INTERNATIONAL COURT OF JUSTICE

Questions relating to the Obligation to Prosecute or Extradite
(Belgium* v. *Senegal)

Reply of the Kingdom of Belgium to the question put by Judge Greenwood

INTRODUCTION

1. Judge Greenwood's question[1] was worded as follows:

"With regard to the argument that Senegal is in breach of a customary international law obligation to prosecute or extradite, please indicate:

(a) which States have provided for their courts to possess jurisdiction over

(i) war crimes committed in an armed conflict not of an international character; and

(ii) crimes against humanity;

in cases where the alleged offence occurred outside their territory and neither the alleged offender nor the victims were their nationals;

(b) what instances there are of States exercising jurisdiction or granting extradition in such cases; and

(c) what evidence exists that States consider that international law require them to prosecute or extradite in such cases.

The question relates solely to customary international law and not to action taken pursuant to treaty obligations such as those arising under the Convention against Torture."

2. These questions have already been partially answered by Belgium in its Memorial of 1 July 2010[2] and in its two rounds of oral argument[3]. Belgium would like to formally confirm and also supplement these considerations.

3. However, before providing more detailed answers to the different parts of Judge Greenwood's question, Belgium considers that two introductory remarks are necessary.

4. Firstly, it wishes to point out, as it did in its oral argument, that it is not seeking, in the context of its dispute with Senegal, to establish a general and abstract obligation to prosecute or extradite provided for by general international law[4]. The following observations concern the present dispute alone and demonstrate that, in its relations with Belgium, Senegal has breached its obligation under general international law to prosecute Hissène Habré for the war crimes, crimes

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[1]CR 2012/5, 16 March 2012, p. 43.

[2]Memorial of Belgium (MB), paras. 4.60-4.89.

[3]CR 2012/3, 13 March 2012, pp. 22-34 (David) and CR 2012/6, 19 March 2012, pp. 32-35, paras. 18-25 (David).

[4]CR 2012/3, 13 March 2012, p. 22, para. 1 (David).

against humanity and crimes of genocide of which he stands accused. In Belgium's view, this obligation to prosecute is firmly embedded in general international law.

5. Secondly, in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, the Court stated:

> "It follows that the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969*, p. 44, para. 77)."[5]

6. Although it is "of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States"[6], it is not always possible or necessary to draw such a clear distinction between the material element and the mental element of custom. In the past, the Court has established the existence of an *opinio juris* through the existence of a certain State practice in the matter[7].

7. This is particularly true of the obligation to prosecute under international humanitarian law. Indeed, as observed in the study on customary international humanitarian law by the International Committee of the Red Cross:

> "During work on the study, it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. Often, the same act reflects both practice and legal conviction. As the International Law Association pointed out, the International Court of Justice 'has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements'[8]. This is particularly so because verbal acts, such as military manuals, count as State practice and often reflect the legal conviction of the State involved at the same time."[9]

8. This does not and cannot mean that a customary international rule can exist without the need to establish the existence of *opinio juris*. It implies only that practice and *opinio juris* are not as clearly and logically distinct as might be thought. The one can in fact inform the other:

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[5] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment of 3 February 2012*, para. 55.

[6] *Ibid*. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 29, para. 27.

[7] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 299, para. 111; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 98, para. 184; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment of 3 February 2012*, para. 55.

[8] International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, *Report of the Sixty-Ninth Conference*, London, 2000, para. 10 *(c)*, p. 718. For an in-depth study of this subject, see Peter Haggenmacher, "La doctrine des deux elements du droit coutumier dans la pratique de la Cour internationale", *Revue générale de droit international public*, Vol. 90, 1986, p. 5.

[9] J.-M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, Bruylant, Brussels, 2008, p. LVIII.

> "When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*. In situations where practice is ambiguous, however, *opinio juris* plays an important role in determining whether or not that practice counts towards the formation of custom."[10]

9. On the basis of these remarks, Belgium will answer the three parts of Judge Greenwood's question in the order in which they were put:

— a list of States which have jurisdiction over crimes against humanity and war crimes committed in an armed conflict not of an international character, where the offence was committed outside their territory and neither the alleged offender nor the victims are nationals of the forum State (I);

— instances of States having exercised their jurisdiction in such cases (II);

— evidence that States consider that customary international law requires them to prosecute or extradite in such circumstances (III).

I. States which have jurisdiction over crimes against humanity and war crimes committed in an armed conflict not of an international character, where the offence occurred outside their territory and neither the alleged perpetrator nor the victims are nationals of the forum State

10. Belgium notes that at least 51 States have designated as offences under their national law crimes against humanity and war crimes committed in an armed conflict not of an international character, even if those offences were committed outside their territory by persons who are not nationals of those States and even if the victims too are not nationals of those States[11]. These States may be grouped into two categories:

— States explicitly conferring jurisdiction on their courts to prosecute crimes against humanity and war crimes committed in an armed conflict not of an international character (A);

— States conferring jurisdiction on their courts to prosecute by reference to the crimes against humanity and war crimes cited in the Rome Statute (which implies the inclusion of war crimes committed in an armed conflict not of an international character) (B).

It should be noted that some national laws simply provide for domestic courts to have jurisdiction over crimes defined as such by international law, without giving any further details (e.g., El Salvador, 2010 Penal Code, Art. 10). Belgium has not included these States in the two lists below, in view of the absence of specifically designated offences, whether "crimes against humanity" or "war crimes" committed in an armed conflict not of an international character.

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[10] *Ibid.* See also J.-M. Henckaerts, "Customary International Humanitarian Law: a response to US Comments", *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 482 ("Hence, the Study did not simply infer *opinio juris* from practice. The conclusions that practice established a rule of law and not merely a policy was never based on any single instance or type of practice but was the result of all the relevant practice").

[11] See in particular the surveys carried out by the ICRC (http://www.icrc.org/customary-ihl/eng/docs/home), by Amnesty International (*Universal Jurisdiction — A Preliminary Survey of Legislation around the World*, London, Amnesty Int. Publ., 2011, 390 pp.) and by Redress and the FIDH (*La compétence extraterritoriale dans l'UE — Etude des lois et des pratiques dans les 27 membres de l'UE*, Redress and FIDH, 2010, 284 pp.).

