



# INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

Website: www.icj-cij.org

## Press Release

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

#### History of the proceedings

On 19 February 2009, Belgium filed in the Registry of the Court an Application instituting proceedings against Senegal in respect of a dispute concerning "Senegal's compliance with its obligation to prosecute Mr. H[issène] Habré[, former President of the Republic of Chad, for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice,] or to extradite him to Belgium for the purposes of criminal proceedings". In its Application, Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter "the Convention against Torture" or the "Convention"), as well as on customary international law. On 19 February 2009, in order to protect its rights, Belgium also submitted a request for the indication of provisional measures, on which the Court made an Order on 28 May 2009 (see Press Release Nos. 2009/13, 2009/21 and 2009/22).

At the oral proceedings, the Parties presented the following submissions:

On behalf of the Government of Belgium (at the hearing of 19 March 2012):

"For the reasons set out in its Memorial and during the oral proceedings, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:

1. (a) Senegal breached its international obligations by failing to incorporate in due time in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
  - (b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under other rules of international law by failing to bring criminal proceedings against Hissène Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings;
  - (c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.
2. Senegal is required to cease these internationally wrongful acts
    - (a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or
    - (b) failing that, by extraditing Hissène Habré to Belgium without further ado."

On behalf of the Government of Senegal (at the hearing of 21 March 2012):

“In the light of all the arguments and reasons contained in its Counter-Memorial, in its oral pleadings and in the replies to the questions put to it by judges, whereby Senegal has declared and sought to demonstrate that, in the present case, it has duly fulfilled its international commitments and has not committed any internationally wrongful act, [Senegal asks] the Court . . . to find in its favour on the following submissions and to adjudge and declare that:

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;
2. In the alternative, should it find that it has jurisdiction and that Belgium’s Application is admissible, that Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to ‘try or extradite’ (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any other rule of conventional law, general international law or customary international law in this area;
3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;
4. In taking the appropriate measures and steps to prepare for the trial of Mr. H. Habré, Senegal is complying with the declaration by which it made a commitment before the Court;
5. It consequently rejects all the requests set forth in the Application of the Kingdom of Belgium.”

### I. HISTORICAL AND FACTUAL BACKGROUND

Before pronouncing on the merits, the Court describes the historical and factual background to the case (paras. 15 to 41). It notes that after taking power on 7 June 1982 at the head of a rebellion, Mr. Hissène Habré was President of the Republic of Chad for eight years, during which time large-scale violations of human rights were allegedly committed. Mr. Habré was overthrown on 1 December 1990. After a brief stay in Cameroon, he requested political asylum from the Senegalese Government, a request which was granted. He then settled in Dakar, where he has been living ever since.

From 25 January 2000 onwards, a number of proceedings relating to crimes alleged to have been committed during Mr. Habré’s presidency were instituted before both Senegalese and Belgian courts by Chadian nationals, Belgian nationals of Chadian origin and persons with dual Belgian-Chadian nationality, together with an association of victims. The matter was also referred by Chadian nationals to the United Nations Committee against Torture and the African Court on Human and People’s Rights. For its part, Senegal referred the issue of the institution of proceedings against Mr. Habré to the African Union.

On 19 September 2005, the Belgian investigating judge issued an international warrant *in absentia* for the arrest of Mr. Habré, indicted as the perpetrator or co-perpetrator, *inter alia*, of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes, on the basis of which Belgium requested the extradition of Mr. Habré from Senegal and Interpol circulated a “red notice” serving as a request for provisional arrest with a view to extradition. Three further requests for extradition have since been transmitted to the Senegalese

authorities by Belgium, of which two, dated 15 March 2011 and 5 September 2011 respectively, were declared inadmissible by the competent Senegalese authorities; the Dakar Court of Appeal has not yet taken a decision on the last request, dated 17 January 2012.

## **II. JURISDICTION OF THE COURT**

The Court recalls that, to found the jurisdiction of the Court, Belgium, in its Application, relies on Article 30, paragraph 1, of the Convention against Torture and on the declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court on 17 June 1958 (Belgium) and 2 December 1985 (Senegal). The Court also notes that Senegal contests the existence of the Court's jurisdiction on either basis, maintaining that the conditions set forth in the relevant instruments have not been met (paras. 42-43).

### **A. The existence of a dispute**

Pointing out that the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium, the Court first examines this issue and concludes that, since any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed, it lacks jurisdiction to decide on Belgium's claim relating to that provision (Article 5, paragraph 2, of the Convention obliges the States parties to that Convention to establish the universal jurisdiction of their courts over the crime of torture — see the annex to this press release). The Court states, however, that it is not precluded from considering the consequences which Senegal's conduct in relation to the measures required by this provision may have had on its compliance with certain other obligations under the Convention (para. 48). The Court notes, however, that Belgium's claims based on the interpretation and application of Article 6, paragraph 2, (which provides that a State party in whose territory a person alleged to have committed acts of torture is present must immediately make a preliminary inquiry into the facts — see the annex to this press release) and Article 7, paragraph 1, of the Convention (under the terms of which, a State party has an obligation to submit the case to its competent authorities for the purpose of prosecution — see the annex to this press release) were positively opposed by Senegal; it infers that a dispute existed at the time of the filing of the Application and notes that this dispute still exists (para. 52). It further concludes that, at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that, accordingly, it has no jurisdiction to decide on Belgium's claims related thereto (para. 55).

