20 JUILLET 2012

ARRÊT

QUESTIONS CONCERNANT L'OBLIGATION DE POURSUIVRE OU D'EXTRADER

(BELGIQUE c. SÉNÉGAL)

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QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE

(BELGIUM *v.* SENEGAL)

20 JULY 2012

JUDGMENT

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INTERNATIONAL COURT OF JUSTICE

YEAR 2012

2012
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20 July 2012

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE

(BELGIUM *v.* SENEGAL)

Historical and factual background.

Complaints filed against Mr. Habré in Senegal and in Belgium — Belgium's first extradition request — Senegal's referral of the "Hissène Habré case" to the African Union — Decision of the United Nations Committee against Torture — Senegalese legislative and constitutional reforms — Judgment of the Court of Justice of the Economic Community of West African States — Belgium's second, third and fourth extradition requests.

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Bases of jurisdiction of the Court — Article 30, paragraph 1, of the Convention against Torture (CAT) — The Parties' declarations under Article 36, paragraph 2, of the Statute.

The existence of a dispute, condition required for both bases of jurisdiction — No dispute with regard to Article 5, paragraph 2, of CAT — Dispute with regard to Article 6, paragraph 2, and Article 7, paragraph 1, of CAT existed at the time of the Application and continues to exist — No dispute relating to breaches of obligations under customary international law.

Other conditions for jurisdiction under Article 30, paragraph 1, of CAT — Dispute could not be settled through negotiation — Belgium requested that dispute be submitted to arbitration — At least six months have passed after the request for arbitration.

The Court has jurisdiction to entertain the dispute concerning Article 6, paragraph 2, and Article 7, paragraph 1, of CAT — No need to consider whether the Court has jurisdiction on the basis of the declarations under Article 36, paragraph 2, of the Statute.

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Admissibility of Belgium's claims — Claims based on Belgium's status as a party to CAT — Claims based on the existence of a special interest of Belgium — Object and purpose of CAT — Obligations erga omnes partes *— State party's right to make a claim concerning the cessation of an alleged breach by another State party — Belgium has standing as a State party to CAT to invoke the responsibility of Senegal for alleged breaches — Claims of Belgium based on Article 6, paragraph 2, and Article 7, paragraph 1, of CAT are admissible — No need to pronounce on whether Belgium has a special interest.*

*

The alleged violations of the Convention against Torture.

Article 5, paragraph 2, of CAT as a condition for performance of other CAT obligations — Absence of the necessary legislation until 2007 affected Senegal's implementation of obligations in Article 6, paragraph 2, and Article 7, paragraph 1.

The alleged breach of the obligation under Article 6, paragraph 2, of CAT — Preliminary inquiry required as soon as suspect is identified in territory of State — The Court finds that Senegalese authorities did not immediately initiate preliminary inquiry once they had reason to suspect Mr. Habré of being responsible for acts of torture.

The alleged breach of the obligation under Article 7, paragraph 1, of CAT — State must submit case for prosecution irrespective of existence of a prior extradition request — Institution of proceedings in light of evidence against suspect — Prosecution as an obligation under CAT — Extradition as an option under CAT.

The temporal scope of the obligation under Article 7, paragraph 1 — Prohibition of torture is part of customary international law and a peremptory norm (jus cogens) *— Obligation to prosecute applies to facts having occurred after entry into force of CAT for a State — Article 28 of the Vienna Convention on the Law of Treaties — Decision of the Committee against Torture — Senegal's obligation to prosecute does not apply to acts before entry into force of CAT for Senegal — Belgium entitled since becoming a Party to CAT to request the Court to rule on Senegal's compliance with Article 7, paragraph 1.*

Implementation of the obligation under Article 7, paragraph 1 — Senegal's duty to comply with its obligations under CAT not affected by decision of Court of Justice of the Economic Community of West African States — Financial difficulties raised by Senegal cannot justify failure to initiate proceedings against Mr. Habré — Referral of the matter to the African Union cannot justify Senegal's delays in complying with its obligations under CAT — Article 27 of the Vienna Convention on the Law of Treaties — Object and purpose of CAT and the need to undertake proceedings without delay — Failure to take all measures necessary for the implementation of Article 7, paragraph 1 — Breach by Senegal of that provision.

*

Remedies.

Purpose of Article 6, paragraph 2, and Article 7, paragraph 1 — Senegal's international responsibility engaged for failure to comply with its obligations under these provisions — Senegal required to cease this continuing wrongful act — Senegal's obligation to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

JUDGMENT

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE; *Judges* ad hoc SUR, KIRSCH; *Registrar* COUVREUR.

In the case concerning questions relating to the obligation to prosecute or extradite,

between

the Kingdom of Belgium,

represented by

Mr. Paul Rietjens, Director-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,

as Agent;

Mr. Gérard Dive, Adviser, Head of the International Humanitarian Law Division, Federal Public Service for Justice,

as Co-Agent;

Mr. Eric David, Professor of Law at the Université Libre de Bruxelles,

Sir Michael Wood, K.C.M.G., member of the English Bar, member of the International Law Commission,

Mr. Daniel Müller, consultant in Public International Law, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel and Advocates;

H.E. Mr. Willy De Buck, Ambassador, Permanent Representative of the Kingdom of Belgium to the International Organizations in The Hague,

Mr. Philippe Meire, Federal Prosecutor, Federal Prosecutor's Office,

Mr. Alexis Goldman, Adviser, Public International Law Directorate, Directorate-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,

Mr. Benjamin Goes, Adviser, Federal Public Service-Chancellery of the Prime Minister,

Ms Valérie Delcroix, Attaché, Public International Law Directorate, Directorate-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,

Ms Pauline Warnotte, Attaché, International Humanitarian Law Division, Federal Public Service for Justice,

Ms Liesbet Masschelein, Attaché, Office of the Prime Minister,

Mr. Vaios Koutroulis, Senior Lecturer, Faculty of Law, Université Libre de Bruxelles,

Mr. Geoffrey Eekhout, Attaché, Permanent Representation of the Kingdom of Belgium to the International Organizations in The Hague,

Mr. Jonas Perilleux, Attaché, International Humanitarian Law Division, Federal Public Service for Justice,

as Advisers,

and

the Republic of Senegal,

represented by

H.E. Mr. Cheikh Tidiane Thiam, Professor, Ambassador, Director-General of Legal and Consular Affairs, Ministry of Foreign Affairs and Senegalese Abroad,

as Agent;

H.E. Mr. Amadou Kebe, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands,

Mr. François Diouf, Magistrate, Director of Criminal Affairs and Pardons, Ministry of Justice,

as Co-Agents;

Professor Serigne Diop, Mediator of the Republic,

Mr. Abdoulaye Dianko, *Agent judiciaire de l'Etat*,

Mr. Ibrahima Bakhoum, Magistrate,

Mr. Oumar Gaye, Magistrate,

as Counsel;

Mr. Moustapha Ly, First Counsellor, Embassy of Senegal in The Hague,

Mr. Moustapha Sow, First Counsellor, Embassy of Senegal in The Hague,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 19 February 2009, the Kingdom of Belgium (hereinafter "Belgium") filed in the Registry of the Court an Application instituting proceedings against the Republic of Senegal (hereinafter "Senegal") in respect of a dispute concerning "Senegal's compliance with its obligation to prosecute Mr. H[issène] Habré[, former President of the Republic of Chad,] or to extradite him to Belgium for the purposes of criminal proceedings". Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter "the Convention against Torture" or the "Convention"), as well as on customary international law.

In its Application, Belgium invoked, as the basis for the jurisdiction of the Court, Article 30, paragraph 1, of the Convention against Torture and the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Belgium on 17 June 1958 and by Senegal on 2 December 1985.

2. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated to the Government of Senegal by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 19 February 2009, immediately after the filing of its Application, Belgium, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a Request for the indication of provisional measures and asked the Court "to indicate, pending a final judgment on the merits", provisional measures requiring the Respondent to take "all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied".

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Belgium chose Mr. Philippe Kirsch and Senegal Mr. Serge Sur.

5. By an Order of 28 May 2009, the Court, having heard the Parties, found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 156, para. 76).

