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COMMITTEE AGAINST TORTURE
Thirty-sixth session
1-19 May 2006

DECISION

Communication No. 181/2001

Submitted by:	Suleymane Guengueng et al. (represented by counsel)
Alleged victims:	The complainants
State party:	Senegal
Date of complaint:	18 April 2001
Date of this decision:	17 May 2006

[ANNEX]

* Made public by decision of the Committee against Torture.

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Annex

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22, PARAGRAPH 7, OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Thirty-sixth session

concerning

Communication No. 181/2001

Submitted by: Suleymane Guengueng et al. (represented by counsel)

Alleged victims: The complainants

State party: Senegal

Date of complaint: 18 April 2001

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 17 May 2006,

Having concluded its consideration of communication No. 181/2001, submitted to the Committee against Torture by Suleymane Guengueng et al. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all the information made available to it by the complainants and the State party,

Adopts the following:

Decision of the Committee against Torture under article 22 of the Convention[1]

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 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 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, 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 prosequi*, 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]

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 the principle established by the European Court of Human Rights in the case of *Osman v. the 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 on Torture meaningless.

5.3 In this connection, the complainants point out that article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights is drafted in the same terms as article 22 of the Convention and has on several occasions been discussed by the Human Rights Committee, which has interpreted the clause in an objective, functional manner: an individual should be considered subject to the jurisdiction of a State if the alleged violations result from an action by that State. It matters little whether the author of the communication is, for example, a national of that State or resides in its territory.[11] In the *Ibrahima Gueye et al. v. France* case, the complainants, of Senegalese nationality and living in Senegal, were found by the Human Rights Committee to be subject to French jurisdiction in the matter of pensions payable to retired soldiers of Senegalese nationality who had served in the French army prior to the independence of Senegal, although the authors were not generally subject to French jurisdiction.[12] The fact of being subject to the jurisdiction of a State within the meaning of article 22 of the Convention must be determined solely on the basis of consideration of the facts alleged in the complaint.[13]

5.4 It follows, in the present case, that the complainants should be considered subject to the jurisdiction of the State party inasmuch as the facts alleged against Senegal under the Convention concern judicial proceedings before the Senegalese courts. Thus, contrary to the contention of the State party, it matters little that the torture occurred in another country or that

the victims are not Senegalese nationals. To establish that the complainants are subject to Senegalese jurisdiction in the present instance, one has only to establish that the communication concerns acts that fell under Senegal's jurisdiction, since as only Senegal can decide whether to continue with the legal proceedings instituted by the complainants in Senegal. By instituting proceedings in the Senegalese courts, the complainants came under the jurisdiction of the State party for the purposes of those proceedings.

5.5 The complainants also make the subordinate point that, under Senegalese law, foreigners instituting judicial proceedings in the State party must accept Senegalese jurisdiction. This shows that, even if Senegal's restrictive interpretation is accepted, the complainants do indeed come under the State party's jurisdiction.

5.6 Lastly, the authors argue that the State party cannot invoke domestic law to claim that they are not subject to its jurisdiction since that would be tantamount to taking advantage of its failure to comply with article 5, paragraph 2, of the Convention, under which States parties are obliged to take such measures as may be necessary to establish their jurisdiction over the offences referred to in article 4 of the Convention. In invoking this argument, the State party is disregarding both customary law and international law. The principle of *nemo auditur propriam turpitudinem allegans* is applied in most legal systems and prevents anyone asserting a right acquired by fraud. Moreover, under article 27 of the Vienna Convention on the Law of Treaties, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The complainants point out that the Vienna Convention thus reaffirms the principle that, regardless of the arrangements under internal law for the implementation of a treaty at the national level, such arrangements cannot detract from the State's obligation at an international level to ensure the implementation of and assume international responsibility for the treaty.

The Committee's decision on admissibility

6.1 At its twenty-seventh session, the Committee considered the admissibility of the complaint. It ascertained that the matter had not been and was not being examined under another procedure of international investigation or settlement, and considered that the communication did not constitute an abuse of the right to submit such communications and was not incompatible with the provisions of the Convention.

