

INTERNATIONAL COURT OF JUSTICE

APPLICATION INSTITUTING PROCEEDINGS

BELGIUM v. SENEGAL

(16 February 2009)

*[Translation by the Registry]*

**APPLICATION INSTITUTING PROCEEDINGS BY THE KINGDOM OF BELGIUM  
AGAINST THE REPUBLIC OF SENEGAL**

**Contents**

- I. Facts, subject of the dispute and legal grounds
- II. Jurisdiction of the Court
- III. Belgium's submissions
- IV. Annexes

**I. FACTS, SUBJECT OF THE DISPUTE AND LEGAL GROUNDS**

1. This Application instituting proceedings before the ICJ will set out the facts which lie behind the dispute between Belgium and Senegal (A), the subject of the dispute (B) and the legal grounds which form the basis of Belgium's Application (C).

**A. The facts**

2. The first complaints against the former President of Chad, Mr. Hissène Habré, were filed in Senegal in 2000: on 25 January 2000, a Senegalese investigating judge communicated to the *procureur de la République* at the *Tribunal régional hors classe* in Dakar, by order, a complaint with civil-party application filed against Mr. H. Habré. Seven of the complainants were natural persons and the eighth a legal person, the Association of Victims of Political Repression and Crime (AVPRC).

The complainants consider themselves to be victims of crimes under international humanitarian law (crimes against humanity, torture, "acts of barbarity", forced disappearances). Further to these complaints, the senior investigating judge at the *Tribunal régional hors classe* in Dakar on 3 February 2000 indicted Mr. H. Habré for complicity in "crimes against humanity, acts of torture and barbarity" and placed him under house arrest (Ann. 2).

On 4 July 2000, the *Chambre d'accusation* of the Dakar Court of Appeal dismissed the complaints and the indictment after finding that "crimes against humanity" did not form part of Senegalese criminal law and that, while the crime of torture was covered by Senegalese criminal law, the acts in question had been committed abroad by an alien; Article 669 of the Code of Criminal Procedure did not empower a Senegalese court to exercise extraterritorial jurisdiction of this type.

3. Between 30 November 2000 and 11 December 2001, 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.

As the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction.

By the time the complaints were filed, Mr. Hissène Habré had ceased to be President of Chad, of which he had been the leader from 7 June 1982 to 1 December 1990, when he was ousted

by Mr. Idriss Déby, who went on to become the current President of Chad. Mr. H. Habré has lived in exile in Dakar, Senegal, since 1990.

4. Further to the complaints and to submissions by the Belgian public prosecutor (*procureur du Roi*), numerous investigative measures were carried out between 30 November 2000, the date on which the complaint with civil-party application was filed in Belgium, and 19 September 2005, when the investigating judge responsible for the case issued an international arrest warrant against Mr. H. Habré (Ann. 3). Amongst these investigative measures were two international letters rogatory, one addressed to Chad and the other to the Senegalese authorities. The latter, dated 19 September 2001, aimed at:

- obtaining the entire original record, or a certified copy thereof, of the investigation in Senegal in the proceedings concerning Mr. H. Habré;
- securing authorization for the transfer to Belgium of any and all documents, papers and items of value which had been seized or produced in the case;
- carrying out or having carried out any other examination or any other investigation which would be helpful to the inquiry.

On 22 November 2001, Senegal sent Belgium a list of documents concerning the proceedings which had taken place in Senegal (complaints, civil-party applications, order of 3 February 2000 placing Mr. H. Habré under house arrest, judgments of the *Chambre d'accusation* of the Dakar Court of Appeal of 4 July 2000 and of the Court of Cassation of Senegal of 20 January 2003).

5. On 7 October 2002, the Minister of Justice of Chad informed the Belgian investigating judge that the competent Chadian authorities had lifted any immunity to which Mr. H. Habré might be entitled; he has not enjoyed any immunity from jurisdiction since 7 April 1993 (Ann. 4).

Between 2002 and 2005, various investigative measures were carried out in Belgium; these included examining the complainants and witnesses and analysing the voluminous documentation transmitted by the Chadian authorities in compliance with the letter rogatory referred to above (27 files of documents).