A. States explicitly conferring jurisdiction on their courts to prosecute crimes against humanity and war crimes committed in an armed conflict not of an international character

11.

1. **Armenia** (2003 Criminal Code, Article 387 *et seq.*; Article 15)

   (http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng)

2. **Australia** (Criminal Code Act, Chapter 8, Article 268.1 *et seq.*)

   (http://www.comlaw.gov.au/Details/C2011C00261)

3. **Azerbaijan** (Criminal Code)

   (http://www.legislationline.org/download/action/download/id/1658/file/4b3ff87c005675cfd74058077132.htm/preview)

4. **Belarus** (Criminal Code, Articles 6, 128 *et seq.*)

   (http://www.icrc.org/ihlnat.nsf/WebLAW!OpenView&Start=1&Count=300&Expand=16.3.1#16.3.1)

5. **Belgium** (Preliminary Title of the Code of Criminal Procedure, Article 12*bis* and Penal Code, Articles 136*ter* and 136 *quater*)

6. **Bosnia and Herzegovina** (for definitions: 2003 Criminal Code, Article 172 *et seq.*)

7. **Bulgaria** (Penal Code, Article 6)

   (http://www.icrc.org/ihlnat.nsf/6fa4d35e5e3025394125673e00508143/0254e69910d7aae8c12573b5004cecf8/$FILE/Bulgaria-Penal-Code.pdf)

8. **Burundi** (2009 Penal Code, Articles 10, 196 *et seq.*) (http://www.oag.bi/spip.php?article733)

9. **Canada** (Crimes against Humanity and War Crimes Act 2000)

   (http://lawslois.justice.gc.ca/eng/acts/C-45.9/page-1.html#docCont)

10. **Croatia** (2003 Criminal Code; Articles 14, 157 (a) *et seq.*)

    (https://www.unodc.org/tldb/pdf/Croatia_Criminal_Code_Full_text.pdf)

11. **Czech Republic** (2009 Criminal Code, section 401 *et seq.*; sections 6-8)

12. **Estonia** (2007 Penal Code, sections 7-8)

    (http://www.legislationline.org/download/action/download/id/1280/file/4d16963509db70c09d23e52cb8df.htm/preview)

13. **Finland** (Criminal Code, Chapter 11, War Crimes and Crimes against Humanity)

    (http://www.legislationline.org/documents/section/criminal-codes)

14. France (Penal Code, Articles 212-1, 461-1 *et seq.*; Code of Criminal Procedure, Article 689 *et seq.*; Laws Nos. 95-1 and 96-432 on the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)[12], [13])

(http://perlpot.net/cod/penal.pdf)

(http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742868)

15. Germany (Code of Crimes against International Law)

(http://www.iuscomp.org/gla/statutes/VoeStGB.pdf)

(See also 1998 Criminal Code) (http://www.iuscomp.org/gla/statutes/StGB.htm)

16. Kenya (International Crimes Act 2008)

(http://www.kenyalaw.org/kenyalaw/klr_app/frames.php)

17. Luxembourg (1999 Law on co-operation with international tribunals, Article 2; universal jurisdiction limited to crimes against humanity committed in the former Yugoslavia and Rwanda)
(http://www.icrc.org/ihlnat.nsf/a24d1cf3344e99934125673e00508142/9eb9e843b646bdf5c1256a8000315dac!OpenDocument)

18. Malta (2005 Criminal Code, Crimes against humanity and war crimes, Articles 5, 54C *et seq.*)

(http://www.icrc.org/ihlnat.nsf/6fa4d35e5e3025394125673e00508143/6051b666d2bfffccc12570fb00518d43!OpenDocument)

19. Moldova (2009 Criminal Code, Articles 11 (3), 137 *et seq.*)

(http://www.legislationline.org/documents/section/criminal-codes/country/14)

20. Montenegro (2003 Criminal Code, Articles 137, 427 *et seq.*)

(https://www.unodc.org/tldb/pdf/Montenegro_Criminal_Code.pdf)

21. Netherlands (International Crimes Act 2003)

(http://www.google.be/url?sa=t&rct=j&q=the+netherlands+international+crimes+act&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.nottingham.ac.uk%2Fshared%2Fshared_hrlcicju%2FNetherlands%2FInternational_Crimes_Act__English_.doc&ei=poVrT-6lCKWm0QW6otTQBg&usg=AFQjCNG9EhokEmei5vN2Eql06LFuhY9IwQ)

22. Norway (War Crimes Law 1946, Article 1; 2005 General Civil Penal Code, [Chapter 1, Section 12]) (http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf)

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[12]Code of Criminal Procedure, Art. 689: "Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Volume I of the Penal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence."

[13]Penal Code, Art. 416-1: "War crimes or offences are the offences defined in this Volume committed during an international or non-international armed conflict and in connection with that conflict, in breach of the laws and customs of war or of the international conventions applicable to armed conflicts, against the persons or goods referred to in Articles 461-2 to 461-31." *[Translation by the Registry.]*

23. Philippines (Crimes against International Law Act 2009; sections 3-6, 15 and 17)

(http://www.icrc.org/ihlnat.nsf/6fa4d35e5e3025394125673e00508143/7857188a2b2bca66c12576b900297ccb!OpenDocument)

24. Poland (Criminal Code, Articles 110(2), 113 and 119-126)

(http://www.icrc.org/customaryihl/eng/docs/v2_cou_pl_rule157)

B. States conferring jurisdiction on their courts to prosecute by reference to the crimes against humanity and war crimes cited in the Rome Statute

12. The Rome Statute does not contain an equivalent article to Article 7 of the Convention against Torture. It recalls in its preamble that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". In this respect, the changes to national legislation indicated below cannot be regarded as "action taken pursuant to treaty obligations such as those arising under the Convention against Torture", measures which Judge Greenwood excluded from the scope of his question. In addition, it should be pointed out that the list below is continuing to grow as more States become parties to the Rome Statute.

