

## The ICJ *Armed Activity Case* – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions

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### Abstract

In the *Armed Activity Case*, the International Court of Justice, found Uganda in breach of various international obligations. In establishing the state responsibility of Uganda, the Court concluded that in the Democratic Republic of Congo the country's troops committed, among other offences, grave breaches of international humanitarian law, as well as serious human rights violations, including torture. According to the Geneva Conventions of 1949 and human rights treaties, these acts should also entail individual criminal responsibility. Furthermore, states have undertaken an obligation to investigate and prosecute individuals for these heinous acts. However, enforcement of that obligation has always been problematic; states have been very reluctant to prosecute their own forces. And without an effective enforcement mechanism at the international level, states have largely gotten away with this bad practice. In light of the importance of having a state's responsibility support the enforcement of individual criminal responsibility at the national level, the article briefly reflects on the case's impact on individual criminal responsibility. It addresses the issue in two ways. Firstly, it examines a state's obligation to prosecute individuals as a secondary obligation, i.e., inherent in a state's obligation to make reparations for an international wrongful act. Secondly, it explores a state's obligation to prosecute individuals as a primary obligation, undertaken in the Geneva Conventions and human rights treaties. The article concludes that despite the clear obligation of a state to enforce individual criminal responsibility for the acts at hand in the *Armed Activity Case*, and the rear occurrence of having a case of this nature reaching the jurisdiction of the International Court of Justice, where the opportunity to address it and enforce it was largely missed. The nature and submissions in other recent cases at the International Court of Justice indicate that in the near future the Court will have a larger role in enforcing states' obligation to investigate and prosecute serious crimes at the national level.

### Keywords

duty to prosecute; grave breaches of the Geneva Conventions; individual criminal responsibility; International Court of Justice; reparation; satisfaction; serious human rights violations; state responsibility

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## 1. Introduction

In the years 1998 to 2003 the Democratic Republic of Congo (hereinafter DRC) and its citizens were plagued with a reckless war. Its civil conflicts, fueled by aggressive inter-state wars, left the country devastated in the new century. The cost of the war was heavy, with at least 3 million lost lives and a further 3 million people displaced. Long reported horrific atrocities, including mass killings, torture and the use of children as soldiers, were verified in 2005 by a judgment of the International Court of Justice in the *Armed Activity Case*.<sup>1</sup> The Court found one of the warring parties, Uganda, in breach of various international obligations, including international humanitarian law and human rights law.

Enforcement of state responsibility for such heinous acts is not common in the international arena; it is, in fact, a rarity. Hardly ever in its almost close to 90-year history have the International Court of Justice and its predecessor the Permanent Court of International Justice found a state in such serious breaches of obligations under peremptory norms of international law, nor being in the position to do so. Without a doubt, other states engaged in grave conflicts, in DRC and elsewhere, have engaged in acts entailing state responsibility, but have simply been protected by the jurisdictional hurdles in The Hague – whatever its violation, a state is not taken to an international court without its consent.<sup>2</sup>

The finding of state responsibility in the *Armed Activity Case* has various legal ramifications. One of them is the relation between state responsibility and individual criminal responsibility. While the Court is only dealing with state responsibility, the individual acts in the background – the ones that were found attributable to Uganda – can also entail individual criminal responsibility. In establishing the state responsibility of Uganda, the Court concluded that the country's troops committed, among other offences, grave breaches of international humanitarian law, as well as massive human rights violations, including torture. Individual criminal responsibility for exactly these crimes has existed for decades, and of particular relevance for this paper states have undertaken an international obligation to investigate and prosecute these crimes. For instance,

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<sup>1</sup> *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, *I.C.J. Reports* 2005, p. 116.

<sup>2</sup> DRC brought also cases against Rwanda and Burundi to the International Court of Justice, without success. In *Congo v. Rwanda*, the Court “deem[ed] it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties”, see *Armed Activities on the Territory of the Congo, (Democratic Republic of Congo v. Rwanda)*, New Application 2002, Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, para. 125. See also *Status of Eastern Carelia Case*: “It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement”, Advisory Opinion, 23 July 1923, PCIJ, Series B, No. 5, p. 27.

these obligations can be found in the four Geneva Conventions of 1949, its Additional Protocol I, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984.