6. As based on the Notes Verbales exchanged, the chronology of relevant events in the present case is as follows:

- 19 September 2005: the Belgian investigating judge issues an international arrest warrant *in absentia* against Mr. H. Habré “as the perpetrator or co-perpetrator” of crimes under international humanitarian law. The warrant is transmitted by Interpol (red notice) to Senegal; in accordance with Interpol practice<sup>1</sup> (Belgium and Senegal having been members of Interpol since 7 September 1923 and 4 September 1961, respectively), the notice serves as a request for provisional arrest with a view to extradition (Ann. 3). The international arrest warrant states that any immunities which Mr. H. Habré may seek to claim have been lifted by Chad.
- 25 November 2005: the *Chambre d'accusation* of the Dakar Court of Appeal holds that it is without jurisdiction to render an opinion on the request for extradition since it concerns acts committed by a Head of State “in the exercise of his functions”.

---

<sup>1</sup><http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS13fr.asp>.

- 30 November 2005: Belgium asks Senegal to describe: the implications of that judgment for Belgium's extradition request; the steps to come in the proceedings; and Senegal's position on Belgium's extradition request.
- 7 December 2005: Senegal's embassy in Brussels states that, by hosting Mr. H. Habré in its territory without "seeking to shield him" from justice, Senegal is giving expression to "its traditional values of hospitality" and "its attachment to the principles of justice and democracy". Senegal further indicates that it is referring the matter to the African Union (AU) summit following the judgment by the *Chambre d'accusation* of the Dakar Court of Appeal, which declared itself to be without jurisdiction in respect of the request for extradition; Senegal considers that by doing so it is contributing "to the political integration of the continent".
- 11 January 2006: Belgium takes note that the case has been passed on to the AU, refers to the negotiation procedure contemplated in Article 30 of the 1984 United Nations Convention against Torture and requests Senegal to inform Belgium of its final decision on Belgium's request for extradition.
- 9 March 2006: Belgium points out that the negotiation process referred to above is continuing and asks Senegal whether the submission of the matter to the AU means that Senegal will neither try Mr. H. Habré nor extradite him to Belgium.
- 9 May 2006: Senegal asserts that, in transferring the case to the African Union summit, it "is complying with the spirit of the rule *aut dedere aut punire*" laid down in Article 7 of the 1984 United Nations Convention against Torture; Article 7, paragraph 1, provides:

"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [acts of torture] is found shall in the cases contemplated in article 5 [cases of territorial, active personal, passive personal, or universal jurisdiction or of failure to extradite], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."
- 20 June 2006: in response to that assertion, Belgium observes that the negotiations based on Article 30 of the above-cited 1984 Convention have failed; it notes that there is a dispute between the two States concerning the interpretation of Article 7 of the Convention and asks Senegal to submit to the arbitration process contemplated by Article 30 of the Convention.
- 20-21 February 2007: Senegal states that its decision to amend Senegalese legislation so as to make provision for Mr. H. Habré's trial is based on the decision taken at Banjul on 2 July 2006 at the Summit of African Union Heads of State and Government; to that end, Senegal amended its Penal Code and Code of Criminal Procedure to include the offences of genocide, war crimes and crimes against humanity and to enable Senegalese courts to exercise universal jurisdiction; according to Senegal, the trial will however call for significant financial resources which it "would be unable to raise without assistance from the international community"; Senegal says that it needs €27,500,000 to hold the trial; by way of comparison, according to the Directorate-General of the Judicial System of the Belgian Federal Public Service for Justice, the three trials held in Belgium concerning the events in Rwanda in April-July 1994 cost:
  - trial of the "Butare Four" (*Ntezimana et al.*), 2001, €233,496.59;
  - *Nzabonimana et al.*, 2005, €308,345.56;
  - *Ntuyahaga*, 2007, €19,117.90 (provisional estimate at 31 August 2008).

In each of these trials, several dozen people came from abroad to testify as witnesses in the Assize Court; their travel and lodging expenses were paid by the Belgian State.

The most recent estimates from the Senegalese authorities of the amounts needed to cover the full judicial proceedings against Mr. H. Habré total more than €16,000,000.

- 8 May 2007: Belgium again refers to the dispute between it and Senegal and asks Senegal whether the new legislative provisions referred to above will enable Senegal to prosecute Mr. H. Habré, failing his extradition to Belgium, and in what time frame; Belgium is prepared to work with the Senegalese judicial authorities within the framework of the rules governing international judicial co-operation (Ann. 5).
- 2 December 2008: Belgium once more draws attention to the existence of the dispute and asks that the rights of the Belgian complainants of Chadian origin be taken into consideration by the Senegalese courts; Belgium also reiterates its willingness to co-operate pursuant to the rules governing international judicial co-operation and asks Senegal to provide the contact details for the investigating judge and prosecutor appointed in that connection (Ann. 6).