6.2 The Committee took note of the State party's argument that the communication should be found inadmissible since the complainants are not subject to Senegal's jurisdiction within the meaning of article 22 of the Convention.

6.3 To establish whether a complainant is effectively subject to the jurisdiction of the State party against which a communication has been submitted within the meaning of article 22, the Committee must take into account various factors that are not confined to the author's nationality. The Committee observes that the alleged violations of the Convention concern the refusal of the Senegalese authorities to prosecute Hissène Habré despite their obligation to establish universal jurisdiction in accordance with article 5, paragraph 2, and article 7 of the Convention. The Committee also observes that the State party does not dispute that the authors were the plaintiffs in the proceedings brought against Hissène Habré in Senegal. Moreover, the

Committee notes, the complainants in this case accepted Senegalese jurisdiction in order to pursue the proceedings against Hissène Habré which they instituted. On the basis of these elements, the Committee is of the opinion that the authors are indeed subject to the jurisdiction of Senegal in the dispute to which this communication refers.

6.4 The Committee also considers that the principle of universal jurisdiction enunciated in article 5, paragraph 2, and article 7 of the Convention implies that the jurisdiction of States parties must extend to *potential* complainants in circumstances similar to the complainants'.

6.5 Accordingly, the Committee against Torture declared the communication admissible on 13 November 2001.

The State party's observations on the merits

7.1 The State party transmitted its observations on the merits by note verbale dated 31 March 2002.

7.2 The State party points out that, in accordance with the rules of criminal procedure, judicial proceedings in Senegal opened on 27 January 2000 with an application from the public prosecutor's office in Dakar for criminal proceedings to be brought against Hissène Habré as an accessory to torture and acts of barbarism and against a person or persons unknown for torture, acts of barbarism and crimes against humanity. Hissène Habré was charged on both counts on 3 February 2000 and placed under house arrest. On 18 February 2000, Hissène Habré submitted an application for the proceedings to be dismissed on the grounds that the Senegalese courts were not competent, that the charges had no basis in law, and that the alleged offences were time-barred.

7.3 On 4 July 2000, the Indictment Division of the Court of Appeal dismissed the proceedings. On 20 March 2001, the Court of Cassation rejected the appeal lodged by the complainants (plaintiffs). That ruling, handed down by the highest court in Senegal, thus brought the proceedings to an end.

7.4 Regarding the allegations that the executive put pressure on the judiciary, in particular by transferring and/or removing the judges trying the case, namely the chief examining magistrate and the President of the Indictment Division, the State party reminds the Committee that the President of the Indictment Division is *primus inter pares* in a three-person court and is thus in no position to impose his or her views. The other two members of the Indictment Division were not affected by the reassignment of judges, which in any case was an across-the-board measure.

7.5 It is also important to bear in mind that any country is free to organize its institutions as it sees fit in order to ensure their proper functioning.

7.6 The independence of the judiciary is guaranteed by the Constitution and the law. One such guarantee is oversight of the profession and rules of conduct of the judiciary by the Higher Council of the Judiciary, whose members are judges, some of them elected and others appointed. Appeals may be lodged when the appointing authority is accused of having violated the principle of the independence of the judiciary.

7.7 A basic element of judicial independence is that judges may appeal against decisions affecting them, and that the executive is duty-bound not to interfere in the work of the courts. Judges' right of appeal is not merely theoretical.

7.8 The Council of State did indeed revoke a number of judges' appointments on 13 September 2001, considering that they failed to apply a basic safeguard designed to protect trial judges and thereby ensure their independence, namely the obligation to obtain people's prior consent before assigning them to new positions, even by means of promotion.

7.9 It must be acknowledged that the Senegalese judiciary is genuinely independent. Criminal proceedings necessarily culminate in decisions which, unfortunately, cannot satisfy all the parties. The judicial investigation is a component of criminal procedure and, by its very nature, is subject to all the safeguards provided for in international instruments. In the present case, the parties benefited from conditions recognized as ensuring fair dispensation of justice. Where no legal provision exists, proceedings cannot be pursued without violating the principle of legality; that was confirmed by the Court of Cassation in its ruling of 20 March 2001.

