearinghouse circulating case alerts aimed at publicizing and preventing major torture related abuses worldwide. In addition to our work on criminal accountability cases and issues we serve as the leading support center and information clearinghouse in the United States dealing with Convention Against Torture cases, and have issued reports on U.S. compliance under a number of major human rights treaties, most recently the Convention on the Elimination of Racial Discrimination (CERD).

Our Criminal Accountability Project supports the criminal prosecution of torturers and other major human rights violators under the principles of universal jurisdiction and criminal accountability as embodied in the Convention Against Torture and other international human rights instruments. Through our Criminal Accountability Project, we previously prepared and submitted to the Supreme Court of Senegal an amicus brief in support of the prosecution of former Chadian dictator Hissene Habre. Our brief, submitted through the auspices of the prosecutor's office, addressed many important

international legal issues presented before the Court. Additionally, we have drafted a number of legal submissions proposing the indictment and/or extradition by the United States of Emmanuel Constant of Haiti, the leader of the FRAPH paramilitary organization. We also are currently supporting several other pending cases worldwide dealing with issues of criminal accountability and universal jurisdiction through the preparation and submission of legal analyses on the key issues raised in these cases. Our Criminal Accountability Project supports the development of criminal tribunals in such countries as Sierra Leone, Cambodia and East Timor, and the establishment of the International Criminal Court. WOAT is not affiliated with any government.

The questions presented here, regarding Belgium's jurisdiction to investigate Israeli Prime Minister Ariel Sharon, for alleged crimes of genocide, crimes against humanity, and war crimes are fundamental to the enforcement of criminal accountability principles under international law. For this reason, we are making this submission to the Court of Appeals of Brussels in support of Belgium's jurisdiction to continue the investigation into the charges against Prime Minister Sharon.

III. STATEMENT OF FACTS

A more detailed review of the facts is provided in submissions previously submitted to the court. Key highlights as presented to the Court by the parties to the case include the following:

In September 1982, the Israeli Parliament (Knesset), through a political directive, established a commission of inquiry presided over by Mr. Yitzhak Kahan, to investigate the events that occurred in the refugee camps of Sabra and Shatila, located in the south of West Beirut from 15-18 September, 1982, during which time these territories were subject to military control of the Government of Israel. The Kahan Commission concluded that Ariel Sharon, as Israeli Minister of Defense, may have borne some command responsibility, by virtue of the authority and control he exercised over the camps, for the rapes, disappearances, and ultimately the massacres of a large number of unarmed civilians (reportedly ranging from 700 to 3,500), mostly women, children, and elderly. On 19 September 1982, the United Nations (UN) Security Council condemned the massacre with Resolution 521, and on 16 December 1982, the UN General Assembly passed a resolution designating the massacre as an "act of genocide." In spite of both the Israeli and international condemnations of the Sabra and Shatila massacres, no judicial action has ever been taken against those deemed responsible, including Ariel Sharon in his

capacity as the principal governmental and military official supervising the region.

On Wednesday, 15 September 1982, the Israeli Government re-occupied portions of West Beirut. As part of this reoccupation, General Sharon permitted Lebanese Phalangist forces to gain access to the Palestinian camps of Sabra and Shatila, resulting in the massacres described above. During the late afternoon of the 15th, Israeli forces allegedly bombarded the camps with shells. By the 16th, the Israeli army controlled West Beirut and “surrounded and sealed” the refugee camps. It was during this period that the entry of the Phalangist army and resulting massacres took place.

On the morning of the 16th, the following order was issued by the Israeli army high command: “The searching and mopping up of the camps will be done by the Phalangist/Lebanese army.” At about midday on the 16th, the Israeli military command gave the Phalangist militia authority to enter the refugee camps. Shortly after 5pm, a unit of approximately 150 Phalangists entered Shatila camp from the south and southwest. For the next 40 hours inside the “surrounded and sealed” camps, the Phalangist militia raped, killed, and injured a large number of unarmed civilians, mostly women, children, and elderly. These actions were accompanied by systematic roundups, allegedly supported by the Israeli army, resulting in dozens of disappearances.

