

BELGIUM'S RESPONSE TO JUDGE CANÇADO TRINDADE

1. The questions put by Judge Cançado Trindade may be set out as follows:

1. For the purposes of a proper understanding of the *rights* to be preserved (under Article 41 of the Statute of the Court), are there rights corresponding to the obligations set forth in Article 7, paragraph 1, in combination with Article 5, paragraph 2, of the 1984 United Nations Convention Against Torture?"
2. "[. . .] if so, what are their *legal nature, content* and *effects*?"
3. "[. . .] Who are the *subjects* of those rights, States having nationals affected, or all States Parties to the aforementioned Convention?"
4. "[. . .] Whom are such rights opposable to, only the States concerned in a concrete case, or any State Party to the aforementioned Convention?"

It is of course true that these questions relate to the merits of the dispute; but, as Judge Cançado Trindade makes clear, and as Belgium said during the oral proceedings¹, as the Court is empowered under Article 41 of its Statute to take provisional measures to protect the rights of the parties, the incidental treatment of questions relating to the merits of the case is unavoidable.

Belgium will answer these questions in the order in which they were asked.

- 1. "For the purposes of a proper understanding of the *rights* to be preserved (under Article 41 of the Statute of the Court), are there rights corresponding to the obligations set forth in Article 7, paragraph 1, in combination with Article 5, paragraph 2, of the 1984 United Nations Convention Against Torture?"**

2. As Belgium understands the question, it bears on the existence of "rights" which Belgium may derive from Article 7, paragraph 1, in combination with Article 5, paragraph 2, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the "1984 Convention").

3. Article 7 paragraph 1, of the 1984 Convention 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 [obligation borne by the State Party to establish its jurisdiction over the person alleged to have committed an act of torture], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

Article 7, paragraph 1, thus lays down an obligation to prosecute on the part of the State in which the alleged perpetrator of an act of torture is present.

¹CR 2009/8, 6 April 2009, p. 27, paras. 15 *et seq.* (David).

Article 5, paragraph 2, of the 1984 Convention provides:

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.”

4. Thus, these two provisions do indeed establish an obligation to prosecute or extradite and they apply to Senegal, which is the State Party in the territory under whose jurisdiction Mr. Hissène Habré (the person alleged to have committed offences referred to in Article 4 of the 1984 Convention) has been found.

5. In this connection it bears recalling that where there is an obligation of one State to other States, those States have a corresponding right to performance of that obligation. The *Dictionnaire de droit international public* defines an obligation as a “subjective situation which is the counterpart to a right in the objective sense” [“*situation subjective qui est la contre partie d’un droit au sens objectif*”] (*Dictionnaire de droit international public*, edited by J. Salmon, Brussels, Bruylant, 2001, p. 765).

Similarly, the International Law Commission has written, in the commentary to Article 31 of its Draft Articles on Responsibility of States:

“Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed.” (Report of the International Law Commission on the work of its fifty-third session, 2001, United Nations document A/56/10, p. 226.)

6. The Court has taken a view along the same lines. Thus, on the subject of unilateral undertakings, of which, incidentally, it drew a comparison with the rule of *pacta sunt servanda*, the Court has written:

“Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected” (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 268 and 473; *id.*, *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 573; *id.*, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1988, p. 105).

In comparing unilateral undertakings to treaty commitments and declaring that States in both cases “are entitled to require that the obligation thus created be respected”, the Court upholds the *right* of States to performance of the obligation.

7. Accordingly, the obligation set out in Article 7, paragraph 1, of the 1984 Convention, in combination with that laid down in Article 5, paragraph 2, of the Convention, gives rise to a correlative right held by Belgium: as Belgium requested, by Note Verbale of 22 September 2005, that Senegal extradite Mr. Hissène Habré, and as Senegal has not acceded to Belgium’s extradition request, Belgium has the specific *right* to require Senegal to submit the case “to its competent authorities for the purpose of prosecution” (Art. 7, para. 1).

2. “[. . .] if so, what are their *legal nature, content and effects*?”

8. As regards the legal nature of these rights, these are, in the case of the 1984 Convention, rights of a conventional character. They are indeed founded on a treaty. The rule *pacta sunt servanda* applies in this respect (Vienna Convention on the Law of Treaties, Art. 26), naturally without prejudice to the application of customary international law with regard to the crimes alleged against Mr. Hissène Habré.

9. As regards the content of the rights referred to by the 1984 Convention, this consists in the present case of the right to have Senegal prosecute Mr. Hissène Habré if it does not extradite him, as indicated above (see para. 7).

10. As regards the effects of these rights, they confer a legal entitlement upon the States Parties to the Convention. In this instance, Belgium therefore possesses rights in relation to Senegal.