6. By an Order of 9 July 2009, the Court fixed 9 July 2010 and 11 July 2011 as the time-limits for the filing of the Memorial of Belgium and the Counter-Memorial of Senegal, respectively. The Memorial of Belgium was duly filed within the time-limit so prescribed.

7. At the request of Senegal, the President of the Court, by an Order of 11 July 2011, extended to 29 August 2011 the time-limit for the filing of the Counter-Memorial. That pleading was duly filed within the time-limit thus extended.

8. At a meeting held by the President of the Court with the Agents of the Parties on 10 October 2011, the Parties indicated that they did not consider a second round of written pleadings to be necessary and that they wished the Court to fix the date of the opening of the hearings as soon as possible. The Court considered that it was sufficiently informed of the arguments on the issues of fact and law on which the Parties relied and that the submission of further written pleadings did not appear necessary. The case thus became ready for hearing.

9. In conformity with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and annexed documents would be made accessible to the public at the opening of the oral proceedings. The pleadings without their annexes were also put on the Court's website.

10. Public hearings were held between 12 March 2012 and 21 March 2012, during which the Court heard the oral arguments and replies of:

For Belgium:	Mr. Paul Rietjens, Mr. Gérard Dive, Mr. Eric David, Sir Michael Wood, Mr. Daniel Müller.
For Senegal:	H.E. Mr. Cheikh Tidiane Thiam, Mr. Oumar Gaye, Mr. François Diouf, Mr. Ibrahima Bakhoum, Mr. Abdoulaye Dianko.

11. At the hearing, questions were put by Members of the Court to the Parties, to which replies were given orally and in writing. In accordance with Article 72 of the Rules of Court, each Party submitted its written comments on the written replies provided by the other Party.

*

12. In its Application, Belgium presented the following submissions:

"Belgium respectfully requests the Court to adjudge and declare that:

— the Court has jurisdiction to entertain the dispute between the Kingdom of Belgium and the Republic of Senegal regarding Senegal's compliance with its obligation to prosecute Mr. H. Habré or to extradite him to Belgium for the purposes of criminal proceedings;

— Belgium's claim is admissible;

— the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice;

— failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts.

Belgium reserves the right to revise or supplement the terms of this Application."

13. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Belgium,

in the Memorial:

"For the reasons set out in this Memorial, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:

1. *(a)* Senegal breached its international obligations by failing to incorporate in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under customary international law by failing to bring criminal proceedings against Mr. Hissène Habré for acts characterized in particular as crimes of torture, genocide, war crimes and crimes against humanity alleged against him as perpetrator, co-perpetrator or accomplice, or to extradite him to Belgium for the purposes of such criminal proceedings;

(c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

(a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or

(b) failing that, by extraditing Mr. Habré to Belgium.

Belgium reserves the right to revise or amend these submissions as appropriate, in accordance with the provisions of the Statute and the Rules of Court."

On behalf of the Government of Senegal,

in the Counter-Memorial:

"For the reasons set out in this Counter-Memorial, the State of Senegal requests the International Court of Justice to adjudge and declare that:

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;

2. In the alternative, Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to 'extradite or try' (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any rule of customary international law;

3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;

4. In taking the appropriate measures and steps to prepare for the trial of Mr. Habré, Senegal is complying with the declaration by which it made a commitment before the Court.

Senegal reserves the right to revise or amend these submissions, as appropriate, in accordance with the provisions of the Statute and the Rules of Court."

14. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Belgium,

at the hearing of 19 March 2012:

"For the reasons set out in its Memorial and during the oral proceedings, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:

1. *(a)* Senegal breached its international obligations by failing to incorporate in due time in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under other rules of international law by failing to bring criminal proceedings against Hissène Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings;

(c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

(a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or

(b) failing that, by extraditing Hissène Habré to Belgium without further ado."

On behalf of the Government of Senegal,

at the hearing of 21 March 2012:

"In the light of all the arguments and reasons contained in its Counter-Memorial, in its oral pleadings and in the replies to the questions put to it by judges, whereby Senegal has declared and sought to demonstrate that, in the present case, it has duly fulfilled its international commitments and has not committed any internationally wrongful act, [Senegal asks] the Court . . . to find in its favour on the following submissions and to adjudge and declare that:

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;

2. In the alternative, should it find that it has jurisdiction and that Belgium's Application is admissible, that Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to 'try or extradite' (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any other rule of conventional law, general international law or customary international law in this area;

3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;

4. In taking the appropriate measures and steps to prepare for the trial of Mr. H. Habré, Senegal is complying with the declaration by which it made a commitment before the Court;

5. It consequently rejects all the requests set forth in the Application of the Kingdom of Belgium."

*

* *

I. HISTORICAL AND FACTUAL BACKGROUND

15. The Court will begin with a brief description of the historical and factual background to the present case.

16. After taking power on 7 June 1982 at the head of a rebellion, Mr. Hissène Habré was President of the Republic of Chad for eight years, during which time large-scale violations of human rights were allegedly committed, including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. Mr. Habré was overthrown on 1 December 1990 by his former defence and security adviser, Mr. Idriss Déby, current President of Chad. After a brief stay in Cameroon, he requested political asylum from the Senegalese Government, a request which was granted. He then settled in Dakar, where he has been living ever since.

17. On 25 January 2000, seven Chadian nationals residing in Chad, together with an association of victims, filed with the senior investigating judge at the Dakar *Tribunal régional hors classe* a complaint with civil-party application against Mr. Habré on account of crimes alleged to have been committed during his presidency. On 3 February 2000, the senior investigating judge, after having conducted a questioning at first appearance to establish Mr. Habré's identity and having informed him of the acts said to be attributable to him, indicted Mr. Habré for having "aided or abetted X . . . in the commission of crimes against humanity and acts of torture and barbarity" and placed him under house arrest.

18. On 18 February 2000, Mr. Habré filed an application with the *Chambre d'accusation* of the Dakar Court of Appeal for annulment of the proceedings against him, arguing that the courts of Senegal had no jurisdiction; that there was no legal basis for the proceedings; that they were time-barred; and that they violated the Senegalese Constitution, the Senegalese Penal Code and the Convention Against Torture. In a judgment of 4 July 2000, that Chamber of the Court of Appeal found that the investigating judge lacked jurisdiction and annulled the proceedings against Mr. Habré, on the grounds that they concerned crimes committed outside the territory of Senegal by a foreign national against foreign nationals and that they would involve the exercise of universal jurisdiction, while the Senegalese Code of Criminal Procedure then in force did not provide for such jurisdiction. In a judgment of 20 March 2001, the Senegalese Court of Cassation dismissed an appeal by the civil complainants against the judgment of 4 July 2000, confirming that the investigating judge had no jurisdiction.

19. On 30 November 2000, a Belgian national of Chadian origin filed a complaint with civil-party application against Mr. Habré with a Belgian investigating judge for, *inter alia*, serious violations of international humanitarian law, crimes of torture and the crime of genocide. Between 30 November 2000 and 11 December 2001, another 20 persons filed similar complaints against Mr. Habré for acts of the same nature, before the same judge. These complaints, relating to the period 1982 to 1990, and filed by two persons with dual Belgian-Chadian nationality and eighteen Chadians, were based on crimes covered by the Belgian Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law, as amended by the Law of 10 February 1999 (hereinafter the "1993/1999 Law"), and by the Convention against Torture. The Convention was ratified by Senegal on 21 August 1986, without reservation, and became binding on it on 26 June 1987, the date of its entry into force. Belgium ratified the Convention on 25 June 1999, without reservation, and became bound by it on 25 July 1999.