Belgium has yet to receive any response to the Notes Verbales of 8 May 2007 and 2 December 2008.

## **B. Subject of the dispute**

7. From the facts set out above, Belgium draws the following conclusions:

- since 2001, Belgium has been requesting that Mr. H. Habré should be brought to trial to answer for the acts alleged against him;
- those acts can be characterized as including crimes against humanity and acts of torture (see paras. 11-12 below);
- since 2005, Belgium has been asking Senegal to prosecute Mr. H. Habré directly for those acts, failing his extradition to Belgium;
- Belgium's claims are based on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, and on the customary obligation to punish crimes against humanity;
- those claims are founded on conventional and customary rules of international law;
- Senegal has failed, in practical terms, to provide a response to Belgium's requests.

8. A dispute therefore exists between Senegal and Belgium over the application of the 1984 Convention and over the application of the customary obligation to punish crimes against humanity. Belgium takes the view that Senegal is not fulfilling its conventional and customary obligations.

9. Senegal appears to claim to have complied with these by referring the case to the AU. Belgium notes that this has not yet led to any criminal proceedings against Mr. H. Habré: Senegal is not applying the international rules that oblige it to prosecute Mr. H. Habré, failing his extradition to Belgium, or is interpreting those rules incorrectly. A dispute between Senegal and Belgium therefore exists, relating to the application and interpretation of conventional and

customary international obligations regarding the punishment of torture and crimes against humanity.

### C. Legal grounds

10. Belgium founds this Application on conventional law and customary international law.

11. Under conventional international law, Senegal's failure to prosecute Mr. H. Habré, if he is not extradited to Belgium to answer for the acts of torture that are alleged against him, violates the Convention against Torture of 1984, in particular Article 5, paragraph 2, Article 7, paragraph 1, Article 8, paragraph 2, and Article 9, paragraph 1.

12. Under customary international law, Senegal's failure to prosecute Mr. H. Habré, or to extradite him to Belgium to answer for the crimes against humanity which are alleged against him, violates the general obligation to punish crimes under international humanitarian law which is to be found in numerous texts of secondary law (institutional acts of international organizations) and treaty law.

The crimes alleged against Mr. H. Habré can be characterized as including crimes against humanity. At the time when Mr. H. Habré was President of Chad (1982-1990), a policy of widespread human rights violations was carried out against political opponents, members of their families and members of certain ethnic groups: the Hadjerai in 1987 and the Zaghawa in 1989. According to a report by the National Committee of Enquiry of the Chadian Ministry of Justice (1992), over 40,000 persons were summarily executed or died in detention<sup>2</sup>.

Such acts correspond to the definition of crimes against humanity, namely murders and acts of torture "committed as part of a widespread or systematic attack directed against any civilian population"; these defining elements of crimes against humanity reflect customary international law as expressed, for example, by the Statute of the International Criminal Court (ICC) (Article 7)<sup>3</sup>, by which Senegal and Belgium have been bound since 2 February 1999 and 26 June 2000, respectively.

The obligation to prosecute the perpetrators of such crimes is indicated in the resolutions of the General Assembly of the United Nations (see, for example, resolution 3074 (XXVIII), para. 1), the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 (Article 9), and in numerous calls by the international community to combat impunity (see, for example, the preamble of the Statute of the ICC, 4th-6th consideranda, the Constitutive Act of the African Union, Article 4 (c), and various Security Council resolutions<sup>4</sup>).

\*

---

<sup>2</sup>*Rapport de la Commission d'Enquête Nationale du Ministère Tchadien de la Justice sur les crimes et détournements commis par l'ex-Président Hissène Habré, ses co-auteurs et complices* (1992), Paris, L'Harmattan, 1993.

<sup>3</sup>ICTY, Case No. IT-95-17/1-T, *Furundzija*, 10 December 1998, para. 227.

<sup>4</sup>For example, S/Res. 1318, 7 September 2000, VI; S/Res. 1325, 31 October 2000, para. 11; S/Res. 1820, 19 June 2008, para. 4.

## II. JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

13. Belgium and Senegal have been Members of the United Nations since 1945 and 1960, respectively. As parties to the Charter, they are also bound by the Statute of the ICJ (United Nations Charter, Article 93).