1. **Argentina**
(http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123921/norma.htm)

2. **Bolivia** (Note: Bolivia is currently preparing a law to implement the Rome Statute: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Bolivia_E.pdf)

3. **Burkina Faso**

(http://www.iccnow.org/documents/Decret_n2009-894-PRES_promulguant_la_loi_n052-2009-AN.pdf)

4. **Cameroon** (Military Manual, p. 296, para. 662; Amnesty International p. 38)

(http://www.icrc.org/customary-ihl/eng/docs/v2_cou_cm_rule157)

5. **Costa Rica** (2003 Penal Code, Articles 7, 378 and 379)

(http://www.pgr.go.cr/scij/busqueda/normativa/normas/nrm_repartidor.asp?param1=NRTC&nValor1=1&nValor2=5027&nValor3=68813&strTipM=TC)

6. **Cuba** (1987 Penal Code, Article 5; Amnesty International, p. 45)

(http://www.icrc.org/customaryihl/eng/docs/v2_cou_cu_rule157)

7. **Cyprus** (Rome Statute Ratification Law 2002)

(http://www.adhgeneva.ch/RULAC/pdf_state/Cyprus.pdf)

8. **Denmark** (2005 Criminal Code, section 7 *et seq.*)

(https://www.unodc.org/tldb/pdf/Denmark_Criminal_Code_2005.pdf)

9. **Ethiopia** (2005 Penal Code, Article 17)

(http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf)

10. Georgia (Criminal Code, Articles 5, 408 *et seq.*)

(http://www.legislationline.org/documents/action/popup/id/16049/preview)

11. Latvia (Criminal Law 2009, sections 4, 71 and 74)

(http://www.legislationline.org/documents/section/criminal-codes)

12. Lithuania (2010 Criminal Code, Articles 5, 7, 100 *et seq.*)

(http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=366707)

13. Mexico (2010 Federal Penal Code, Article 6)

(http://www.pgr.gob.mx/Que%20es%20PGR/Documentos/CodigoPenalFederal.pdf)

14. New Zealand (International Crimes and International Criminal Court Act 2000)

(http://www.legislation.govt.nz/act/public/2000/0026/latest/DLM63091.html)

15. Nicaragua (2008 Penal Code, Articles 486-522)

(http://legislacion.asamblea.gob.ni/Normaweb.nsf/%28$All%29/1F5B59264A8F00F906257540005EF77E?OpenDocument)

16. Panama (2007 Penal Code, Articles 19, 21, 432 *et seq.*)

(http://www.iccnow.org/documents/Panama_nuevo_codigo_penal2.pdf)

17. Portugal (Law No. 31/2004, Articles 5, 9 *et seq.*)

(http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/6af0950f91cbc493c1256ef500419718!OpenDocument)

18. Samoa (International Criminal Court Act 2007, sections 6, 7 and 13 *(d)*)

(http://www.paclii.org/ws/legis/consol_act_2010/icca2007303/)

19. Senegal (Law No. 06/2007 modifying the Penal Code, Article 431-2 *et seq.*)

(http://www.icrc.org/ihlnat.nsf/6fa4d35e5e3025394125673e00508143/2312e920ae081336c1257292005578af!OpenDocument)

20. Slovenia (2008 Criminal Code, Articles 11, 13, 100 *et seq.*)

(http://www.wipo.int/wipolex/en/text.jsp?file_id=180880)

21. South Africa (International Criminal Court Act 2002, sections 4 and 5)

(http://www.info.gov.za/gazette/acts/2002/a27-02.pdf)

22. Spain (Judiciary Law 2009, Article 23 (4))

(http://noticias.juridicas.com/base_datos/Admin/lo6-1985.l1t1.html#a23)

23. Switzerland (2011 Criminal Code, Article 6) (http://www.admin.ch/ch/e/rs/c311_0.html)

24. Timor-Leste (Penal Code, Article 8 *(e)*)

(http://www.laohamutuk.org/econ/corruption/CodigoPenalEn.pdf)

25. Trinidad and Tobago (International Criminal Court Act 2006, Section 8)

(http://www.icrc.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/2bbdd7c1affd8d7bc1257563005c8833/$FILE/International%20Criminal%20Court%20Act.pdf)

26. Uganda (International Criminal Court Act 2010, Article 18)

(http://www.icrc.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/764ecda109407b7bc12577bd0038b623!OpenDocument)

27. Uruguay (Law No. 18.026 on Co-operation with the International Criminal Court in respect of the struggle against genocide, war crimes and crimes against humanity, Article 4.2)

(http://pdba.georgetown.edu/Security/citizensecurity/uruguay/leyes/lesahumanidad.pdf)

II. Instances of prosecution for crimes against humanity and/or war crimes committed in an armed conflict not of an international character, where the offence occurred outside the forum State and neither the alleged perpetrator nor the victims are its nationals

13. To Belgium's knowledge, there are some half-dozen cases in which the courts of certain countries have tried non-nationals for "crimes against humanity" or "war crimes" committed in an armed conflict not of an international character. In each of these cases, the offences had been committed outside the forum State and neither the victims nor the alleged perpetrators were nationals of that State. These instances are presented in chronological order below.

14. **Hungary**

— **Constitutional Court, 13 October 1993**

The Constitutional Court of Hungary was required to rule on the constitutionality of a law proclaiming the non-applicability of statutory limitation to war crimes and crimes against humanity. The court classes breaches of common Article 3 as criminal offences, characterizing them as crimes against humanity and concluding that statutory limitation is not applicable to them:

> "The activities enumerated in common Article 3 of the Geneva Conventions constitute crimes against humanity and they contain those minimal requirements which every State Party in an armed conflict is obligated to comply with and which are 'at any time and in any place' are *(sic)* prohibited . . .
>
> . . . . . .
>
> the statute of limitation for the punishment of the activities enumerated in common Article 3 of the Geneva Conventions does not expire either; in case these offences do not fall within the category of war crimes defined by Article I *(a)* of the New York Convention [the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] — either with respect to the

> scope of protected persons or because of the manner of the commission of the act — they would be unavoidably covered by the non-applicability of statutory limitations requirement imposed by Article I *(b)* of the Convention on Crimes against Humanity."[14]

Although this is not strictly an example from case law of prosecution for war crimes committed in an armed conflict not of an international character, it is included here because it constitutes a form of recognition that such acts are crimes which fall within the scope of common Article 3 of the Geneva Conventions.

