

INTERNATIONAL COURT OF JUSTICE

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

**Comments of the Kingdom of Belgium on the replies given by the  
Republic of Senegal to the questions put by certain judges**

I. Comments on the replies given by Senegal to the question put by Judge Greenwood

1. In its comments on the question put by Judge Greenwood, Senegal partially described Belgium's legislation regarding the extraterritorial jurisdiction of the Belgian courts over, for example, war crimes and crimes against humanity<sup>1</sup>. For clarification, Belgium will very briefly retrace the history of that legislation, so that the Court is fully informed on the matter.

2. In 1993, the legislature gave the Belgian courts extraterritorial jurisdiction, described as absolute universal jurisdiction, over acts constituting grave breaches of the Geneva Conventions of 12 August 1949 and of its first two Additional Protocols<sup>2</sup>. In 1999, that jurisdiction was extended to cover crimes of genocide and crimes against humanity<sup>3</sup>. It was this legislation which, in 2000, enabled the Belgian judicial authorities to deal with the acts of which Hissène Habré is accused: Article 7, paragraph 1, of the Law in question provided that "[t]he Belgian courts shall have jurisdiction to deal with the grave breaches contemplated in the present Law, regardless of the place where they were committed." [*Translation by the Registry.*] No bond of attachment was laid down as a condition for this jurisdictional rule.

3. Following the entry into force of the Rome Statute of the International Criminal Court, the Belgian legislature repealed the above legislation by means of the Law of 5 August 2003<sup>4</sup>, which then incorporated into the Preliminary Title of the Code of Criminal Procedure (PTCCP) the rules on extraterritorial jurisdiction of the Belgian courts over, in particular, war crimes and crimes against humanity.

4. Three new provisions of this Preliminary Title have thus since embodied the rules on extraterritorial jurisdiction in this respect: Articles 6, 10 and 12*bis*. These three provisions are also supplemented by a transitional provision (Article 29 of the Law of 5 August 2003).

5. Firstly, Article 6 of the modified PTCCP provides for the traditional active personal jurisdiction of the Belgian courts to be extended to certain offences committed by persons whose principal residence is in Belgian territory. These include war crimes and crimes against humanity.

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<sup>1</sup>Letter of 28 March 2012 from the Agent of Senegal to the Registrar of the Court, Supplementary written replies of the Government of Senegal to the questions put by judges at the close of the hearing held on 16 March 2012, p. 3; CR 2012/7, 21 March 2012, pp. 28-31, paras. 9-32 (Thiam).

<sup>2</sup>Law of 13 June 1993 on the punishment of grave breaches of the international Geneva Conventions of 12 August 1949 and of Additional Protocols I and II to those Conventions, *Moniteur belge* (hereinafter "MB"), 5 August 1993.

<sup>3</sup>Law of 10 February 1999 on the punishment of grave breaches of international humanitarian law, *MB*, 23 March 1999.

<sup>4</sup>Law of 5 August 2003 on grave breaches of international humanitarian law, *MB*, 7 August 2003.

6. Secondly, the Belgian legislature also conferred on the Belgian courts an extensive passive personal jurisdiction (Article 10, paragraph *1bis*, of the PTCCP), enabling them to deal with a war crime or a crime against humanity committed by a foreigner outside Belgium against a person who, at the time of the acts, was either a Belgian national or a person who had been habitually resident in Belgium for at least three years.

In 2006, following a judgment by the Belgian Constitutional Court (known at that time as the Court of Arbitration)<sup>5</sup>, the jurisdictional rules laid down by Article 10, paragraph *1bis*, of the PTCCP were extended to victims who, at the time of the acts, were recognized as refugees in Belgium and had their habitual residence in the territory of the Kingdom, pursuant to the 1951 Convention relating to the Status of Refugees and its Protocol<sup>6</sup>.

7. Thirdly, Article *12bis* of the PTCCP, in its present version, provides that “[a]part from the cases referred to in Articles 6 to 11 [including, therefore, Article 10, paragraph *1bis*], the Belgian courts shall also have jurisdiction to deal with offences committed outside the territory of the Kingdom and covered by a rule of conventional or customary international law or by a rule of European Union secondary law which is binding on Belgium, where that rule requires it, in whatever manner, to submit the case to its competent authorities for the purposes of prosecution” (emphasis added) [*translation by the Registry*].

