

THE INTERNATIONAL COURT OF JUSTICE PASSES LANDMARK VERDICT ON THE DUTY OF STATES REGARDING THE PROSECUTION AND EXTRADITION IN *BELGIUM V SENEGAL* CASE

Introduction

The International Court of Justice (ICJ) delivered its verdict on 20 July 2012 in the case of *Belgium v. Senegal* where the main point of law ruled upon concerned the question of whether States have an obligation to prosecute the perpetrators of crimes against humanity, war crimes and torture, or extradite them for prosecution.

Facts of the Case

The case in question dealt with the obligation to prosecute Mr. Hissène Habré who was the President of Chad between 7 June 1982 and 1 December 1990. During Mr. Habré's tenure as President, there were allegedly large scale human rights violations committed including torture and enforced disappearances. After being overthrown in 1990, Mr. Habré was granted, political asylum by the Senegalese Government and thereafter began living in Dakar.

Following his removal from office, several complaints were filed in Belgian and Senegalese courts against Mr. Habré alleging violations of international humanitarian law (IHL), including the commission of offences like torture and genocide, by victims bearing Belgian and Chadian nationalities,. This resulted in an arrest warrant being issued by Belgium in September 2005. However, the *Chambre d'accusation* of the Dakar Court of Appeal ruled on Belgium's extradition request, holding that, as "a court of ordinary law, [it could] not extend its jurisdiction to matters relating to the investigation or prosecution of a Head of State for acts allegedly committed in the exercise of his functions."

On 19 February 2009, Belgium filed an application instituting proceedings against Senegal before the ICJ. Belgium requested that the Court declare that Senegal was obliged to bring criminal proceedings against Mr. Habré, or extradite him to Belgium to face trial there. Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 ("UNCAT"), which had been ratified by Belgium on 25 June 1999 and by Senegal on 21 August 1986.

Main Questions Considered

The main questions under consideration by the Court were:

1. Whether the ICJ had jurisdiction to hear and decide on the matter;
2. Whether Belgium's claim is admissible; and,
3. Whether Senegal had an obligation to prosecute Mr. Habré, or extradite him to Belgium for prosecution if Senegal was unable to prosecute.

Judgment

1. The Court concluded that it has the necessary jurisdiction to hear the matter and decide upon it.

The main contention against the jurisdiction of the ICJ was on the ground that there was no dispute as per Article 30 of the UNCAT between Belgium and Senegal over the interpretation of the Convention and that Senegal had never opposed the obligations imposed by the UNCAT. The only dispute was therefore over the pace at which obligations were to be performed. To that extent, the ICJ found that no dispute existed with regard to Senegal's implementation of the UNCAT had been obviated by Senegal's legislative reforms to implement UNCAT in 2007-2008 in accordance with Article 5 of the Convention.

However, the Court ruled that a dispute continued to exist with respect to Senegal's compliance with UNCAT Article 6, which requires a state party to the Convention to conduct a preliminary inquiry into the facts when a person accused of torture is found within that state's territory, and CAT Article 7, which requires a state party to submit the case to its competent authorities for prosecution or to extradite the accused to another state for prosecution.

It was also determined that other requirements for jurisdiction under UNCAT Article 30 had been met. These included the fact that (1) the dispute had not been settled through negotiations, and (2) Belgium had properly requested arbitration with no response from Senegal.

2. The Court concluded that Belgium had the standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under the UNCAT.

The Court held that all the State Parties to the UNCAT, including Senegal and Belgium, have a common interest to ensure, in that acts of torture are prevented and that their perpetrators do not enjoy impunity. The Court went on to state that all the States parties "have a legal interest" in the protection of the rights involved (also mentioned in *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32, para. 33) and that these obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case.

The Court also held that the obligations of a State party are triggered by the presence of the alleged offender, regardless of his/her or the victims' nationality, in its territory. The admissibility of Belgium's claim was therefore confirmed by the Court which stated that,

"The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation

of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*.” (paragraph 69)

3. The Court held that Senegal did indeed have an obligation to prosecute Mr. Habré or extradite him to a State which was capable and willing to prosecute him.

The Court was of the opinion that the prohibition of torture is part of customary international law and has become a peremptory norm (*jus cogens*). However, States are only obliged to prosecute alleged perpetrators of acts of torture for acts that had been committed after the UNCAT had entered into force in the concerned State, and that despite in addition to this obligation, there is nothing in the UNCAT preventing States from prosecuting acts committed before the concerned date of entry into force. Therefore, while Senegal was not obliged to prosecute Mr. Habré for acts committed before 26 June 1987 (date of entry into force of UNCAT in Senegal), Senegal was obliged to prosecute Mr. Habré for those acts committed after that date.

The Court thus found that the UNCAT obliged Senegal to commence proceedings against Mr. Habré, or in the event that prosecuting Mr. Habré was not possible in Senegal, to extradite him to another State which had jurisdiction pursuant to Article 5 of the UNCAT. However, the Court did not rule on whether Belgium has jurisdiction to prosecute the matter.

AALCO’s Observations on “Obligation to Extradite or Prosecute”:

Erga omnes obligation of the State parties under the UNCAT is an established norm. It is an obligation of the State towards the “international community as a whole”. Obligation to extradite or prosecute has been an accepted general principle of international law, with reference to invoking universal jurisdiction during violations of *jus cogens* norms.

In the present case, it is essential to refer to the Dissenting Opinion of Judge Xue Hanqin¹ in the above ICJ Judgement. One of the major issues that is required to be analysed, is whether a state has any monitoring authority over the said obligation. In this case, Belgium has been repeatedly requesting the extradition of Mr. Habre, and this request requires to be checked as to its role in pushing forward the prosecution of Mr. Habre. One of the observations that need to be taken note of by the AALCO Member States are:

“If Senegal’s obligation to prosecute is presumed or mandated, Belgium’s request for extradition may be deemed playing a different role: monitoring the

¹ Accessible at <http://www.icj-cij.org/docket/files/144/17076.pdf>.

implementation of Senegal's obligations under the Convention. It is true that Belgium's request for extradition has actually pushed the process to bring Mr. Habré to prosecution, but to give a State party an entitlement to monitor the implementation of any State party on the basis of erga omnes partes, certainly goes beyond the legal framework of the Convention."

- The Convention does not require any state party to act as a monitoring/implementing authority in matters requiring 'obligation to extradite or prosecute'.
- It entails the question of whether the obligations to 'extradite' or 'prosecute' carry the same importance, making it obligatory on the part of States to either extradite or prosecute without fail.
- In this instance, as Senegal has been contending that their competent authorities have been entrusted with the task of prosecuting the alleged offender, does Belgium's actions affect the concept of 'reciprocity' and 'good faith' in international law, that States enjoy in their inter-state relations?
- The decision has to be carefully reviewed as these above mentioned issues have definitely not subscribed to the viewpoints and state practice of developing countries.
- Food-for-thought: Is the ICJ revisiting the debates on the general principles of international law, to the extent that States are being subjected to more scrutiny in terms of complying with international law norms?
- Is it not subscribing to the stricter compliance regime in itself?
- With the example of UNCAT, is the international community trying to explain that certain countries have lax/incompetent criminal legal system within their country?