20. After finding that the acts complained of — extermination, torture, persecution and enforced disappearances — could be characterized as "crimes against humanity" under the 1993/1999 Law, the Belgian investigating judge issued two international letters rogatory, to Senegal and Chad, on 19 September and 3 October 2001, respectively. In the first of these, he sought to obtain a copy of the record of all proceedings concerning Mr. Habré pending before the Senegalese judicial authorities; on 22 November 2001 Senegal provided Belgium with a file on the matter. The second letter rogatory sought to establish judicial co-operation between Belgium and Chad, in particular requesting that Belgian authorities be permitted to interview the Chadian complainants and witnesses, to have access to relevant records and to visit relevant sites. This letter rogatory was executed in Chad by the Belgian investigating judge between 26 February and 8 March 2002. Furthermore, in response to a question put by the Belgian investigating judge on 27 March 2002, asking whether Mr. Habré enjoyed any immunity from jurisdiction as a former Head of State, the Minister of Justice of Chad stated, in a letter dated 7 October 2002, that the Sovereign National Conference, held in N'Djamena from 15 January to 7 April 1993, had officially lifted from the former President all immunity from legal process. Between 2002 and 2005, various investigative steps were taken in Belgium, including examining complainants and witnesses, as well as analysing the documents provided by the Chadian authorities in execution of the letter rogatory.

21. On 19 September 2005, the Belgian investigating judge issued an international warrant *in absentia* for the arrest of Mr. Habré, indicted as the perpetrator or co-perpetrator, *inter alia*, of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes. By Note Verbale of 22 September 2005, Belgium transmitted the international arrest warrant to Senegal and requested the extradition of Mr. Habré. On 27 September 2005, Interpol — of which Belgium and Senegal have been members since 7 September 1923 and 4 September 1961, respectively — circulated a "red notice" concerning Mr. Habré, which serves as a request for provisional arrest with a view to extradition.

22. In a judgment of 25 November 2005, the *Chambre d'accusation* of the Dakar Court of Appeal ruled on Belgium's extradition request, holding that, as "a court of ordinary law, [it could] not extend its jurisdiction to matters relating to the investigation or prosecution of a Head of State for acts allegedly committed in the exercise of his functions"; that Mr. Habré should "be given jurisdictional immunity", which "is intended to survive the cessation of his duties as President of the Republic"; and that it could not therefore "adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State".

23. The day after the delivery of the judgment of 25 November 2005, Senegal referred to the African Union the issue of the institution of proceedings against this former Head of State. In July 2006, the Union's Assembly of Heads of State and Government, by Decision 127 (VII), *inter alia*

> "decid[ed] to consider the Hissène Habré case as falling within the competence of the African Union, . . . mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial"

and

> "mandate[d] the Chairperson of the [African] Union, in consultation with the Chairperson of the Commission [of the Union], to provide Senegal with the necessary assistance for the effective conduct of the trial".

24. In view of the judgment of 25 November 2005 of the *Chambre d'accusation* of the Dakar Court of Appeal, Belgium asked Senegal, in a Note Verbale of 30 November 2005, to inform it about the implications of this judicial decision for Belgium's request for extradition, the current stage of the proceedings, and whether Senegal could reply officially to the request for extradition and provide explanations about its position pursuant to the said decision. In response, in a Note Verbale of 7 December 2005 Senegal stated *inter alia* that, following the judgment in question, it had referred the Habré case to the African Union, and that this "prefigure[d] a concerted approach on an African scale to issues that fall in principle under the States' national sovereignty". By Note Verbale of 23 December 2005, Senegal explained that the judgment of the *Chambre d'accusation* put an end to the judicial stage of the proceedings, that it had taken the decision to refer the "Hissène Habré case" to the African Union (see paragraphs 23 above and 36 below), and that this decision should consequently be considered as reflecting its position following the judgment of the *Chambre d'accusation*.

25. By Note Verbale of 11 January 2006, Belgium, referring to the ongoing negotiation procedure provided for in Article 30 of the Convention against Torture and taking note of the referral of the "Hissène Habré case" to the African Union, stated that it interpreted the said Convention, and more specifically the obligation *aut dedere aut judicare* provided for in Article 7 thereof, "as imposing obligations only on a State, in this case, in the context of the extradition request of Mr. Hissène Habré, the Republic of Senegal". Belgium further asked Senegal to "kindly notify it of its final decision to grant or refuse the . . . extradition application" in respect of Mr. Habré. According to Belgium, Senegal did not reply to this Note. By Note Verbale of 9 March 2006, Belgium again referred to the ongoing negotiation procedure provided for in Article 30 and explained that it interpreted Article 4, Article 5, paragraphs (1) *(c)* and (2), Article 7, paragraph (1), Article 8 paragraphs (1), (2) and (4), and Article 9, paragraph (1), of the Convention as "establishing the obligation, for a State in whose territory a person alleged to have committed any offence referred to in Article 4 of the Convention is found, to extradite him if it does not prosecute him for the offences mentioned in that Article". Consequently, Belgium asked Senegal to

> "be so kind as to inform it as to whether its decision to refer the Hissène Habré case to the African Union [was] to be interpreted as meaning that the Senegalese authorities no longer intend[ed] to extradite him to Belgium or to have him judged by their own Courts".

26. By Note Verbale dated 4 May 2006, having noted the absence of an official response from the Senegalese authorities to its earlier Notes and communications, Belgium again made it clear that it interpreted Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him if it does not prosecute him, and stated that the "decision to refer the Hissène Habré case to the African Union" could not relieve Senegal of its obligation to either judge or extradite the person accused of these offences in accordance with the

relevant articles of the Convention. It added that an unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention. By Note Verbale of 9 May 2006, Senegal explained that its Notes Verbales of 7 and 23 December 2005 constituted a response to Belgium's request for extradition. It stated that, by referring the case to the African Union, Senegal, in order not to create a legal impasse, was acting in accordance with the spirit of the "*aut dedere aut punire"* principle. Finally, it took note of "the possibility [of] recourse to the arbitration procedure provided for in Article 30 of the Convention". In a Note Verbale of 20 June 2006, which Senegal claims not to have received, Belgium "note[ed] that the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded" and accordingly asked Senegal to submit the dispute to arbitration "under conditions to be agreed mutually", in accordance with Article 30 of the Convention. Furthermore, according to a report of the Belgian Embassy in Dakar following a meeting held on 21 June 2006 between the Secretary-General of the Senegalese Ministry of Foreign Affairs and the Belgian Ambassador, the latter expressly invited Senegal to adopt a clear position on the request to submit the matter to arbitration. According to the same report, the Senegalese authorities took note of the Belgian request for arbitration and the Belgian Ambassador drew their attention to the fact that the six month time-limit under Article 30 (see paragraph 42 below) began to run from that point.

27. The United Nations Committee against Torture considered a communication submitted by several persons, including Mr. Suleymane Guengueng, one of the Chadian nationals who had filed a complaint against Mr. Habré with the senior investigating judge at the Dakar *Tribunal régional hors classe* on 25 January 2000 (see paragraph 17 above). In its decision of 17 May 2006, the Committee found that Senegal had not adopted such "measures as may be necessary" to establish its jurisdiction over the crimes listed in the Convention, in violation of Article 5, paragraph 2, of the latter. The Committee also stated that Senegal had failed to perform its obligations under Article 7, paragraph 1, of the Convention, to submit the case concerning Mr. Habré to its competent authorities for the purpose of prosecution or, in the alternative, since a request for extradition had been made by Belgium, to comply with that request. Furthermore, the Committee gave Senegal 90 days to provide information "on the measures it ha[d] taken to give effect to its recommendations".

28. In 2007, Senegal implemented a number of legislative reforms in order to bring its domestic law into conformity with Article 5, paragraph 2, of the Convention against Torture. The new Articles 431-1 to 431-5 of its Penal Code defined and formally proscribed the crime of genocide, crimes against humanity, war crimes and other violations of international humanitarian law. In addition, under the terms of the new Article 431-6 of the Penal Code, any individual could

> "be tried or sentenced for acts or omissions . . ., which at the time and place where they were committed, were regarded as a criminal offence according to the general principles of law recognized by the community of nations, whether or not they constituted a legal transgression in force at that time and in that place".

Furthermore, Article 669 of the Senegalese Code of Criminal Procedure was amended to read as follows:

> "Any foreigner who, outside the territory of the Republic, has been accused of being the perpetrator of or accomplice to one of the crimes referred to in Articles 431-1 to 431-5 of the Penal Code . . . may be prosecuted and tried according to the provisions of Senegalese laws or laws applicable in Senegal, if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal, or if the Government obtains his extradition."

A new Article 664*bis* was also incorporated into the Code of Criminal Procedure, according to which "[t]he national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic by a national or a foreigner, if the victim is of Senegalese nationality at the time the acts are committed".