The rare finding of a state's responsibility for serious violations of international human rights law and international humanitarian law in the *Armed Activity Case* provides an excellent opportunity to explore the case's impact on individual criminal responsibility.<sup>3</sup> Despite being an explicit obligation in international conventions, enforcement of individual criminal responsibility at the national level has always been problematic. States have been reluctant to prosecute their own troops, and as the obligations come without any enforcement mechanism at the international level, the relevant provisions have almost become dead letters.<sup>4</sup> In contrast, the enforcement of individual criminal responsibility for international crimes at the international level has flourished, as illustrated by the number (now eight) of operating international criminal tribunals. However, on the eve of the operation of the international criminal tribunals for Rwanda and the former Yugoslavia, the limitations of these institutions are now surfacing. Firstly, they can never be a complete substitute for the prosecution by states at the national level. The tribunals' capacity to deal with the situations is minimal, enabling them to deal with only fraction of the cases. The initial years of the International Criminal Court only confirm this reality; its indictments so far can be counted on one hand in each situation.<sup>5</sup> Secondly, the International Criminal Court's principle of complementarity has worked in unexpected ways. Instead of being the long absent enforcement mechanism of national prosecutions, states, including DRC and Uganda, have voluntarily handed over the responsibility of these prosecutions to the International Criminal Court.<sup>6</sup>

In light of the importance of having a state responsibility support the enforcement of individual criminal responsibility at the national level, this article will briefly reflect on the *Armed Activity Case* with respect to states' international

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<sup>3</sup> On the issue of the impact of individual responsibility on state responsibility, see A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', *52 International and Comparative Law Quarterly* (2003) pp. 615–640.

<sup>4</sup> The bad practice has casted doubt on whether the principle can be considered a customary law, see A. Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford University Press, 2008) p. 418; and United Nations, Commission on Human Rights, *The Administration of Justice and the Human Rights of Detainees, Revised final report prepared by Mr. Joined pursuant to Sub-Commission decision 1996/119*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 29.

<sup>5</sup> On ICC prosecutorial strategy of focused investigations and prosecutions, see International Criminal Court, The Office of the Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006.

<sup>6</sup> On this unexpected development, see M. H. Arsanjani and W. M. Reisman, 'The International Criminal Court and the Congo: From Theory to Reality', in L. N. Sadat and M. P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers, 2008) pp. 325–345.

obligation to investigate and prosecute individuals for serious violations of human rights and grave breaches of international humanitarian law.<sup>7</sup> As a prologue, section 2 describes the broad jurisdiction the International Court of Justice had in the case, as well as its findings. Section 3 illustrates how the difference between state responsibility and individual responsibility is reflected in the case. Then, section 4 examines a state's obligation to prosecute individuals as a legal consequence of violation of an international obligation, i.e., inherent in a state's obligation to make reparations for an international wrongful act. Finally, section 5 explores state's obligation to prosecute grave breaches of the Geneva Conventions and serious human rights violations. Section 6 contains some concluding remarks.

## 2. The International Court of Justice and the *Armed Activity Case*

The International Court of Justice was endowed with a broad jurisdiction in the *Armed Activity Case*. The jurisdiction relied on the declarations made by the two state parties accepting the Court's compulsory jurisdiction under Article 36(2) of the Statute of the Court.<sup>8</sup> Equipped with the declarations, broad references by the parties in submissions to "violations of human rights and international humanitarian law", coupled with the parties' ratifications of all major international human rights and international humanitarian conventions, the Court was in the unique position to apply and base its findings on all major international instruments of human rights and international humanitarian law. This is a rare occurrence at the Court, in particular when compared to the Court's often crippled jurisdiction in contentious cases on human rights law and international humanitarian law.<sup>9</sup> In light of the complicated situation in DRC and the multiple atrocities committed, the Court's broad jurisdiction *ratione materiae* greatly enhanced the Court's finding and its relevance.

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<sup>7</sup> The analysis is confined to the finding of the Court that Uganda, by the conduct of its armed forces, which committed, among others, acts of killing and torture of the Congolese civilian population, violated its obligation under international human rights law and international humanitarian law. On other aspects of the case, see 40 *New York University Journal of International Law and Politics*, Special Issue on the *Armed Activity Case*, dealing with fact-assessment, self-defence, role of peace-agreements, and illegal resource exploitation. See also P. Okowa, 'Congo's War: The Legal Dimensions of a Protracted Conflict', 77 *Brit. Y.B.Int'L* 203 (2006).

<sup>8</sup> Uganda's declaration is from the year 1963, *UNTS*, Vol. 479, p. 35, and Congo's is from the year 1989, *UNTS*, Vol. 1523, p. 300.

<sup>9</sup> For instance, in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, the Court could only apply international humanitarian law that has gained the status as customary law, and not the Geneva Conventions directly. Similarly, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court's jurisdiction was strictly limited to violations of that treaty – excluding any considerations of possible violations of other human right treaties or international humanitarian law.