On the violation of article 5, paragraph 2, of the Convention

7.10 In its ruling on the Hissène Habré case, the Court of Cassation considered that "duly ratified treaties or agreements have, once they are published, an authority higher than that of laws, subject to implementation, in the case of each agreement or treaty, by the other party", and that the Convention cannot be applied as long as Senegal has not taken prior legislative measures. The Court adds that ratification of the Convention obliges each State party to take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4, or to extradite perpetrators of torture.

7.11 Proceedings were brought against Hissène Habré. However, since the Convention against Torture is not self-executing, Senegal, in order to comply with its commitments, promulgated Act No. 96-16 of 28 August 1996 enacting article 295 of the Criminal Code. The principle *aut dedere aut judicare* comprises the obligation to prosecute or to extradite in an efficient and fair manner. In this regard, Senegalese legislators have endorsed the argument of Professor Bassiouni, according to whom "[t]he obligation to prosecute or extradite must, in the absence of a specific convention stipulating such an obligation, and in spite of specialists' arguments to this effect, be proved to be part of customary international law".

7.12 Pursuant to article 4 of the Convention, torture is classified in the Senegalese Criminal Code as an international crime arising from *jus cogens*. It should be noted that Senegal is aware of the need to amend its legislation; however, under the Convention a State party is not bound to meet its obligations within a specific time frame.

On the violation of article 7 of the Convention

7.13 Since the Convention is not self-executing, in order to establish universal jurisdiction over acts of torture it is necessary to pass a law establishing the relevant procedure and substantive rules.

7.14 While the Committee has stressed the need for States parties to take appropriate legislative measures to ensure universal jurisdiction over crimes of torture, the manner in which this procedure is accomplished cannot be dictated. Senegal is engaged in a very complex process that must take account of its status as a developing State and the ability of its judicial system to apply the rule of law.

7.15 The State party points out that the difficulty of ensuring the absolute application of universal jurisdiction is commonly acknowledged. It is therefore normal to provide for different stages of its application.

7.16 However, the absence of domestic codification of universal jurisdiction has not allowed Hissène Habré complete impunity. Senegal applies the principle *aut dedere aut judicare*. Any request for judicial assistance or cooperation is considered benignly and granted insofar as the law permits, particularly when the request relates to the implementation of an international treaty obligation.

7.17 In the case of Hissène Habré, Senegal is applying article 7 of the Convention. The obligation to extradite, unless raised at another level, has never posed any difficulties. Consequently, if a request is made for application of the other option under the principle *aut dedere aut judicare*, there is no doubt that Senegal will fulfil its obligations.

On the request for financial compensation

7.18 In violation of the principle *Electa una via non datur recursus ad alteram* (once a course of action is chosen, there is no recourse to another), the complainants have also instituted proceedings against Hissène Habré in the Belgian courts. The State party believes that, in the circumstances, to ask Senegal to consider financial compensation would be a complete injustice.

7.19 The Belgian Act of 16 June 1993 (as amended by the Act of 23 April 2003) relating to the suppression of serious violations of international humanitarian law introduces significant departures from Belgian criminal law in both procedure and substance. A Belgian examining magistrate has been assigned, and pretrial measures have been requested, just as they had been in Senegal. The State party maintains that it is advisable to let these proceedings follow their course before considering compensation of any kind.

Observation of the complainants on the merits

8.1 In a letter dated 1 July 2002, the complainants submitted their observations on the merits.

On the violation of article 5, paragraph 2, of the Convention

8.2 With regard to the State party's argument that there is no specific time frame for complying with its obligations under the Convention, the complainants' principal contention is that the State party was bound by the Convention from the date of its ratification.

8.3 According to article 16 of the Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"), "unless the treaty otherwise provides, instruments of ratification,

acceptance, approval or accession establish the consent of a State to be bound by a treaty upon: […] (b) their deposit with the depositary […]". The *travaux préparatoires* relating to this provision confirm that the State party is immediately bound by the obligations arising from the treaty, from the moment the instrument of ratification is deposited.

