

WELCOME LETTER

Dear members of The International Court of Justice,

On behalf of the Court, we would like to welcome you all to the first International Court of Justice.

At Court, you'll serve either as an agent or a justice in one of the most important cases of the International Court of Justice; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

The ICJ is the most important judicial organ of the United Nations, and as such it requires a vast set of skills, such as leadership, creativity, law analysis, a complete and total knowledge of the protocol but, above all else, a sense of justice. Your duty is to reach a viable and non prejudicial verdict. We, as your staff, encourage you to use all these abilities with all due respect and diplomacy.

Agents and Justices of the International Court of Justice, always remember your oath and perform your duties with honor, faith and justice.

Welcome to the MUNARJÍ 2019

Yours sincerely,

Santiago Gómez Barragán

*President of the International Court
of Justice*

Diego Enrique Silva Diaz

*Vice President of the International Court
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Carlos Hernández Carrera

*Moderator of the International Court
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I. Introduction to the committee

The creation of the Court represented the culmination of a long process of developing methods for the pacific settlement of international disputes between States, for such purpose, Article 33 of the United Nations Charter lists the following methods: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resorting to regional agencies or arrangements, to which should also be added good offices.

The International Court of Justice is composed of 15 judges elected to nine-year terms of office by the United Nations General Assembly and the Security Council. These organs vote simultaneously but separately. In order to be elected, a candidate must receive an absolute majority of the votes in both bodies, this sometimes makes it necessary to hold numerous voting rounds.

In order to ensure a degree of continuity, one third of the Court is elected every three years. Judges are eligible for re-election. Should a judge die or resign during his or her term of office, a special election is held as soon as possible to choose a judge to fill the unexpired part of the term.

Once elected, a Member of the Court is a delegate neither from the government of his own country nor of any other State. Unlike other international organizations, the Court is not composed of representatives of governments. Members of the Court are independent judges whose first task, before taking up their duties, is to make a solemn declaration in open court that pledging they will exercise their powers impartially and conscientiously.

In order to guarantee his or her independence, no Member of the Court can be dismissed unless, in the unanimous opinion of the other Members, he/she no longer fulfills the required conditions. This, however, has never happened.

II. Introduction to the case

On February 19 of 2009, Belgium filed an Application against Senegal regarding Hissène Habré, the former President of Chad and resident of Senegal since being granted political asylum by the Senegalese Government in 1990. Belgium alleged that, by failing to prosecute Mr. Habré for acts of torture and crimes against humanity, and extraditing him to Belgium, Senegal had violated the so-called obligation *aut dedere aut judicare* (meaning, “to prosecute or extradite”) found in Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in customary international law.

On the same day, Belgium filled a request for the implementation of provisional measures, asking the Court to order “Senegal to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied”.

Belgium justified this request by referencing to certain statements made by Mr. Abdoulaye Wade, President of the Republic of Senegal which, according to Belgium, indicated that, if

Senegal could not secure the necessary funding to prosecute Mr. Habré, it would “cease monitoring him or transfer him to another State”.

In its Order of May 28 of 2009, referring to the assurances given by Senegal during the oral proceedings that it would not allow Mr. Habré to leave its territory while the case was pending, the Court concluded that there was no risk of irreparable prejudice to the rights claimed by Belgium and that there did not exist any urgency to justify the enforcement of provisional measures.

In its Judgment date, July 20 of 2012, the Court began by examining the questions raised by Senegal relating to its jurisdiction as well as to the admissibility of Belgium’s claims. The Court considered that, since any dispute that may have existed between the both Parties regarding the interpretation or application of the Convention against Torture had ended by the time the Application was filed, therefore it lacked jurisdiction to decide on Belgium’s claim relating that provision.