The Court found Uganda in breach of international human rights law and international humanitarian law, and its responsibility was twofold. Firstly, Uganda's responsibility for atrocities committed by the Ugandan troops – attributable to the state; and, secondly, Uganda's responsibility as an occupying power in the area of Ituri, for failing its obligation of vigilance. The Court found that

the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law.<sup>10</sup>

On the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory, the Court relied on its previous finding in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and concluded that both branches would have to be taken into consideration.<sup>11</sup> Consequently, the Court found Uganda in breach of both various human rights laws and international humanitarian law obligations, including ones in the Hague Regulations of 1907, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the International Covenant on Civil and Political Rights (hereinafter ICCPR), the First Protocol Additional to the Geneva Conventions of 12 August 1949, the African Charter on Human and People's Rights, the Convention on the Rights of the Child, and the Optional Protocol to the Convention on the Rights of the Child.

As a legal consequence, the Court concluded that Uganda had an obligation to make reparations to DRC for the injury caused, and decided that, failing an agreement between the parties, the question of reparations due to the DRC should be settled by the Court.<sup>12</sup>

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<sup>10</sup> *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 345(3).

<sup>11</sup> *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 216, citing its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. On the convergence of international humanitarian law and human rights law, see W. A. Schabas, 'Criminal Responsibility for Violations of Human Rights', in J. Symonides (Ed.), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate, 2003) pp. 281–302.

<sup>12</sup> *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 345(13) and para. 345(14).

### 3. State Responsibility v. Individual Criminal Responsibility

State responsibility for internationally wrongful acts is distinct from individual responsibility for international crimes. This principle is well reflected in international instruments. According to Article 58 of the Draft Rules on States' Responsibility, the articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a state.<sup>13</sup> Similarly, from the other side, Article 25 of the Rome Statute of the International Criminal Court states that no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of states under international law.<sup>14</sup> Even though the same treaty entails international responsibility of both states and individuals, such as the Geneva Conventions, it does not affect the principle of distinction of state and individual responsibility.<sup>15</sup> If the individual act is attributable to the state, the State is not exempted from its own responsibility even if it prosecutes and punishes the relevant individual.

In the *Armed Activity Case* the Court found that "massive human rights violations and grave breaches of international humanitarian law were committed by [Uganda's troops] on the territory of the DRC".<sup>16</sup> These acts were attributable to Uganda, and the state was found to have violated principles of international human rights law and international humanitarian law, such as prohibition of taking any measures to cause physical suffering or extermination of protected persons (Article 32 of Geneva Convention), and the right to life and prohibition against torture (Articles 6 and 7 of the ICCPR). Even if Uganda had prosecuted and convicted individuals for the acts attributable to it, it would not have changed anything regarding Uganda state's responsibility. For instance, finding that Uganda failed its duty of vigilance by not taking adequate measures to ensure its military forces did not engage in looting, the Court stated:

It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its armed forces.<sup>17</sup>

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<sup>13</sup> International Law Commission, *Responsibility of States for International Wrongful Acts* (2001), U.N. Doc. A/RES/56/83.

<sup>14</sup> Rome Statute of the International Criminal Court, 2187 *U.N.T.S.* 3.

<sup>15</sup> On the relationship between international crimes committed by individuals and state responsibility, see S. Roseanne, 'War Crimes and State responsibility', in Y. Dinstein and M. Tabory (eds.), *War Crimes in International Law* (Martinus Nijhoff Publishers, 1996) p. 65.

<sup>16</sup> *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 207.

<sup>17</sup> *Ibid.*, para. 246.

Similarly, the Court considered it irrelevant for the attribution of the conduct of Uganda's troops whether they had acted contrary to the instruction given or exceeded their authority:

It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.<sup>18</sup>

The parties debated to what extent they needed to address the individual acts, in order to establish an attribution to the state. The DRC highlighted that it was not addressing the Court as a criminal tribunal, asking it to pass judgment on each of the tens of thousands of crimes committed. It was asking for the Ugandan state to be held responsible, and in that respect it suffices to show that agents of the Ugandan state, whatever their identity or position, have committed or tolerated violations. On the contrary, Uganda highlighted the need to identify each act in order to make it attributable to Uganda.<sup>19</sup> In order to rule on the claim of violations by Uganda's troops, the Court did not consider it necessary to make findings of facts with regard to each individual incident alleged.<sup>20</sup> Citing various documents from the United Nations, the Court "therefore finds the coincidence of reports from credible sources sufficient to convince it that massive human rights violations and grave breaches of IHL were committed by the UPDF on the territory of the DRC".<sup>21</sup>

#### **4. A State's Obligation to Prosecute Individuals as a Legal Consequence of Violation of International Obligation**

While a state is not exempted from its own responsibility for an internationally wrongful act by the prosecution and punishment of the state officials who carried it out, such a prosecution has relevance with respect to reparations, in particular satisfaction. According to Article 37 of the International Law Commission's Draft Rules of Responsibility of States for Internationally Wrongful Acts (2001):

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<sup>18</sup>) *Ibid.*, para. 214. On Article 3 and 91, see F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces', 40 *International and Comparative Law Quarterly* (1991) pp. 827–858.

