BELGIUM[1]

Contents

Cases — Fight against Impunity

☛ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits)* [2012] ICJ Rep, 22 July 2012 (*Hissène Habré* case)[2]

On 22 July 2012, the International Court of Justice delivered its judgment in the *Hissène Habré* case brought by Belgium against Senegal in February 2009.

The facts of the case arose in 2000 when 'a Belgian national of Chadian origin and Chadian nationals filed a series of criminal complaints with civil-party applications in the Belgian courts against the former president of Chad, Mr. Hissène Habré, for crimes under international humanitarian law.'[3] The complaints were founded on the *Law of 16 June 1993 on the Punishment of Serious Violations of International Humanitarian Law*, amended by the *Law of 10 February 1999*.[4] They accused H. Habré of numerous war crimes, crimes against humanity and crimes of genocide at the time he was President of Chad, from 7 June 1982 to 1 December 1990. According to a report by the National Committee of Enquiry of the Chadian Ministry of Justice (1992), over 40,000 persons had been summarily executed or had died in detention.[5] At the time of the complaints, H. Habré was living in exile in Dakar, Senegal, where he had lived since 1990.

The Belgian investigating judge, who had received the complaints, carried out numerous investigative measures in Belgium and Chad. On 19 September 2005, he issued an international arrest warrant *in absentia* against H. Habré 'as the perpetrator or co-perpetrator' of crimes under international humanitarian law. The legal grounds of the arrest warrant were the *1984 Torture Convention*, the *1948 Genocide Convention*, the *1949 Geneva Conventions* and various provisions of the *Belgian Penal Code* criminalising the crimes provided for by these conventions as well as crimes against humanity.[6]

The arrest warrant was transmitted to Senegal for the purposes of securing the arrest of H. Habré and extraditing him to Belgium. On 25 November 2005, the Chamber of indictments of the Dakar Court of Appeal held that it was without jurisdiction to render an opinion on the request for extradition since it concerned acts committed by a Head of State 'in the exercise of his functions'.[7] On 30 November 2005, Belgium asked Senegal for clarification on the judgment's implications for Belgium's extradition request. On 7 December 2005, Senegal answered that 'by hosting Mr. H. Habré in its territory without "seeking to shield him" from justice, Senegal was giving expression to "its traditional values of hospitality" and "its

[1] Information and commentaries by Eric David, Emeritus Professor, Free University of Brussels.
[2] As Counsel for Belgium in this case, the undersigned stresses that the following comment reflects his own view and not necessarily the official Belgian position.
[3] *Hissène Habré case (Application Instituting Proceedings)* [2012] ICJ Rep, 17 February 2009, p. 5 <http://www.icj-cij.org/docket/files/144/15054.pdf>.
[4] *Moniteur belge* [Belgian Official Gazette], 5 August 1993; *Moniteur belge* [Belgian Official Gazette], 23 March 1999.
[5] *Hissène Habré case (Application Instituting Proceedings)* [2012] ICJ Rep, 17 February 2009, p. 13 <http://www.icj-cij.org/docket/files/144/15054.pdf>.
[6] *Ibid*., Annex 4, p. 31.
[7] *Ibid*., p. 7.

attachment to the principles of justice and democracy"'.[8] Senegal further indicated that it had referred the matter to the African Union (AU) summit.[9] From this moment, Belgium and Senegal exchanged notes verbales: Belgium repeated its request for H. Habré's extradition; and Senegal answered that in transferring the case to the AU summit, it had complied 'with the spirit of the rule *aut dedere aut punire* laid down in Article 7 of the *1984 Convention against Torture*'.[10]

Belgium did not agree with this interpretation of the *Torture Convention* and considered that both States had a dispute over the interpretation of the *Convention*.