However, The Court found that it did have jurisdiction to entertain Belgium’s claims based on the interpretation of the Convention. It further considered, on the basis of the international arrest warrant issued against Mr. Habré by Belgium, the extradition request transmitted to Senegal and the diplomatic exchanges between the two Parties that, at the time of the filing of the Application instituting proceedings, there was no dispute between the Parties regarding Senegal’s obligation to prosecute or extradite Mr. Habré for crimes he was alleged to have committed under customary international law. Consequently, The Court observed that, while the facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture, it did not have jurisdiction to entertain

the issue whether there existed an obligation for a State to prosecute crimes under customary international law allegedly committed by a foreign national abroad.

The Court then turned to the conditions which have to be met in order for it to have jurisdiction under the Convention against Torture, namely that the dispute cannot be settled through negotiation and that, after a request for mediation has been made by one of the parties, and they have been unable to agree on the organization of such within six months from that request. Having met these conditions, the Court concluded that it had jurisdiction to consider the dispute between the Parties concerning the interpretation and application of the Convention. Nevertheless, it ruled it was not necessary for the Court to establish whether its jurisdiction also existed respecting the same dispute on the basis of the declarations made by the Parties under its Statute.

Concerning the admissibility of Belgium's claims, the Court ruled that once any State party to the Convention against Torture was able to invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations owed towards all States parties, Belgium, as a party to the said Convention, had standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that Convention. The Court thus found that Belgium's claims based on those provisions were admissible.

On the subject of the alleged violation of the Convention against Torture, which provides that; a State party in whose territory is present a person alleged to have committed acts of torture must "immediately make a preliminary inquiry into the facts", the Court noted that Senegal had not included in the case file any material demonstrating that it had carried out such inquiry. The Court further observed that, while the choice of means for

conducting the inquiry remained in the hands of the States parties, the Convention requires that certain steps are taken as soon as the suspect is identified within the territory in order to conduct an investigation of that case.

In the case of Mr. Hissène Habré, the establishment of the facts had become imperative at least since the year 2000, when a complaint was filed in Senegal against him. But no investigation had been initiated in 2008 when a further complaint against Mr. Habré was filed in Dakar, after the legislative and constitutional amendments made in 2007 and 2008, respectively. The Court concluded from the foregoing that Senegal had breached its obligation under the above-mentioned provision

Finally, the Court examined the implementation of the obligation to prosecute. It concluded that the obligation laid down in the Convention, requiring 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 had breached and remained in breach of its obligations under the Convention.

The Court found that, by failing to comply with its obligations, Senegal had engaged its international responsibility. Therefore, it was required to cease that continuing wrongful act and to take, without further delay, the necessary measures to submit the case to its competent authorities for the prosecution of Mr. Hissène Habré, if the State would not extradite him.

A. Jurisdiction of the Court

Article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment establishes that:

Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

On the other side, the article 36 of the Statute of the International Court of Justice establish that:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;

- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

In this order of ideas, having recalled the two bases of jurisdiction relied on by Belgium (namely Article 30, paragraph 1, of the Convention against Torture and the declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court), the Court notes that Senegal contests the existence of its jurisdiction on either basis, maintaining that the conditions set forth in the relevant instruments have not been met and, in the first place, that there is no dispute between the Parties.

B. The existence of a dispute

The Court recalls that, in the claims included in its Application, Belgium requested the Court to adjudge and declare that “the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice; failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts”.

In its final submissions, Belgium asked the Court to find that Senegal breached its obligations under Article 5, paragraph 2, of the Convention against Torture, and that, by failing to take action in relation to Mr. Habré’s alleged crimes, Senegal has breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that instrument and under certain other rules of international law.

The Court notes that, for its part, Senegal submits that there is no dispute between the Parties with regard to the interpretation or application of the Convention against Torture or any other relevant rule of international law and that, as a consequence, the Court lacks jurisdiction in the present case. The Court observes, therefore, that the Parties have thus presented radically divergent views about.