<sup>19</sup>) International Court of Justice, Counter-Memorial submitted by the Republic of Uganda, 21 April 2001, p. 185.

<sup>20</sup>) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 205.

<sup>21</sup>) *Ibid.*, para. 207.

1. The State responsible for an international wrongful act is under an obligation to give satisfaction for the injury caused by that act as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, and expression of regret, a formal apology or another appropriate modality.<sup>22</sup>

The list of forms of satisfaction listed in paragraph two is not exhaustive. Indeed, the commentary on the Draft Rules lists duty to prosecute as an example of satisfaction:<sup>23</sup>

The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. Many possibilities exist, including ... disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act.

DRC included in its written submissions that in light of Uganda's violation of international obligations, Uganda shall "render satisfaction for the injuries inflicted by it upon the [DRC], in the form of ... and the prosecution of all those responsible".<sup>24</sup> Citing the Draft Rules of Responsibility of States for Internationally Wrongful Acts, DRC made the argument

that disciplinary action against Ugandan officials who have been guilty of serious or criminal misconduct, in respect of both the attack and the resulting human rights violations, should be viewed as a particularly appropriate form of satisfaction in the circumstances of this case. ... It is essential, however, that the proceedings should be brought against all officials concerned, regardless of their rank and office within the Ugandan State and administrative structure. In other words, they must also – and indeed above all – be brought against the highest-ranking individuals, precisely because it is they who bear prime responsibility for the policy of aggression pursued and the acts of oppression committed against the Congolese State and its people.<sup>25</sup>

<sup>22</sup>) Responsibility of States for International Wrongful Acts (2001), *supra* note 13.

<sup>23</sup>) In 2001 the International Law Commission adopted its final Draft Rules on States Responsibility. The final draft article on satisfaction changed in the last reading, moving prosecution of individuals from the list of examples in the main text of the article into the commentaries. However, the Commission made it clear that the list of different types of satisfaction in Article 37 was not exhaustive. The inclusion of this remedy was backed by a study on long diplomatic practice and punishment of individuals as a consequence of state violations, organised by practice in the time periods of 1850–1945 and from 1945–1989, see *Second state report on state responsibility*, by Aranguio-Ruiz, *ILC Report* 1989, document at 41st session, pp. 36–40. The report states: "the disavowal (d'esaveu) of the action of its agent by the wrongdoer State, the setting up of a commission of inquiry and the punishment of the responsible individuals are frequently requested and granted in post-war diplomatic practice" (para. 130, p. 39). As an example the commentary lists that action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (*RGDIP*, vol. 80 (1976), p. 257); *Report of the International Law Commission on the work of its fifty-third session*, p. 106 and fn. 589.

<sup>24</sup>) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 24.

<sup>25</sup>) International Court of Justice, *Memorial of the Democratic Republic of the Congo*, Volume I, July 2000, para. 6.78.

However, while the DRC included this submission in its memorial and reply, it was not included in its final submissions given at the end of the oral proceedings. DRC's final submission was

that the Republic of Uganda is under obligation to the [DRC] to make reparation for all injury caused to the latter by the violations of the obligations imposed by international law and set out in the submission 1, 2, and 3 above ... that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.<sup>26</sup>

Nothing in the case's documents explains this change of submission. Developments on the ground in the time period between written and oral proceedings should not have rendered the original submission of prosecution irrelevant.<sup>27</sup> Earlier practice at the International Court of Justice may have been an influencing factor. Declaratory judgments are common and the exact scope of reparations has largely been left to the parties to settle.<sup>28</sup> Mandatory orders are rare, and, for instance, the Court has never decided on prosecutions at the national level as a secondary obligation. Such a decision would by some be regarded as inappropriate, if not intrusion in the sovereignty of a state.<sup>29</sup> However, as the Court is increasingly dealing with the linkage between state responsibility and rights and obligation of individuals, the Court's jurisprudence on reparations may evolve. This is illustrated by the nature, submissions, orders and/or findings in recent cases such as *Jurisdictional Immunities of the State (Germany v. Italy)*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Certain Questions of Mutual*

<sup>26</sup> *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 25, 4(d) and (e).

<sup>27</sup> For instance, Uganda had not started any prosecutions for crimes committed by its troops in DRC. In 2003 and 2004 the DRC and Uganda, respectively, made referrals to the International Criminal Court, DRC with respect to crimes committed in all its territory from July 2002 and Uganda regarding crimes committed by the Lord Resistance Army in Uganda. While DRC's referral gives the International Criminal Court a broad jurisdiction, and in accordance with Article 12 of the Rome Statute includes crimes committed in the DRC irrespective of the nationality of perpetrators, the jurisdiction of the International Criminal Court is limited to crimes committed after July 2002, *cf.* Article 11 of the Rome Statute. As the violations in the *Armed Activity Case* go back to earlier years, DRC's referral could only cover a fraction of those crimes addressed in the *Armed Activity Case*.