Until the morning of Saturday the 18th, when the massacre ended, the Israeli army, commanded by General Sharon, was in constant contact with the Phalangist militia leaders and was aware of the events taking place in the camps. The Israeli army made no attempt to intervene, but rather prevented civilians from escaping the camps. The camps were illuminated throughout the night by flares sent into the sky from Israeli helicopters and mortars. General Sharon, as military commander, had direct authority over the Sabra and Shatila camps but did not prevent the massacres from taking place. From 9am on the 15th, General Sharon was personally present at the scene, installing himself in the general army camp at the Kuwait embassy junction situated at the edge of Shatila. From the roof of this six-story building, it was possible to clearly observe the town and the camps of Sabra and Shatila, and the events unfolding within the camps.

On June 18, 2001, 23 Palestinian and Lebanese survivors of the massacres brought a civil indictment in Belgium against Messrs. Ariel Sharon, Amos Yeron and other Israelis and Lebanese allegedly responsible for these events. The charges are based on *The Loi Relative A La Repression Des Violations Graves De Droit International Humanitaire (Moniteur Belge, Mar. 23, 1999)*, which authorizes Belgian courts to exercise universal jurisdiction over certain international

crimes. Sharon and others are charged with acts of genocide, crimes against humanity, and crimes against persons and goods protected by the Geneva Conventions of 1949.

IV. LEGAL ISSUES ADDRESSED

In July 2001, Investigating Magistrate Patrick Collignon opened an investigation of the complaint. On September 7, 2001, Magistrate Collignon suspended the investigation and submitted several questions to the Court of Appeals.¹ Of special concern to the investigating magistrate are two specific questions: first, whether the Belgian universal jurisdiction law² applies and can be invoked when the alleged perpetrator is not in Belgium and the traditional grounds for invoking domestic jurisdiction over crimes committed abroad are not present; second, whether the Lebanese Amnesty Law limits or precludes the ability of the Belgian courts to investigate the alleged violations under principles of universal jurisdiction.

A. BELGIAN COURTS HAVE JURISDICTION TO INVESTIGATE AND INDICT PERPETRATORS OF GROSS HUMAN RIGHTS VIOLATIONS, BASED ON THE PRINCIPLES OF UNIVERSAL JURISDICTION AND CRIMINAL ACCOUNTABILITY EMBODIED IN INTERNATIONAL HUMAN RIGHTS LAW.

Certain international crimes are so grave in nature that all nations have the right, and sometimes the duty, to prosecute those who commit them. The crimes alleged in this complaint – genocide, crimes against humanity, and war crimes – are of this nature. The fact that the alleged perpetrator is not physically present within the jurisdiction of the prosecuting state does not bar that state from initiating criminal proceedings.

¹ Decision of Investigating Magistrate Patrick Collignon, Court of First Instance, Brussels, Belgium, Dossier No. 56/01, *Case against Ariel Sharon and Amos Yaron, et al*, in response to, Note by Michele Hirsh, *Etat d'Israel – Considerations Sur L'incompetance Des Jurisdictions Belges Pour Connaitre De La Plainte Depossee Le 18.6.2001 Sans L'affaire Portant Le No. 54/1 De Monsieur Le Juge D'instruction Collignon*.

² *Loi relative a la repression des violations graves de droit international humanitaire (Moniteur Belge, Mar. 23, 1999)*, English translation at 38 ILM 918, which modified the original *Loi relative a la repression des infractions graves aux conventions internationales de Genve du 12 aout 1949 at aux protocols I et II du juin 1977, assitionels a ces conventions*.

1. The Gravity and Pervasive Impact of Certain International Crimes Provide the Basis for Belgium to Exercise Universal Jurisdiction.

International criminal law recognizes five types of criminal jurisdiction: 1) territorial, based on the location of the crime; 2) nationality, based on the nationality of the alleged offender; 3) passive personality, based on the nationality of victim; 4) protective, based on a threat to the security or well-being of the prosecuting state; and 5) universal, based on the nature of crime.³ The first four jurisdictional bases are viewed as the more traditional requirements, in that domestic courts more commonly rely upon them to establish criminal jurisdiction over crimes that may have taken place abroad.