15. **Switzerland**

— **Division 1 Military Tribunal, *G.*, 14-18 April 1997**

G., a Bosnian Serb, was prosecuted before a Swiss military tribunal for breaches of the Third and Fourth Geneva Conventions (including common Article 3), Additional Protocol I and Additional Protocol II (Articles 4, 5 and 13) (judgment, p. 1). These acts were alleged to have been committed in the camps of Keraterm and Omarska in Bosnia-Herzegovina. The tribunal acquitted the defendant on the grounds of insufficient evidence, but did not question the characterization of the charges. The judgment states:

— "In the context of this general conflict [in former Yugoslavia], various internal armed conflicts broke out, including the conflict among Bosnians" (judgment, p. 2);

— "the scope of Article 109 *et seq.* of the MPC [Military Penal Code] extends to all armed conflicts . . . thus, since the acts of which the defendant is accused, if they were committed, constitute breaches of the laws of war within the meaning of Article 109 of the MPC, this tribunal therefore has jurisdiction" (judgment, p. 6). *[Translations by the Registry.]*

— **Military Court of Cassation, *Niyonteze*, 27 April 2001**

F. Niyonteze, "a Rwandan national residing in Switzerland as a refugee" (judgment, p. 1), had been sentenced to life imprisonment on 30 April 1999 by the Division 2 Military Tribunal, in particular for "grave breaches of the prescriptions of international conventions on the conduct of war and the protection of persons and goods (Article 109 of the MPC)" *(ibid.)*; the Military Appeals Tribunal had upheld the conviction of the defendant for "grave breaches of the prescriptions of international conventions on the conduct of war and the protection of persons and goods (Article 109 of the MPC)" and reduced the sentence to 14 years' imprisonment. The Court of Cassation essentially confirmed the appeal judgment. It observed in particular that

> "the 'prescriptions of international conventions on the conduct of war and the protection of persons and goods' which apply to conflicts not of an international character — and therefore have a broader scope than those of conventions applicable only to international conflicts — are also covered by Article 109 (1) of the MPC" (*ibid.*, p. 3).

The Court of Cassation also held that:

— "[t]he appealed judgment refers to common Article 3 of the four Geneva Conventions concluded on 12 August 1949" *(ibid.)*;

[14] Text at http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/e781668ba0b17804c1256b220039e303!OpenDocument

— "a foreign perpetrator of breaches of the laws of war, who has acted against foreign persons in the context of a non-international conflict in the territory of a foreign State, can be prosecuted and sentenced by Swiss courts under Article 109 of the MPC" (*ibid.*, p. 5);

— "[t]he Military Tribunals are competent, since Article 218 of the MPC provides that any person to whom military law is applicable is subject to the military tribunals (paragraph 1), including when the offence was committed abroad (paragraph 2)" *(ibid.)*;

— "[m]oreover it was not in dispute . . . that in Rwanda, during the months of April to July 1994, a non-international armed conflict within the meaning of common Article 3 took place in the territory of that country between the government army (the Rwandan Armed Forces — FAR) and the dissident forces (the Rwandan Patriotic Front — FPR); this conflict also falls under the definition in Article 1 of Protocol II" *(ibid.)*;

— "the defendant met the conditions required, as perpetrator of the offences, to fall within the ambit of common Article 3 and the provisions of Protocol II" (*ibid.*, p. 23). *[Translations by the Registry.]*

16. **Netherlands**[15]

— **Court of Appeal, The Hague, 29 January 2007**

An Afghan, head of the Afghan military intelligence service — the *Khad-e-Nezami* — between 1979 and 1989, had been sentenced by a Dutch court of first instance on 14 October 2005, *inter alia* on the basis of common Article 3 of the Geneva Conventions, to nine years' imprisonment for acts of violence and torture committed against seven persons. In his appeal, the defendant relied in particular on the fact that the Geneva Conventions did not provide for jurisdiction to prosecute or extradite in respect of violations of common Article 3. His argument was as follows:

> "in the present case, the Dutch criminal legislation[s] lacks (universal) jurisdiction if, during the period charged, this would concern a non-international armed conflict to which 'only' the common Article 3 of the Geneva Conventions applies. These conventions (or other provisions pertaining to international law) do not offer universal criminal jurisdiction with regard to violations of those articles; establishment of such a jurisdiction needs an authorization pertaining to international law which can neither be found in the unwritten legislation pertaining to international law, as was also stated by the Yugoslavia Tribunal (ICTY) in its Tadic decision of October 2, 1995. In the opinion of the defence the issue in Afghanistan was at the time, in any case in as far as important to the practices suspect is charged with, not a non-international armed conflict. Therefore the public prosecutions department, who are exercising their authority to prosecute contrary to international law, should be declared non-admissible in that prosecution." (Judgment, para. 5.1 *(a)*.)

The Court of Appeal first held that, in the 1980s, an armed conflict not of an international character was taking place in Afghanistan, despite the intervention of the USSR army:

> "With relation to the nature of the conflict, the Court of Appeal, as was the court, is together with the defence and (more implicitly) the public prosecutions department, of the opinion that the combat in Afghanistan during the eighties of the last century primarily concerned a non-international armed conflict taking place between the régime in Kabul and the 'Mujahedin' who — also armed — rebelled

[15] Texts of the judgments at http://zoeken.rechtspraak.nl/Default.aspx.

> against that. It is true that this régime was also supported by Russian advisers and parts of the army (who also participated in the battles), but in the judgment of the Court of Appeal does not negatively affect the primarily non-international character of the combat." (Judgment, para. 5.3.)