Senegal informed Belgium of these legislative reforms by Notes Verbales dated 20 and 21 February 2007. In its Note Verbale of 20 February, Senegal also recalled that the Assembly of the African Union, during its eighth ordinary session held on 29 and 30 January 2007, had

> "[a]ppeal[ed] to Member States [of the Union], . . . international partners and the entire international community to mobilize all the resources, especially financial resources, required for the preparation and smooth conduct of the trial [of Mr. Habré]" (doc. Assembly AU/DEC.157 (VIII)).

29. In its Note Verbale of 21 February, Senegal stated that

> "the principle of non-retroactivity, although recognized by Senegalese law[,] does not block the judgment or sentencing of any individual for acts or omissions which, at the time they were committed, were considered criminal under the general principles of law recognized by all States".

After having indicated that it had established "a working group charged with producing the proposals necessary to define the conditions and procedures suitable for prosecuting and judging the former President of Chad, on behalf of Africa, with the guarantees of a just and fair trial", Senegal stated that the said trial "require[d] substantial funds which Senegal cannot mobilize without the assistance of the [i]nternational community".

30. By Note Verbale dated 8 May 2007, Belgium recalled that it had informed Senegal, in a Note Verbale of 20 June 2006, "of its wish to constitute an arbitral tribunal to resolve th[e] difference of opinion in the absence of finding a solution by means of negotiation as stipulated by Article 30 of the Convention [against Torture]". It noted that "it ha[d] received no response from the Republic of Senegal [to its] proposal of arbitration" and reserved its rights on the basis of the above-mentioned Article 30. It took note of Senegal's new legislative provisions and enquired whether those provisions would allow Mr. Habré to be tried in Senegal and, if so, within what time frame. Finally, Belgium made Senegal an offer of judicial co-operation, which envisaged that, in response to a letter rogatory from the competent Senegalese authorities, Belgium would transmit to Senegal a copy of the Belgian investigation file against Mr. Habré. By Note Verbale of 5 October 2007, Senegal informed Belgium of its decision to organize the trial of Mr. Habré and invited Belgium to a meeting of potential donors, with a view to financing that trial. Belgium reiterated its offer of judicial co-operation by Notes Verbales of 2 December 2008, 23 June 2009, 14 October 2009, 23 February 2010, 28 June 2010, 5 September 2011 and 17 January 2012. By Notes Verbales of 29 July 2009, 14 September 2009, 30 April 2010 and 15 June 2010, Senegal welcomed the proposal of judicial co-operation, stated that it had appointed investigating judges and expressed its willingness to accept the offer as soon as the forthcoming Donors' Round Table had taken place. The Belgian authorities received no letter rogatory to that end from the Senegalese judicial authorities.

31. In 2008, Senegal amended Article 9 of its Constitution in order to provide for an exception to the principle of non-retroactivity of its criminal laws: although the second subparagraph of that Article provides that "[n]o one may be convicted other than by virtue of a law which became effective before the act was committed", the third subparagraph stipulates that

> "[h]owever, the provisions of the preceding subparagraph shall not prejudice the prosecution, trial and punishment of any person for any act or omission which, at the time when it was committed, was defined as criminal under the rules of international law concerning acts of genocide, crimes against humanity and war crimes".

32. Following the above-mentioned legislative and constitutional reforms (see paragraphs 28 and 31 above), 14 victims (one of Senegalese nationality and 13 of Chadian nationality) filed a complaint with the Public Prosecutor of the Dakar Court of Appeal in September 2008, accusing Mr. Habré of acts of torture and crimes against humanity during the years of his presidency.

33. On 19 February 2009, Belgium filed in the Registry the Application instituting the present proceedings before the Court (see paragraph 1 above). On 8 April 2009, during the hearings relating to the request for the indication of provisional measures submitted by Belgium in the present case (see paragraphs 3 and 5 above), Senegal solemnly declared before the Court that it would not allow Mr. Habré to leave its territory while the case was pending (see *I.C.J. Reports 2009*, p. 154, para. 68). During the same hearings, it asserted that "[t]he only impediment . . . to the opening of Mr. Hissène Habré's trial in Senegal [was] a financial one" and that Senegal "agreed to try Mr. Habré but at the very outset told the African Union that it would be unable to bear the costs of the trial by itself". The budget for the said trial was adopted during a Donors Round Table held in Dakar in November 2010, involving Senegal, Belgium and a number of other States, as well as the African Union, the European Union, the Office of the United Nations High Commissioner for Human Rights and the United Nations Office for Project Services: it totals €8.6 million, a sum to which Belgium agreed to contribute a maximum of €1 million.

34. By judgment of 15 December 2009, the African Court on Human and Peoples' Rights ruled that it had no jurisdiction to hear an application filed on 11 August 2008 against the Republic of Senegal, aimed at the withdrawal of the ongoing proceedings instituted by that State, with a view to charge, try and sentence Mr. Habré. The court based its decision on the fact that Senegal had not made a declaration accepting its jurisdiction to entertain such applications, under Article 34, paragraph 6, of the Protocol to the African Charter on Human and People's Rights on the establishment of an African Court of Human and People's Rights (African Court of Human and Peoples' Rights, *Michelot Yogogombaye* v. *Republic of Senegal*, Application No. 001/2008, Judgment of 15 December 2009).

35. In a judgment of 18 November 2010, the Court of Justice of the Economic Community of West African States (hereinafter the "ECOWAS Court of Justice") ruled on an application filed on 6 October 2008, in which Mr. Habré requested the court to find that his human rights would be violated by Senegal if proceedings were instituted against him. Having observed *inter alia* that

evidence existed pointing to potential violations of Mr. Habré's human rights as a result of Senegal's constitutional and legislative reforms, that Court held that Senegal should respect the rulings handed down by its national courts and, in particular, abide by the principle of *res judicata*, and ordered it accordingly to comply with the absolute principle of non-retroactivity. It further found that the mandate which Senegal received from the African Union was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Mr. Habré to take place, within the strict framework of special *ad hoc* international proceedings (ECOWAS Court of Justice, *Hissein Habré* v. *Republic of Senegal*, Judgment No. ECW/CCJ/JUD/06/10 of 18 November 2010).

36. Following the delivery of the above-mentioned judgment by the ECOWAS Court of Justice, in January 2011 the Assembly of African Union Heads of State and Government

> "request[ed] the Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré through a special tribunal with an international character consistent with the ECOWAS Court of Justice Decision".

At its seventeenth session, held in July 2011, the Assembly "confirm[ed] the mandate given to Senegal to try Hissène Habré on behalf of Africa" and

> "urge[d] [the latter] to carry out its legal responsibility in accordance with the United Nations Convention against Torture[,] the decision of the United Nations . . . Committee against Torture[,] as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial".

37. By Note Verbale of 15 March 2011, Belgium transmitted to the Senegalese authorities a second request for the extradition of Mr. Habré. On 18 August 2011, the *Chambre d'accusation* of the Dakar Court of Appeal declared this second request for extradition inadmissible because it was not accompanied by the documents required under Senegalese Law No. 71-77 of 28 December 1971 (hereinafter the "Senegalese Law on Extradition"), in particular documents disclosing the existence of criminal proceedings alleged to have been instituted against Mr. Habré in Belgium and the legal basis of those proceedings, as required by Article 9 of the Law on Extradition, and "any record of the interrogation of the individual whose extradition is requested, as required by . . . Article 13 of the [same] Law". The *Chambre d'accusation* further observed that Belgium had instituted proceedings against Senegal before the International Court of Justice; it therefore concluded that

> "th[e] dispute [was] still pending before the said Court, which ha[d] sole competence to settle the question of the disputed interpretation by the two States of the extent and scope of the obligation *aut dedere aut judicare* under Article 4 of the . . . Convention [against Torture]".

38. By Note Verbale of 5 September 2011, Belgium transmitted to Senegal a third request for the extradition of Mr. Habré. On 10 January 2012, the *Chambre d'accusation* of the Dakar Court of Appeal declared this request for extradition inadmissible on the grounds that the copy of the international arrest warrant placed on the file was not authentic, as required by Article 9 of the Senegalese Law on Extradition. Furthermore, it stated that "the report on the arrest, detention and questioning of the individual whose extradition [wa]s requested [wa]s not appended to the case file as required by Article 13 of the above-mentioned Law".