The separate formulation of these bases permits them to stand independent from each other. For example, the very nature of universal jurisdiction is that it can be invoked independent of any of the more traditional bases. Current international law endorses this concept of universal jurisdiction, as reflected in the recently drafted *Princeton Principles on Universal Jurisdiction*.⁴ Principle 1(1) defines universal jurisdiction as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” Obviously, a case may fit under more than one type of jurisdiction (or any other combination thereof).⁵ Only one basis, however, is required. Nationality jurisdiction, standing alone, meets the jurisdictional requirement under international criminal law. Likewise, universal jurisdiction, standing alone, meets the jurisdictional requirement. Other applicable jurisdictional bases may strengthen support for the prosecution. The presence or absence of one of these bases, however, is not determinative of whether a state can exercise universal jurisdiction.

The premise of universal jurisdiction is that some crimes are so severe as to damage the interests of the international community as a

³ Restatement Third of Foreign Relations Law of the United States (1987) 402-404. See also Jon B. Jordan, *Universal Jurisdiction In A Dangerous World: A Weapon For All Nations Against International Crime*, 9 MSU-DCL J. Int'l L. 1, 2-3.

⁴ Principle 1(1), *Princeton Principles on Universal Jurisdiction*, (2001), Princeton University Program in Law and Public Affairs [hereinafter, *Princeton Principles*].

⁵ For example, in the Spanish proceedings against Pinochet, both these bases for criminal jurisdiction were present. Passive personality jurisdiction existed because the victims were Spanish citizens, and universal jurisdiction existed because of the nature of the charges against Pinochet – torture and other crimes against humanity.

whole. Because these crimes pose a threat to, and negatively impact all nations, every nation is authorized to take appropriate legal action to either prosecute or extradite alleged perpetrators. In essence, the very nature of the crime forms the basis for each state to exercise jurisdiction over the alleged perpetrator. In his report to the International Law Association, Menno Kamminga stated,

Domestic courts and prosecutors bringing the perpetrators [of gross human rights offenses] to justice are not acting on behalf of their own domestic legal system but on behalf of the international legal order. The increasing exercise of universal jurisdiction in respect of gross human rights offenders is a reflection of the smaller world in which we live in which people feel affronted not merely by crimes committed within their own territories or against their own fellow citizens but also by heinous crimes perpetrated in distant states against others. They therefore regard it as appropriate that the machinery of justice in their state is used to bring the perpetrators to trial.⁶

Crimes that have traditionally fallen within the ambit of universal jurisdiction on these grounds include piracy; slavery; war crimes; crimes against peace; crimes against humanity; genocide; and torture.⁷ The crimes alleged in this case therefore trigger universal jurisdiction and authorize Belgium to initiate appropriate criminal proceedings.

2. Genocide, Crimes Against Humanity, and War Crimes Rise to the Level of Grave Crimes Invoking the Universal Jurisdiction Principle.

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) places primary jurisdiction for prosecution with the government where the violations occurred. Though the Genocide Convention expressly focuses on territorial jurisdiction, it does not preclude universal jurisdiction as an alternative basis for prosecuting a genocide suspect, leaving open the option to exercise universal jurisdiction.⁸

⁶ Menno T. Kamminga, *Final Report On The Exercise Of Universal Jurisdiction In Respect Of Gross Human Rights Offences*, Committee On International Human Rights Law And Practice, International Law Association, London Conference (2000) at 3.

⁷ Princeton Principle 2(1), *supra* note 4.

⁸ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (hereinafter Genocide Convention).

Moreover, the crime of genocide is subject to universal jurisdiction as a matter of customary international law.⁹ International case law has reinforced this position. In the Nuremberg trials after World War II, the Allied powers prosecuted genocide as a war crime under the concept of universal jurisdiction. Two leading national prosecutions have affirmed the principle that genocide is a crime subject to universal jurisdiction. In *Attorney General of Israel v. Eichmann*,¹⁰ and *Demjanjuk v. Petrovsky*,¹¹ the Israeli and U.S. governments, respectively, applied the principle of universal jurisdiction to facilitate genocide prosecutions in states other than where the genocide occurred. The court, in the *Eichmann* case, noted that while the Genocide Convention gives primary authority to prosecute to the nation where the genocide occurred, the Convention did not intend for this to be the only means for exercising jurisdiction. The court found that “every sovereign state may exercise its existing powers within the limits of customary international law.”¹² As noted above, customary international law authorizes universal jurisdiction over genocide.

