

CASE NOTE ON CASE CONCERNING QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE (BELGIUM V. SENEGAL)

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The International Court of Justice (ICJ) issued on July 20, 2012 a long awaited judgment in a case brought by Belgium against Senegal regarding the latter's failure to prosecute former Chadian dictator Hissène Habré confirming the obligation of states parties to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 ("UNCAT") to either prosecute alleged perpetrators or extradite them to another country with jurisdiction for prosecution. The desire to prosecute Mr. Habré for crimes of torture committed during his eight year presidency of Chad has led to a stream of national and international litigation. The Convention adopted under the auspices of the United Nations in 1984 currently has 151 states parties who are required to take effective measures to prevent torture and hold accountable those who engage in torture.

Facts:

During the presidency of Mr. Habré in the Republic of Chad for eight years, it was alleged that large-scale of human rights violation were committed, including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. After being ousted from office in 1990, Mr. Habré was granted, political asylum by the Senegalese Government and settled in Dakar.

In 2009, Belgium filed an application instituting proceedings against Senegal before the ICJ alleging that Senegal was in violation of its obligation to prosecute or extradite Habré under the UNCAT, which had been ratified by Belgium on 25 June 1999 and by Senegal on 21 August 1986. Also, Belgium requested the Court to indicate provisional measures requiring Senegal to take all steps within its power to keep Habré under the control and surveillance of the

Senegalese judicial authorities. Belgium justified this request by reference to certain statements made by Mr. Abdoulaye Wade, President of Senegal, which, indicated that, if Senegal could not secure the necessary funding to try Mr. Habré, it would “cease monitoring him or transfer him to another State”. During the oral procedure, the Agent of Senegal gave formal assurances to the court that it would not allow Habré to leave its territory before the Court delivered its final decision. Belgium accepted these assurances and the Court rejected the request for provisional measures in its order.

Contention:

Firstly, Belgium submitted in its memorial that Senegal had violated its obligation to amend its domestic legislation in order to bring its domestic laws in consonance with Article 5(2) of UNCAT. Secondly, Belgium claimed in its submission that by failing to bring criminal proceedings against Habré or to extradite him to Belgium, Senegal had violated and continued to violate both the Convention and customary international law.

In a counter-claim, Senegal put forward the argument that it had complied with all its obligations both under the Convention against Torture and under customary international law and rejected to admit any of the claims made by Belgium against Senegal government.

Issues Involved and Court’s Holdings:

The Court in its judgment on 20 July 2012 dealt with three main issues-

1. Jurisdiction of the Court

One of the main questions under consideration by the court is whether the ICJ had jurisdiction to hear and decide on the matter. Belgium relied on Article 30 of UNCAT, a clause conferring jurisdiction to the Court for disputes arising under the Convention between State Parties and on the declarations made by Belgium and Senegal recognizing compulsory jurisdiction of the Court under Article 36 of the Court’s Statute to find the jurisdiction of the court. Senegal rejected the ICJ’s jurisdiction on either ground and it claimed that no dispute existed between the parties as the conditions necessary for the exercise of the Court’s jurisdiction were not met.

The ICJ decided to consider first, whether there is any existence of a dispute. In Belgium's final submission to the court regarding jurisdiction issue, it requested court to find that Senegal breached its obligations under Article 5 of CAT and by failing to take action in relation Mr. Habré's alleged crimes, it has also breached its obligation under Article 6 and 7 of CAT. The ICJ found that no dispute existed with regard to Senegal's implementation of the UNCAT Article 5 as Senegal complied with its obligation by adequately adopting law no. 2007-05, which amended Article 669 of its Code of Criminal Procedure in order to extend its court's jurisdiction to certain offences.

However, the Court ruled that a dispute continued to exist with respect to Senegal's responsibility to comply 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 UNCAT 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 as its application was positively opposed by Senegal.

The ICJ also determined that the other conditions for jurisdiction under Article 30 of UNCAT have been met as despite of so many years passed, the dispute had not been settled through negotiations or arbitrations. Also, Belgium had properly and procedurally requested arbitration more than six months prior to the institution of proceedings with no response from Senegal.

2. Admissibility of Belgium's Claim

The ICJ also considered objections to admissibility of claims made by Belgium. Senegal objects to the admissibility of Belgium's claim and contended that Belgium is not entitled to invoke the international responsibility of Senegal as none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the acts were committed. Belgium doesn't reject the contention that none of the alleged victims was of Belgian nationality but Belgium defended its entitlement by invoking the *erga omnes* character of the obligations established by the Convention.

The Court states that all the States parties "have a legal interest" in the protection of the rights involved and that these obligations may be defined as "obligations *erga omnes partes*" in the sense that every State Party is entitled to claim performance of the obligation concerned and can also invoke the responsibility arising from the failure to perform, such as those under

Article 6 and 7 of UNCAT. Hence, the Court concludes in this issue that the claims of Belgium based on these provisions of UNCAT are admissible.

3. The Alleged Violation of UNCAT

The Court noted that Senegal with regard to the alleged violation of Article 6, paragraph 2, has neither included in the case file any material demonstrating that it has carried out such inquiry nor initiated any investigation despite the establishment of facts has become imperative since the year 2000. The Court concluded that Senegal has breached its obligation under Article 6 of UNCAT.

The Court was of the opinion with regard to alleged violation of Article 7, Para 1, of UNCAT, that if the State in whose territory the suspect is present has received a request for extradition by any of the State party in any of the cases envisaged in the provisions of the Convention, it may relieve itself of its obligation to prosecute by acceding to that request. The Court further stated that extradition was an option offered to the State by the Convention, but prosecution was an international obligation under the Convention, the violation of which was a wrongful act engaging the responsibility of the State. Hence, the Court concluded that the obligation laid down 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.

Critical Analysis:

This kind of judgment provides means to deny safe haven for offenders enjoying state immunity. It is true that Belgium's request for extradition has actually pushed the process to bring Mr. Habré to prosecution and the judgement given in favour of Belgium allows State parties to ensure accountability worldwide for acts of torture and also added understanding of preliminary investigation of torture allegations. However, 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 and follows much stricter regime. Also, it has been found that ICJ took over the role of Inter-state Human Rights Tribunal as the major issues involved in this case includes human rights dispute.

The Court must look into the future application of its judgement i.e. whether other States will comply with the judgment in its future endeavours regarding torture allegations remains to be

seen. Instead of pointing out the legal incompetency of domestic criminal legal system, the Courts must focus on the obligations of State Party to comply with the provisions of International Laws not by undermining State's sovereignty. This judgment by ICJ is a step towards realising the importance of respecting International Law and a general international duty to curb torture crimes. Also, one of the primary purpose of law is to bring the offender to justice must not be overlooked on the mere plea of jurisdictional issue for maintenance of the suit. Every nation, irrespective of being party to the UNCAT, must co-operate in law enforcement for e.g. by undertaking primary inquiry, apprehending the suspect etc and enact or amend its legislation accordingly. The court must also states the consequence for non-compliance of the obligation to prosecute or extradite. All, in all, this case is to great extend successful in imposing obligation on State parties to UNCAT to extradite or prosecute as compared to previous rulings of ICJ in this regard.