8.4 According to the complainants, the State party's arguments call into question the very meaning of the act of ratification and would lead to a situation in which no State would have to answer for a failure to comply with its treaty obligations.

8.5 With regard to the specific legislative measures that a State must take in order to meet its treaty obligations, the complainants maintain that the manner in which the State in question fulfils its obligations is of little importance from the standpoint of international law. Moreover, they believe that international law is moving towards the elimination of the formalities of national law relating to ratification, on the principle that the norms of international law should be considered binding in the internal and international legal order as soon as a treaty has entered into force. The complainants add that the State party could have taken the opportunity to amend its national legislation even before it ratified the Convention.

8.6 Finally, the complainants recall that article 27 of the Vienna Convention prohibits the State party from invoking the provisions of its internal law as a justification for its failure to perform its treaty obligations. This provision has been interpreted by the Committee on Economic, Social and Cultural Rights as an obligation for States to "modify the domestic legal order as necessary in order to give effect to their treaty obligations".[14]

8.7 As a subsidiary argument, the complainants maintain that, even if one considers that the State party was not bound by its obligations from the moment the treaty was ratified, it has committed a violation of article 5 by not adopting appropriate legislation to comply with the Convention within a reasonable time frame.

8.8 Article 26 of the Vienna Convention establishes the obligation of parties to perform their obligations under international treaties in good faith; the complainants point out that, since it ratified the Convention Against Torture on 21 August 1986, the State party had 15 years before the submission of the present communication to implement the Convention, but did not do so.

8.9 In this regard, the Committee, in its concluding observations on the second periodic report of Senegal, had already recommended that "the State party should, during its current legislative reform, consider introducing explicitly in national legislation the following provisions: (a) The definition of torture set forth in article 1 of the Convention and the classification of torture as a general offence, in accordance with article 4 of the Convention, which would, inter alia, permit the State party to exercise universal jurisdiction as provided in articles 5 et seq. of the Convention; […]".[15] The State party has not followed up this recommendation and has unreasonably delayed adoption of the legislation necessary for implementing the Convention.

On the violation of article 7 of the Convention

8.10 With regard to the argument that article 7 has not been violated because the State was prepared, if necessary, to extradite Hissène Habré, the complainants maintain that the obligation under article 7 to prosecute Hissène Habré is not linked to the existence of an extradition request.

8.11 The complainants appreciate the fact that Senegal was prepared to extradite Hissène Habré and in this connection point out that on 27 September 2001 President Wade had stated that "if a country capable of holding a fair trial - we are talking about Belgium - wishes to do so, I do not see anything to prevent it". Nevertheless, this suggestion was purely hypothetical at the time of the present observations since no extradition request had yet been made.

8.12 On the basis of a detailed examination of the *travaux préparatoires*, the complainants refute the argument that the State party appears to be propounding, namely that there would be an obligation to prosecute under article 7 only after an extradition request had been made and refused. They also condense long passages from an academic work[16] to demonstrate that the State's obligation to prosecute a perpetrator of torture under article 7 does not depend on the existence of an extradition request.

On the request for financial compensation

8.13 The complainants reject the State party's claim that they have instituted proceedings in Belgian courts. It is, in fact, other former victims of Hissène Habré who have applied to the Belgian courts. The complainants are not parties to those proceedings.

8.14 The complainants also maintain that there is no risk of double compensation because Hissène Habré can be tried only in one place.

The Committee's considerations on the merits

9.1 The Committee notes, first of all, that its consideration on the merits has been delayed at the explicit wish of the parties because of judicial proceedings pending in Belgium for the extradition of Hissène Habré.

9.2 The Committee also notes that, despite its note verbale of 24 November 2005 requesting the State party to update its observations on the merits before 31 January 2006, the State party has not acceded to that request.

9.3 On the merits, the Committee must determine whether the State party violated article 5, paragraph 2, and article 7 of the Convention. It finds - and this has not been challenged - that Hissène Habré has been in the territory of the State party since December 1990. In January 2000, the complainants lodged with an examining magistrate in Dakar a complaint against Hissène Habré alleging torture. On 20 March 2001, upon completion of judicial proceedings, the Court of Cassation of Senegal ruled 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". The courts of the State party have not ruled on the merits of the allegations of torture that the complainants raised in their complaint.