Crimes against humanity also are considered gross human rights violations and, as such, are subject to the application of universal jurisdiction under customary international law.¹³ Crimes against humanity also are explicitly mentioned in Princeton Principle 2 as authorizing the application of universal jurisdiction.¹⁴ The Commentary to the Principles cites the Rome Statute of the ICC as providing more specific content to the term “crimes against humanity.”¹⁵ According to the Rome Statute, certain crimes qualify as crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁶ The fact that crimes against humanity, similar to those alleged to have taken place in the Sabra and Shatila refugee camps, are designated as within the jurisdiction of the

⁹ Restatement (Third) of the Foreign Relations Law of the United States (1987), para. 404, Reporters’ Note 1.

¹⁰ *Attorney General of Israel v. Eichmann*, 36 I.L.R. 18, 18 (Isr. Dist. Ct. – Jerusalem 1961), aff’d, 36 I.L.R. 277 (Isr. Sup. Ct. 1962).

¹¹ *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert denied, 475 U.S. 1016 (1986).

¹² *Eichmann* at 18.

¹³ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (2nd ed. 1999) 240.

¹⁴ Princeton Principle 2, supra note 4.

¹⁵ Commentary to the Princeton Principles, supra note 4 at 47.

¹⁶ Article VII, Rome Statute of the International Criminal Court, by the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc A/Conf.183/9 (1998) reprinted in 37 I.L.M. 999 (1998).

International Criminal Court adds weight to the conclusion that they are subject to universal jurisdiction standards.

The Geneva Conventions all explicitly provide for universal jurisdiction for violations of the laws of war. Article 146 reads:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.¹⁷ (emphasis added)

As a signatory to the Fourth Geneva Convention, which protects civilians in time of war or internal armed conflict, Belgium has the obligation to fulfill this responsibility in its own courts. Moreover, as a signatory to the Convention, Israel has given implicit consent to other nations to exercise this jurisdiction. The principles established by the Nuremberg Tribunal, both in its Charter and in its judgments, are further indications that war crimes and crimes against humanity are subject to prosecution by all governments under customary international law.¹⁸

The precedent set by the Pinochet proceedings in the United Kingdom in interpreting the universal jurisdiction clause of the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment and Punishment (CAT) also supports the basis for Belgium's exercise of universal jurisdiction. First, the Law Lords in *Pinochet III* (the second of the House of Lords rulings on whether the extradition proceedings could go forward) held that the Convention Against Torture obliges Britain to extradite Pinochet. More specifically, the Law Lords read the Convention Against Torture as establishing universal jurisdiction for national courts to prosecute acts covered by CAT, thereby compelling a holding that Pinochet's crimes were crimes under U.K. law, and thus obliging Britain to extradite. This sets a precedent to interpret the Fourth Geneva Convention as containing similar obligations for the Belgian judicial system. In particular, the Geneva

¹⁷ Geneva Convention IV, art. 146, at 3616, T.I.A.S. No. 3365 at 102, 75 U.N.T.S. at 386 (emphasis added). See also Geneva Convention I, art. 49 at 3146, T.I.A.S. No. 3362 at 34, 75 U.N. T.S. at 62; Geneva Convention II, art. 50, at 3250, T.I.A. S. No. 3363 at 34, 75 U.N.T.S. at 116; Geneva Convention III, art. 129, at 3418, T.I.A.S. No. 3364 at 104, 75 U.N.T.S at 236.

¹⁸ As laid out by the International Law Commission, <http://www.un.org/law/ilc/texts/nurnfra.htm>, at Principle VI.

Conventions compel the court to hold that it has jurisdiction over the acts in question under the universality principle, and that it is therefore obliged to continue its investigation according to its treaty obligations.

Moreover, we may look to Lord Millet's opinion in *Pinochet III* as a basis for finding that, regardless of treaty obligations, crimes against humanity and war crimes form a basis for universal jurisdiction in national courts under customary international law alone. The standards dealing with these crimes are firmly entrenched in international law and implicate the interests of all nations, insofar as their violation constitutes "an attack on the international legal order."¹⁹

Applying these jurisdictional standards to the specific question raised by Magistrate Collignon, it is true that Sharon does not fit into one of the more traditional jurisdictional categories. This does not preclude Belgian courts, however, from continuing their investigation into the victims' allegations. The victims allege that Sharon committed genocide, war crimes, and crimes against humanity. All three of these crimes are recognized through treaty and customary international law as gross human rights violations subject to universal jurisdiction. The very nature of these alleged crimes provides Belgium with a basis to establish jurisdiction over Sharon under universal jurisdiction standards. Sharon need not have committed the acts on Belgian soil, nor do the victims need to be of Belgian nationality. It is enough that the crimes alleged, if proven, would violate *jus cogens* norms of international law.

