INTERNATIONAL COURT OF JUSTICE

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

Supplementary written replies of the Government of Senegal to the questions put by judges at the close of the hearing held on 16 March 2012

submitted by

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Mr. President, Members of the Court, the Government of the Republic of Senegal, through its Agent, has the honour to transmit herewith to the Court the supplementary replies or replies to some of the questions put by judges.

I. Question put by Judge Abraham

To conclude the reply provided by the Agent of Senegal at the public hearing of 21 March 2012 (CR 2012/7, para. 7), it will be recalled that, in Senegal's view, the victims should have had Belgian nationality at the time when the harmful act was committed (para. 6). International jurisprudence does not accept any break in the bond of nationality which must here form the basis of Belgium's jurisdiction. In this case, the time in question is when the alleged Chadian victims, who subsequently acquired Belgian nationality, suffered the harmful acts.

In other words, the legal basis on which Belgium claims to be entitled to rely in order to invoke Senegal's alleged international responsibility under the Convention against Torture is the legal connection between the victims and the Belgian State. Yet it is a "well-established principle of international jurisprudence" (Arbitral Award in the case concerning *British Property in Spanish Morocco (Spain* v. *United Kingdom)*, 1 May 1925, Claim No. XXXVI, Benchiton, *RIAA*, Vol. II, p. 706) that the law which forms the basis of Belgium's action must, from the very outset, apply to the victims on whose behalf Belgium seeks extradition in order for it then to invoke Senegal's responsibility. Thus, it is the *critical date* which should be taken into account, namely the time when the Chadian victims suffered harm (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76,* p. 17).

It is clear from the foregoing that Belgium is not entitled to invoke the responsibility of Senegal for the alleged breach of its obligation to submit the H. Habré case to its competent authorities for the purpose of prosecution, unless it extradites him.

Moreover, it is doubly surprising that Belgium remains silent on this issue.

Firstly, since Belgium did not deem it necessary to give either a full or even a provisional response at the hearing of Monday 19 March 2012 to such an important and crucial question as that put by Judge Abraham.

Secondly, while it has always deemed itself competent on the basis of passive personal jurisdiction, and whereas it still relies on the criterion of the bond of nationality, Belgium has never considered trying Mr. Habré by default, that is, *in absentia* (cf. the case concerning *Ely Ould Dah*, a Mauritanian officer prosecuted by France and tried *in absentia*, who challenged the judgment against him before the European Court of Human Rights — application No. 1314/03 — which rejected his appeal (17 March 2009); see also the case of the Libyan official, al-Senoussi).

II. Additional comments on the question put by Judge Greenwood

The comments provided to the Court at the hearing of 21 March 2012 (CR 2012/7, paras. 9 to 32) on the question put to Belgium by Judge Greenwood can be confirmed and supplemented by the following.

The reference to the Geneva Conventions of 12 August 1949 rather than to the Additional Protocols of 8 June 1977, as made by the judge when he speaks of war crimes and crimes against humanity, can be taken as a reference to the rules of customary law that have been codified in these international treaty instruments.

Thus, in the view of the Government of Senegal, in light of the foregoing remarks in the above-mentioned pleading, Belgium's arguments do not make it possible to establish any violation of the provisions of the Convention against Torture, let alone of customary international obligations (cf. the final submissions of the Government of Senegal, CR 2012/7, point 2).

III. Question put by Judge Donoghue

Reply

Recent developments in respect of the punishment of serious crimes under international humanitarian law suggest that the prohibition of torture belongs to a category of obligations that should be binding on all States (*Prosecutor* v. *Furundzija*, ICTY, judgment). Similarly, the obligations incumbent upon Senegal under Article 7, paragraph 1, of the Convention against Torture, a necessary corollary (and essential complement) to the primary obligation cited above, are of the same order. Senegal is aware of this fact and has not sought to deviate from that path. Moreover, it does not deny that the obligation provided for in the Convention can be applied to the offences allegedly committed before 26 June 1987, when the Convention entered into force for Senegal.

However, the Senegalese Government disputes Belgium's right to invoke Senegal's responsibility (on the basis of this Convention) for acts alleged to have occurred before 25 July 1999, when the Convention entered into force for Belgium, for the following reasons.

While the norm in question creates obligations which are incumbent upon all States, that is to say *erga omnes* obligations, it nonetheless belongs to the category of divisible *erga omnes* obligations. Such obligations bind one State to all the other States of the international community separately. States may derogate from them by agreement. In the event of a breach, only the State whose right has been infringed may seek its enforcement. However, Belgium could not claim the status of injured State, on the basis of the said Convention, for acts committed prior to 1999. The obligation exists, but is not owed to Belgium. The obligation is owed to Belgium only from the date on which it ratified the Convention, namely from 1999. The Convention can therefore only apply in relation to acts subsequent to 1999. The relevant provisions of the Vienna Convention on the Law of Treaties are decisive in this respect. Thus, Article 28 of that Convention provides as follows: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

It is a commonplace to say that there are many such examples in international case law. One might mention the *Ambatielos* case, in which the Court acknowledged that "[retroactivity can only apply if there is a] special clause or . . . special object necessitating retroactive interpretation" (*Ambatielos (Greece* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 28). In its judgment of 24 March 1999, the Judicial Committee of the House of Lords held that the principle of non-immunity could only be applied to former President Pinochet for extraditable

acts from the time when the British Parliament ratified the Convention against Torture and incorporated it into the British criminal justice system, namely December 1988.

For all these reasons, Senegal considers that the obligation at issue does not exist in its relations with Belgium during the time that the latter was not a party to the Convention against Torture.

IV. Question put by Judge Keith

Reply

In accordance with its declaration, Senegal is entitled to ask that a method of settlement other than the one imposed by Belgium be sought by common accord.

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