

Human rights — Torture — Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Articles 5(2) and 7 — International crimes in Chad — Obligations of Senegal under Convention — Whether Senegal having established jurisdiction over crimes of torture in its domestic law — Whether Senegal having submitted Mr Habré's case to its competent authorities for the purpose of prosecution — Whether Senegal violating Articles 5(2) and 7 of Convention

Relationship of international law and municipal law — Treaties — Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 — Senegalese Constitution and Code of Criminal Procedure — Whether Senegal failing to adopt necessary measures to establish jurisdiction over crimes of torture — Whether Senegal failing to submit Mr Habré's case to its competent authorities — Whether Senegal violating Articles 5(2) and 7 of Convention

GUENGUENG AND OTHERS *v.* SENEGAL

(Communication No 181/2001)

*United Nations Committee against Torture.*¹ 17 May 2006

SUMMARY:² *The facts:*—Mr Guengueng and six other Chadian complainants living in Chad (“the complainants”) claimed to be victims of Senegal’s violation of Articles 5(2)³ and 7⁴ of the Convention against Torture and

¹ The Committee against Torture was established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. During the thirty-sixth session, the members of the Committee were: Andreas Mavrommatis (Cyprus), Guibril Camara (Senegal), Claudio Grossman (Chile), Alexandre Kovalev (Russian Federation), Felice Gaer (United States), Saadia Belmir (Morocco), Fernando Marino (Spain), Nora Svaæss (Norway), Xuexian Wang (China) and Julio Prado Vallejo (Ecuador). Guibril Camara (Senegal) did not participate in the deliberations in this case.

For related proceedings see 177 ILR 22 and 59.

² Prepared by Ms Ryce Lee.

³ Article 5(2) of the Convention provided that: “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 Article 7 provided that: “1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (“the Convention”). They sought a declaration that Senegal had breached its obligations under the Convention in relation to the case of Mr Habré, who was the President of Chad between 1982 and 1990, and various forms of compensation.

The complainants claimed to have been tortured and ill-treated by agents of Chad who answered directly to Mr Habré. They also considered that the disappearance of the relatives of two complainants amounted to torture and other inhuman and degrading treatment for the disappeared persons and their relations. A report by the National Commission of Inquiry established by the Chadian Ministry of Justice estimated that 40,000 politically motivated murders and systemic acts of torture had been committed by the Habré regime.

The complainants contended that Senegal had violated Article 5(2) of the Convention as it had not implemented the necessary measures to establish jurisdiction over the crimes covered by the Convention. Article 79 of the Senegalese Constitution, as interpreted by the Senegalese Court of Cassation in its ruling of 20 March 2001, prevented the direct application of international treaties where compliance with the Convention required prior legislative measures to be taken. Article 669 of the Senegalese Code of Criminal Procedure also precluded proceedings from being brought against foreigners in Senegal for acts committed abroad.

Relying on the *Pinochet* case in the United Kingdom,⁵ the complainants argued that Senegal had also violated Article 7 of the Convention since it had neither prosecuted nor extradited Mr Habré. If Senegal was unwilling to prosecute or extradite him, the complainants claimed that they were entitled to compensation for injury suffered in accordance with Article 14 of the Convention, and for the costs incurred in the proceedings that they had brought before the Senegalese courts.

Senegal maintained that Mr Habré’s case had been dismissed by the Senegalese courts as the charges against him had no basis in law and the offences were time-barred. Although it admitted that its legislation required amendment, Senegal argued that there was no specific time frame for this. Moreover, it claimed that the process of legislating to establish universal jurisdiction over crimes of torture was complex considering Senegal’s status as a developing State and the ability of its judicial system to apply the rule of law.

On 13 November 2001, the UN Committee against Torture (“the Committee”) declared that the complainants’ communication was admissible

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.”