3. The Principle of Universal Jurisdiction in International Law Does Not Require that an Alleged Defendant Be Within the Territory of the Prosecuting State Before Launching an Investigation into an Alleged Crime.

There is nothing in the doctrine of universal jurisdiction that requires the defendant to be within the territory of the prosecuting state for that state to open an investigation. Indeed, such a requirement would contravene the fundamental premise of the doctrine, in that it would impede the possibility of bringing to justice perpetrators of grave human rights crimes who have fled nations

¹⁹ In discussing the crime of torture as customary international law, Lord Millet stated, "In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1971," *Regina v. Bartle-Ex Parte Pinochet*, 38 ILM 581 (U.K. House of Lords, 1999). See also Michael Ratner's analysis of *Pinochet III* in *The Pinochet Papers* (The Hague: Kluwer Law International, 2000) at 50.

where they might be subject to criminal jurisdiction based on more traditional standards of territoriality or nationality. For the court to endorse a personal custody requirement would undermine the purpose of the doctrine and would constitute a significant impediment to the effective prosecution of international criminals.

The Princeton Principles are clear that the law of universal jurisdiction does not require the presence of the potential defendant within the borders of the country whose courts seek to exercise this jurisdiction in order to investigate or request the extradition of the individual in question – although physical presence may be required to actually institute a criminal trial. Principle 1(1) suggests no such “present in the territory” standard for investigations or extradition proceedings is required. Indeed, the very fact that extradition forms a crucial mechanism of the process envisioned by the international legal scholars suggests that physical presence of the defendant is not a prerequisite for opening an investigation. The Commentary on Principle 1 specifically addresses this issue by indicating that its language “does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment, or requesting extradition, when the accused is not present.”²⁰ The investigation into Sharon is at the investigative level, and therefore, Magistrate Collignon can proceed under universal jurisdiction, even without Sharon being physically present in Belgium.

This issue is not entirely novel. Universal jurisdiction has been upheld where a defendant was not present in the prosecuting country. In the various European investigations into former Chilean president Augusto Ugarte Pinochet, the investigations proceeded and warrants were issued without Pinochet being present in the investigating countries. In the British extradition proceedings against Pinochet, both the preliminary proceedings in the House of Lords and the extradition proceedings proper in the Magistrate’s court were clearly predicated on the assumption that the Spanish investigation and request for extradition were not rendered illegitimate simply by the absence of Pinochet on Spanish soil. In Belgium’s investigation into Pinochet, the investigating magistrate, referring to Article 7 of Belgium’s universal jurisdiction law, held that “it was the legislator’s unambiguous intent that the law should apply even when the alleged perpetrator is not present in Belgian territory.”²¹ Indeed, for Belgium to hold the opposite in this case would actually occasion a *retreat* from

²⁰ Commentary to the Princeton Principles, *supra* note 4 at 44.

²¹ Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), Nov. 8, 1998, 93 A.J.I.L. 700.

the Pinochet precedent and would have grave implications for international human rights law.

There are important practical reasons to avoid imposing a “physical presence” limitation upon universal jurisdiction. Requiring physical presence would create an easy ‘safe haven’ for perpetrators in countries where political conditions ensure that they are shielded from good-faith criminal proceedings. Investigations could not proceed. Extradition proceedings would never have the chance to go forward. Precisely the conditions of political insulation from culpability for powerful perpetrators of human rights violations that the apparatus of universal jurisdiction has evolved to combat would be allowed to reassert themselves.

These arguments do not imply that there may not be valid policy reasons for Belgium to exercise its discretion not to prosecute, or even investigate certain individuals not present in Belgian territory. In fact, the law of universal jurisdiction makes room for such discretion. International and domestic law, however, clearly provide a firm jurisdictional basis for the investigation into alleged violations by Sharon to move forward, at least through the investigative and indictment phases, under universal jurisdiction.