<sup>28</sup> So much so that the power of the Court to order for instance a specific performance in a mandatory term has been questioned, or at least not considered to be an appropriate judicial remedy, *see for instance* the discussion in C. Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) pp. 209–211; C. Gray, *Judicial Remedies in International Law* (Oxford University Press, 1987) p. 98; and M. N. Shaw, 'A Practical Look at the International Court of Justice', in M. D. Evans (Ed.), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing, 1998) pp. 13–16.

<sup>29</sup> *See* discussion in Gray, *ibid.*, p. 98.

*Assistance in Criminal Matters (Djibouti v. France)*, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*. The recently filed case before the International Court of Justice by Belgium v. Senegal, requesting the Court to declare that Senegal is obliged to prosecute Mr. H. Habré for acts including crimes of torture and crimes against humanity, and failing the prosecution is obliged to extradite him to Belgium, illustrates the changing nature of cases before the International Court of Justice.<sup>30</sup> While the case concerns primary obligation of a state, and not a secondary one, it reflects how states seem now to be less hesitant to make submissions regarding implementation at the national level. The developments at other international courts and tribunals, such as the regional human rights tribunals, appear to be following the same path. In their decisions on reparations, they are increasingly deciding on investigation and prosecutions at the national level as a remedy, abandoning a somewhat cautious earlier approach to the issue.<sup>31</sup>

The reparation agreement reached between the DRC and Uganda may include an obligation of Uganda to prosecute the individuals bearing the responsibility of the acts committed and which were attributable to it. The words “nature, form and amount” in the DRC’s new submission, and subsequent decision by the Court that Uganda “is under obligation to make reparation to the [DRC] for the injury caused”, keep the possibility open that the agreement can include satisfaction, including the duty to prosecute individuals. Such an inclusion would be in accordance with the international obligation of a state to make full reparation for internationally wrongful acts.<sup>32</sup> Then, the Court may need to decide on the nature of the reparations in the future. At the time of writing, close to four years after the judgment in the *Armed Activity Case*, the DRC and Uganda have not reached an

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<sup>30</sup> *Case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Application filed on 19 February 2009.

<sup>31</sup> See C. Tomuschat, ‘The Duty to Prosecute International Crimes Committed by Individuals’, in *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (2002) pp. 319–322. See also the following recent decisions at the European Court of Human Rights: *Assanidze v. Georgia* [GC] (App. no. 71503/01) ECHR 2004-II, paras. 202–203; *Ilaşcu and Others v. Moldova and Russia* [GC] (App. no. 48787/99) ECHR 2004-VII, para. 490; *Papamichalopoulos and Others v. Greece* (Article 50) (App. no. 14556/89) ECHR Series A no. 330-B, paras. 34–39; and *Sejdovic v. Italy* [GC] (App. no. 56581/00) ECHR 2006-II.

<sup>32</sup> *Factory at Chorzow*, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 17, p. 29. Similarly, according to Article 34 of the Draft Articles on State Responsibility, “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter”, Responsibility of States for International Wrongful Acts (2001), *supra* note 13.

agreement on reparations due to the DRC. According to the judgment in the *Armed Activity Case*, failing an agreement, the question of reparations due to the DRC is to be settled by the Court.<sup>33</sup>

## 5. A State's Obligation to Prosecute Grave Breaches of the Geneva Conventions and Serious Human Rights Violations

In international law there is an independent duty on states to investigate and prosecute individuals for certain international crimes. Applying the terminology set out in the Draft Rules of Responsibility of States for Internationally Wrongful Acts, the duty is a primary obligation as opposed to a secondary obligation (the latter being a legal consequence of a state's breach of an international obligation, as described in Section 4). The duty is irrespective whether the act can also be considered attributable to a state and may lead to a state responsibility. The primary example of a state's obligation to prosecute certain crimes is to be found in the very same instruments that are considered in the *Armed Activity Case* – the Geneva Conventions of 1949 and their additional protocols, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

The Geneva Conventions of 1949 were among the first international instruments to stipulate member states' obligations to prosecute crimes falling under the treaty. This was a major development in the enforcement of international obligations, as until that time it was up to individual states to determine how to implement international treaties at the national level.<sup>34</sup> Furthermore, the new obligation underscored the prosecution of war criminals by the state to which the perpetrators belongs.<sup>35</sup> According to Article 146 of the Fourth Geneva Convention:

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<sup>33</sup>) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 345(13) and para. 345 (14).