Both have recognized the jurisdiction of the ICJ by unilateral declarations made on the basis of Article 36, paragraph 2, of the Statute, on 17 June 1958 (Belgium) and 2 December 1985 (Senegal) (Ann. 1). These declarations, which have not been revoked, state that the ICJ may settle any legal dispute concerning, in particular, the interpretation or application of a rule of international law. In this case, Belgium takes the view that Senegal is not fulfilling its obligation to punish crimes against humanity and crimes of torture. There is thus a legal dispute concerning the interpretation and application of international treaty norms (in respect of torture) and customary norms (in respect of crimes against humanity).

14. The two States have been parties to the United Nations Convention against Torture of 10 December 1984 since 21 August 1986 (Senegal) and 25 June 1999 (Belgium). The Convention has been in force since 26 June 1987. Article 30 of the Convention provides that any dispute between two States parties concerning the interpretation or application of the Convention which it has not been possible to settle through negotiation or arbitration may be submitted to the ICJ by one of the States. In this instance, Belgium has been negotiating with Senegal since 2005 for the latter to prosecute Mr. H. Habré directly, failing his extradition to Belgium. As Senegal has taken no action on these alternatives in practical terms, Belgium is now in a situation where the other party has declared itself unable, or refuses, to give way, thereby exhausting the obligation to settle the dispute by negotiation<sup>5</sup>.

As for arbitration, Belgium suggested this to Senegal on 20 June 2006 (Ann. 7). It failed to respond to that request either in the following six months or subsequently, whereas Belgium has persistently confirmed in Notes Verbales that a dispute on this subject continues to exist.

15. Negotiations between the two States have continued unsuccessfully since 2005. On 20 June 2006, Belgium observed that they had failed (Ann. 7). In addition, the suggestion of recourse to arbitration did not elicit any response from the Senegalese authorities. Consequently, the conditions in Article 30 have been fulfilled so as to allow Belgium to bring its dispute over the interpretation and application of the 1984 Convention before the Court.

\*

## III. BELGIUM'S SUBMISSIONS

16. Belgium respectfully requests the Court to adjudge and declare that:

- the Court has jurisdiction to entertain the dispute between the Kingdom of Belgium and the Republic of Senegal regarding Senegal's compliance with its obligation to prosecute Mr. H. Habré or to extradite him to Belgium for the purposes of criminal proceedings;
- Belgium's claim is admissible;

---

<sup>5</sup>*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2 p. 13; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988, p. 33.*

- 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.

17. Belgium reserves the right to revise or supplement the terms of this Application. In order not to make the Application unduly long, Belgium has limited the number of annexes to it. A larger number of annexes will be included with Belgium's Memorial on the merits, unless the Court wishes otherwise.

18. Pursuant to Article 31, paragraph 2, of the Statute and Article 35 of the Rules of Court, Belgium reserves the right to choose a judge *ad hoc*.

19. Pursuant to Article 41 of the Statute, Belgium is requesting the Court to indicate provisional measures. That request is set out in a separate document from this Application.

(Signed) Paul RIETJENS,  
Director-General of Legal Affairs,  
Federal Public Service for Foreign Affairs,  
Foreign Trade and Development Co-operation,  
Agent of the Government of  
the Kingdom of Belgium.

(Signed) Gérard DIVE,  
Head of the International Humanitarian  
Law Division,  
Federal Public Service for Justice,  
Co-Agent of the Government of  
the Kingdom of Belgium.



#### IV. LIST OF ANNEXES

- Annex 1**     Declarations recognizing the jurisdiction of the ICJ by Belgium and Senegal.
- Annex 2**     3 February 2000, indictment and placing under house arrest of Mr. H. Habré by the senior investigating judge of the Dakar *Tribunal régional hors classe*.
- Annex 3**     International arrest warrant of 19 September 2005 issued by the Belgian investigating judge responsible for the case.
- Annex 4**     Letter of 7 October 2002 from the Minister of Justice of Chad lifting any immunity which might be claimed by Mr. H. Habré.
- Annex 5**     Note Verbale of 8 May 2007 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of the Republic of Senegal.
- Annex 6**     Note Verbale of 2 December 2008 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of the Republic of Senegal.
- Annex 7**     Note Verbale of 20 June 2006 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of the Republic of Senegal.
-