

12. BELGIUM CURTAILS ANTI-ATROCITY LAW UNDER US PRESSURE

by: Reed Brody*

The United States' campaign against international justice claimed another victim in July as Belgium repealed its landmark "anti-atrocity" law under pressure from Washington.

The Belgian law was also a victim of its own ambitions, however. There were few limits on which cases could be filed, and lawyers lodged complaints indiscriminately, threatening to kill the goose that laid the golden egg even before the United States turned its sights on the law.

Fortunately, some key cases, such as the prosecution of Chad's ex-dictator Hissène Habré, will still be allowed to go forward .

Background

A 1993 law, amended in 1999, gave Belgian courts the authority to prosecute persons accused of genocide, crimes against humanity or war crimes regardless of where the crimes took place or whether the suspect or the victims were Belgian. The Belgian law put into practice the principle of "universal jurisdiction" which holds that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims.

Until recently, Belgium was one of the rare countries (together with Spain) which had a practice of undertaking investigations into charges of atrocities committed abroad even when none of its citizens was a victim and the suspect was not in the country.¹ In addition, as in most French-inspired civil law countries,

under the Belgian law victims had the right to file complaints directly before an investigating judge (*juge d'instruction*). The law also explicitly barred any state immunity. These aspects, combined, made the Belgian law the broadest in the world.

In a landmark trial, with wide public support in Belgium, four Rwandans living in Belgium were convicted in June 2001 by a Belgian jury on charges of involvement in the 1994 genocide in their country. An avalanche of new cases ensued helter-skelter, however.² Most of these cases charged sitting leaders with crimes having no connection to Belgium, and there was little chance that most of the defendants would ever come before a Belgian jurisdiction, but the filings began to cause diplomatic headaches for the Belgian government.

As a result, the law came under challenge on three fronts. First, Belgian politicians argued that the law was turning Belgium into a magnet for all the world's human rights cases. Second, the Democratic Republic of the Congo (DRC) brought a case against Belgium before the International Court of Justice (ICJ) arguing that a Belgian arrest warrant for its then-Foreign Minister on charges of inciting genocide violated international law. Finally, in the politically-sensitive case against Israel's Prime Minister Ariel Sharon for his alleged role in the 1982 massacre of civilians in the Palestinian refugee camps of Sabra and Shatilla, Sharon's lawyers argued that the law could not apply to defendants who were not on Belgian soil.

The first blow against the law came in February 2002, when the ICJ ruled that Belgium could not issue a warrant for the arrest of the incumbent DRC Foreign Minister, because, in its view, under customary international law foreign ministers, as well as prime ministers and heads of state, were immune from arrest by foreign courts while in office. This decision went against the international trend towards accountability for the worst abuses, but was the

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predictable result of allowing such an explosive case on a matter so connected with state sovereignty to be decided by one of the world's most hide-bound judicial institutions.

Then in three rulings, including in the case of Ariel Sharon, the Court of Appeals of Brussels cited the language of the Belgian law to declare complaints inadmissible because the suspects were not present in the country. These rulings would be overturned in February 2003, when the Belgian Supreme Court (*Cour de Cassation*) ruled in the Sharon case that investigations could go forward even when the suspect was outside of the country. (The court dismissed the case against Sharon himself, however, because of the immunity he enjoyed as Prime Minister.)

The April 2003 Amendments

These developments pushed the anti-atrocity law on to the legislative agenda. A coalition of Belgian and international human rights groups³ formed to defend the law, arguing that while Belgium should not become a dumping ground for political grievances, it could and should provide a court of last resort for atrocity victims. The groups rejected the use of the Belgian law for political purposes and sought "filters" to prevent frivolous cases and preserve the law for victims whose cases could truly be resolved in Belgium. Victims from Chad, Rwanda, Guatemala and elsewhere came to Belgium to impress on parliament and the public the importance of the law. The Belgian Employers Federation, with the support of U.S. businesses, opposed the law, using arguments lifted from the U.S. debate over the Alien Tort Claims Act.

Over the course of almost one year, numerous legislative compromises were brokered and undone. Just as the parliamentary debate was coming to a head in March 2003, a complaint was filed against former U.S. President George Bush Sr., and other senior figures by the families of Iraqi victims of a U.S.

attack on a Baghdad shelter in the 1991 Gulf War which left over 400 persons dead. This spectacularly ill-timed complaint demonstrated the potential headaches in store for Belgium, and caused several leading politicians who had once supported the law to abruptly change their positions on the eve of a critical parliamentary vote.

As a result, the amendments narrowly adopted in April 2003 went far beyond what the NGOs had agreed to. The changes limited the ability of victims to directly file cases with no connection to Belgium. Victims could now file suits directly only if there was a link between the crime and Belgium: if the suspect was on Belgian soil, if the crime took place in Belgium, or if the victim was Belgian or had lived in Belgium for at least three years. If this link did not exist, cases could only be brought by the state prosecutor.⁴ That much was acceptable. In addition, however, the Belgian government could now step in to send many cases elsewhere. One amendment allowed the Belgian government to refer pending cases to the accused's home state or the state in which the accused is present if that state upheld the right to a fair trial. If that state did in fact take the case up, then the Belgian courts would dismiss the case. Another amendment provided that if the victim was not Belgian, the government could transfer the case to the accused's home state, so long as that state upheld the right to a fair trial and has laws that criminalize the grave human rights violations covered by the Belgian law. The case would then be dismissed even if the other state decided not to act on the complaint. This provision essentially allowed the government to interfere with pending cases and opened the door to political and diplomatic negotiations over every case that was filed.

