

Translated from French

Observations by Belgium on the scope and application of the principle of universal jurisdiction

1. Belgium has the honour to transmit, below, pursuant to paragraph 1 of General Assembly resolution 64/117, its observations on the principle of universal jurisdiction (paras. 2-7) and the application of that principle in international law (paras. 8-12) as well as information on its domestic legal rules (paras. 13-17) and judicial practice (paras. 18-19).

2. Universal criminal jurisdiction is the ability of a State to prosecute the perpetrator of a crime committed abroad, by an alien against an alien, where such action does not directly threaten the vital interests of the prosecuting State. Accordingly, this jurisdiction does not derive from the classic factors for connection to a State, namely the place of the crime and the nationality of the perpetrator or that of the victim.

3. The judicial authorities of the State in the territory of which a crime was committed are generally the first to be competent to search for and try the perpetrators of the crime.

4. However, certain crimes concern the entire international community because of their exceptional gravity. Universally condemned, these crimes cannot go unpunished and must therefore be universally suppressed. Any State which exercises its jurisdiction in respect of such crimes is acting in the interests of the international community, not simply in its own interest.

5. It is for this reason that all States must establish their jurisdiction with regard to these crimes so as to be able to bring the perpetrators to justice. Accordingly, the rationale for universal jurisdiction is to ensure that the perpetrators of the most serious crimes can be prosecuted when no other otherwise competent court is able or willing to initiate proceedings. Universal jurisdiction is in a sense subsidiary to the jurisdiction of the State in the territory of which a crime was committed. It is a component of cooperation among States, which is an essential element in combating impunity for the most serious crimes.

6. Belgium stresses the importance of distinguishing between universal jurisdiction, which is exercised by a State in the interests of the international community, and other types of extraterritorial jurisdiction, such as those deriving from the principle of protection or the nationality of the perpetrator or that of the victim. Belgium believes that the idea of subsidiarity referred to in the preceding paragraph is not the basis of the classic types of extraterritorial jurisdiction, which are also going to be reviewed; the International Law Commission has included the topic of extraterritorial jurisdiction in its long-term programme of work.

7. Belgium will not address here issues related to the immunity of State officials from foreign criminal jurisdiction which are currently under consideration by the International Law Commission.

8. Far from prohibiting States from exercising universal jurisdiction, international law requires the exercise of this jurisdiction in relation to certain crimes.

9. The multiplicity of multilateral treaties which include an *aut dedere aut judicare* clause clearly points to the existence of a consensus within the international community that the perpetrators of the crimes covered by these treaties should not go unpunished, irrespective of their whereabouts. The obligation to extradite or prosecute obliges States to establish their jurisdiction in relation to persons suspected of international crimes who are present in their territory, irrespective of their nationality, the nationality of the victims or the place of commission of the crime. The States parties to a treaty which includes an *aut dedere aut judicare* obligation must therefore incorporate universal jurisdiction into their legislation without prejudice to the possibility of the courts and tribunals of monist States exercising jurisdiction on the direct basis of international law. According to a majority of treaties, however, the obligation to exercise universal jurisdiction is subject to the prior refusal of a State to extradite the suspect to a State which has made such a request.¹

10. Some treaties oblige States parties to establish their jurisdiction, even their universal jurisdiction, and to prosecute the perpetrators of crimes covered by these treaties, whether or not there has been a request for extradition by another State. States are at liberty to extradite suspects, however, if they do not wish to prosecute them. This type of *aut dedere aut judicare* obligation is found, in particular, in the four Geneva Conventions of 12 August 1949,² in the Convention against Torture of 10 December 1984³ and also in the International Convention for the Protection of All Persons from Enforced Disappearance, of 20 December 2006.⁴

11. Belgium believes that there are also customary obligations which require States to incorporate rules of universal jurisdiction in their domestic law in order to try persons suspected of crimes of such seriousness that they threaten the international community as a whole, such as grave crimes under international humanitarian law. This customary obligation to prosecute the perpetrators of grave crimes under international humanitarian law does not exist, in Belgium's view, unless such persons are present in the territory of the State concerned. The fourth, sixth and tenth preambular paragraphs, along with articles 1 and 5 of the Rome Statute, are, for example, evidence of the existence of this customary obligation, particularly in respect of the suppression of crimes against humanity.

12. Lastly, Belgium believes that customary law enables States which are not parties to the 1984 Convention against Torture to prosecute, on the basis of universal jurisdiction, persons suspected of torture who are present in their territory, in view of the nature of the prohibition against torture as a peremptory norm of international law. Similarly, customary law authorizes States to exercise universal jurisdiction against persons suspected of acts of piracy, slavery or trafficking in persons.