⁵ See 119 ILR 1. The judgment of the House of Lords of 24 March 1999 in *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* can be found at 119 ILR 135.

since Mr Habré's case had not been examined under another international settlement procedure and the communication had not been abusive or incompatible with the Convention. Rejecting Senegal's arguments to the contrary, the Committee found that the Chadian complainants had accepted Senegalese jurisdiction to pursue domestic proceedings against Mr Habré, thereby subjecting them to Senegal's jurisdiction within the meaning of Article 22 of the Convention.⁶

Held:—Senegal had violated Articles 5(2) and 7 of the Convention.

(1) Senegal had violated Article 5(2) of the Convention by failing to adopt the necessary measures to establish jurisdiction over crimes of torture. While the Senegalese courts had dealt with several complaints against Mr Habré, they had not ruled on the merits of the allegations. Senegal did not contest that it had not taken the necessary measures under Article 5(2); the Senegalese Court of Cassation also held the same view. Senegal had exceeded the reasonable time frame within which it should have complied with its obligation under the Convention (paras. 9.3-9.6).

(2) Senegal had violated Article 7 of the Convention by failing to submit Mr Habré's case to its competent authorities. The obligation to prosecute alleged perpetrators of torture was not dependent on the prior existence of an extradition request; extradition was an alternative to prosecution, if an extradition request had been made. Senegal could not invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with its obligations under the Convention. It should have prosecuted Mr Habré at least by the time complaints were submitted to its courts in January 2000, unless there had been insufficient evidence. Further, Senegal had refused to comply with Belgium's extradition request, violating Article 7 of the Convention (paras. 9.7-9.11).

(3) Senegal was obliged to adopt the necessary measures, including legislative measures, to establish jurisdiction over crimes of torture and other offences under the Convention, and to submit the case to its competent authorities for the purpose of prosecution if it did not extradite him (para. 10).

The text of the decision of the Committee commences on the following page.

⁶ Article 22 of the Convention provided that: "1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

...

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION¹

1.1 The complainants are Suleymane Guengueng, Zakaria Fadoul Khidir, Issac Haroun, Younous Mahadjir, Valentin Neatobet Bidi, Ramadane Souleymane and Samuel Togoto Lamaye (hereinafter “the complainants”), all of Chadian nationality and living in Chad. They claim to be victims of a violation by Senegal of article 5, paragraph 2, and article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the Convention”).

1.2 Senegal ratified the Convention on 21 August 1986 and made the declaration under article 22 of the Convention on 16 October 1996.

1.3 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 20 April 2001. At the same time, the Committee, acting under article 108, paragraph 9, of its rules of procedure, requested the State party, as an interim measure, not to expel Hissène Habré and to take all necessary measures to prevent him from leaving the territory other than under an extradition procedure. The State party acceded to this request.

The facts as submitted by the complainants

2.1 Between 1982 and 1990, during which period Hissène Habré was President of Chad, the complainants were purportedly tortured by agents of the Chadian State answerable directly to President Hissène Habré. The acts of torture committed during this period formed the subject of a report by the National Commission of Inquiry established by the Chadian Ministry of Justice; according to that report 40,000 political murders and systematic acts of torture were committed by the Habré regime.

2.2 The complainants have submitted to the Committee a detailed description of the torture and other forms of ill-treatment that they claim to have suffered. Moreover, relatives of two of them, Valentin Neatobet Bidi and Ramadane Souleymane, have disappeared: on the basis of developments in international law and the case law of various international bodies, the complainants consider this equivalent to

¹ In accordance with rule 103 of the Committee’s rules of procedure, Mr Guibril Camara did not take part in the Committee’s deliberations on this case.

torture and other inhuman and degrading treatment, both for the disappeared persons and, in particular, for their relations.

2.3 After being ousted by the current President of Chad, Idriss Déby, in December 1990, Hissène Habré took refuge in Senegal, where he has since resided. In January 2000, the complainants lodged a complaint against him with an examining magistrate in Dakar. On 3 February 2000, the examining magistrate charged Hissène Habré with being an accomplice to acts of torture, placed him under house arrest and opened an inquiry against a person or persons unknown for crimes against humanity.