9.4 The Committee also notes that, on 25 November 2005, the Indictment Division of the Dakar Court of Appeal stated that it lacked jurisdiction to rule on Belgium's request for the extradition of Hissène Habré.

9.5 The Committee recalls that, in accordance with article 5, paragraph 2, of the Convention, "each State Party shall […] 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 […]". It notes that, in its observations on the merits, the State party has not contested the fact that it had not taken "such measures as may be necessary" in keeping with article 5, paragraph 2, of the Convention, and observes that the Court of Cassation itself considered that the State party had not taken such measures. It also considers that the reasonable time frame within which the State party should have complied with this obligation has been considerably exceeded.

9.6 The Committee is consequently of the opinion that the State party has not fulfilled its obligations under article 5, paragraph 2, of the Convention.

9.7 The Committee recalls that, under article 7 of the Convention, "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". It notes that the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished.

9.8 The Committee considers that the State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with these obligations under the Convention. It is of the opinion that the State party was obliged to prosecute Hissène Habré for alleged acts of torture unless it could show that there was not sufficient evidence to prosecute, at least at the time when the complainants submitted their complaint in January 2000. Yet by its decision of 20 March 2001, which is not subject to appeal, the Court of Cassation put an end to any possibility of prosecuting Hissène Habré in Senegal.

9.9 Consequently and notwithstanding the time that has elapsed since the initial submission of the communication, the Committee is of the opinion that the State party has not fulfilled its obligations under article 7 of the Convention.

9.10 Moreover, the Committee finds that, since 19 September 2005, the State party has been in another situation covered under article 7, because on that date Belgium made a formal

extradition request. At that time, the State party had the choice of proceeding with extradition if it decided not to submit the case to its own judicial authorities for the purpose of prosecuting Hissène Habré.

9.11 The Committee considers that, by refusing to comply with the extradition request, the State party has again failed to perform its obligations under article 7 of the Convention.

9.12 The Committee against Torture, acting under article 22, paragraph 7, of the Convention, concludes that the State party has violated article 5, paragraph 2, and article 7 of the Convention.

10. In accordance with article 5, paragraph 2, of the Convention, the State party is obliged to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts referred to in the present communication. Moreover, under article 7 of the Convention, the State party is obliged to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since Belgium has made an extradition request, to comply with that request, or, should the case arise, with any other extradition request made by another State, in accordance with the Convention. This decision in no way influences the possibility of the complainants' obtaining compensation through the domestic courts for the State party's failure to comply with its obligations under the Convention.

11. Bearing in mind that, in making the declaration under article 22 of the Convention, the State party recognized the competence of the Committee to decide whether or not there has been a violation of the Convention, the Committee wishes to receive information from the State party within 90 days on the measures it has taken to give effect to its recommendations.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[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.

[2] According to the press release, "[t]he Special Rapporteur on the independence of judges and lawyers, Mr. Dato Param Cumaraswamy, 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".

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

[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, Basel-Brussels, 2000, p. 349.

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

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

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

[11] See *Primo Jose Essono Mika Miha v. Equatorial Guinea*, communication No. 414/1990 submitted to the Human Rights Committee, A/49/40, vol. II (1994), annex IX, part O (pp. 96-100). The complainants also point out that the nationality of the author of a communication is not sufficient to establish that the author is subject to that State's jurisdiction (see *H. v. d. P. v. the Netherlands*, communication No. 217/1986, A/42/40 (1987), annex IX, part C (pp. 185-186), para. 3.2.

[12] Communication No. 196/1985, A/44/40 (1989), annex X, part B (pp. 189-195).

[13] See *Sophie Vidal Martins v. Uruguay*, communication No. 57/1979, A/37/40 (1982), annex XIII (pp. 157-160).

[14] General comment No. 9, 3 December 1998, E/C.12/1998/24, para. 3.

[15] See A/51/44, para. 114.

[16] Mark Henzelin, *Le Principe d'universalité en Droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, Bruylant, Bruxelles, 2000.