<sup>34</sup>) J. S. Pictet (Ed.), *The Geneva Conventions of 12 August 1949, Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, 1952) p. 353. However, despite that the duty to prosecute is considered one of the cornerstones of the Geneva Conventions, the treaties do not provide for any enforcement mechanism in the case of a dispute over a state's compliance with the obligation. A vague enforcement mechanism was established in Additional Protocol I, Article 90, with the establishment of a permanent International Fact-Finding Commission. The Commission came into existence in 1991, but has never been used by state parties. Furthermore, a reporting duty on states parties on implementation of the Geneva Conventions at the national level does not exist either. This is also in stark contrast with the substantial reporting duty of states parties to the United Nations human rights conventions, and Security Council resolution 1373/2001 with respect to the implementation of the terrorist conventions. Recently, the Secretary General of the United Nations has made attempts to call for reports on the implementation of Protocol I to the Geneva Conventions, e.g., *Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts*, *Report of the Secretary-General*, UN Doc. A/61/222, 4 August 2006.

<sup>35</sup>) Prior to this the prosecution of war crimes had largely be confined to prosecution through the injured state, see R. Wolfrum, 'Enforcement of International Humanitarian law', in D. Fleck (Ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) p. 523.

... Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such *grave breaches*, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case. ...<sup>36</sup>

Similarly, according to Article 85 of Protocol I to the Geneva Conventions, the provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by the section, shall apply to the repression of breaches and grave breaches of the Protocol.<sup>37</sup>

Of relevance to the case at hand, an occupying power has obligation under international humanitarian law to ensure public order and safety. According to Article 43 of the Hague Regulations of 1907:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in the force in the country.

The obligation can be considered to entail the duty to prosecute violations of international humanitarian law and serious human rights violations. Interpreting the rather general wording of Article 43 (“take measures”, “as far as possible”) and deciding the scope of the obligation, the Court in the *Armed Activity Case* concluded:

This obligation comprised the duty to secure respect for the applicable rules international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against the acts of violence, and not to tolerate such violence by any third party.<sup>38</sup>

The obligation to prosecute arises also corollary with regard to states' international human rights obligations.<sup>39</sup> The Convention against Torture and Other

<sup>36</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 *U.N.T.S.* 287, Article 146. See similar provisions in Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 *U.N.T.S.* 31, Article 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 *U.N.T.S.* 85, Article 50; and Geneva Convention relative to the Treatment of Prisoners of War, 75 *U.N.T.S.* 135, Article 129.

<sup>37</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 *U.N.T.S.* 2.

<sup>38</sup> *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 178.

<sup>39</sup> See further Cassese, *supra* note 4, p. 418. The obligations of states to investigate and prosecute crimes is also reinforced in United Nations work on the fight against impunity, right to truth, and right to reparations, see Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 19. Similarly, the duty to investigate and prosecute is listed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International

Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 have provisions stipulating the obligation of states parties to prosecute violations of the conventions.<sup>40</sup> The International Covenant on Civil and Political Rights does not have an explicit provision on such an obligation.<sup>41</sup> However, the obligation to prosecute is considered to arise with the right to an effective remedy, cf. Article 2(3) together with duties in other provisions, in particular in its provision on right to life and prohibition on torture.<sup>42</sup>

The failure of Uganda to prosecute was part of the DRC's submission regarding the violation of international humanitarian law and human rights law. DRC claims that

Uganda, by committing acts of violence against nationals of the [DRC], by killing them and injured them..., by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and or failing to *punish persons under its jurisdiction or control having engaged in the above-mentioned acts has violated the following principles of conventional and customary law: ... the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law; the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural.*<sup>43</sup>

In support of its submission, DRC referred to the Hague Regulations of 1907, the Fourth Geneva Convention of 1949, the ICCPR, the Additional Protocol to

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Human Rights Law and Serious Violations of International Humanitarian Law, resolution adopted by the General Assembly, Annex, UN Doc. A/RES/60/147, 21 March 2006, paras. 3(b), 4 and 22(f).

<sup>40</sup> The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 *U.N.T.S.* 85, Articles 5 and 7; Convention on the Prevention and Punishment of the Crime of Genocide, 78 *U.N.T.S.* 277, Articles 3–6.

<sup>41</sup> During the drafting of the ICCPR, some states wanted to strengthen the obligation on the part of government authorities to prosecute violations, see N. Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress', in N. Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995) p. 33.

<sup>42</sup> ICCPR General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7), 30/05/82, para 1; ICCPR, General Comment No. 31(80): Nature of the general legal obligation imposed on states parties to the Covenant, 26/05/2005, CCPR/C/21/Rev.1/Add.13 (General Comments), para. 18. For corresponding case law, see for instance CCPR, *Maria del Carmen Almeida de Quinteros and Elena Quinteros Almeida v. Uruguay* (Communication No. 107/1981), UN Doc. CCPR/C/19/D/107/1981, 21 July 1983, para. 16, and *Bleir v. Uruguay* (Communication No. 30/1978). The European Court of Human Rights follows a similar approach. In cases of enforced disappearances, torture and extrajudicial executions, the Court has highlighted that the notion of an effective remedy for the purpose of Article 13 of the European Convention on Human Rights entails a thorough and effective investigation capable of leading to the identification and punishment of those responsible, see *Aksoy v. Turkey*, Application No. 25781/94, Judgement of 18 December 1996, para. 136.