We support the Princeton Principles standard that the physical presence of the defendant is mandatory before a trial can begin. To do otherwise would raise substantial problems of due process and arbitrariness. But this is not the issue posed by this case at this point in time, where only the authority of Belgian courts to *begin the criminal process* by instituting an investigation need be addressed.

B. AN AMNESTY LAW ADOPTED BY A GOVERNMENT WHERE MAJOR HUMAN RIGHTS ABUSES HAVE TAKEN PLACE CANNOT RESTRICT OR PREVENT THE EXERCISE OF INTERNATIONAL CRIMINAL JURISDICTION TO PROSECUTE THESE VIOLATIONS.

In 1991, Lebanon issued an amnesty law granting immunity for certain enumerated crimes committed before March 28, 1991.²² Lawyers for Israel have argued that this amnesty law covers the Sabra and Shatila massacres and therefore precludes Belgium from

²² Loi d’amnestie 84/21 du 28 Mars 1991.

investigating or prosecuting any alleged international crimes stemming from that incident.²³ Magistrate Collignon has presented this issue to the Court of Appeals of Brussels for further analysis and guidance.²⁴

The validity of domestic amnesty laws under international standards has been the subject of considerable debate particularly where governments seek to extend the protections of these amnesty laws beyond their own borders. One point that has been articulated very clearly is that such laws cannot be used to seek to grant impunity to individuals or groups who commit gross violations of international human rights law.²⁵ For example, when UN Secretary-General Kofi Annan signed the July 8, 1999 Sierra Leone Peace Agreement, which grants a broad amnesty for participants of the conflict,²⁶ he articulated that “the amnesty would not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.²⁷ The reasons for this approach are to prevent a situation where victims of such violations would be denied access to some legal remedy, criminal or civil, for their suffering; to recognize that national legislation cannot be used to abridge internationally protected rights; and to act as a deterrent.

Recent international jurisprudence has confirmed that amnesty laws that seek, or are applied, to excuse gross human rights violations, or to prevent victims from attaining remedies, are inconsistent with the international obligations of states to criminally prosecute such violations. The Inter-American Court of Human Rights has recently issued an opinion on this amnesty issue. The Court, in *Caso Paez Castillo*, stated:

The impunity that amnesty laws imply should be limited as much as possible, so that they are able to achieve their legitimate objectives without thus diminishing or undermining respect of human rights, whose violation cannot be regarded as a legitimate recourse in civil strife.... Recent studies on the subject have found that international law does not allow criminal

²³ See supra note 1.

²⁴ Id.

²⁵ Naomi Roht-Arriaza, *State Responsibility to Investigate And Prosecute Grave Human Rights Violations in International Law*, 78 California Law Review 451, 485 (1990).

²⁶ Article 9 of the Sierra Leone Peace Agreement outlines an “absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives.”

²⁷ UN Daily Press Briefing, 5-7 July 1999.

exoneration when grievous human rights violations are involved.²⁸

The Inter-American Commission on Human Rights has reached similar conclusions in reviewing the amnesty laws in such countries as Uruguay and Argentina. In those country reports, the Commission found that blanket amnesty laws that preclude criminal prosecution for gross human rights violations constitute improper restrictions on member states' obligations to prevent and prosecute such crimes.²⁹ In the Commission's recent analysis of the validity of Peru's amnesty laws, the Commission noted the following:

[T]he concept of amnesty was historically conceived of as a political measure by which the victorious sovereign would grant the pardon for the crimes of his enemies, so as to foster reconciliation after an armed conflict. This concept has been distorted in modern times, marked by 'self-amnesties' by which the sovereign grants itself a pardon for its own crimes, thereby creating a state of impunity and illegality, flagrantly contradicting the original purposes of the institution of amnesty.³⁰

In its 1999 report on Colombia, the Commission stated it has "uniformly found that amnesty laws ... that preclude or terminate the investigation and prosecution of State agents who may be responsible for serious violations of the American Convention or Declaration violate multiple provisions of these instruments."³¹ In this report, the Commission further stated that the Inter-American Court also has firmly adopted the principle that "States parties to the American Convention cannot invoke the application of their domestic law, in this case the amnesty laws, in order to disregard their obligation to ensure the full and proper functioning of government."³² The jurisprudence of

²⁸ *Castillo Paez Case*, Judgment of November 27, 1998, Inter-American Court of Human Rights, reported in IHRR Vol. 7 No. 1 (2000), concurring opinion of Judge Garcia-Ramirez, para. 8.