2.4 On 18 February 2000, Hissène Habré applied to the Indictment Division of the Dakar Court of Appeal for the charge against him to be dismissed. The complainants consider that, thereafter, political pressure was brought to bear to influence the course of the proceedings. They allege in particular that, following this application, the examining magistrate who had indicted Hissène Habré was transferred from his position by the Supreme Council of Justice and that the President of the Indictment Division before which the appeal of Hissène Habré was pending was transferred to the Council of State.

2.5 On 4 July 2000, the Indictment Division dismissed the charge against Hissène Habré and the related proceedings on the grounds of lack of jurisdiction, affirming that “Senegalese courts cannot take cognizance of acts of torture committed by a foreigner outside Senegalese territory, regardless of the nationality of the victims: the wording of article 669 of the Code of Criminal Procedure excludes any such jurisdiction.” Following this ruling, the Special Rapporteurs on the question of torture and on the independence of judges and lawyers of the United Nations Commission on Human Rights expressed their concerns in a press release dated 2 August 2000.²

2.6 On 7 July 2000, the complainants filed an appeal with Senegal’s Court of Cassation against the ruling of the Indictment Division, calling for the proceedings against Hissène Habré to be reopened. They maintained that the ruling of the Indictment Division was contrary to

² According to the press release, “[t]he Special Rapporteur on the independence of judges and lawyers, Mr Dato Param Kumaraswamy, and the Special Rapporteur on the question of torture, Sir Nigel Rodley, have expressed their concern to the Government of Senegal over the circumstances surrounding the recent dismissal of charges against Hissène Habré, the former President of Chad . . . The Special Rapporteurs reminded the Government of Senegal of its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which it is party. They also draw its attention to the resolution adopted this year by the Commission on Human Rights on the question of torture (resolution 2000/43), in which the Commission stressed the general responsibility of all States to examine all allegations of torture and to ensure that those who encourage, order, tolerate or perpetrate such acts be held responsible and severely punished.”

the Convention against Torture and that a domestic law could not be invoked to justify failure to apply the Convention.

2.7 On 20 March 2001, the Senegalese Court of Cassation confirmed the ruling of the Indictment Division, stating *inter alia* that “no procedural text confers on Senegalese courts a universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] . . . when these acts have been committed outside Senegal by foreigners; the presence in Senegal of Hissène Habré cannot in itself justify the proceedings brought against him”.

2.8 On 19 September 2005, after four years of investigation, a Belgian judge issued an international arrest warrant against Hissène Habré, charging him with genocide, crimes against humanity, war crimes, torture and other serious violations of international humanitarian law. On the same date, Belgium made an extradition request to Senegal, citing, *inter alia*, the Convention against Torture.

2.9 In response to the extradition request, the Senegalese authorities arrested Hissène Habré on 15 November 2005.

2.10 On 25 November 2005, the Indictment Division of the Dakar Court of Appeal stated that it lacked jurisdiction to rule on the extradition request. Nevertheless, on 26 November, the Senegalese Minister of the Interior placed Hissène Habré “at the disposal of the President of the African Union” and announced that Hissène Habré would be expelled to Nigeria within 48 hours. On 27 November, the Senegalese Minister for Foreign Affairs stated that Hissène Habré would remain in Senegal and that, following a discussion between the Presidents of Senegal and Nigeria, it had been agreed that the case would be brought to the attention of the next Summit of Heads of State and Government of the African Union, which would be held in Khartoum on 23 and 24 January 2006.

2.11 At its Sixth Ordinary Session, held on 24 January 2006, the Assembly of the African Union decided to set up a committee of eminent African jurists, who would be appointed by the Chairman of the African Union in consultation with the Chairman of the African Union Commission, to consider all aspects and implications of the Hissène Habré case and the possible options for his trial, and report to the African Union at its next ordinary session in June 2006.