<sup>43</sup> *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 25(2).

the Geneva Conventions, the African Charter on Human Rights and People's Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the African Charter on the Rights and Welfare of the Child.<sup>44</sup>

In the *Armed Activity Case* the Court addressed the obligation to prosecute with respect to the obligation of Uganda as an occupying power, and even there not directly. It found that Uganda “by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law”.<sup>45</sup> In its findings, the Court does not mention Article 146 of the Fourth Geneva Convention and Article 85 of Protocol I to bring to courts those committing grave breaches of the Conventions. At the same time, establishing state responsibility of Uganda, the Court found that Uganda's troops had committed grave breaches of the Fourth Geneva Convention and Protocol I.<sup>46</sup> The Court's silence on the issue is addressed in one of the judge's separate declarations:

Nevertheless, since grave breaches of international humanitarian law were committed, there is another legal consequence which has not been raised by the DRC and on which the Court remains silent. That consequence is provided for in international humanitarian law. There should be no doubt that Uganda, as party to both the Geneva Conventions of 1949 and the Additional Protocol I of 1977 remains under the obligation to bring those persons who have committed these grave breaches before its own courts (Article 146 of the Fourth Geneva Convention, and Article 85 of the Protocol I Additional to the Geneva Conventions).<sup>47</sup>

Similarly, the Court does not address the obligation to prosecute stipulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or such an obligation considered inherent in the other human rights treaties. At the same time, the Court found that actions by Uganda's troops violated various international human rights law, including right to life and prohibition of torture or degrading treatment, cf. Articles 6 and 7 of the International Covenant on Civil and Political rights and Articles 4 and 5 of the African Charter on Human and People's Rights.<sup>48</sup>

The Court's silence on the issue of obligation to prosecute may be explained by the *non ultra petita* rule: the Court is bound by parties' submissions. As explained

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<sup>44</sup> *Ibid.*, para. 190.

<sup>45</sup> *Ibid.*, para. 345(3).

<sup>46</sup> *Ibid.*, para. 207.

<sup>47</sup> *Ibid.*, Declaration of Judge Tomka, para. 9.

<sup>48</sup> The Court did not include in its list of provisions of international instruments violated by Uganda the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, while DRC referred to that instrument in its arguments and both Parties have ratified that instrument without any reservations.

by Sir Gerald Fitzmaurice, “an international tribunal will not decide more than it is asked to decide, and will not award by way of compensation or other remedy more than it is asked to award”.<sup>49</sup> In its submission, DRC does not make specific reference to Article 146 of the Geneva Convention, Article 85 of Protocol I Additional to the Geneva Conventions, or relevant articles of the human rights treaties. So, while the Court found that Uganda’s troops committed grave breaches of the Geneva Conventions and that Uganda breached Article 7 on torture and Article 6(1) on the right to live of the ICCPR, a decision on Uganda’s failure to prosecute might be beyond the Court’s jurisdiction. At the same time, DRC’s final submission argued that Uganda “*fail[ed] to punish persons under its jurisdiction or control having engaged in the above-mentioned acts*”, supported by general reference to the Hague Regulations, Geneva Conventions, and human rights treaties.

The Court’s jurisprudence regarding state’s obligation to prosecute as a primary obligation is not rich. For instance, in the *Case concerning United States Diplomatic and Consular Staff in Tehran*, among United States’ submissions was that Iran “should submit to its competent authorities for the purposes of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and the premises of the United States Embassy and Consulates in Iran”.<sup>50</sup> The United States’ submission was among others argued in light of Article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which stipulates that member states are obligated to prosecute the crimes defined in the Convention or extradite them to trial in other states.<sup>51</sup> Despite the fact that the Court found Iran in violations of various treaties, and international customary law, it did not address this submission. The issue of prosecuting serious international crimes was also in the background in the *Case concerning the Arrest Warrant of 11 April 2000*.<sup>52</sup> The Court’s decision confined itself to international law regarding immunities, without addressing the subject of universal jurisdiction for serious international crimes, in this case acts punishable in Belgium under the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II

<sup>49</sup> Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (1986) p. 524. According to the Court, “it is the duty of the Court not only to reply to the questions as stated in the final submission of the parties, but also must abstain from deciding points not included in those submissions”, *Asylum Case* (interpretation), ICJ 1950, p. 402.

<sup>50</sup> *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgement of 24 May 1980, para. 8.