²⁹ Reports No. 28/92 and 29/92, 2 October 1992, *Annual Report of the Inter-American Commission on Human Rights 1992-1993*, 41 at 154.

³⁰ IACHR, Second Report on the Human Rights Situation in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev, 2 June 2000, Chapter II, para. 220.

³¹ IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, op. cit., para. 345. See also the following cases, in which the compatibility of amnesty laws with the American Convention was challenged: Report No. 1/99, Case 10.480 (El Salvador), IACHR, Annual Report 1998; Report No. 36/96, Case No. 10,843 (Chile), IACHR, Annual Report 1996; Reports No. 28/92, Cases 10.147, 10.240, 10.262, 10.309, and 10.311 (Argentina), and No 29/96, Cases 10.029, 10.036, 10.372, 10.373, 10.374, and 10.375 (Uruguay), IACHR Annual Report 1992-1993.

³² *Id.*

the Inter-American human rights system shows that neither the Court nor the Commission recognize amnesty laws precluding prosecution of crimes such as those alleged in this case – genocide, crimes against humanity, and war crimes.

Support for the position that amnesty laws must not contradict international obligations also can be found in the jurisprudence of United Nations human rights treaty-monitoring bodies. The United Nations Human Rights Committee, referring to the Article 7 prohibition against torture in the International Covenant on Civil and Political Rights (ICCPR), has issued a comment specifically rejecting the legality of granting national amnesty to torturers. At its 44th Session in 1992, the Committee issued General Comment 20, holding that “amnesties are generally incompatible with the duty of States to investigate such acts [torture and cruel, inhuman, or degrading treatment or punishment]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”³³ The Human Rights Committee applied this standard in the case of Rodriguez v. Uruguay, holding that a Uruguayan amnesty law that precluded a remedy for victims of torture was inconsistent with Uruguay’s obligations under Article 7 of the ICCPR to prevent and punish these abuses.³⁴

The Committee also applied this standard in calling for the voiding of amnesty laws adopted by Peru and noting its deep concern for the potential impunity that may result:

The amnesty granted by Decree Law 26,479 on 14 June 1995, absolves from criminal responsibility and, as a consequence, from all forms of accountability, all military, police, and civilian agents of the State who are accused, investigated, charged, processed, or convicted [of crimes committed during the war on terrorism] ... Such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, [and] contributes to an atmosphere of impunity among perpetrators of human rights violations *In this connection, the Committee reiterates its view as expressed in its General Comment 20(44), that this type of amnesty is incompatible with the duty of States to investigate human rights violations...[and] domestic*

³³ Human Rights Committee, General Comment No. 20 on Article 7, para. 15.

³⁴ Case No. 487/1992 (1994), Report of the Human Rights Committee Vol. II GAOR 49th Session, Supplement 40 No. 20 (1994) Annex X B.

legislation cannot modify a State party's international obligations under the Covenant. ”³⁵ (emphasis added)

A similar standard has been enunciated by the United Nations Committee Against Torture, in evaluating the legality and appropriateness of amnesty laws adopted by Azerbaijan. The Committee recommended the Azerbaijan government, “ensure that amnesty laws exclude torture from their reach” because torture, as well as several other types of international crimes involving gross human rights abuses, cannot be excused or made subject to impunity.³⁶ The UN General Assembly follows this reasoning in regards to prosecuting forced disappearances, stating that those who perpetrate forced disappearances cannot benefit from amnesty laws.³⁷ The crimes alleged in the present case – genocide, crimes against humanity, and war crimes – are comparable in their gravity to torture and forced disappearance, and this same principle of inapplicability of amnesties logically extends to cover them as well. Additionally, a 1997 study submitted by the UN Special Rapporteur on amnesty laws to the UN Commission on Human Rights confirmed that “those who have committed grave and surreptitious violations of international law should not be protected by amnesty [laws]” adopted at the domestic level by individual states, because “the right to justice entails the States’ obligations to investigate the violations, place on trial those who perpetrate them, and, if their responsibility is established, punish them.”³⁸ Along with the jurisprudence of the Inter-American system, the United Nations has reinforced the principle that amnesties providing impunity for massive human rights violations cannot be valid.