The Court of Appeal further held that Dutch law gave its courts jurisdiction to prosecute war crimes other than "grave breaches" of the Geneva Conventions, but that this was in accordance with a development in law based on the conventional law adopted after the Second World War. The Court found, in particular, that:

> "our country has an exceptional position not only because it penalizes 'grave breaches', but also less serious violations, with universal jurisdiction. Support for the establishment of secondary universal jurisdiction (not trial by default) may however be found in the development of the conventional law after the Second World War, as this is represented in separate points of view of judges in the decision of the ICJ on February 14, 2002 in the case Yerodia (Congo *v.* Belgium) . . .
>
> The court moreover establishes, with regard to the history of the formation of the Criminal War Act, that — as analysed by the Supreme Court in its Knesevic II ruling — the legislator at the time had the absolute intention to fully comply with the conventional obligation of the Geneva Conventions. The main thought then was – as has to be admitted to the defence – especially the obligation to penalize 'grave breaches', which against the background of the then very recent worldwide conflict should not be surprising. From the verbal treatment of the legislative proposal (pp. 2247 and 2251) it however also becomes clear that (also at that time) the possibility was kept open that crimes committed in a non-international armed conflict (this was about the coup d'état in Bolivia) would be dealt with in this country. Whatever it may be: the Court of Appeal concludes from the following legal grounds in the latter ruling of the Supreme Court that it should be accepted that also in case of violations of the common Article 3 there is jurisdiction.
>
> 6.1 In the disputed ruling, the Court of Appeal has obviously based itself on the fact that the offences described and further detailed in the . . . demand referred to, if proven, are acting contrary to the common Article 3 of the Red Cross Geneva Conventions of 1949 and on the basis thereof result in the crime described in Article 8 of the WOS [*Wet Oorlogsstrafrecht*, the Dutch Wartime Offences Act]." (Judgment, paras. 5.4.3-6.1.)

— **Dutch Supreme Court, 8 July 2008**

The facts are similar to those in the preceding case: this too involved a member of the Afghan military intelligence service who was prosecuted in the Netherlands for acts of torture. He had been sentenced at the appeal stage, on 29 July 2007, to 12 years' imprisonment for torture and for having authorized a subordinate to violate the laws and customs of war.

The Supreme Court first held that breaches of common Article 3 were designated as crimes by the WOS:

> "It should be noted at the outset that since the entry into force of the Convention, acts in breach of Article 3 of the Convention [the 4th Geneva Convention] have constituted the crime described in section 8 of the Wartime Offences Act and that in such a case — pursuant to the decision of the Supreme Court of 11 November 1997, LJN ZD0857, NJ 1998, 463 — the Dutch courts are entitled under section 3 (old) of the Wartime Offences Act to exercise what is termed universal jurisdiction." (Judgment, para. 6.2.)

More specifically regarding the defendant's argument that torture "was not a criminal offence in the case of an internal armed conflict" (judgment, para. 10.1), the Court responded that:

> "the offence of violating the laws and customs of war as created in section 8 of the Wartime Offences Act should be understood as including the offence of acting in breach of Article 3 of the Convention [the 4th Geneva Convention], including the commission of acts of physical violence, cruel treatment and torture against the persons listed there in an internal armed conflict, which criminal liability came into effect when the Convention entered into force." (Judgment, para. 10.2.)

17. **Canada**

— **Superior Court, Criminal Division, 22 May 2009, *Munyaneza***

The defendant, Désiré Munyaneza, is a Rwandan citizen prosecuted in Canada for "genocide, crimes against humanity and war crimes" (judgment, paras. 68 *et seq.*, 108 *et seq.* and 129 *et seq.*) committed in Rwanda between April and July 1994. Without going into the detail of this 200-page judgment, it will be noted that the defendant is found guilty of, amongst other things, "crimes against humanity" and "war crimes" (*ibid.*, paras. 2083-2089).

With regard to war crimes, the court asserted its jurisdiction to deal with such crimes committed in an armed conflict not of an international character. It stated that:

> "For a war crime to occur in a non-international armed conflict, the victim must be a protected person taking no direct part in the hostilities, a civilian, or a person who has laid down his or her arms or has been placed *hors de combat*." (*Ibid.*, para. 153.)

The defendant was sentenced to life imprisonment (Superior Court, Criminal Division, 29 October 2009).

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18. This practice of the courts, which does not include Belgium's practice as already mentioned in its oral argument[16], reflects State practice with regard to the obligation to prosecute. Although Belgium cannot claim to have been exhaustive, it is nonetheless unable to cite any example of a case where a domestic court has refused either to deal with crimes against humanity or war crimes committed in a non-international conflict, or to extradite the suspected person for a reason associated with the internal nature of the conflict or with the foreign status of the perpetrator or the victims. States have hardly ever objected to the exercise of this jurisdiction[17].

III. Evidence that States prosecute persons suspected of the above-mentioned offences because they consider that they are required to do so under customary international law

19. Judge Greenwood asks Belgium to indicate what evidence exists that States "consider" that customary international law "requires" them to prosecute the alleged perpetrators of the above-mentioned offences. Belgium will begin by outlining its understanding of how custom is formed (A). It will then examine the evidence that a customary obligation exists to prosecute or extradite a person suspected of a war crime or a crime against humanity (B).

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[16]CR 2012/6, 19 March 2012 (David), para. 24, footnote 75.

[17]Cf. *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment of 3 February 2012*, para. 72.

A. How custom is formed

20. In addition to what has already been said in the introduction (see paras. 2-8 above), it will be noted that, among the rules of international law applied by the Court, Article 38, paragraph 1 *(b)*, of the Statute of the Court cites custom "as evidence of a general practice accepted as law". In reality, "international custom is evidenced by practice and not the reverse"[18] *[translation by the Registry]*, as the Court recognized when it held that the presence of customary rules "in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice"[19]. Since the legislation of at least 51 States has conferred jurisdiction on international courts to prosecute crimes against humanity and war crimes such as those referred to by Judge Greenwood (crimes committed outside the forum State by foreign nationals against foreign nationals in an armed conflict not of an international character), it is clear that there is a significant and growing practice in respect of such jurisdiction.

21. Belgium also wishes to point out that custom may be general, regional or local. The Court has accepted that a custom could "be established between only two States"[20]. This point should be borne in mind, is so far as Belgium believes that the obligation to prosecute or, failing that, to extradite is applicable to all States, and in its mutual relations with Senegal in particular (see para. 37 below).

B. Evidence that a customary obligation exists to prosecute or extradite a person suspected of a war crime or a crime against humanity

22. There is various evidence to show that States consider themselves bound by a customary obligation to prosecute or extradite a person suspected of a war crime or a crime against humanity. The idea that States have to "feel" that they are "conforming to what amounts to a legal obligation"[21] can be found in the resolutions of the United Nations General Assembly (1) and in treaty texts which appear to express a customary rule (2); the obligation to prosecute also derives from the obligation to combat impunity (3) and from the obligation to contribute to the maintenance of international peace and security (4). The idea of a "feeling" can also be seen in the speeches made by States during the work of the Sixth Committee of the United Nations General Assembly on "[t]he scope and application of the principle of universal jurisdiction" (5). Finally, academic writers also take the view that prosecuting or extraditing a person suspected of a war crime or a crime against humanity is a customary obligation (6).

