

**SENEGAL'S COMMENTS ON BELGIUM'S RESPONSE TO THE QUESTION
PUT BY JUDGE CAÑADO TRINDADE ON 8 APRIL 2009**

In accordance with Article 72 of the Rules of Court, Senegal has been invited to comment upon Belgium's response, of 15 April 2009, to the question put by Judge Cañado Trindade.

The Senegalese Government notes that, in the first paragraph of its response, Belgium expresses the view it shares with Senegal that the various elements of this question relate to the merits of the case.

The lack of comment by Senegal on one of Belgium's responses does not signify Senegal's approval of the position set out by the Applicant.

For the sake of convenience, the comments below will follow the order of those elements of the question on which Belgium has responded. Senegal remains mindful of the aim to be achieved through the question: "for the purposes of a proper understanding of the rights to be preserved (under Article 41 of the Statute of the Court)".

These comments are as follows:

I. In respect of the first element of the question asked (paragraphs 2 to 7 of Belgium's response) and the third element (paragraph 13 of the Belgian response — conclusion), given the connection between these elements, Senegal wishes to state as follows:

Reasoning from the provisions of Articles 7, paragraph 1, and 5, paragraph 2, of the Convention against Torture (para. 3), Belgium asserts that Senegal bears an obligation to prosecute or extradite Mr. Hissène Habré (para. 4) and that, corresponding to this obligation, there is a right on the part of other States to enforce compliance with the obligation (para. 5). Senegal does not disagree with that position.

However, in support of its argument, Belgium relies on a commentary of the International Law Commission. This reliance is mistaken, because the commentary serving as the basis for Belgium's reasoning concerns a particular situation, wherein bilateral treaty relations give rise to obligations borne by one State and corresponding to correlative rights of the other. This commentary covers a specific situation, one where two "States have agreed to engage in particular conduct . . .".

Every State possesses the right to investigate, to prosecute and to punish or extradite perpetrators of acts of torture present in its territory. It is the universality of crimes of this nature which explains why these prerogatives have been vested in States. As the International Criminal Tribunal for the former Yugoslavia rightly observed in its decision of 10 December 1998¹ (in the *Furundzija* case): "international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes"².

If Belgium can claim the right to try Mr. Hissène Habré, it is by virtue of this principle, which is also the basis of Senegal's right to bring proceedings.

The case presently before the Court involves Belgium and Senegal, both States Parties to the 1984 Convention against Torture. In Senegal's view, all States Parties to the Convention are entitled to require that their rights — to prosecute or extradite — be respected. But the Convention

¹Case No. IT-95-17/1-T.

²The crime of torture is one of the international crimes in question.

is silent on the question of whether the holders of the right to seek prosecution or extradition are solely those States whose nationals are the purported victims of the alleged acts of torture.

Having already made the changes throughout its entire domestic legal system necessary to achieve conformity with the Convention against Torture, Senegal is in a position to exercise the right to try Mr. H. Habré. The consequence of this should be to bring to a halt the implementation of Belgium's right to seek extradition.

In so far as a conflict would thus arise between the two rights to be preserved, Senegal's and Belgium's, the conflict should be resolved in favour of Senegal.

II. In respect of the third element of the question asked (paragraphs 11 to 12 of Belgium's response), Senegal has already stated that the rights set out in the Convention are possessed by every State Party; Senegal would like to add:

Belgium was not content to respond "in the abstract" to the Court. It related its response to Senegal's conduct and asserted that this conduct involved an "internationally wrongful act".

In Belgium's view, Senegal has thus breached the obligation to "prosecute or extradite" referred to in Article 7.

This contention is open to challenge on two counts:

(a) Senegal has not committed an "internationally wrongful act".

An internationally wrongful act is defined as "an action or omission attributable to a subject of international law, constituting a breach of an international obligation borne by said subject which engages its international responsibility" (*Dictionnaire de droit international public*, J. Salmon (ed.), Brussels, Bruylant, 2001, p. 497) [*translation by the Registry*].

The fact that Senegal has by now completed the process required by the 1984 Convention for amending its law makes any allegation of responsibility inappropriate and unjustified. What is expected of Senegal is the reform of its laws and the initiation of judicial proceedings. The first stage has now been achieved and Senegal is actively seeking the means to begin the second. Let us recall in this connection that, under Article 12 of the International Law Commission's Draft on State Responsibility: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation." Accordingly, it cannot be concluded that there is a breach of an international obligation by the State of Senegal.

(b) Senegal's conduct corresponds with what is expected of it in performing its obligations as a State Party to the 1984 Convention.

Under Articles 2 and 4 of the 1984 Convention, States must take the domestic measures called for by their capacity as Parties to the Convention. Senegal has met its obligations in this respect.

Belgium, in the exercise of its own judgment, might consider that the pace at which these measures have been taken is not in keeping with that expected of a State Party, but it undoubtedly cannot see "an internationally wrongful act" in this, save by playing the role of both judge and Party.

III. In respect of the fourth element of the question asked (paragraph 14 of Belgium's response), it is Senegal's view that Belgium's response calls for the same comments as those made under heading I above.

In conclusion to these responses on the subject of the rights to be preserved in the present case, under Article 41 of the Statute, Senegal reiterates that the circumstances of the present case do not require any measure provisionally protecting Belgium's right to request the extradition of Mr. Hissène Habré.
