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Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

ICJ Judgement of 20 July 2012

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I. FACTUAL AND PROCEDURAL BACKGROUND

While Mr Hissène Habré, the former president of Chad, resided in Senegal, Belgian nationals of Chadian origin filed a complaint, accusing Mr Habré of his acts of torture, crimes against humanity, and the crime of genocide during the years of his presidency. Thereafter, Belgium issued an international arrest warrant. Nevertheless, Senegal's Court of Appeal ruled that it could not "extend their jurisdiction" to crimes committed abroad by an alien against aliens (i.e. universal jurisdiction), as the Senegalese Code of Criminal Procedure does not offer jurisdiction in such circumstance.[1]

Thus, on 19 February 2009, Belgium instituted proceeding against Senegal before the International Court of Justice (ICJ) with its alleged breaches of obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and customary international law for the reason that Senegal failed to conduct preliminary inquiry and bring criminal proceedings against Mr Habré or to extradite him (aut dedere aut judicare).[2]

The ICJ in its judgement held that the Court has the jurisdiction to examine the dispute concerning the interpretation and application of Article 6(2) and Article 7(1) of the UNCAT and that these claims are admissible. Ultimately, holding that Senegal breached its obligations under Article 6(2) and 7(1) of the Convention.[3]

II. ARGUMENTS ON JURISDICTION AND ADMISSIBILTY

Senegal, in this case, objected to the jurisdiction and the admissibility of Belgium's claims. Senegal argued that Belgium is not entitled to invoke the international responsibility of Senegal for the alleged breaches of its obligations because none of the alleged victims was Belgian nationals at the time when the acts

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1 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgement, ICJ Reports 2012 ('Belgium v Senegal'), para 18.

2 Ibid, para 71.

3 Ibid, para 122.

were committed.[4] Belgium did not contest on this fact; however, they argued on three bases to bring their claims against Senegal. First, they claimed to be in a 'particular position' to request the extradition of Mr Habré under Article 5(2) of UNCAT.[5] Second, as they were the State party to the UNCAT, "irrespective of the nationality of the victims [i.e. despite that they are not an injured State in the sense of Article 42 of ARSIWA], they are entitled to claim performance of the obligation" as the specific obligations concerns with "protecting the collective interests of a group of States or the interests of the international community as a whole…"[6]. Third, Belgium claimed that they have the 'special interest' under the principle of passive personality, as the complaint was filed by Belgian of Chadian origin, which they distinguished themselves from other States to which the obligation is owed.[7]

III. FINDINGS ON JURISDICTION AND ADMISSIBILTY OF CLAIMS

Considering these arguments, the Court in question dealt with the issue of whether the mere position as a State party was adequate to establish standing (locus standi) before the Court. To be more precise, the question was whether the obligation to investigate and the obligation to prosecute or extradite under Article 6(2) and 7(1) of the UNCAT are considered as obligations erga omnes partes. To begin with, the Court explained obligations erga omnes partes as an obligation "owned by any State party to all the other States parties".[8] Moreover, with reference to the Barcelona Traction case,[9] the Court demonstrated that this obligation reflects Article 48(1)(a) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which recognises the 'collective interests' of the States parties.[10]

The Court interpreted Article 6(2) and 7(1) as obligations erga omnes partes on the following reasons. First, the States parties have the 'common interest' underlying in the performance of these obligations, which is the prevention of torture and perpetrators to not enjoy impunity.[11] Such interests refer to the 'shared values' recognised in the object and purpose of that Convention.[12] Second, it is the obligation that is owed towards every party and not to one specific party.[13] This means that such an obligation could be triggered without the establishment of the link between the States, including the nationality of the offender and the victim. With such reasons, the obligations were identified as obligations erga omnes partes, which was sufficient to establish Belgium's standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under the UNCAT.