39. On 12 January and 24 November 2011, the Rapporteur of the Committee Against Torture on follow-up to communications reminded Senegal, with respect to the Committee's decision rendered on 17 May 2006 (see paragraph 27 above), of its obligation to submit the case of Mr. Habré to its competent authorities for the purpose of prosecution, if it did not extradite him.

40. By Note Verbale of 17 January 2012, Belgium addressed to Senegal, through the Embassy of Senegal in Brussels, a fourth request for the extradition of Mr. Habré. On 23 January 2012, the Embassy acknowledged receipt of the said Note and its annexes. It further stated that all those documents had been transmitted to the competent authorities in Senegal. By letter dated 14 May 2012, the Senegalese Ministry of Justice informed the Ministry of Foreign Affairs of Senegal that the extradition request had been transmitted in due course "as is, to the Public Prosecutor at the Dakar Court of Appeal, with the instruction to bring it before the *Chambre d'accusation* once the necessary legal formalities had been completed".

41. At its eighteenth session, held in January 2012, the Assembly of the Heads of State and Government of the African Union observed that the Dakar Court of Appeal had not yet taken a decision on Belgium's fourth request for extradition. It noted that Rwanda was prepared to organize Mr. Habré's trial and

> "request[ed] the Commission [of the African Union] to continue consultations with partner countries and institutions and the Republic of Senegal[,] and subsequently with the Republic of Rwanda[,] with a view to ensuring the expeditious trial of Hissène Habré and to consider the practical modalities as well as the legal and financial implications of the trial".

II. JURISDICTION OF THE COURT

42. To found the jurisdiction of the Court, Belgium relies on Article 30, paragraph 1, of the Convention against Torture and on the declarations made by the Parties under Article 36, paragraph 2, of the Court's Statute. Article 30, paragraph 1, of the Convention reads as follows:

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

Belgium's declaration under Article 36, paragraph 2, of the Court's Statute was made on 17 June 1958, and reads in the relevant part as follows:

> "[Belgium] recognize[s] as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement."

Senegal's declaration was made on 2 December 1985, and reads in the relevant part as follows:

> "[Senegal] accepts on condition of reciprocity as compulsory *ipso facto* and without special convention, in relation to any other State accepting the same obligation, the jurisdiction of the Court over all legal disputes arising after the present declaration, concerning:
>
> — the interpretation of a treaty;
>
> — any question of international law;
>
> — the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> — the nature or extent of the reparation to be made for the breach of international obligation.
>
> This declaration is made on condition of reciprocity on the part of all States. However, Senegal may reject the Court's competence in respect of:
>
> — disputes in regard to which the parties have agreed to have recourse to some other method of settlement;
>
> — disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal."

43. Senegal contests the existence of the Court's jurisdiction on either basis, maintaining that the conditions set forth in the relevant instruments have not been met and, in the first place, that there is no dispute between the Parties.

A. The existence of a dispute

44. In the claims included in its Application, Belgium requested the Court to adjudge and declare that "the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice; failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts". According to Belgium's final submissions, the Court is requested to find that Senegal breached its obligations under Article 5, paragraph 2, of the Convention against Torture, and that, by failing to take action in relation to Mr. Habré's alleged crimes, Senegal has breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that instrument and under certain other rules of international law.

Senegal submits that there is no dispute between the Parties with regard to the interpretation or application of the Convention against Torture or any other relevant rule of international law and that, as a consequence, the Court lacks jurisdiction.

45. The Court observes that the Parties have thus presented radically divergent views about the existence of a dispute between them and, if any dispute exists, its subject-matter. Given that the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium, the Court will first examine this issue.

46. The Court recalls that, in order to establish whether a dispute exists, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The Court has previously stated that "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74) and that "[t]he Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections*, Judgment of 1 April 2011, para. 30.) The Court has also noted that the "dispute must in principle exist at the time the Application is submitted to the Court" (*ibid.*, para. 30).

47. The first request made in 2010 by Belgium in the submissions contained in its Memorial and then in 2012 in its final submissions, is that the Court should declare that Senegal breached Article 5, paragraph 2, of the Convention against Torture, which requires a State party to the Convention to "take such measures as may be necessary to establish its jurisdiction" over acts of torture when the alleged offender is "present in any territory under its jurisdiction" and that State does not extradite him to one of the States referred to in paragraph 1 of the same article. Belgium argues that Senegal did not enact "in a timely manner" provisions of national legislation allowing its judicial authorities to exercise jurisdiction over acts of torture allegedly committed abroad by a foreign national who is present on its territory. Senegal does not contest that it complied only in 2007 with its obligation under Article 5, paragraph 2, but maintains that it has done so adequately by adopting Law No. 2007-05, which amended Article 669 of its Code of Criminal Procedure in order to extend the jurisdiction of Senegalese courts over certain offences, including torture, allegedly committed by a foreign national outside Senegal's territory, irrespective of the nationality of the victim (see paragraph 28 above).

Senegal also points out that Article 9 of its Constitution was amended in 2008 so that the principle of non-retroactivity in criminal matters would not prevent the prosecution of an individual for genocide, crimes against humanity or war crimes if the acts in question were crimes under international law at the time when they were committed (see paragraph 31 above).

Belgium acknowledges that Senegal has finally complied with its obligation under Article 5, paragraph 2, but contends that the fact that Senegal did not comply with its obligation in a timely manner produced negative consequences concerning the implementation of some other obligations under the Convention.

48. The Court finds that any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed. Thus, the Court lacks jurisdiction to decide on Belgium's claim relating to the obligation under Article 5, paragraph 2. However, this does not prevent the Court from considering the consequences that Senegal's conduct in relation to the measures required by this provision may have had on its compliance with certain other obligations under the Convention, should the Court have jurisdiction in that regard.

49. Belgium further contends that Senegal breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture. These provisions respectively require a State party to the Convention, when a person who has allegedly committed an act of torture is found on its territory, to hold "a preliminary inquiry into the facts" and, "if it does not extradite him", to "submit the case to its competent authorities for the purpose of prosecution". Senegal maintains that there is no dispute with regard to the interpretation or application of these provisions, as there is no dispute between the Parties concerning the existence and scope of the obligations contained therein, and that it has met those obligations.

50. Before submitting its Application to the Court, Belgium on several occasions requested Senegal to comply with its obligation under the Convention "to extradite or judge" Mr. Habré for the alleged acts of torture (see paragraphs 25-26 and 30 above). For instance, a Note Verbale of 9 March 2006 addressed by the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal (see paragraph 25 above) referred to a number of provisions of the Convention, including Article 7, and stated that the Convention had to be understood

> "as requiring the State on whose territory the alleged author of an offence under Article 4 of the aforesaid Convention is located to extradite this offender, unless it has judged him on the basis of the charges covered by said article".

Similarly, a Note Verbale of 4 May 2006 addressed by the Belgian Ministry of Foreign Affairs to the Ambassador of Senegal in Brussels (see paragraph 26 above) declared that "Belgium interprets Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him unless it has judged him". While the emphasis in Belgium's Notes Verbales and also in Belgium's Application is on extradition, in its pleadings Belgium stresses the obligation to submit Mr. Habré's case to prosecution. This does not change the substance of the claim. Extradition and prosecution are alternative ways to combat impunity in accordance with Article 7, paragraph 1. In the above-mentioned diplomatic exchanges, the request by Belgium that Senegal comply with the obligation to hold a preliminary inquiry into the facts of Mr. Habré's case may be considered as implicit, since that inquiry should normally take place before prosecution.

51. In its diplomatic exchanges with Belgium, Senegal contended that it was complying with its obligations under the Convention. For instance, in a Note Verbale of 9 May 2006 addressed to the Belgian Ministry of Foreign Affairs, Senegal's Embassy in Brussels wrote that

> "[w]ith regard to the interpretation of Article 7 of the Convention . . ., the Embassy considers that by referring the Hissène Habré case to the African Union, Senegal, in order not to create a legal impasse, is acting in accordance with the spirit of the principle *'aut dedere aut punire'* the essential aim of which is to ensure that no torturer can escape from justice by going to another country".