Senegal amended its penal laws in order to enable its courts to exercise universal jurisdiction over H. Habré but it observed that H. Habré's trial required huge financial resources and claimed EUR 27,500,000 from the international community to cover the prosecution.[11] According to Belgium, this amount was greatly exaggerated in comparison with the expenses triggered by recent trials held in Belgium concerning persons indicted for their participation in the 1994 Rwandan genocide.[12]

As Senegal did nothing to prosecute H. Habré or to extradite him to Belgium, Belgium brought the case before the ICJ and founded the jurisdiction of the Court on a double basis: on the one hand, Senegal and Belgium's unilateral declarations recognising the jurisdiction of the Court for any legal dispute (*Statute of the ICJ*, Art. 36(2)); and on the other hand, Article 30 of the *Torture Convention* providing for the jurisdiction of the Court for disputes relating to the interpretation and application of the *Convention*, which bound both States.

The pleadings took place in The Hague between 12 and 21 March 2012 and the judgment on the merits was delivered just 4 months later, on 22 July 2012. The Court held *unanimously* that Senegal 'must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.'[13]

The judgment addresses the issues of competence, admissibility and merits. In the interests of space, this commentary will be limited to addressing the main issues of the case, namely, the bases of Senegal's obligation either to prosecute H. Habre, or in the alternative, to extradite him to Belgium. The grounds of Belgium's claim were customary international law and the *1984 Torture Convention*.

According to Belgium, customary IHL obliged Senegal to prosecute or extradite H. Habre. In support of this position, Belgium invoked, in particular, resolutions of the UN General Assembly (specifically, General Assembly Resolution 3074, UN Doc. A/RES/3074 (XXVIII), 3 Dec. 1973, para. 1), about one hundred SC resolutions requiring States to fight impunity, the International Law Commission's *Draft Code of Crimes against Peace and the Cecurity of Mankind* (1996) and the Preamble of the *Rome Statute of the International Criminal Court* (paras. 4–6).

Rather strangely, Senegal did not respond to this argument in its counter-memorial or in its oral pleadings. However, the Court dismissed Belgium's argument after having observed that Belgium did not refer to Senegal's obligations under customary international law in its diplomatic correspondence with Senegal. According to the Court:

[8] *Ibid*., p. 9.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*., p. 9
[12] *Ibid*.
[13] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 122(6).

> 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. … The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture.' [14]

Therefore, the Court considered 'that such a dispute did not exist on that date'.[15]

In his separate opinion, Judge Abraham rightly observed that this argument had been raised '*ex officio*' by the Court and that this raised 'the procedural question of whether the Court could raise such a ground *ex officio* — without even notifying Belgium beforehand'.[16] Judge Abraham did not answer the question but he disagreed with the Court and considered 'that a dispute between the Parties as regards compliance with customary international law existed on the date of [the Court] Judgment'.[17] However, he did not share Belgium's reasoning in this regard.[18]

Concerning the *Torture Convention*, the Court recalled Article 7(1), which provides:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall … if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[19]

In this regard, the Court underlined four points underlying the prohibition of torture: (1) its status as a *jus cogens* norm; (2) the rule *aut dedere aut judicare*; (3) the *erga omnes partes* character of the *Convention*; and (4) its *ratione temporis* character.

The Court highlighted the *jus cogens* character of the prohibition of torture, stating that 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.[20] This was not really new as the Court, without referring to the ICTY, confirmed what the latter has already said in prior decisions.[21]

The rule *aut dedere aut judicare* as stated in Article 7(1), means, from a literal point of view, that the obligation of the State to prosecute is subject to a prior request for extradition from another State. Thus, the former State must prosecute only if it does not extradite the person to the requesting State. If the wording of Article 7(1) leads to this interpretation, the Court agreed with the Committee against Torture which has said, in the same context (a claim filed by a victim of H. Habré against Senegal for not having prosecuted or extradited him), that the obligation to prosecute a suspected perpetrator of torture did not depend on a prior request for extradition of the person.[22] According to the Court, '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

[14] *Ibid*., para. 54.
[15] *Ibid*.
[16] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 20 (Separate Opinion of Judge Abraham).
[17] *Ibid*.
[18] His arguments will not be developed and debated here.
[19] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 89.
[20] *Ibid*., para. 99.
[21] *Prosecutor v Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 156.
[22] Committee against Torture, Communication No. 181/2001, UN Doc. CAT/C/36/D/181/2001, 17 May 2006, para. 9.7.