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4 Ibid, para 64.
5 Ibid, para 65.
6 Belgium v. Senegal (Memorial of Kingdom of Belgium), para 5.16.
7 M Andenas and T Weatherall, ICJ: Questions Relating to The Obligation to Extradite or Prosecute (Belgium V. Senegal) (International and Comparative Law Quarterly, 2013) 757.
8 Belgium v. Senegal (n 2) para 68.
9 Ibid.
10 ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', ILC Ybk 2001/II, A/56/10 ('ARSIWA Commentary')126.
11 Belgium v. Senegal (n 9).
12 Ibid.
13 Ibid, paras 68-69.

IV. ASSESSMENT

One of the principal findings of the case is that the Court for the first time in its history recognised the obligations erga omnes partes as the basis of standing and admissibility. This innovative decision of the Court, however, in itself was non-unanimous and spurred a range of public debate amongst scholars. Indeed, this case was subsequently subjected to many criticisms, since accepting the jurisdiction without having the applicant State injured was an unparalleled legal notion.

A. Dissenting and Separate Opinions

Several judges, in this case, were dubious of the notion of obligation erga omnes partes as a basis of standing and admissibility. It was argued by Judge Xue in her dissenting opinion that the doctrine of obligation erga omnes partes goes beyond the scope of the UNCAT.[14] This is because the Convention does not require States to monitor other State's way of implementing the law (Article 17-20), or to make communications to the Committee Against Torture (Article 21).[15] If the obligations entail 'common interest' of all States, such communication procedures set in the Convention should not have been optional in nature.[16] Judge Xue further points out that States parties did not intend to create obligation erga omnes partes under Article 6(2) and 7(1), as parties have the right to make reservations in relation to Article 30(1) of the UNCAT.[17] This signifies that States parties which makes the reservation is not bound to the resolution to disputes under such provision, inter alia, the jurisdiction of the ICJ.[18] With such analysis, she reaches a well-founded conclusion that "[o]bviously, if the States parties had intended to create obligations erga omnes partes, … Article 30, paragraph 1, should have been made mandatory rather than optional for the States parties."[19]

Judge ad hoc Sur shared the same premise as Judge Xue, which he contends that this obligation is not in accordance with the intention of the States parties.[20] He underlines that it "cannot be presumed or inferred [that all provisions in the treaty enshrine the erga omnes character] from the presence of an erga omnes partes obligation therein." In support of his contention, he further notes that certain obligations are subject to reservation, which makes it incongruous with the feature of treaty obligation erga omnes partes.[21] Hence, in his view, the Court does not offer an adequate explanation as to erga omnes character of provisions,[22] where he cogently expresses that the obligation is formed as if "a rabbit out of a magic hat."[23]

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14 Belgium v. Senegal (Dissenting Opinion of Judge Xue), para 14.
15 Ibid, para 19.
16 Ibid.
17 Ibid, para 22.
18 Ibid.
19 Ibid, para 23.
20 Belgium v. Senegal (Separate Opinion of ad hoc Judge Sur), para 28.
21 Ibid, para 39.
22 Ibid, para 26.
23 Ibid, para 44.

In addition, Judge Skotnikov and Judge Owada propounded the view that this Court's judgement lacked authority to support their reasoning.[24] In their observation, Belgium's entitlement to this standing derives merely from its status as a State party to the treaty, and nothing else.[25]

These contentions concerning reservations to the provisions on procedural matters (reflecting intentions of the drafters to not incorporate the duties erga omnes partes) is not necessarily correct. In line with the wording of Judge Donoghue, the permission to "opt out of the jurisdiction of this Court… [is to] permit flexibility as to dispute resolution mechanisms."[26] Here, I share the same view as Judge Donoghue,[27] which she observes that procedural provisions that provides flexibility cannot be used as a ground to erode the erga omnes partes character of substantive obligations enshrined in the Convention. Furthermore, in support of this stance, a number of scholars argue that it is better to be consistent with Article 48 of the ARSIWA that recognises 'collective interest', since this new position is justified by policy considerations. In particular, by the evidence in the government comments to the ILC.[28] Hence, despite these dissenting opinions of judges are well-founded, the decision of the Court is justified and endorsed by State's opinions.