Under the new amendments, the Belgian government immediately stepped in to refer to the United States a case filed in against Gen. Tommy Franks, the American commander of the 2003 Iraq war.

The United States Attacks

These amendments did not satisfy the Bush administration, however, engaged as it is in a worldwide crusade against the ICC and universal jurisdiction, which it sees as incompatible with its vision of U.S. global supremacy. At a news conference in Brussels in June, U.S. Defense Secretary Donald H. Rumsfeld threatened Belgium that it risked losing its status as host to NATO's headquarters if it did not rescind the law entirely.

The United States apparently wants to immunize itself from any international legal restraint on its conduct by barring even the theoretical possibility that the actions of top U.S. officials could be questioned by the ICC or the courts of another state. Unable to persuade countries to fall into line by the force of its ideas, the U.S. has resorted to bullying 51 largely aid-dependent nations to sign agreements committing them not to send U.S. citizens to the ICC. Caribbean states, for instance, were told they would lose benefits for hurricane relief if they did not sign on. The Bahamas were publicly warned that aid for an airport would be cut.

These U.S. pressures, of course, are not based on a real fear that the Bahamas will transfer an American official to the ICC, or that Gen. Tommy Franks or Pres. George Bush would actually be indicted in Belgium. Rather, the U.S. moves are part of an ideological "jihad" to use every possible forum and every opening to contest the ICC and undermine the legitimacy of the idea of international justice.

In this respect, the Belgian law, with its unlimited possibilities and the increasingly mischievous cases it generated, offered an easy opportunity for the United States to score political points.

In the face of the Rumsfeld attack, and with support for the once-popular law evaporating with each high-profile political case (and now positive results in terms of trials to show for the law), the Belgian government

capitulated. Prime Minister Guy Verhofstadt announced that Belgium would repeal the law altogether.

Under the bill adopted in July 2003, Belgian courts will only have jurisdiction over international crimes if the accused is Belgian or has his primary residence in Belgium; if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed; or if Belgium is required by treaty to exercise jurisdiction over the case. The new law also considerably reduces victims' ability to obtain direct access to the courts- unless the accused is Belgian or has his primary residence in Belgium, the decision whether or not to proceed with any complaint rests entirely with the state prosecutor. Belgium has thus restricted the reach of universal jurisdiction in its courts by adopting a law similar to or more restrictive than most European countries.

The case concerning the Sabra and Shatilla massacre will now terminate, barring legal challenges. The new law does, however, "grandfather" in a limited category of cases that had already begun to move forward, including those concerning the Rwandan genocide and the killing of two Belgian priests in Guatemala, as well as the complaints filed against ex-Chadian dictator Hissène Habré, for which a Belgian investigating judge had already gone to Chad in 2002. Habré lives in exile in Senegal, where he was indicted three years ago on atrocity charges before the Senegalese courts ruled that he could not be tried there. Senegal is holding Habré pending an extradition request from Belgium and the government of Chad recently told Belgium that it would waive any immunity that Habré might seek to assert. The Habré case may yet show how the law was supposed to work.

Conclusion

Belgium's universal jurisdiction law helped weaken the wall of impunity behind which the world's tyrants had always hidden to

shield themselves from justice. The repeal of the law, in the face of imprudent use and U.S. attacks, is a setback for the cause of international justice.

Endnotes

¹ In the last two years, however, a number of countries, such as Australia, Germany, New Zealand and South Africa, have amended their laws, after joining the International Criminal Court, to provide for the opening of investigations without any such nexus requirement.

² Defendants included Mauritanian President Maaouya ould Sid'Ahmed Taya, Iraqi President Saddam Hussein, Israeli Prime Minister Ariel Sharon, Ivory Coast President Laurent Gbagbo, Rwandan President Paul Kagame, Cuban President Fidel Castro, Central African Republic President Ange-Felix Patassé, Republic of Congo President, Denis Sassou Nguesso, Palestinian Authority President Yassir Arafat, former Chadian President Hissène Habré, former Chilean President Gen. Augusto Pinochet, former Iranian president Hashemi Rafsanjani former Moroccan interior minister Driss Basri, former Foreign Minister Abdoulaye Yerodia Ndombasi of the Democratic Republic of the Congo, among others. Many of these cases were not actively pursued, however.

³ Amnesty International Belgium, La Ligue des Droits de l'Homme (Belgique), Liga voor Mensenrechten, la Fédération Internationale des Droits de l'Homme, Avocats sans Frontières and Human Rights Watch.

⁴ However, the prosecutor was required to go forward with a case presented by victims unless the complaint was manifestly without merit; the complaint did not allege a violation of the anti-atrocity law; the complaint did not fall within the competence of the Belgian courts; or, in the interests of justice and respect for Belgium's international obligations, the case should be transferred to another court, so long as that jurisdiction upholds the right to a fair trial. The victims could appeal the prosecutor's decision not to move forward.