suspect.'[23] In other words, the rule *aut dedere aut judicare* becomes *judicare vel dedere*, which is not quite the same.[24]

The major contribution of the judgment to international law probably lies in the Court's interpretation of the purpose of the *Convention* as expressed in its Preamble: 'to make more effective the struggle against torture ... throughout the world'.[25] Considering this objective of the *Convention*, the Court said that all States Parties had an interest in compliance with the *Convention* and that each State Party might require any other State Party to comply with the *Convention*. The relevant passage of the judgment deserves to be quoted *in extenso*:

> The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties 'have a legal interest' in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). 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.[26]

Even if this reference to 'obligations *erga omnes partes*' is a self-evident consequence of *pacta sunt servanda* (*Vienna Convention on the Law of Treaties*, Art. 26), not very surprisingly, Judge Skotnikov (Russia), Judge Xue (China) and Judge *ad hoc* Sur (France), did not share this view.[27]

The Court interpreted the *ratione temporis* extent of the *Convention* very narrowly. The Court said Senegal must prosecute H. Habré for acts committed after the entry into force of the *Convention* for Senegal (26 June 1987). The judgment stated that '[t]he 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.'[28]

Even if this conclusion is, as Judge Cançado Trindade said, 'a regressive interpretation' of Art. 7(1),[29] the Court added that '[a]lthough Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.'[30]

---

[23] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 94.
[24] See, e.g., International Law Commission, *Draft Code of Crimes against Peace and the Security of Mankind: Commentary* (1996) Art. 9.
[25] Quoted in *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 68.
[26] *Ibid*.
[27] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 20 (Separate Opinion of Judge Skotnikov); *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 18 (Separate Opinion of Judge Xue); *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, paras. 25, 30, 35 (Separate Opinion of Judge Sur).
[28] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 102.
[29] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 158 (Separate Opinion of Judge Cançado Trindade).
[30] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 102.

In other words, the Court considered that the prosecution of acts committed and attributed to H. Habré before 26 June 1987 would not breach the principle of non-retroactivity of criminal laws. Three consequences can be drawn from this finding: (1) exercising criminal jurisdiction which did not exist in Senegalese law before June 1987 would not be a retroactive application of a penal law (this is logical since the prohibition of retroactive criminal laws concerns the criminality of a fact, not the jurisdition of the judge); (2) implicitly, the Court admited that, even if torture as provided for by the *1984 Convention* did not exist in Senegalese law, the crime 'was criminal according to the general principles of law recognized by the community of nations' (*International Covenant on Civil and Political Rights*, Art. 15(2));[31] and (3) the Court implicitly suggested that torture is a crime under customary international law (the Court considered that the Belgian argument relying on the obligations provided by customary IHL was not admissible (*supra*), but custom reappears indirectly as a source of criminality).

In conclusion, this is an important judgment in a case, which for the first time in the history of the Court, was brought by a State not for national political, economic or territorial reasons, but for reasons based on the respect of the rule of law in the fight against impunity.

State Practice — Fight against Impunity — New Legal Instrument

☛ UN Doc. A/PV.67, 24 September 2013, p. 11

Jointly with Slovenia and the Netherlands, Belgium suggested the adoption of a new instrument to improve cooperation in the fight against impunity. The Belgian Minister of Foreign Affairs, D. Reynders, stated at the 4th Plenary Meeting of the 67th session of the UN General Assembly:

> By virtue of the complementarity that underpins the Statute of the [International Criminal] Court, States bear primary responsibility for prosecuting the perpetrators of the most serious crimes. With a view to contributing to efforts to enhance national capacities in that respect, Belgium, with Slovenia and the Netherlands, proposes to improve the international framework for judicial aid and extradition through the negotiation and adoption of a new international legal instrument. I call on the comity of States to support that initiative. Belgium remains ready to cooperate with the United Nations and other Member States, through strengthening the rule of law at all levels, to build a more just, more prosperous more peaceful and more humane world.

ERIC DAVID

[31] *Hissène Habré case (Merits)* [2012] ICJ Rep, 22 July 2012, para. 18 (Declaration of Judge Donoghue).