B. Express Provision under the UNCAT

The Court, in this case, accepted Belgium's standing based on obligation erga omnes partes, despite that it was not clearly stipulated in the Convention. Thus, this raised a question as to whether an express provision is required to establish locus standi. This debate originally stems from the divergence between the judgement rendered in South West Africa case. The Court in South West Africa did recognise that standing could be determined by a sufficient degree of 'legal interest', including mere status as a treaty party (that is comparable to 'common interest' referred in Belgium v Senegal).[29] Nevertheless, it has also held that such obligation must be expressly prescribed in the instrument as a matter of the 'rule of law',[30] which certainly conflicts with the judgement of Belgium v Senegal.

To this date, this inconsistency of the Court has been left unsolved. Nonetheless, it had led various scholars such as Professor Crawford,[31] Thirlway,[32] Shany[33] and the

24 Belgium v. Senegal (Dissenting Opinion of Judge Skotnikov), para 20.

25 Belgium v. Senegal (Declaration of Judge Owada), para 15; Belgium v. Senegal (Dissenting Opinion of Judge Skotnikov), para 3.

26 Belgium v. Senegal (Declaration of Judge Donoghue), para 16.

27 Ibid.

28 ILC, 'State Responsibility: Comments and observations received from Governments' (19 March – 28 June 2001) UN Doc A/CN.4/515.

29 South West Africa, Second Phase, Judgement, ICJ Reports 1966, para 44.

30 Ibid.

31 A Sullivan, Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony, (Taylor & Francis, 2017) 194; J Crawford, The ILC's ARSIWA: Completion of the Second Reading, (European Journal of International Law, 2001) 976; J Crawford, Fourth Report on State Responsibility, UN Doc A/CN.4/517.

32 H Thirlway, The Sources of International Law (2nd edn OUP, 2019) 173-74.

33 Y Shany, The Competing Jurisdictions of International Courts and Tribunals (OUP, 2004) 196.

International Law Commission (ILC)[34] to express their views that there is no need for express provision to establish standing. This approach is well-grounded, given that the judgement of South West Africa case dates back to 1966 where not many human rights treaties were introduced, and this issue was not much addressed during the drafting process of ARSIWA back then.[35] Thus, in this author's view, the judgement of Belgium v Senegal is a case that should be acclaimed for its contribution made to the progress of international law, in which the Court reversed its position from the past case and influenced scholarly opinions, particularly, the ILC. The Court did not only reverse its position, but also the Court instilled human rights treaties with 'sharp teeth' by recognising the status of the 'third parties' to bring its case before the Court without any special interest. Otherwise, there will be "many cases [where] no State would be in the position to make such a claim [against torture]."[36]

34 ARSIWA Commentary (n 11) 127.

35 P Saengkrai, Obligations Erga Omnes Partes And Standing Before The ICJ, (Faculty of Law, Thammasat University, 2017) 48.

36 Belgium v. Senegal (n 2), para 65.

V. SUBSEQUENT DEVELOPMENTS

In due course, the notion of the obligation erga omnes partes was further reflected in the Whaling in the Antarctic case, [37] which the Court accepted the standing based on protection of the common interest of the international law. It is interesting to note that in the Whaling in the Antarctic, the issue of locus standi was not disputed. Japan, as the Respondent State did not raise any objection as to Australia's standing before the Court in spite of the fact that Australia was a non-inured State. Indeed, it appears that the States and the Court have taken the same stance as the judgement in Belgium v Senegal, in which Australia's mere status as a State party to the International Convention for the Regulation of Whaling (ICRW) entitles Australia to have standing before the Court. According to Professor Crawford, "Australia invokes an obligation erga omnes partes …under the Whaling Convention" because Japan's whaling activities was "opposed by a 'strong reaction of the international community'" reflecting an international interest.[38] Notwithstanding that there is still a need for clarity on the status of the erga omnes partes, it can be concluded that the advancement on the concept of erga omnes standing under the landmark case of Belgium v Senegal had played a significant role in the progressive development of international law and continues to have major influence on the application of erga omnes partes as a basis of standing and admissibility of claims before the ICJ.

37 Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) [2014] ICJ Rep 234.
38 J Crawford, State Responsibility: The General Part (CUP, 2013) 373.