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Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture

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Introduction

On July 20, 2012, the International Court of Justice (“ICJ”) confirmed the obligation of states parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the CAT” or “the Convention”)[1] to either prosecute alleged perpetrators or extradite them to another country with

jurisdiction for prosecution.[2] Adopted under the auspices of the United Nations in 1984 and entered into force in 1987, the Convention currently has 151 states parties who are required to take effective measures to prevent torture and hold accountable those who engage in torture.

The case, *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, involved Hissène Habré, the former president of Chad, who is accused of engaging in torture, war crimes, and crimes against humanity against thousands of victims during his term in office from 1982–1990. Habré has been residing in Senegal as a political asylee since the overthrow of his government two decades ago.[3]

This *Insight* reviews the case and offers thoughts about its importance and its implications for similar situations in the future.

Background

On February 19, 2009, Belgium filed an application instituting proceedings against Senegal at the ICJ alleging that Senegal had breached its obligations under the CAT by failing to prosecute Habré or to extradite him to Belgium for prosecution. Belgium invoked the CAT as the basis for the Court’s jurisdiction as both Belgium and Senegal are parties to the treaty. Belgium filed its application on behalf of Chadian citizens and Belgian citizens of Chadian origin who claimed to be victims of Habré’s regime. In addition, Belgium asserted that, regardless of the victims’ nationalities, all states parties to the CAT have an obligation to prevent and punish torture.

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Belgium originally requested the extradition of Habré in 2006, following a four-year investigation by Belgian authorities into the victims' allegations and several failed attempts to bring Habré to justice elsewhere. Belgium repeated its extradition request multiple times over the ensuing years as Senegal delayed prosecution on a variety of legal and financial grounds.

Senegal asserted it had taken a number of steps to facilitate the prosecution of Habré, including changes in its domestic laws in 2007-2008 to implement the CAT and the referral of the matter to the African Union ("AU"). The AU Assembly of Heads of State and Government issued Decision 127 (VII) in 2006 deciding that the case falls within the competence of the AU and instructed Senegal to prosecute Habré, but Senegal claimed that it lacked financial resources and requested international financial assistance.^[4] Senegal also claimed that it was hindered in the prosecution of Habré in its domestic courts due to a separate decision by the Economic Community of West African States ("ECOWAS"), which concluded that Habré's human rights could be violated by a failure to abide by the principle of non-retroactivity.^[5]

Jurisdiction

Senegal contested the ICJ's jurisdiction on the ground that no dispute existed between the parties regarding the interpretation of the CAT or under any other relevant rule of international law, as required by Article 30 of the CAT and the parties' declarations accepting the ICJ's jurisdiction.^[6] In this regard, Senegal claimed that it never opposed or refused to accept the extent or the principle of the obligations imposed by the CAT.^[7] The parties, according to Senegal, simply had different understandings of the pace at which the obligations are to be performed.

The ICJ found that because of Senegal's legislative reforms to implement the CAT in 2007-2008, whatever dispute existed with respect to Senegal's failure to timely implement the CAT under its Article 5 no longer existed at the time Belgium filed the ICJ application.^[8] However, disputes continued to exist with respect to Senegal's compliance with CAT 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.^[9]

The ICJ also determined that the other conditions for jurisdiction under CAT Article 30 had been met.^[10] First, although many years had passed, the dispute had not been settled through negotiations. Second, Belgium had properly requested arbitration more than six months prior to the institution of proceedings with no response from Senegal. Accordingly, for the first time in its history, the Court concluded that it had jurisdiction to entertain a dispute between parties to the CAT.^[11] This decision is significant because the Court has few opportunities to opine on the obligations established by international human rights treaties.^[12]

Admissibility of Belgium's Claims

The ICJ also considered objections to admissibility. While jurisdiction deals with the Court's authority to hear a case, admissibility refers to other legal or prudential bars, such as the requirement to exhaust domestic remedies. Here, Senegal objected to the admissibility of Belgium's claims on the ground that Belgium cannot invoke the international responsibility of Senegal when none of the alleged victims of Habré were of Belgian nationality at the time