1. The obligation to prosecute or extradite in the relevant resolutions of the United Nations General Assembly

23. In its Opinion on the *Threat or Use of Nuclear Weapons* (1996), the Court recognized

> "that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show

[18] *Dictionnaire de droit international public*, J. Salmon (ed.), Brussels, Bruylant, p. 283.

[19] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 299, para. 111.

[20] *Right of Passage over Indian Territory, I.C.J. Reports 1960*, p. 39.

[21] *North Sea Continental Shelf (Denmark/Federal Republic of Germany; Netherlands/Federal Republic of Germany), Judgment, I.C.J. Reports 1970*, p. 44, para. 77.

> the gradual evolution of the *opinio juris* required for the establishment of a new rule."[22]

24. On several occasions, the Court has considered the Assembly's resolutions to express the *opinio juris* of States and has thus relied on those resolutions in order to recognize the existence of a customary rule within the meaning of Article 38 (1) *(b)* of the Statute of the Court:

— on the subject of the right of peoples to self-determination, as set out in resolution 1514 (XV), the Court declared that this General Assembly resolution

> "provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations"[23];

— in respect of the Declaration on Friendly Relations and Co-operation among States (resolution 2625 (XXV), 24 October 1970), the Court stated that

> "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question"[24];

— and with regard to resolution 3314 (XXIX), which defines aggression and categorizes as such the sending of armed bands by one State against another, the Court found that

> "[t]his description, contained in Article 3, paragraph *(g)*, of the Definition of Aggression annexed to . . . resolution 3314 (XXIX), may be taken to reflect customary international law"[25].

25. More specifically regarding the obligation to prosecute a person suspected of a war crime or a crime against humanity, the resolutions of the General Assembly plainly express the conviction of States that this is a legal duty imposed by international law. Belgium has invoked numerous General Assembly resolutions which set out in a *prescriptive* manner the obligation borne by States to prosecute the perpetrators of war crimes and crimes against humanity[26]. Thus, resolution 2840 (XXVI) ("Question of the punishment of war criminals and of persons who have committed crimes against humanity") provides:

> "*The General Assembly* . . .
>
> 1. *Urges* all States to implement the relevant resolutions of the General Assembly and to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes;
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> . . . . . .

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[22] Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 255, para. 70.

[23] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 31, para. 57. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52.

[24] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 101, para. 191; see also *ibid*., p. 100, para. 188; see also H. Thierry, "Cours général de droit international public", *CCHAIL*, 1990, III, Vol. 222, p. 37.

[25] *Military and Paramilitary Activities in and against Nicaragua, loc. cit.*, p. 103, para. 195.

[26] CR 2012/3, 13 March 2012, p. 24, para. 7 (David).

4. *Affirms* that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law." *[Underlining added.]*

That resolution was adopted *without a dissenting vote* on 18 December 1971, by 71 votes to none, with 42 abstentions[27]. The abstaining States cited problems relating to the definition of the crimes in question[28], domestic law[29] and the statute of limitations[30]. Not one contested the obligation to co-operate in order to extradite or try the perpetrators of war crimes or crimes against humanity. It is clear, therefore, that there is consent among States to the obligation to punish, as set out in the resolution.

26. Resolution 3074 (XXVIII) states:

"1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

. . . . . .

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

. . . . . .

7. In accordance with article 1 of the Declaration on Territorial Asylum of 14 December 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.

. . . . . ."
[Underlining added.]

This resolution was also adopted *without a dissenting vote* on 3 December 1973, by 94 votes to none, with 29 abstentions[31]. As with the adoption of resolution 2840 (XXVI), no State contested the obligation to prosecute or to co-operate for the purpose of extradition. The abstentions can be attributed to the rejection of an amendment favourable to asylum[32] and, in the opinion of some States, to an inadequate definition of the offences in question[33].

One author writes in respect of those resolutions:

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[27] A/PV.2025, p. 10.

[28] *Ibid*., France; A/C.3/SR.1902, Philippines, para. 79.

[29] A/C.3/SR.1902, Chile, para. 78.

[30] *Ibid*., Norway, para. 80.

[31] A/PV.2187, p. 8.

[32] *Ibid*., pp. 1-8, *passim*.

[33] Kuwait, A/C.3/SR.2021, 9 November 1973, para. 33; Qatar, Oman, Cameroon, Bahrain, Botswana, Spain, Nigeria, *id*., SR.2022, 9 November 1973, para. 12; Argentina, A/PV.2187, 3 December 1973, para. 33.

> "Their weight in the formation of a customary obligation to extradite or prosecute is remarkably strong, especially given that no state voted against the resolutions and the reasons for abstention were not concerned with the recognition of an obligation to extradite or prosecute."[34]

2. The obligation to prosecute or extradite in treaty texts which appear to express a customary rule

27. The 1949 Geneva Conventions (binding on Senegal and Belgium since 18 May 1963 and 3 September 1952, respectively) and the Statute of the International Criminal Court (ICC) (binding on Senegal and Belgium since 2 February 1999 and 28 June 2000, respectively) define war crimes and crimes against humanity and demand their punishment by the States parties to those instruments. The definition of war crimes features in common Article 50/51/130/147 of the four Geneva Conventions and in Article 8 of the Statute of the ICC. The obligation of States to punish those crimes is set forth in common Article 49/50/129/146 of the Geneva Conventions and in the Preamble of the ICC Statute (recitals 4-6).

As Belgium wrote in its Memorial[35] and stated in its oral argument[36], the Geneva Conventions and the Statute of the ICC express customary rules:

— the Court has recalled that the Geneva Conventions set forth "fundamental rules . . . to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law"[37];

— referring to the ICC Statute, the ICTY has declared that "the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States"[38].