As was made clear during the parliamentary work on the Law<sup>7</sup>, this provision means that the Belgian courts have jurisdiction on the basis of the principle *aut dedere aut judicare*, for example over war crimes and crimes against humanity. It also permits the direct application of Article 7, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

8. Fourthly, since jurisdictional rules were involved, these were applicable immediately to proceedings already under way. The legislature therefore included, in the transitional provisions of the 2003 Law referred to above, an Article 29 providing that the Belgian courts remained seised of cases in which, at the time when the Law entered into force, at least one measure of investigation had been taken and where at least one complainant held Belgian nationality at the time when the prosecution was initially brought. That was indeed the case with the complaints filed against Hissène Habré. The aim of the present Law is to maintain the jurisdiction of the Belgian courts only where there is a bond of attachment with Belgium, be that the mere presence of the suspected person in Belgium after the commission of the acts. Moreover, Article 29 of the 2003 Law was amended following the above-mentioned judgment of the Belgian Constitutional Court, the Belgian courts remaining seised in the same circumstances where at least one of the complainants was recognized as a refugee in Belgium and had their habitual residence there, within the meaning of the 1951 Convention relating to the Status of Refugees and its Protocol.

9. Furthermore, in order to take account of the Judgment of 14 February 2002 rendered by the Court in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the*

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<sup>5</sup>Court of Arbitration, judgment No. 104/2006 of 21 June 2006, available at: <http://www.const-court.be/public/f/2006/2006-104f.pdf>.

<sup>6</sup>Law of 22 May 2006 amending certain provisions of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure and a provision of the Law of 5 August 2003 on grave breaches of international humanitarian law, *MB*, 7 July 2006.

<sup>7</sup>Chamber of Representatives, S.E. 2003, DOC 51 0103/003, pp. 8, 9 and 41, available at: <http://www.lachambre.be/FLWB/pdf/51/0103/51K0103003.pdf>.

*Congo v. Belgium*)<sup>8</sup>, the same Law inserted an Article 1*bis* into the PTCCP, paragraph 1 of which, in its first indent, excludes the prosecution of foreign Heads of State, Heads of Government and Ministers for Foreign Affairs, during the period in which they exercise their functions, and of any person whose immunity from jurisdiction is recognized by international law. The second paragraph covers international immunity from enforcement.

10. Finally, while the jurisdiction of the Belgian courts based on Article 12*bis* of the PTCCP is linked to the performance of an international obligation, as the wording of that article makes perfectly clear, the broadened rules of active personal jurisdiction and the extensive rules of passive personal jurisdiction are, for their part, based on the right of States to extend more widely the jurisdictional rules applying to their courts<sup>9</sup>. This extension of the rules of extraterritorial jurisdiction must, however, abide by the other relevant rules of international law, including those relating to international immunities (see the points in para. 9 above regarding Article 1*bis* of the PTCCP).

11. In conclusion, the extraterritorial jurisdiction of the Belgian courts in respect of the complaints filed in Belgium against Hissène Habré was initially based on Article 7 of the 1993 Law mentioned earlier (see para. 2 above). That jurisdiction has been maintained through and under the terms of Article 29 of the 2003 Law referred to above (see para. 8).

## II. Comments on the reply given by Senegal to the question put by Judge Abraham

12. Belgium takes note of Senegal's reply to the question put by Judge Abraham<sup>10</sup>.

13. It observes that Senegal's reasoning is based on the rules and jurisprudence applicable in respect of diplomatic protection. However, Belgium has already made clear in its reply to Judge Abraham's question that in the present case, it has no intention whatever of exercising its diplomatic protection<sup>11</sup>.

14. Consequently, the fact that none of the complainants held Belgian nationality at the time when the acts of which they claim to be the victims were committed is of no relevance.

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<sup>8</sup>*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.*

<sup>9</sup>"*Lotus*", *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, pp. 18-19 and 30-31; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 76, paras. 45-46; p. 80, paras. 57-58.*

<sup>10</sup>Letter of 28 March 2012 from the Agent of Senegal to the Registrar of the Court, Supplementary written replies of the Government of Senegal to the questions put by judges at the close of the hearing held on 16 March 2012, pp. 2-3; CR 2012/7, 21 March 2012, pp. 25-27, paras. 1-7 (Thiam).

<sup>11</sup>CR 2012/6, 19 March 2012, pp. 52-53, para. 54 *et seq.* (Wood).