The complaint

3.1 The complainants allege a violation by Senegal of article 5, paragraph 2, and article 7 of the Convention and seek in this regard various forms of compensation.

Violation of article 5, paragraph 2, of the Convention

3.2 The complainants point out that, in its ruling of 20 March 2001, the Court of Cassation stated that “article 79 of the Constitution [which stipulates that international treaties are directly applicable within the Senegalese legal order and can accordingly be invoked directly before Senegalese courts] cannot apply when compliance with the Convention requires prior legislative measures to be taken by Senegal” and “article 669 of the Code of Criminal Procedure [which enumerates the cases in which proceedings can be brought against foreigners in Senegal for acts committed abroad] has not been amended”. They also note that, while the State party has adopted legislation to include the crime of torture in its Criminal Code in accordance with article 4 of the Convention, it has not adopted any legislation relating to article 5, paragraph 2, despite the fact that this provision is the “cornerstone” of the Convention, referring in this connection to the *travaux préparatoires*.

3.3 Moreover, the complainants point out, whereas the Court of Cassation states that “the presence in Senegal of Hissène Habré cannot in itself justify the proceedings”, it is precisely the presence of the offender in Senegalese territory that constitutes the basis under article 5 of the Convention for establishing the jurisdiction of the country concerned.

3.4 The complainants consider that the ruling of the Court of Cassation is contrary to the main purpose of the Convention and to the assurance given by the State party to the Committee against Torture that no internal legal provision in any way hinders the prosecution of torture offences committed abroad.³

3.5 The complainants note that, irrespective of article 79 of the Constitution, under which the Convention is directly an integral part of internal Senegalese legislation, it was incumbent on the authorities of the State party to take any additional legislative measures necessary to prevent all ambiguities such as those pointed out by the Court of Cassation.

3.6 The complainants observe that members of the Committee regularly emphasize the need for States parties to take appropriate legislative measures to establish universal jurisdiction in cases of torture. During its consideration of the second periodic report submitted by the State party under article 19 of the Convention, the Committee underlined the importance of article 79 of the Senegalese Constitution,

³ See the second periodic report of Senegal to the Committee against Torture, CAT/C/17/Add.14, para. 42.

stressing that it should be implemented unreservedly.⁴ The State party had, moreover, expressly affirmed in its final statement that it “intended to honour its commitments, in the light of the Committee’s conclusions and in view of the primacy of international law over internal law”.⁵

3.7 The complainants therefore consider that the State party’s failure to make its legislation comply with article 5, paragraph 2, of the Convention constitutes a violation of this provision.

Violation of article 7 of the Convention

3.8 On the basis of several concordant opinions expressed by members of the British House of Lords in the *Pinochet* case, the complainants argue that the essential aim of the Convention is to ensure that no one suspected of torture can evade justice simply by moving to another country and that article 7 is precisely the expression of the principle *aut dedere aut punire*, which not only allows but obliges any State party to the Convention to declare it has jurisdiction over torture, wherever committed. Similarly, the complainants refer to Cherif Bassiouni and Edward Wise, who maintain that article 7 expresses the principle *aut dedere aut judicare*.⁶ They also cite a legal opinion according to which “the Convention’s main jurisdictional feature is thus that it does not impose a solely legislative and territorial obligation, in the manner of previous human rights conventions, drawing as it does on the models of collective security of Tokyo and The Hague, dominated by the principle of jurisdictional freedom, *aut dedere aut prosecute*, as well as by the obligation to prosecute”.⁷

3.9 The complainants stress that the Committee itself, when considering the third periodic report of the United Kingdom concerning the *Pinochet* case, recommended “initiating criminal proceedings in England, in the event that the decision is made not to extradite him. This would satisfy the State party’s obligations under articles 4 to 7 of the Convention and article 27 of the Vienna Convention on the Law of Treaties of 1969.”⁸

⁴ See the concluding observations of the Committee against Torture, A/51/44, para. 117.