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when the acts were committed.[13] Belgium responded that present jurisdiction is based in part on complainants who are Belgian nationals of Chadian origin. Belgium also claimed that the victims' nationalities are irrelevant because every state party to the CAT is entitled to insist that other state parties fulfill their obligations under the Convention.[14]

In this regard, the ICJ agreed with Belgium, finding that "States parties to the Convention have a common interest to ensure . . . that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity." [15] The Court defined these obligations as "obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case." [16] This common interest entitles each state party to the Convention to make a claim for the cessation of any breach by another state party regardless of whether the applicant state has a special interest in bringing the claim due to the nationality of the victims.

Violations of the CAT

On the merits, the ICJ found that Senegal's failure to enact implementing legislation for the CAT until 2007 delayed the submission of the case to Senegalese authorities, thus causing Senegal to breach its obligation under CAT Article 6 to "immediately make a preliminary inquiry into the facts" as soon as a suspect is identified in the territory of the state party.[17] The Court clarified the obligation to carry out a preliminary investigation, stating that a competent authority should draw up a case file and collect facts and evidence, including documents and witness statements relating to the events and to the suspect's possible involvement. In this case, the first complaint against Habré was filed in Dakar, Senegal in 2000 and, at that time, it "became imperative" for Senegal to conduct the preliminary inquiry.[18] Senegal failed to include any materials demonstrating that it had carried out such an inquiry with respect to Habré's involvement.[19]

The ICJ also determined that Senegal breached CAT Article 7, which requires the state party having jurisdiction over the territory where a person accused of offenses under the CAT is found to submit the case to its competent authorities for prosecution or to extradite him.[20] The ICJ opined that "[e]xtradition is an option . . . whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State." [21]

A question also arose during the proceedings regarding the temporal scope of CAT Article 7 in light of the fact that Senegal did not join the Convention until 1987, and Belgium did not join until 1999.[22] In considering this question, the Court observed that "the prohibition on torture is part of customary international law and has become a peremptory norm (*jus cogens*)." [23] However, the obligation to prosecute alleged perpetrators of torture only arises after the Convention has entered into force for that state party.[24] In this case, Senegal's obligations under the Convention date back to June 1987 when Senegal joined the CAT. [25] The Court noted that there were a number of complaints regarding serious offenses committed by Habré after that date for which Senegal is obligated to prosecute. The Court also observed that while not required to do so, Senegal is free to institute proceedings concerning acts committed before that date as well. In addition, the Court found that Belgium is entitled to invoke Senegal's compliance with the Convention beginning in 1999 and has, in fact, requested Senegal's compliance since 2000 when the first complaint against Habré was filed in Senegal.[26]

Finally, the Court addressed some of the obstacles Senegal claimed existed in prosecuting

of Habré. In one brief sentence, the ICJ dismissed Senegal's concerns regarding the ECOWAS judgment, stating that the judgment cannot affect Senegal's duty to comply with the Convention.^[27] Likewise, the Court stated that neither Senegal's referral of the matter to the AU nor its financial difficulties could justify Senegal's delays in complying with the CAT.^[28] In addition, the ICJ reminded Senegal that under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law, Senegal cannot justify its breach of the CAT by invoking its domestic law.^[29]

With respect to the timing of Senegal's compliance, the ICJ observed that CAT Article 7 does not contain any indication as to the time frame for performance. The Court held that a "reasonable time, in a manner compatible with the object and purpose of the Convention" is implicit in the text and added that proceedings should be undertaken "without delay."^[30] Notably, the ICJ's finding of jurisdiction under the Convention was unanimous, as was its holding that Senegal must submit the case of Habré to its authorities for prosecution or otherwise extradite him without delay.^[31]

The ICJ's judgment affirms that all 151 states parties to the CAT may insist on performance of obligations under the Convention, even if the alleged torture occurred before the applicant state joined the Convention and even if the alleged torturer or victims have no connection with the applicant state. This holding therefore allows more states to act to ensure accountability worldwide for acts of torture. The Court also added to the understanding of what a preliminary investigation of torture allegations should consist of and how quickly it must be carried out.