3. The obligation to prosecute or extradite as a consequence of the obligation to combat impunity

28. In its Memorial[39] and in its oral pleadings[40], Belgium cited a hundred or so Security Council resolutions calling on States to combat impunity which very clearly confirmed the obligation of States to prosecute the perpetrator of a war crime or a crime against humanity. To give but one example, at the Millennium Summit the Security Council:

> "*[s]tresse[d]* that the perpetrators of crimes against humanity, crimes of genocide, war crimes, and other serious violations of international humanitarian law should be brought to justice"[41].

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[34]R. Van Steenberghe, "The Obligation to Extradite or Prosecute: Clarifying its Nature", *Journal of International Criminal Law*, 2011, p. 1100.

[35]MB, para. 4.74.

[36]CR 2012/3, 13 March 2012, pp. 29-30, para. 20 (David).

[37]*Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, para. 79.

[38]ICTY, case IT-95-17/1-T, *Furundzija*, 10 December 1998, para. 227; see also, *id*., case IT-94-1-A, *Tadic*, 15 July 1999, para. 223.

[39]MB, para. 4.69.

[40]CR 2012/3, 13 March 2012, p. 24, para. 8 (David).

[41]S/RES/1318, 7 September 2000, VI.

4. The obligation to prosecute or extradite as a consequence of the obligation to contribute to the maintenance of international peace and security

29. The serious human rights violations committed in the former Yugoslavia as from 1991 and in Rwanda in 1994 led to the creation by the Security Council of the ICTY[42] and the ICTR[43]. The preambles of the Security Council resolutions which contain the Statutes of those two tribunals state, in similar terms, that situations of human rights violations characterized by "mass killings", "[mass] rape", "ethnic cleansing"[44], "genocide and other systematic, widespread and flagrant violations of international humanitarian law"[45] constitute a threat to "international peace and security"[46].

The Preamble of resolution 827 reads:

"*The Security Council*,

. . . . . .

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

. . . . . ."

The Preamble of resolution 955 similarly reads:

"*The Security Council*,

. . . . . .

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

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[42]S/RES/827, 25 May 1993.

[43]S/RES/955, 8 November 1994.

[44]S/RES/827, 25 May 1993, Preamble, recital 3.

[45]S/RES/955, 8 November 1994, Preamble, recital 4.

[46]S/RES/827, 25 May 1993, Preamble, recital 4; S/RES/955, 8 November 1994, Preamble, recital 5.

. . . . . ."

During the discussions within the Security Council on the occasion of the adoption of resolution 955, some States made a connection between the crimes committed in Rwanda and the existence of a threat to international peace and security. For example, France declared:

> "Because of their particular seriousness, the offences which fall within the competence of the Tribunal are a threat to peace and international security which justifies recourse to Chapter VII of the Charter.
>
> . . . . . .
>
> The Tribunal itself will have to determine which cases it can appropriately deal with. The other suspects will remain subject to the national jurisdiction of Rwanda or of other States."[47]

Similarly, China, condemning "crimes in violation of international humanitarian law, including acts of genocide", declared that:

> "China is in favour of bringing to justice those responsible for such crimes.
>
> The establishment of an international tribunal for the prosecution of those who are responsible for crimes that gravely violate international humanitarian law . . . is only a supplement to domestic criminal jurisdiction and the current exercise of universal jurisdiction over certain international crimes."[48]

Since the purposes of the United Nations are to "maintain international peace and security" (Charter, Art. 1, para. 1) and to promote and encourage "respect for human rights and for fundamental freedoms" (Charter, Art. 1, para. 3), Belgium therefore considers there to be a judicial connection between the maintenance of international peace and security and the punishment of war crimes and crimes against humanity.

5. The obligation to prosecute or extradite in the context of the work of the Sixth Committee of the General Assembly on "[t]he scope and application of the principle of universal jurisdiction"

30. While the Sixth Committee of the General Assembly was working on "[t]he scope and application of the principle of universal jurisdiction", a number of States (not already listed in paras. 11 and 12 above) clearly affirmed that universal jurisdiction applied to war crimes and crimes against humanity. Those States were Egypt[49], Chile, Sweden, Lesotho[50], Colombia, Malaysia, Algeria[51] and El Salvador[52]. For example, the representative of Algeria stated:

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[47] S/PV.3453, 8 November 1994, p. 3. See also the position of Pakistan, which observed that the resolution "clearly establish[ed] that gross and systematic violations of international humanitarian law constitute a threat to international peace and security" (*ibid*., p. 10). In addition, according to Spain, "[t]he international community could not remain indifferent in the face of those deeds. It is not only the Rwandese people that is affected by such grave violations of human rights and the fundamental values of mankind, but the entire international community. This is why, for the second time in its history, the Security Council, acting under Chapter VII of the Charter, has established a jurisdictional organ . . . to hand down judgments in these very serious cases." (*Ibid*., pp. 11-12).

[48] *Ibid*., p. 11.

[49] UN doc. A/C.6/65/SR.10, para. 68.

[50] *Id*., A/C.6/65/SR.12, paras. 6, 15, 38.

[51] *Id*., A/C.6/66/SR.12, paras. 27, 63, 66.

[52] *Id*., A/66/93, *Report of the Secretary-General, The scope and application of the principle of universal jurisdiction*, para. 143.

> "The nature of a crime should determine whether it [falls] within the scope of the principle of universal jurisdiction. It [is] largely agreed that piracy qualifie[s] for inclusion on that basis, as d[o] crimes against humanity, war crimes, genocide, slavery and torture."[53]

It must be noted, however, that in respect of war crimes, no State has taken a clear position on the application of universal jurisdiction to the perpetrators of such offences solely in the context of an armed conflict not of an international character; nevertheless, almost all of those States (Malaysia being the exception) cite war crimes as grounds for the exercise of that jurisdiction, without specifying whether the armed conflict during which those offences were committed must be of an international character[54].

31. It is also interesting to note that in these discussions, the African Union, of which Senegal is a member, asserted that such jurisdiction applied to war crimes (without distinguishing between international armed conflicts and armed conflicts not of an international character) and crimes against humanity. According to the Union, the offences falling under universal jurisdiction

> "should be restricted to piracy, slavery, crimes against humanity, war crimes, genocide and torture, and the application of universal jurisdiction should be invoked only under exceptional circumstances and when it has been recognized that there are no other means of bringing criminal action against the alleged perpetrators"[55].