⁵ CAT/C/SR.249, para. 44.

⁶ Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, 1997, p. 159.

⁷ Marc Henzelin, *Le Principe de l’universalité en droit pénal international. Droits et obligations pour les Etats de poursuivre et de juger selon le principe de l’universalité*, Helbing & Lichtenhahn, ed. Bruylant, Basle/Brussels, 2000, p. 349.

⁸ Concluding observations of the Committee against Torture, 17 November 1998, A/54/44, para. 77(f).

3.10 While in its second periodic report to the Committee it described in detail the mechanism for implementing article 7 in its territory, the State party has neither prosecuted nor extradited Hissène Habré, and this the complainants consequently regard as a violation of article 7 of the Convention.

Compensation

3.11 The complainants state that they have been working for over 10 years to prepare a case against Hissène Habré and that the latter's presence in the State party together with the existence of international commitments binding upon Senegal have been decisive factors in the institution of proceedings against him. The decision by the authorities of the State party to drop these proceedings has therefore caused great injury to the complainants, for which they are entitled to seek compensation.

3.12 In particular, the complainants request the Committee to find that:

- By discontinuing the proceedings against Hissène Habré, the State party has violated article 5, paragraph 2, and article 7 of the Convention;
- The State party should take all necessary steps to ensure that Senegalese legislation complies with the obligations deriving from the above-mentioned provisions. The complainants note in this connection that, while the findings of the Committee are only declaratory in character and do not affect the decisions of the competent national authorities, they also carry with them “a responsibility on the part of the State to find solutions that will enable it to take all necessary measures to comply with the Convention”,⁹ measures that may be political or legislative;
- The State party should either extradite Hissène Habré or submit the case to the competent authorities for the institution of criminal proceedings;
- If the State party neither tries nor extradites Hissène Habré, it should compensate the complainants for the injury suffered, by virtue inter alia of article 14 of the Convention. The complainants also consider that, if necessary, the State party should itself pay this compensation in lieu of Hissène Habré, following

⁹ Communication No 34/1995 *Seid Mortesa v. Switzerland*, CAT/C/18/D/34/1995, para. 11.

the principle established by the European Court of Human Rights in the case of *Osman v. United Kingdom*;¹⁰

- The State party should compensate the complainants for the costs they have incurred in the proceedings in Senegal; and
- Pursuant to article 111, paragraph 5, of the Committee's rules of procedure, the State party should inform the Committee within 90 days of the action it has taken in response to the Committee's views.

The State party's observations on admissibility

4. On 19 June 2001, the State party transmitted to the Committee its observations on the admissibility of the communication. It maintains that the communication could be considered by the Committee only if the complainants were subject to the jurisdiction of Senegal. The torture referred to by the complainants was suffered by nationals of Chad and is presumed to have been committed in Chad by a Chadian. The complainants are not, therefore, subject to the jurisdiction of the State party within the meaning of article 22, paragraph 1, of the Convention since, under Senegalese law, in particular article 699 of the Code of Criminal Procedure, a complaint lodged in Senegal against such acts cannot be dealt with by the Senegalese courts, whatever the nationality of the victims. The State party is consequently of the opinion that the communication should be declared inadmissible.

The complainants' comments

5.1 In a letter dated 19 July 2001, the complainants first stress that, contrary to what is indicated by the State party, the substance of the alleged violation by Senegal is not the torture they underwent in Chad but the refusal of the Senegalese courts to act upon the complaint lodged against Hissène Habré. The incidents of torture were presented to the Committee solely for the purpose of describing the background to the complaints lodged in Senegal.

5.2 The complainants go on to observe that the State party's interpretation of the expression "subject to its jurisdiction", appearing in article 22 of the Convention, would effectively render any appeal to the Committee [against] Torture meaningless.

¹⁰ ECHR/87/1997/871/1083, 28 October 1998.