It remains to be seen whether Senegal will comply with the judgment. In a hopeful sign, immediately after the ICJ judgment was announced, Senegal renewed negotiations to create a special court to try Habré. Human Rights Watch reports that those talks resulted in an agreement to adopt an AU plan to try Habré before a special court, to be known as the "Extraordinary African Chambers."^[32] The Chambers would be created inside the existing court structure in Dakar, Senegal and consist of Senegalese and other African judges. The Chambers' mandate would be to prosecute the person or persons most responsible for atrocity crimes in Chad between 1982 and 1990. Parliamentary approval for the plan is still necessary in Senegal, and Senegal has indicated that it will seek additional international funding. However, the agreement represents some positive movement towards bringing justice to the victims.

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Endnotes:

[1] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

[2] Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (Jul. 20, 2012)], *available at* <http://www.icj-cij.org/docket/files/144/17064.pdf>.

[3] *Id.* ¶ 16.

[4] *Id.* ¶¶ 23, 28. Negotiations with respect to international financial assistance for the trial of Habré

resulted in pledges of €8.6 million. *Id.* ¶ 33.

[5] *Id.* The ECOWAS judgment recommended a trial before a special ad hoc tribunal of international character.

[6] Judgment, *supra* note 2, ¶¶ 42-44.

[7] Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Counter-Memorial of the Republic of Senegal, ¶ 135 (Aug. 23, 2011), *available at* <http://www.icj-cij.org/docket/files/144/16931.pdf>.

[8] Judgment, *supra* note 2, ¶ 48.

[9] *Id.* ¶¶ 49, 52.

[10] *Id.* ¶ 63.

[11] Jurisdiction under CAT has been claimed before, but never found to be proper. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application (Feb. 3, 2006), *available at* <http://www.icj-cij.org/docket/files/126/10435.pdf>.

[12] The ICJ's docket tends to be dominated by territorial disputes rather than human rights cases. *See* Berry E. Carter, Phillip R. Trimble & Allen S. Weiner, *International Law* 335 (5th ed. 2007). Moreover, even when human rights cases are filed, some are dismissed on jurisdictional grounds. *See* Armed Activities on the Territory of the Congo, *supra* note 11; *see also* Application of the International Convention on the Elimination of All Forms of Racial Discrimination, (Geor. v. Russ.), Judgment regarding Preliminary Objections (Apr. 1, 2011).

[13] Judgment *supra* note 2, ¶ 64.

[14] *Id.* ¶ 65.

[15] *Id.* ¶ 68.

[16] *Id.*

[17] *Id.* ¶¶ 79, 86. *See also* CAT, *supra* note 1, art. 6.

[18] Judgment, *supra* note 2, ¶ 86.

[19] *Id.* ¶¶ 85, 87.

[20] CAT, *supra* note 1, art. 7.

[21] Judgment, *supra* note 2, ¶ 95.

[22] *Id.* ¶ 96.

[23] *Id.* ¶ 99.

[24] *Id.* ¶ 100.

[25] *Id.* ¶ 102.

[26] *Id.* ¶ 104.

[27] *Id.* ¶ 111.

[28] *Id.* ¶ 112.

[29] *Id.* ¶ 113.

[30] *Id.* ¶¶ 115, 117.

[31] *Id.* ¶ 122. Two justices dissented with respect to each of the other holdings of the Court.

[32] *Senegal: Agreement on Habré Court*, Human Rights Watch (July 24, 2012), <http://www.hrw.org/news/2012/07/24/senegal-agreement-habr-court>.