Senegal's denial that there has been a breach appears to be based on its contention that Article 6, paragraph 2, and Article 7, paragraph 1, grant a State party some latitude with regard to the time within which it may take the actions required. As was acknowledged by Senegal, "[a]t issue before the Court is a difference between two States as to how the execution of an obligation arising from an international instrument to which both States are parties should be understood".

52. Given that Belgium's claims based on the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention were positively opposed by Senegal, the Court considers that a dispute in this regard existed by the time of the filing of the Application. The Court notes that this dispute still exists.

53. The Application of Belgium also includes a request that the Court declare that Senegal breached an obligation under customary international law to "bring criminal proceedings against Mr. H. Habré" for crimes against humanity allegedly committed by him. This submission has been later extended to cover war crimes and genocide. On this point, Senegal also contends that no dispute has arisen between the Parties.

54. While it is the case that the Belgian international arrest warrant transmitted to Senegal with a request for extradition on 22 September 2005 (see paragraph 21 above) referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties reviewed above (see paragraphs 21-30), the Court considers that such a dispute did not exist on that date. The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture. It is noteworthy that even in a Note Verbale handed over to Senegal on 16 December 2008, barely two months before the date of the Application, Belgium only stated that its proposals concerning judicial co-operation were without prejudice to "the difference of opinion existing between Belgium and Senegal regarding the application and interpretation of the obligations resulting from the relevant provisions of the [Convention against Torture]", without mentioning the prosecution or extradition in respect of other crimes. In the same Note Verbale, Belgium referred only to the crime of torture when acknowledging the amendments to the legislation and Constitution of Senegal, although those amendments were not limited to that crime. Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law. The facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture. However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems.

55. The Court concludes that, at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium's claims related thereto.

It is thus only with regard to the dispute concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture that the Court will have to find whether there exists a legal basis of jurisdiction.

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B. Other conditions for jurisdiction

56. The Court will turn to the other conditions which should be met for it to have jurisdiction under Article 30, paragraph 1, of the Convention against Torture (see paragraph 42 above). These conditions are that the dispute cannot be settled through negotiation and that, after a request for arbitration has been made by one of the parties, they have been unable to agree on the organization of the arbitration within six months from the request. The Court will consider these conditions in turn.

57. With regard to the first of these conditions, the Court must begin by ascertaining whether there was, "at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections*, Judgment of 1 April 2011, para. 157). According to the Court's jurisprudence, "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked" (*ibid.*, para. 159). The requirement that the dispute "cannot be settled through negotiation" could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, "no reasonable probability exists that further negotiations would lead to a settlement" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345).

58. Several exchanges of correspondence and various meetings were held between the Parties concerning the case of Mr. Habré, when Belgium insisted on Senegal's compliance with the obligation to judge or extradite him. Belgium expressly stated that it was acting within the framework of the negotiating process under Article 30 of the Convention against Torture in Notes Verbales addressed to Senegal on 11 January 2006, 9 March 2006, 4 May 2006 and 20 June 2006 (see paragraphs 25-26 above). The same approach results from a report sent by the Belgian Ambassador in Dakar on 21 June 2006 concerning a meeting with the Secretary-General of the Ministry of Foreign Affairs of Senegal (see paragraph 26 above). Senegal did not object to the characterization by Belgium of the diplomatic exchanges as negotiations.

59. In view of Senegal's position that, even though it did not agree on extradition and had difficulties in proceeding towards prosecution, it was nevertheless complying with its obligations under the Convention (for instance, in the Note Verbale of 9 May 2006; see paragraph 26 above), negotiations did not make any progress towards resolving the dispute. This was observed by Belgium in a Note Verbale of 20 June 2006 (see paragraph 26 above). There was no change in the respective positions of the Parties concerning the prosecution of Mr. Habré's alleged acts of torture during the period covered by the above exchanges. The fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute. The Court therefore concludes that the condition set forth in Article 30, paragraph 1, of the Convention that the dispute cannot be settled by negotiation has been met.

60. With regard to the submission to arbitration of the dispute on the interpretation of Article 7 of the Convention against Torture, a Note Verbale of the Belgian Ministry of Foreign Affairs of 4 May 2006 (see paragraph 26 above) observed that "[a]n unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture". In a Note Verbale of 9 May 2006 (see paragraph 26 above) the Ambassador of Senegal in Brussels responded that

> "As to the possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture, the Embassy can only take note of this, restating the commitment of Senegal to the excellent relationship between the two countries in terms of cooperation and the combating of impunity."

A direct request to resort to arbitration was made by Belgium in a Note Verbale of 20 June 2006 (see paragraph 26 above). In that Note Verbale, Belgium remarked that "the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded"; Belgium, "in accordance with Article 30, paragraph 1, of the Torture Convention, consequently ask[ed] Senegal to submit the dispute to arbitration under conditions to be agreed mutually". In its Order of 28 May 2009 on Belgium's request for the indication of provisional measures, the Court has already observed that this Note Verbale:

> "contains an explicit offer from Belgium to Senegal to have recourse to arbitration, pursuant to Article 30, paragraph 1, of the Convention against Torture, in order to settle the dispute concerning the application of the Convention in the case of Mr. Habré" (*I.C.J. Reports 2009*, p. 150, para. 52).

In a Note Verbale of 8 May 2007 (see paragraph 30 above) Belgium recalled "its wish to constitute an arbitral tribunal" and remarked that it had "received no response from the Republic of Senegal on the issue of this proposal of arbitration". Although Senegal maintains that it had not received the Note Verbale dated 20 June 2006, it did not mention that matter after having received the Note Verbale of 8 May 2007. On that occasion, there was again no response on the part of Senegal to the request for arbitration.

61. Following its request for arbitration, Belgium did not make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings. In the Court's view, however, this does not mean that the condition that "the Parties are unable to agree on the organization of the arbitration" has not been fulfilled. A State may defer proposals concerning these aspects to the time when a positive response is given in principle to its request to settle the dispute by arbitration. As the Court said with regard to a similar treaty provision:

> "the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 41, para. 92.)

The present case is one in which the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of the State to which the request for arbitration was addressed.

62. Article 30, paragraph 1, of the Convention against Torture requires that at least six months should pass after the request for arbitration before the case is submitted to the Court. In the present case, this requirement has been complied with, since the Application was filed over two years after the request for arbitration had been made.

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63. Given that the conditions set out in Article 30, paragraph 1, of the Convention against Torture have been met, the Court concludes that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

Having reached this conclusion, the Court does not find it necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute.

III. ADMISSIBILITY OF BELGIUM'S CLAIMS

64. Senegal objects to the admissibility of Belgium's claims. It maintains that "Belgium is not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to submit the H[issène] Habré case to its competent authorities for the purpose of prosecution, unless it extradites him". In particular, Senegal contends that none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the acts were committed.

65. Belgium does not dispute the contention that none of the alleged victims was of Belgian nationality at the time of the alleged offences. However, it noted in its Application that "[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction". In its Application Belgium requested the Court to adjudge and declare that its claim was admissible. In the oral proceedings, Belgium also claimed to be in a "particular position" since "it has availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition". Moreover, Belgium argued that "[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform".

66. The divergence of views between the Parties concerning Belgium's entitlement to bring its claims against Senegal before the Court with regard to the application of the Convention in the case of Mr. Habré raises the issue of Belgium's standing. For that purpose, Belgium based its claims not only on its status as a party to the Convention but also on the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré.

67. The Court will first consider whether being a party to the Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument.

68. As stated in its Preamble, the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world". The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide, with regard to which the Court observed that

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.

70. For these reasons, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible.

As a consequence, there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré.

IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE

71. In its Application instituting proceedings, Belgium requested the Court to adjudge and declare that Senegal is obliged to bring criminal proceedings against Mr. Habré and, failing that, to extradite him to Belgium. In its final submissions, it requested the Court to adjudge and declare that Senegal breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré, unless it extradites him.