Amnesty laws that seek to extend impunity too broadly do not bind third party states attempting to exercise universal jurisdiction. In 1997, Spanish Magistrate Balastar Garzon of the Fifth Tribunal of the Spanish National Audiencia issued international arrest warrants for Argentine officials who were covered by Argentina’s internal amnesty

³⁵ U.N. Doc. CCPR/C/79/Add. 67 (July 25, 1996) Preliminary Observations of the Human Rights Committee, Peru.

³⁶ Conclusions and recommendations of the Committee against Torture : Azerbaijan. 17/11/99. CAT/C/23/5, (Concluding Observations/Comments) 23rd session, 8-19 November 1999.

³⁷ Art. 18, UNGA Declaration 47/133 on the Protection of All Persons from Enforced Disappearances, 8 December 1992.

³⁸ Louis Joinet, *Administration of Justice and the Human Rights of Detainees, Questions of the Impunity of Perpetrators of Human Rights Violations (civil and political)*, prepared for the United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. 1996/119, E/CN.4/Sub.2/1997/20 Rev. 1, October 2, 1997.

laws. The warrants were issued after Garzon determined that the Argentine amnesty laws were not binding on Spanish courts.³⁹ This precedent has been followed in subsequent international investigations and was addressed in the Princeton Principles. Principle 7(2) states, “[t]he exercise of universal jurisdiction with respect to serious crimes under international law...shall not be precluded by amnesties which are incompatible with international legal obligations of the granting state.”⁴⁰ Because the crimes alleged in this case are indeed gross human rights abuses, and the Lebanese Amnesty Law, if accepted and invoked by the Belgian courts, would bar prosecution for those responsible for these abuses, the amnesty law would, in effect, be providing international impunity for violations of peremptory norms of international law. Additionally, the amnesty would preclude the victims of the Sabra and Shatila massacre from obtaining a legal remedy for their suffering. The Lebanese Amnesty Law, therefore, is inconsistent with international law and the Belgian courts need not adhere to it in its exercise of universal jurisdiction.

Not all amnesty grants are inconsistent with international law. In fact, Article 6(5) of Additional Protocol II to the Geneva Conventions suggests the use of amnesties at the conclusion of international armed conflicts in an effort to foster reconciliation.⁴¹ The *travaux preparatoires*, however, make it clear that any such amnesty is not available to those who violated the law, but rather to those who were “detained or punished for the mere fact of having participated in the hostilities.”⁴² The prospective defendants in this case do not fit within the exception of Additional Protocol II in that they are not being investigated because of simple participation in hostilities, but for very specific and grave violations of international law, which Article 6(5) stipulates are not amenable to waiver through amnesty laws.

Under current standards and interpretations, amnesties must be narrowly tailored and applied so as to avoid inconsistencies with international law, and improper limitations on remedies for victims. Even if an amnesty grant is within the scope of international law, it would still lack extra-territorial effect because “[domestic amnesties] do not affect treaty obligations or entitlements under customary international law to bring gross human rights offenders to justice

³⁹ See Orden de prision provisional incondicional de Leopoldo Fortunato Galtieri, Juzgado Numero cinco de la Audiencia Nacional Espanola (25 Mar. 1997).

⁴⁰ Princeton Principle 7(2), *supra* note 4.

⁴¹ Protocol II Additional to the Geneva Convention of 12 Aug. 1949, and Relating to Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, UN Doc. A/32/144, Annex II, art. 6(5), 1125 U.N.T.S. 513 (entered into force 7 Dec. 1978), reprinted in 16 I.L.M. 1442 (1977).

⁴² *Id.*

wherever they are.”⁴³ Even if Lebanon, Israel, or any other nation attempts to extend an amnesty in its own national courts, this would not alter Belgium’s obligation to prosecute international crimes. Belgium not only has the authority to exercise jurisdiction over crimes covered by the amnesty, but if it does, it has the obligation not to apply a domestic amnesty law that improperly seeks to restrict accountability for international crimes. Domestic amnesties cannot be used to seek exoneration of those who commit grave international abuses, nor can they preclude enforcement action by other governments, or by the international community as a whole.

⁴³ supra 6 at 15.