<sup>51</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1035 *U.N.T.S.* 167, Article 7.

<sup>52</sup> *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002.

of 8 June 1977 Additional Thereto. The Court was less restrained in the *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case*.<sup>53</sup> Among Bosnia and Herzegovina's submission was one that Serbia had failed its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide and its obligation to cooperate with international penal tribunal having a jurisdiction. In interpreting the obligation stipulated in the Genocide Convention on states' duty to punish the crime of genocide, the Court concluded that the obligation only related to states where genocide took place; other states were not obligated by the Convention to punish, not even those states which the perpetrators were nationals of. And as the genocide took place outside Serbia, that state was not obligated by the Convention to prosecute. However, the Court did find that Serbia failed its obligation under the Convention to cooperate with the international penal tribunal, in this case the International Criminal Tribunal for the former Yugoslavia (ICTY), in particular "for having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, ... and thus having failed fully to co-operate with that Tribunal".<sup>54</sup> The Court decided that Serbia

should immediately take effective steps to ensure full compliance with its obligation under the Genocide Convention defined by Article II of the Convention, or any of the other acts prescribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal.<sup>55</sup>

The Court's decision is interesting as it is not shy in deciding on Serbia's primary obligation to cooperate with an international penal tribunal. Furthermore, the decision goes far in stipulating that a state should act in a certain way, and in this case regarding measures against a named national not mentioned in the other party's submission. Furthermore, the decision seems to imply that Serbia is obligated to transfer to ICTY all individual requested by that Tribunal, including the ones indicted for other crimes than genocide ("any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia"). Such an interpretation is inconceivable, as the Court's jurisdiction in the case was strictly

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<sup>53</sup> *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007.

<sup>54</sup> *Ibid.*, para 471(6).

<sup>55</sup> While the Court concluded that genocide did take place in Srebrenica, it did not address the duty of Bosnia and Herzegovina to prosecute the crimes, in accordance with the Genocide Convention. In its memorial and counter-reply Serbia made the submission that Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; however, the submission was not included in its very altered submissions presented at the oral hearings.

limited to the Genocide Convention.<sup>56</sup> As discussed earlier, the duty to prosecute individuals for international crimes is increasingly being dealt with by the Court, illustrated by the recent application by Belgium against Senegal. The duty to prosecute as a primary obligation is at the center of another pending case at the Court – *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Among Croatia's claims is that Serbia breached its legal obligation in Articles 3 and 4 of the Genocide Convention by not punishing individuals who committed acts of genocide.<sup>57</sup>

## 6. Conclusion

The *Armed Activity Case* illustrates well the difference between a state's responsibility and an individual criminal responsibility, as well as the linkage between the two principles. While the case only addressed responsibility of a state, the very same acts found attributable to the state, Uganda, should also entail individual criminal responsibility under international law. A state can both have a primary and secondary obligation to enforce such an individual criminal responsibility at the national level. States have undertaken in international conventions to investigate and prosecute grave breaches of international humanitarian law, and serious violations of human rights. The duty to prosecute can also be inherent in a state's obligation to make reparations for an international wrongful act.

The International Court of Justice was endowed with a broad jurisdiction in the *Armed Activity Case*. The parties have ratified all major humanitarian and human rights conventions and made general references to them in their submissions. Still, the issue of enforcement of individual criminal responsibility at the national level, stipulated or inherent in the above conventions, largely escaped any attention. The DRC's original submission of Uganda's obligation to prosecute at the national level was later merged to a general submission of reparations. Now it is dependent on the parties whether they will include such an obligation in the reparation

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<sup>56</sup> The Court could only address Serbia's obligations to cooperate with ICTY in accordance with provisions of the Genocide Convention, not in accordance with the latter's obligations under the United Nations Charter, including Chapter VII.

<sup>57</sup> International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, Application Instituting Proceedings, 2 July 1999, para. 35. Croatia's submission requests the Court to find Serbia "to take immediate and effective steps to submit to trial before appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1)(a), or any of the other acts referred to in paragraph (1)(b) in particular Slobodan Milosevic the former President of the Federal Republic of Yugoslavia, and to ensure that those persons are duly punished for their crimes", *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgement of 18 November 2008 (Preliminary Objections), para. 21.

agreement which is to be reached. The possibility remains, that failing an agreement, the question of reparations due to the DRC will be settled by the Court. While finding that Uganda's troops committed grave breaches of the Geneva Conventions and serious human rights violations, the Court did not address the obligation of Uganda to investigate and prosecute these crimes in accordance with international obligations to do so. The missed opportunity to do so is regrettable, in particular in light of the lack of enforcement of the obligation at the international level. Such enforcement is, however, increasingly reaching the jurisdiction of the Court, illustrated by the nature and submissions in recent cases.