In the present case, the criteria established by the court in the case of South West Africa carried out between Ethiopia, South Africa and Liberia against South Africa is applicable, since it maintains that it must be shown that the claim of one party is positively

opposed by the other. This is because whether there exists an international dispute is a matter for objective determination”[1]and that “[t]he Court’s determination must turn on an examination of the facts. The matter is one of substance, not of form.”[2] The Court also notes that the “dispute must in principle exist at the time the Application is submitted to the Court”

The Court begins by examining Belgium’s first request that the Court should declare that Senegal breached Article 5, paragraph 2, of the Convention against Torture, which requires a State party to the Convention to “take such measures as may be necessary to establish its jurisdiction” over acts of torture when the alleged offender is “present in any territory under its jurisdiction” and that State does not extradite him to one of the States referred to in paragraph 1 of the same article. The Court notes that, while Belgium contends that the fact that Senegal did not comply with its obligation under Article 5, paragraph 2, “in a timely manner” produced negative consequences concerning the implementation of some other obligations under the Convention, it acknowledges, however, that Senegal has finally complied with its obligation through, on the one hand, its 2007 legislative reforms (which extend the jurisdiction of Senegalese courts over certain offences, including torture, war crimes, crimes against humanity and the crime of genocide allegedly committed by a foreign national outside Senegal’s territory, irrespective of the nationality of the victim) and, on the other, its 2008 Constitutional amendment (which now precludes the principle of non-retroactivity in criminal matters from preventing the prosecution of an individual for acts which were crimes under international law at the time when they were committed).

The Court considers that 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 concludes, therefore, that it lacks jurisdiction to decide on Belgium's claim relating to the obligation deriving from that treaty provision. It states, however, that this does not prevent the Court from considering the consequences that 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, should the Court have jurisdiction in that regard.

The Court next considers Belgium's contention that Senegal breached two other treaty obligations, which respectively require a State party to the Convention, when a person who has allegedly committed an act of torture is found on its territory, to hold "a preliminary inquiry into the facts" (Art. 6, para. 2) and, "if it does not extradite him", to "submit the case to its competent authorities for the purpose of prosecution" (Art. 7, para. 1). On this point, the Court notes that Senegal maintains that there is no dispute with regard to the interpretation or application of these provisions, not only because there is no dispute between the Parties concerning the existence and scope of the obligations contained therein, but also because it has met those obligations. On the basis of the Parties' diplomatic exchanges, the Court considers that Belgium's claims founded on the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention were positively opposed by Senegal; it concludes, therefore, that a dispute existed at the time of the filing of the Application and notes that this dispute still exists.

The Court observes that the Application of Belgium also includes a request that the Court declare that Senegal breached an obligation under customary international law to "bring criminal proceedings against Mr. H. Habré" for crimes against humanity allegedly committed by him; Belgium later extended this request to cover war crimes and genocide,

both in its Memorial and at the hearings. On this point, Senegal also contends that no dispute has arisen between the Parties.

The Court notes that, while it is the case that the Belgian international arrest warrant in respect of Mr. Habré — transmitted to Senegal with a request for extradition on 22 September 2005 — referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré.

In the light of the diplomatic exchanges between the Parties, the Court considers that such a dispute did not exist on that date. The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture. The Court considers that, under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law. The Court states that the facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture. However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems.

The Court 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 it thus has no jurisdiction to decide on Belgium's claims related thereto. It is, therefore, only with regard to the dispute concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture that the Court will have to determine whether there exists a legal basis of jurisdiction

Position of the parts

In its Memorial, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that^[3]:

1. Senegal is required to cease these internationally wrongful acts
 - a. Senegal breached its international obligations by failing to incorporate 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 customary international law by failing to bring criminal proceedings against Mr. Hissène Habré for acts characterized in particular as crimes of torture, genocide, war crimes and crimes against humanity alleged against him as perpetrator, co-perpetrator or accomplice,

or 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 promptly submitting the Hissène Habré case to its competent authorities for prosecution; or
 - b. failing that, by extraditing Mr. Habré to Belgium.

By the other side, the Republic of Senegal, in its Counter-memorial, requests the International Court of Justice 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. Alternatively, Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to “extradite or try” (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any rule of customary international law;
- 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. Habré, Senegal is complying with the declaration by which it made a commitment before the Court.