3. “[. . .] Who are the *subjects of those rights, States having nationals affected, or all States Parties to the aforementioned Convention*?”

11. All the States Parties to the Convention are entitled to obtain compliance with these rights in accordance with the rule *pacta sunt servanda* (see para. 8). This is a treaty obligation of Senegal in relation to all other States Parties to the Convention, naturally including Belgium. As stated by the International Law Commission in Article 48, paragraph 1 (a), of its Draft Articles on Responsibility of States, the obligation “is owed to a group of States”, which, in the present case, is the group of States Parties to the 1984 Convention².

In the case *Goiburú et al. v. Paraguay*, the Inter-American Court of Human Rights observed that all the States Parties to the American Convention on Human Rights should collaborate in good faith in the obligation to extradite or prosecute the perpetrators of crimes relating to human rights; it is interesting to note that, in order to illustrate this obligation, the Court refers to the 1984 Convention (see footnote 3):

“The Court therefore deems it pertinent to declare that the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based on these principles, a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory.”³

(*Note*: since the last sentence of the English translation of the above extract is ambiguous, reference should be made to the authentic Spanish text, which reads:

²See the ILC’s commentary on Art. 48 in *I.L.C. Report 2001*, United Nations doc. A/56/10, p. 320, para. 6.

³Inter-American Court of Human Rights, 22 September 2006, para. 132 and in particular footnote 87, which provides a full list of the relevant universal instruments, including the 1984 Convention; see also the separate opinion of Judge Cançado Trindade, paras. 67-68.

“En consecuencia, el mecanismo de garantía colectiva establecido bajo la Convención Americana, en conjunto con las obligaciones internacionales regionales y universales en la materia, vinculan a los Estados de la región a colaborar de buena fe en ese sentido, ya sea mediante la extradición o *el juzgamiento en su territorio* de los responsables de los hechos del presente caso.” (Emphasis added.)

All the States Parties to the 1984 Convention can therefore be regarded as possessing the rights deriving from that Convention. In other words, any State Party has the right to claim from Senegal “[c]essation of the internationally wrongful act” — in this instance, cessation of the breach of Article 7 — together with “assurances and guarantees of non-repetition” and “[p]erformance of the obligation of reparation” in the interest of the injured State or of the beneficiaries of the obligation breached (ILC, Draft Articles on Responsibility of States, Art. 48, para. 2).

12. Belgium has the status of an “injured State” (within the meaning of Art. 42 of the ILC Draft Articles on Responsibility of States), since the non-performance of the 1984 Convention affects it as a State Party to that Convention (ILC Draft Articles, Art. 42 (b)). In the present case, moreover, it has the status of a “specially” affected State, because of the criminal proceedings opened in Belgium against Mr. Hissène Habré (*idem*, Art. 42 (b) (i)).

The notion of a breach which “specially affects” a State, within the meaning of Art. 42 (b) (i) of the ILC Draft Articles, is analysed by the ILC as follows:

“Like article 60 (2) (b) of the Vienna Convention [on the Law of Treaties], subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered ‘injured’. This will have to be assessed on a case by case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.”⁴

In the present case, an analysis of the facts of the matter shows that Belgium is certainly a “specially affected” State: on the one hand, it is in Belgium that a criminal action has been brought against Mr. Hissène Habré, *inter alia* for crimes of torture; on the other, some of the victims are of Belgian nationality, which matches a rule of jurisdiction referred to in Article 5, paragraph 1 (c), of the 1984 Convention. It was following their complaints and the investigation carried out in Belgium that the latter requested Senegal to extradite Mr. Hissène Habré, on the basis of the 1984 Convention.

13. In conclusion, Belgium possesses the rights deriving from the 1984 Convention as a State Party to it, namely the right to see Mr. Hissène Habré prosecuted and tried in Senegal or, failing that, the right to obtain his extradition. Belgium is all the more entitled to secure compliance with these rights because it has received complaints filed by victims of acts of torture which are offences under the Convention, because some of the victims are Belgian, and because it has presented Senegal with a request for the extradition of Mr. Hissène Habré.

4. “[. . .] Whom are such rights opposable to, only the States concerned in a concrete case, or any State Party to the aforementioned Convention?”

14. As the 1984 Convention is a multilateral treaty, it is binding on all the States that are party to it.

⁴*ILC. Report 2001*, United Nations doc. A/56/10, p. 300, para. 12.

Since, by definition, “every treaty in force is binding upon *the parties to it*” (emphasis added) (Vienna Convention on the Law of Treaties, Art. 26), the rights set forth in the 1984 Convention are therefore opposable to *all* the States Parties to that Convention.

This applies all the more to Belgium, which as a specially affected State (see para. 12) has a specific right that is opposable to Senegal.