72. Belgium has pointed out during the proceedings that the obligations deriving from Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, are closely linked with each other in the context of achieving the object and purpose of the Convention, which according to its Preamble is "to make more effective the struggle against torture". Hence, incorporating the appropriate legislation into domestic law (Article 5, paragraph 2) would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts (Article 6, paragraph 2), a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1).

73. Senegal contests Belgium's allegations and considers that it has not breached any provision of the Convention against Torture. In its view, the Convention breaks down the *aut dedere aut judicare* obligation into a series of actions which a State should take. Senegal maintains that the measures it has taken hitherto show that it has complied with its international commitments. First, Senegal asserts that it has resolved not to extradite Mr. Habré but to organize his trial and to try him. It maintains that it adopted constitutional and legislative reforms in 2007-2008, in accordance with Article 5 of the Convention, to enable it to hold a fair and equitable trial of the alleged perpetrator of the crimes in question reasonably quickly. It further states that it

has taken measures to restrict the liberty of Mr. Habré, pursuant to Article 6 of the Convention, as well as measures in preparation for Mr. Habré's trial, contemplated under the aegis of the African Union, which must be regarded as constituting the first steps towards fulfilling the obligation to prosecute laid down in Article 7 of the Convention. Senegal adds that Belgium cannot dictate precisely how it should fulfil its commitments under the Convention, given that how a State fulfils an international obligation, particularly in a case where the State must take internal measures, is to a very large extent left to the discretion of that State.

74. Although, for the reasons given above, the Court has no jurisdiction in this case over the alleged violation of Article 5, paragraph 2, of the Convention, it notes that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1). The purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.

75. The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.

76. The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. Indeed, the Dakar Court of Appeal was led to conclude that the Senegalese courts lacked jurisdiction to entertain proceedings against Mr. Habré, who had been indicted for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing such proceedings within the domestic legal order (see paragraph 18 above). The Dakar Court of Appeal held that:

> "the Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention" (Court of Appeal (Dakar), *Chambre d'accusation, Public Prosecutor's Office and François Diouf* v. *Hissène Habré*, Judgment No. 135, 4 July 2000).

This judgment was subsequently upheld by the Senegalese Court of Cassation (Court of Cassation, *première chambre statuant en matière pénale, Souleymane Guengueng et al.* v. *Hissène Habré*, Judgment No. 14, 20 March 2001).

77. Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

78. The Court, bearing in mind the link which exists between the different provisions of the Convention, will now analyse the alleged breaches of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention

79. Under the terms of Article 6, paragraph 2, of the Convention, the State in whose territory a person alleged to have committed acts of torture is present "shall immediately make a preliminary inquiry into the facts".

80. Belgium considers that this procedural obligation is obviously incumbent on Senegal, since the latter must have the most complete information available in order to decide whether there are grounds either to submit the matter to its prosecuting authorities or, when possible, to extradite the suspect. The State in whose territory the suspect is present should take effective measures to gather evidence, if necessary through mutual judicial assistance, by addressing letters rogatory to countries likely to be able to assist it. Belgium takes the view that Senegal, by failing to take these measures, breached the obligation imposed on it by Article 6, paragraph 2, of the Convention. It points out that it nonetheless invited Senegal to issue a letter rogatory, in order to have access to the evidence in the hands of Belgian judges (see paragraph 30 above).

81. In answer to the question put by a Member of the Court concerning the interpretation of the obligation laid down by Article 6, paragraph 2, of the Convention, Belgium has pointed out that the nature of the inquiry required by Article 6, paragraph 2, depends to some extent on the legal system concerned, but also on the particular circumstances of the case. This would be the inquiry carried out before the case was transmitted to the authorities responsible for prosecution, if the State decided to exercise its jurisdiction. Lastly, Belgium recalls that paragraph 4 of this Article provides that interested States must be informed of the findings of the inquiry, so that they may, if necessary, seek the extradition of the alleged offender. According to Belgium, there is no information before the Court suggesting that a preliminary inquiry has been conducted by Senegal, and it concludes from this that Senegal has violated Article 6, paragraph 2, of the Convention.

82. Senegal, in answer to the same question, has maintained that the inquiry is aimed at establishing the facts, but that it does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for such proceedings. Senegal takes the view that this is simply an obligation of means, which it claims to have fulfilled.

83. In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned. Thus the co-operation of the Chadian authorities should have been sought in this instance, and that of any other State where complaints have been filed in relation to the case, so as to enable the State to fulfil its obligation to make a preliminary inquiry.

84. Moreover, the Convention specifies that, when they are operating on the basis of universal jurisdiction, the authorities concerned must be just as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question. Article 7, paragraph 2, of the Convention thus stipulates:

> "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."

85. The Court observes that Senegal has not included in the case file any material demonstrating that the latter has carried out such an inquiry in respect of Mr. Habré, in accordance with Article 6, paragraph 2, of the Convention. It is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts. The questioning at first appearance which the investigating judge at the *Tribunal régional hors classe* in Dakar conducted in order to establish Mr. Habré's identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.

86. While the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. That provision must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture. The establishment of the facts at issue, which is an essential stage in that process, became imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré (see paragraph 17 above).

87. The Court observes that a further complaint against Mr. Habré was filed in Dakar in 2008 (see paragraph 32 above), after the legislative and constitutional amendments made in 2007 and 2008, respectively, which were enacted in order to comply with the requirements of Article 5, paragraph 2, of the Convention (see paragraphs 28 and 31 above). But there is nothing in the materials submitted to the Court to indicate that a preliminary inquiry was opened following this second complaint. Indeed, in 2010 Senegal stated before the ECOWAS Court of Justice that no proceedings were pending or prosecution ongoing against Mr. Habré in Senegalese courts.

88. The Court finds that the Senegalese authorities did not immediately initiate a preliminary inquiry as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. That point was reached, at the latest, when the first complaint was filed against Mr. Habré in 2000.

The Court therefore concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention.

B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention

89. Article 7, paragraph 1, of the Convention provides:

> "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."

90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the "obligation to prosecute") was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the 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 the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention Against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven. Belgium's claim relating to the application of Article 7, paragraph 1, raises a certain number of questions regarding the nature and meaning of the obligation contained therein and its temporal scope, as well as its implementation in the present case.

1. The nature and meaning of the obligation laid down in Article 7, paragraph 1

92. According to Belgium, the State is required to prosecute the suspect as soon as the latter is present in its territory, whether or not he has been the subject of a request for extradition to one of the countries referred to in Article 5, paragraph 1 — that is, if the offence was committed within the territory of the latter State, or if one of its nationals is either the alleged perpetrator or the victim — or in Article 5, paragraph 3, that is, another State with criminal jurisdiction exercised in

accordance with its internal law. In the cases provided for in Article 5, the State can consent to extradition. This is a possibility afforded by the Convention, and, according to Belgium, that is the meaning of the maxim *"aut dedere aut judicare"* under the Convention. Thus, if the State does not opt for extradition, its obligation to prosecute remains unaffected. In Belgium's view, it is only if for one reason or another the State concerned does not prosecute, and a request for extradition is received, that that State has to extradite if it is to avoid being in breach of this central obligation under the Convention.

93. For its part, Senegal takes the view that the Convention certainly requires it to prosecute Mr. Habré, which it claims it has endeavoured to do by following the legal procedure provided for in that instrument, but that it has no obligation to Belgium under the Convention to extradite him.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

2. The temporal scope of the obligation laid down in Article 7, paragraph 1

96. A Member of the Court asked the Parties, first, whether the obligations incumbent upon Senegal under Article 7, paragraph 1, of the Convention applied to offences alleged to have been committed before 26 June 1987, the date when the Convention entered into force for Senegal, and, secondly, if, in the circumstances of the present case, those obligations extended to offences allegedly committed before 25 June 1999, the date when the Convention entered into force for Belgium (see paragraph 19 above). Those questions relate to the temporal application of Article 7, paragraph 1, of the Convention, according to the time when the offences are alleged to have been committed and the dates of entry into force of the Convention for each of the Parties.

97. In their replies, the Parties agree that acts of torture are regarded by customary international law as international crimes, independently of the Convention.