33. Finally, still in the context of this work, attention may also be drawn to the statement of the ICRC, according to which:

> "The basis for universal jurisdiction over serious violations of international humanitarian law is found in both treaty law and customary international humanitarian law."[56]

6. The obligation to prosecute or extradite in academic writings

35. The International Law Commission (ILC), whose object is "the promotion of the progressive development of international law and its codification" (Statute of the ILC, Art. 1), confirms the customary nature of the obligation to prosecute a person suspected of a war crime or a crime against humanity in its draft Code of Crimes against the Peace and Security of Mankind. Article 9, entitled "Obligation to extradite or prosecute", provides:

> "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations personnel] or 20 [war crimes] is found shall extradite or prosecute that individual."

In its commentary, the ILC writes that the obligation to prosecute is not subordinate to a prior request for extradition. The mere presence of the alleged perpetrator of the offence in its territory is sufficient to engage the State's obligation:

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[53] *Id*., A/C.6/66/SR.12, para. 66.

[54] *Id*., A/C.6/65/SR.10, para. 68; *id*., SR.12, paras. 6, 15, 38; A/C.6/66/SR.12, paras. 27, 66.

[55] *Id*., A/66/93, *Report of the Secretary-General, The scope and application of the principle of universal jurisdiction*, para. 158.

[56] *Ibid*., para. 121.

> "In the absence of a request for extradition, the custodial State would have no choice but to submit the case to its national authorities for prosecution. This residual obligation is intended to ensure that alleged offenders will be prosecuted by a competent jurisdiction, *that is to say*, the custodial State, in the absence of an alternative national or international jurisdiction."[57]

34. Several writers have drawn attention to the customary nature of the obligation to prosecute. Thus, L.A. Steven writes:

> "As a matter of custom, universal jurisdiction adheres only to the most egregious offenses under international law; that is, to those offenses that by their very nature undermine the foundations of the international community. (p. 441) . . . Most importantly, the duty to extradite or prosecute under customary international law applies as a mandatory, affirmative obligation for serious crimes such as war crimes, crimes against humanity, and genocide. (p. 442)"[58]

R. van Steenberghe clearly states that:

> "a customary obligation to extradite or prosecute may be derived from the state practice but only with respect to a limited number of crimes, namely core international crimes such as genocide, crimes against humanity or war crimes, and only to the extent that such a customary nature is ascribed to the obligation as it is correctly understood"[59].

He explains his thinking by recognizing, as Belgium does, that certain limits apply to this obligation:

> "According to the classical conception of the customary law formation and given the numerous state declarations made on the subject, it would be difficult to deny ascribing a customary status to the obligation to extradite or prosecute. This customary obligation is nonetheless limited in some respects. First, as evidenced by state practice, it is only concerned with core international crimes such as genocide, crimes against humanity or war crimes. A second fundamental limit comes from the declarations in which prominent states have strongly opposed affording a customary nature to the obligation to extradite or prosecute due to concern over incompatibility with domestic provisions regarding extradition and state jurisdiction. This opposition is overcome, however, by limiting the ascription of a customary status to the obligation as 'a rule', that is, to the obligation as conceived independently of the implementation system to which it is generally associated and which provides obligations concerning both extradition and state jurisdiction. In other words, the existence of a customary obligation to extradite or prosecute can be asserted only if it leaves the discretionary nature of extradition and state jurisdiction unaffected. Thirdly, the customary obligation does not imply any automatic obligation to extradite or prosecute. As the obligation to extradite or prosecute does in most of the treaties embodying it, it only requires the custodial state to submit the case to the competent authorities for the purpose of extradition or prosecution."[60]

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[57] *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, p. 33.

[58] "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", *Virginia Journal of International Law*, 1999, pp. 441-442.

[59] "The Obligation to Extradite or Prosecute: Clarifying its Nature", *Journal of International Criminal Law*, 2011, p. 1095.

[60] *Ibid*., pp. 1115-1116.

36. In conclusion, it is clear both from the practice cited in parts I and II of this reply and from the positions of States set out above that States consider that international law requires them to prosecute or extradite persons suspected of crimes against humanity or war crimes committed in an armed conflict not of an international character, where those offences occur outside their territory and neither the alleged perpetrator nor the victims are their nationals. Clearly, this does not mean that this obligation may not be subject to other bonds of attachment with the forum State. Thus, in Belgium's view, the *obligation* to prosecute or, failing that, to extradite can only exist — by its very nature, as the word "extradite" suggests — when the person suspected of those crimes is present in the territory of the forum State. Of course, this does not prejudice the *right* of other States to assert their jurisdiction in respect of those crimes, by virtue of universal jurisdiction, in the absence of such a bond of attachment with the forum State. However, these aspects of the exercise of universal jurisdiction fall outside the scope of the question put to Belgium by Judge Greenwood; accordingly, Belgium will not elaborate on them any further.

37. Finally, supposing there to be a doubt as to the universal character of the rule — *quod non*, according to Belgium — there is, however, no doubt that Senegal agrees with Belgium on the obligatory nature of the rule, which it confirmed when:

— it stated during the work of the Sixth Committee of the General Assembly on the obligation to prosecute or extradite that

> "[i]t [is] therefore vital to reach a common understanding of universal jurisdiction by clearly defining its essence, scope, application and limits and setting guidelines for its application with a view to ending impunity for the perpetrators of serious crimes"[61];

— the explanatory memorandum to the Senegalese law of 12 February 2007 defined war crimes, crimes against humanity and crimes of genocide on the basis of international custom[62];

— it repeatedly affirmed during the oral proceedings in this case that Senegal is committed to combating impunity[63].

38. This is the evidence which, in Belgium's view, demonstrates that States in general, and Senegal — like Belgium — in particular, are required and consider that they are required under customary international law to prosecute or extradite a person suspected of a crime against humanity or a war crime committed in an armed conflict not of an international character, where those offences occurred outside the forum State and neither the alleged perpetrator of those offences nor the victims are nationals of the forum State.

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[61]UN doc. A/C.6/66/SR.12, para. 67.

[62]Law No. 2007-02 of 12 February 2007 amending the Penal Code, *Journal officiel de la République du Sénégal*, p. 2377, in MB, Ann. D.6.

[63]Ref. in CR 2012/6, 19 March 2012, p. 33, para. 20 (David).