¹ See the annex to the document prepared by the Secretariat for the sixty-second session of the International Law Commission: "Survey of multilateral conventions which may be of relevance for the Commission's work on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'"; http://untreaty.un.org/ilc/documentation/english/a_cn4_630.pdf.

² Article 49/50/129/146 which is common to the four conventions.

³ Article 5 (2) as interpreted by the Committee against Torture in its decision under article 22 of the Convention, taken on 17 May 2006 in relation to communication 181/2001: "the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition"; CAT/C/36/D/181/2001, para. 9.7.

⁴ Article 9 (2).

13. Belgium was one of the pioneers in the establishment of universal jurisdiction in respect of grave crimes under international humanitarian law. The act of 16 June 1993 which transposed to Belgium law the system of suppression established by the four Geneva Conventions of 1949 and their two protocols of 1977 on the protection of victims of war was extended to the crime of genocide and crimes against humanity by an act of 10 February 1999. Thus, victims of war crimes, crimes against humanity and crimes of genocide may complain before the Belgian courts irrespective of the place of the crime, the nationality of the perpetrator or that of the victim. Under this act, Belgian courts were accorded absolute universal jurisdiction in order to suppress the most serious crimes affecting the international community.

14. The application of this very far-reaching law gave rise to a number of problems in practice, however, deriving from the combined application of several provisions: the possibility of initiating proceedings in absentia and of opening a case by instituting civil indemnification proceedings before an examining magistrate, and the exclusion of immunities as an obstacle to prosecution. As mentioned in the commentary introducing to Parliament the text of the act of 5 August 2003 repealing the act of 16 June 1993, this broad field of application gave rise to a politicization of the law which was considered improper. Moreover, the entry into force of the Rome Statute necessitated a reduction in the extraterritorial sphere of jurisdiction of Belgian courts so that they would not routinely enter into potential competition with the International Criminal Court, in application of the principle of complementarity.

15. The act of 5 August 2003 on grave violations of international humanitarian law preserves intact the substantive law of the 1993 and 1999 acts by including in the penal code a new chapter I bis: "Grave violations of international humanitarian law". Moreover, the rules on the jurisdiction of Belgian courts are still broad, as a result of an adaptation of the general law of extraterritorial competence to the realities of modern international crime. At the same time, however, the 2003 act modifies the procedure for applying to Belgian courts by providing that prosecutions, including investigations, can be undertaken only at the request of the federal prosecutor, who assesses the complaints made. The procedure of instituting civil indemnification proceedings is therefore abandoned, with the exception of cases where an offence is perpetrated wholly or partly in Belgium or where the alleged perpetrator of an offence is Belgian or resides primarily in Belgium. Furthermore, in order to take into account the jurisprudence of the International Court of Justice,⁵ the 2003 act included in the preliminary chapter of the Code of Criminal Procedure the principle of respect for the rules of international treaty and customary law in respect of immunity from jurisdiction and execution.⁶

16. Apart from extraterritorial jurisdiction based on the principles of protection and of the nationality of the perpetrator or of the victim, the 2003 act did not affect universal jurisdiction where it was already envisaged under domestic law for a number of offences or where required under international treaty or customary law:

(a) Sexual offences perpetrated against minors, procurement, trafficking in persons;⁷

⁵ Judgement of 14 February 2002 issued in a case concerning an arrest warrant of 11 April 2000.

⁶ Act of 18 April 1878 containing the preliminary chapter of the Code of Criminal Procedure, article 1 bis.

⁷ Preliminary chapter of the Code of Criminal Procedure, art. 10 ter, 1, referring to articles 379-381 and 381 bis, paras. 1 and 3 of the Criminal Code.

- (b) Sexual mutilation of females;⁸
- (c) Non-respect for certain rules applicable to the activities of marriage bureaux;⁹
- (d) Acts of corruption;¹⁰
- (e) Acts of terrorism;¹¹
- (f) Any offence in respect of which international treaty or customary law require that it should be suppressed regardless of the country in which it was committed and of the nationality of the perpetrator(s).¹²

17. As mentioned above, application to an examining magistrate by instituting civil indemnification proceedings is no longer possible, with the exception of cases where an offence is perpetrated wholly or partly in Belgium or where the alleged perpetrator of an offence is Belgian or resides primarily in Belgium. When he receives a complaint, the federal prosecutor refers it to the examining magistrate for investigation. Nevertheless, the law provides for several grounds which may justify a decision not to initiate proceedings or a decision on inadmissibility taken either by the indictment division, at the behest of the federal prosecutor (a, b and c), or directly by the federal prosecutor (d).¹³ This is what happens when one of the following situations obtains:

- (a) The complaint is manifestly unfounded;
- (b) The facts cited in the complaint do not correspond to the classification of offences set forth in book II, chapter I bis of the Penal Code concerning grave violations of international humanitarian law;
- (c) The complaint cannot result in an admissible case;
- (d) It is apparent from the specific circumstances of the case that, in the interests of the proper administration of justice and in respect for Belgium's international obligations, this case should be brought either before international courts, or before the court in the place where the acts were committed, or before a court of the State of which the perpetrator is a national or of the place where he can be located, in so far as such court demonstrates the attributes of independence, impartiality and equity which accord, in particular, with the relevant international commitments between Belgium and that State.

If the decision not to undertake proceedings or a decision on inadmissibility is made on the basis of one of the last two grounds set forth above (c or d), the decision is communicated to the Minister of Justice, who informs the International Criminal Court thereof if the acts in question were committed after 30 June 2002, when the temporal jurisdiction of this court came into effect. Lastly, the preliminary chapter

⁸ Preliminary chapter of the Code of Criminal Procedure, art. 10 ter, 2, referring to article 409 of the Criminal Code.

⁹ Preliminary chapter of the Code of Criminal Procedure, art. 10 ter, 3, referring to articles 10 and 13 of the law of 9 March 1993.

¹⁰ Preliminary chapter of the Code of Criminal Procedure, art. 10 quater, 1, referring to articles 246-249 of the Criminal Code.

¹¹ Preliminary chapter of the Code of Criminal Procedure, art. 10, 6.

¹² Preliminary chapter of the Code of Criminal Procedure, art. 10, 1 bis and art. 12 bis.

¹³ Preliminary chapter of the Code of Criminal Procedure, art. 10, 1 bis and art. 12 bis.

of the Code of Criminal Procedure contains a provision indicating that the principle *ne bis in idem* remains applicable in the context of proceedings undertaken on the basis of universal jurisdiction: except in respect of crimes and offences committed during times of war, Belgian courts will not be competent when the accused, after being tried in a foreign country for the same offence, has been acquitted, or when after being convicted his sentence has been served or extinguished, or he has been pardoned or amnestied.¹⁴

18. To date, four trials relating to acts carried out during the 1994 genocide in Rwanda have been held before the Brussels Assize Court, in 2001, 2005, 2007 and 2009. These cases were opened wholly or partly on the basis of the universal jurisdiction of Belgian courts and their investigation went smoothly because of very close cooperation between the Belgian and Rwandan judicial authorities.

19. In addition, several dozen cases concerning grave violations of international humanitarian law are still at the stage of information or investigation and could, in the years to come, lead to new trials. However, only some of these cases are based on the universal jurisdiction of Belgian courts, the suspect being present in Belgian territory.

20. By way of conclusion, Belgium proposes two alternatives to be pursued during the future work of the Sixth Committee on universal jurisdiction:

- In recent years, this question was taken up in depth by numerous specialists in public international law and international criminal law. In 2000, the International Law Association meeting in London adopted a resolution¹⁵ welcoming the conclusions of its working groups on the “exercise of universal jurisdiction in respect of gross human rights offences”.¹⁶ In 2005, the Institute of International Law, for its part, adopted at its session in Krakow a resolution on “universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes”.¹⁷ Lastly, in 2009, the International Association of Penal Law adopted a resolution on universal jurisdiction¹⁸ at its XVIIIth congress in Istanbul. These texts, which are the culmination of several years’ study by legal experts from very different backgrounds, could constitute a useful basis for the work of the Sixth Committee.
- During the debates in the Sixth Committee in October 2009, many speakers referred to the subsidiary nature of universal jurisdiction. It might be interesting to study this in more detail, particularly by comparing subsidiarity with the principle of complementarity which is the basis for intervention by the International Criminal Court.

¹⁴ Preliminary chapter of the Code of Criminal Procedure, art. 13.

¹⁵ <http://www.ila-hq.org/download.cfm/docid/4084F742-03C7-49A3-90AIC4934E109B46>.

¹⁶ <http://www.ila-hq.org/download.cfm/docid/43F56C67-C59D-496E-A7C9FF418D88FCF4>.

¹⁷ http://www.idi-iiil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

¹⁸ <http://www.penal.org/IMG/ReAIDP%20FR.pdf>, pages 13 to 15.