### **B. Other conditions for jurisdiction**

The Court next turns to the other conditions which must be met for it to have jurisdiction under Article 30, paragraph 1, of the Convention against Torture, namely that the dispute cannot be settled through negotiation and that, after a request for arbitration has been made by one of the parties, they have been unable to agree on the organization of the arbitration within six months from that request. The Court concludes from its analysis that each of these conditions has been met; it thus finds that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention. However, the Court states that it is not necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute (paras. 56-62).

### III. ADMISSIBILITY OF BELGIUM'S CLAIMS

The Court considers that any State party to the Convention against Torture may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes (obligations owed toward all States Parties), such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end (para. 69). It concludes that, in the present proceedings, Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under those provisions. Accordingly, the Court finds that the claims of Belgium based on these provisions are admissible and that there is no need for it to pronounce on whether Belgium also has a special interest with respect to Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré (para. 70).

See  
extract of  
judgment.

### IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE

Although the Court has already established that it has no jurisdiction in this case over Belgium's claims under Article 5, paragraph 2, of the Convention, it notes that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Art. 6, para. 2), and for submitting the case to its competent authorities for the purpose of prosecution (Art. 7, para. 1). The Court considers that, by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution, thus affecting the implementation of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention (paras. 74-78).

#### A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention

Having observed that the preliminary inquiry provided for in Article 6, paragraph 2, is intended to corroborate or not the suspicions regarding a person alleged to have committed acts of torture, the Court notes that Senegal has not included in the case file any material demonstrating that it has carried out such an inquiry (paras. 79-83). It observes that, in the present case, the establishment of the facts at issue is an essential stage which has been imperative at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré. The Court further notes that there is nothing in the materials submitted to the Court to indicate that a preliminary inquiry was opened following the filing of a second complaint against Mr. Habré in Dakar in 2008. It therefore concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention (paras. 85-88).

#### B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention

The Court first states that the obligation of the State party to submit the case to its competent authorities for the purpose of prosecution was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems (paras. 89-91). It then examines certain questions relating to the nature and meaning of the obligation laid down in Article 7, paragraph 1, its temporal scope and its implementation in this case.

### **1. The nature and meaning of the obligation laid down in Article 7, paragraph 1**

The Court first observes that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. It then notes, however, that if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It thus concludes that extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State (paras. 94-95).

### **2. The temporal scope of the obligation laid down in Article 7, paragraph 1**

In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*). It is grounded in a widespread international practice and on the *opinio juris* of States, and appears in numerous international instruments of universal application. However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. The Court concludes that Senegal's obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987 (paras. 99-102).

The Court next considers the effect, on the scope of the obligation to prosecute, of the date of entry into force of the Convention, for Belgium; it finds that Belgium has been entitled, with effect from 25 July 1999 — the date when it became party to the Convention —, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1 (para. 104).

### **3. Implementation of the obligation laid down in Article 7, paragraph 1**

The Court considers that Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of 18 November 2010 of the ECOWAS Court of Justice, which found that Senegal's amendment to its Penal Code in 2007 might be contrary to the principle of non-retroactivity of criminal laws and that proceedings against Hissène Habré should be conducted before an *ad hoc* court of an international character. It is also of the opinion that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré and that the referral of the matter to the African Union cannot justify Senegal's delays in complying with its obligations under the Convention. The Court further observes that, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law. It concludes that the obligation provided for in Article 7, paragraph 1, required Senegal to take all measures necessary for its implementation as soon as possible, in particular once the first complaint had been filed against Mr. Habré in 2000. Having failed to do so, Senegal has breached and remains in breach of its obligations under Article 7, paragraph 1, of the Convention (paras. 111-117).

## **V. REMEDIES**

The Court recalls that Senegal's failure to adopt until 2007 the legislative measures necessary to institute proceedings against Mr. Habré on the basis of universal jurisdiction delayed the implementation of its other obligations under the Convention. It further states that Senegal was in breach of its obligation under Article 6, paragraph 2, to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under

Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution. In failing to comply with its obligations under those provisions, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. The Court concludes, therefore, that Senegal must take, without further delay, the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré (paras. 119-121).

#### Composition of the Court

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judges ad hoc Sur, Kirsch; Registrar Couvreur.

Judge Owada appends a declaration to the Judgment of the Court; Judges Abraham, Skotnikov, Cançado Trindade and Yusuf append separate opinions to the Judgment of the Court; Judge Xue appends a dissenting opinion to the Judgment of the Court; Judge Donoghue appends a declaration to the Judgment of the Court; Judge Sebutinde appends a separate opinion to the Judgment of the Court; Judge ad hoc Sur appends a dissenting opinion to the Judgment of the Court.