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

The International Court of Justice (ICJ) heard arguments from March 12 to 21, 2012 in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* over the fate of the former dictator of Chad, Hissène Habré.

Habré is accused of responsibility for thousands of political killings and systematic torture when he ruled Chad, from 1982 to 1990, before fleeing to Senegal. Seven of Habré's victims filed a criminal complaint in Senegal in January 2000, accusing him of torture, barbaric acts, and crimes against humanity. A Senegalese judge indicted Habré on those charges but, after political interference by the Senegalese government, which was denounced by two UN human rights rapporteurs, appellate courts dismissed the case on the grounds that Senegalese courts lacked jurisdiction to try crimes committed abroad.

Other victims, including three Belgian citizens, then filed a case in Belgium. In September 2005, after four years of investigation, a Belgian judge indicted Habré and Belgium requested his extradition. A Senegalese court ruled that it lacked jurisdiction to decide on the extradition request, and the Senegalese government referred the Habré case to the African Union (AU) for a decision on how Habré should be tried. The AU created a Committee of Eminent African Jurists and, on its recommendation, asked Senegal in July 2006 to prosecute Habré "on behalf of Africa." Senegal accepted the AU mandate and amended its legislation to give its courts extraterritorial jurisdiction over international crimes but for years raised obstacle after obstacle to Habré's trial.

Belgium filed an application against Senegal at the International Court of Justice (ICJ) in February 2009 after Senegal failed to extradite Habré and continued to stall on his

trial. Belgium has submitted three subsequent extradition requests. Two were rejected on technical grounds as the Senegalese government apparently did not transmit the Belgian legal papers intact to the court, and the third is still pending. In 2011 Senegal announced and then retracted a decision to expel Habré back to Chad.

KEY POINTS OF DEBATE

Competence of the Court

The Republic of Senegal based the jurisdiction of the Court in Article 36, Paragraph 2, of the Statute of the Court. Meanwhile Belgium sustain that the Court lacks competence in order to proceed with the case.

Legal competence to prosecute Mr. Hissène Habré

On July 4, the Dakar Court of Appeal declared that the courts of Senegal are legally incompetent to prosecute Mr. Hissène Habré, because their penal code did not consider crimes against humanity such as genocide, torture, and other war crimes.

The right to judge Mr. Hissène Habré proclaimed by Belgium

Belgium base their right to judge Mr. Hissène Habré on the fact that one of their citizens with a Chadian descent submits a complaint to their Kingdom. As their citizen they do not only have the right, but the obligation to defend their citizen by accepting his complaint.

The complaint submitted by the citizen includes several crimes against humanity which were contemplated under Belgian constitutional law of 1993.

Constitutional amendments made by The Republic of Senegal (2007)

The delegation of Senegal amended its Constitution, in Articles 435-1 and 431-5, respectively, to avoid legal incompetence in their courts.

Judicial cooperation

In December 2008 Belgium offers a judicial cooperation to the Republic of Senegal, by sending files of research related to the process of the accused.

Your duty at Court

Agents and Justices remain from debating and proving the crimes committed by the accused. We as members of the International Court of Justice may only judge the Questions relating to the Obligation to Prosecute or Extradite Mr. Hissène Habré.

Members of The Court

1. Agency of Belgium
2. Agency of Senegal
3. Justice Tomka
4. Justice Sepúlveda-Amor
5. Justice Owada
6. Justice Abraham, Keith
7. Justice Bennouna
8. Justice Skotnikov
9. Justice Cançado
10. Justice Yusuf
11. Justice Greenwood
12. Justice Xue
13. Justice Donoghue
14. Justice Sebutinde
15. Justice Julia Kirsch
16. Justice Couvreur

[1] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950

[2] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, para. 30

[3] Memorial of the Kingdom of Belgium. Obtained from <https://www.icj-cij.org/files/case-related/144/16933.pdf>



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