98. As regards the first aspect of the question put by the Member of the Court, namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation *aut dedere aut judicare* occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987.

99. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*.

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.

100. However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter, provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of that treaty with respect to that party."

The Court notes that nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7, paragraph 1, of the Convention does not apply to such acts.

101. The Committee against Torture emphasized, in particular, in its decision of 23 November 1989 in the case of *O.R., M.M. and M.S.* v. *Argentina* (Communications Nos. 1/1988, 2/1988 and 3/1988, decision of 23 November 1989, para. 7.5, *Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44* (UN doc. A/45/44, Ann. V, p. 112)) that

"'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention". However, when the Committee considered Mr. Habré's situation, the question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that question (*Guengueng et al.* v. *Senegal* (Communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).

102. The Court concludes that Senegal's obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987. The Court would recall, however, that the complaints against Mr. Habré include a number of serious offences allegedly committed after that date (see paragraphs 17, 19-21 and 32 above). Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.

103. The Court now comes to the second aspect of the question put by a Member of the Court, namely, what was the effect of the date of entry into force of the Convention, for Belgium, on the scope of the obligation to prosecute. Belgium contends that Senegal was still bound by the obligation to prosecute Mr. Habré after Belgium had itself become party to the Convention, and that it was therefore entitled to invoke before the Court breaches of the Convention occurring after 25 July 1999. Senegal disputes Belgium's right to engage its responsibility for acts alleged to have occurred prior to that date. It considers that the obligation provided for in Article 7, paragraph 1, belongs to "the category of divisible *erga omnes* obligations", in that only the injured State could call for its breach to be sanctioned. Senegal accordingly concludes that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.

104. The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal's responsibility for the latter's conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal (see paragraph 17 above).

105. The Court notes that the previous findings are also valid for the temporal application of Article 6, paragraph 2, of the Convention.

3. Implementation of the obligation laid down in Article 7, paragraph 1

106. Belgium, while recognizing that the time frame for implementation of the obligation to prosecute depends on the circumstances of each case, and in particular on the evidence gathered, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for

the purpose of prosecution. Procrastination on the latter's part could, according to Belgium, violate both the rights of the victims and those of the accused. Nor can the financial difficulties invoked by Senegal (see paragraphs 28-29 and 33 above) justify the fact that the latter has done nothing to conduct an inquiry and initiate proceedings.

107. The same applies, according to Belgium, to Senegal's referral of the matter to the African Union in January 2006, which does not exempt it from performing its obligations under the Convention. Moreover, at its seventh session in July 2006 (see paragraph 23 above), the Assembly of Heads of State and Government of the African Union mandated Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial" (African Union, doc. Assembly/AU/Dec. 127 (VII), para. 5).

108. With regard to the legal difficulties which Senegal claims to have faced in performing its obligations under the Convention, Belgium contends that Senegal cannot rely on its domestic law in order to avoid its international responsibility. Moreover, Belgium recalls the judgment of the ECOWAS Court of Justice of 18 November 2010 (see paragraph 35 above), which considered that Senegal's amendment to its Penal Code in 2007 might be contrary to the principle of non-retroactivity of criminal laws, and deemed that proceedings against Hissène Habré should be conducted before an *ad hoc* court of an international character, arguing that this judgment cannot be invoked against it. Belgium emphasizes that, if Senegal is now confronted with a situation of conflict between two international obligations as a result of that decision, that is the result of its own failings in implementing the Convention against Torture.

109. For its part, Senegal has repeatedly affirmed, throughout the proceedings, its intention to comply with its obligation under Article 7, paragraph 1, of the Convention, by taking the necessary measures to institute proceedings against Mr. Habré. Senegal contends that it only sought financial support in order to prepare the trial under favourable conditions, given its unique nature, having regard to the number of victims, the distance that witnesses would have to travel and the difficulty of gathering evidence. It claims that it has never sought, on these grounds, to justify the non-performance of its conventional obligations. Likewise, Senegal contends that, in referring the matter to the African Union, it was never its intention to relieve itself of its obligations.

110. Moreover, Senegal observes that the judgment of the ECOWAS Court of Justice is not a constraint of a domestic nature. While bearing in mind its duty to comply with its conventional obligation, it contends that it is nonetheless subject to the authority of that court. Thus, Senegal points out that that decision required it to make fundamental changes to the process begun in 2006, designed to result in a trial at the national level, and to mobilize effort in order to create an *ad hoc* tribunal of an international character, the establishment of which would be more cumbersome.

111. The Court considers that Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice.

112. The Court is of the opinion that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré. For its part, Senegal itself states that it has never sought to use the issue of financial support to justify any failure to comply with an obligation incumbent upon it. Moreover, the referral of the matter to the African Union, as recognized by Senegal itself, cannot justify the latter's delays in complying with its obligations under the Convention. The diligence with which the authorities of the forum State must conduct the proceedings is also intended to guarantee the suspect fair treatment at all stages of the proceedings (Article 7, paragraph 3, of the Convention).

113. The Court observes that, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007.

114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is "to make more effective the struggle against torture" (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

116. In response to a question put by a Member of the Court concerning the date of the violation of Article 7, paragraph 1, alleged by Belgium, it replied that that date could fall in the year 2000, when a complaint against Mr. Habré was filed (see paragraph 17 above), or later, in March 2001, when the Court of Cassation confirmed the decision of the Dakar Court of Appeal, annulling the proceedings in respect of Mr. Habré on the ground that the Senegalese courts lacked jurisdiction (see paragraph 18 above).

117. The Court finds that the obligation provided for in Article 7, paragraph 1, required Senegal to take all measures necessary for its implementation as soon as possible, in particular once the first complaint had been filed against Mr. Habré in 2000. Having failed to do so, Senegal has breached and remains in breach of its obligations under Article 7, paragraph 1, of the Convention.

V. REMEDIES

118. The Court notes that, in its final submissions, Belgium requests the Court to adjudge and declare, first, that Senegal breached its international obligations by failing to incorporate in due time into its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against

Torture, and that it has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré for the crimes he is alleged to have committed, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings. Secondly, Belgium requests the Court to adjudge and declare that Senegal is required to cease these internationally wrongful acts by submitting without delay the "Hissène Habré case" to its competent authorities for the purpose of prosecution, or, failing that, by extraditing Mr. Habré to Belgium without further ado (see paragraph 14 above).

119. The Court recalls that Senegal's failure to adopt until 2007 the legislative measures necessary to institute proceedings on the basis of universal jurisdiction delayed the implementation of its other obligations under the Convention. The Court further recalls that Senegal was in breach of its obligation under Article 6, paragraph 2, of the Convention to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution.

120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State Party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.

121. The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

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122. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which the Kingdom of Belgium submitted to the Court in its Application filed in the Registry on 19 February 2009;

(2) By fourteen votes to two,

Finds that it has no jurisdiction to entertain the claims of the Kingdom of Belgium relating to alleged breaches, by the Republic of Senegal, of obligations under customary international law;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Kirsch;

AGAINST: *Judge* Abraham; *Judge* ad hoc Sur;

(3) By fourteen votes to two,

Finds that the claims of the Kingdom of Belgium based on Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 are admissible;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Kirsch;

AGAINST: *Judge* Xue; *Judge* ad hoc Sur;

(4) By fourteen votes to two,

Finds that the Republic of Senegal, by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed by Mr. Hissène Habré, has breached its obligation under Article 6, paragraph 2, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Greenwood, Donoghue, Gaja, Sebutinde; *Judges* ad hoc Sur, Kirsch;

AGAINST: *Judges* Yusuf, Xue;

(5) By fourteen votes to two,

Finds that the Republic of Senegal, by failing to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, has breached its obligation under Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 ;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Kirsch;

AGAINST: *Judge* Xue; *Judge* ad hoc Sur;

(6) Unanimously,

Finds that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and the Government of the Republic of Senegal, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge OWADA appends a declaration to the Judgment of the Court; Judges ABRAHAM, SKOTNIKOV, CANÇADO TRINDADE and YUSUF append separate opinions to the Judgment of the Court; Judge XUE appends a dissenting opinion to the Judgment of the Court; Judge DONOGHUE appends a declaration to the Judgment of the Court; Judge SEBUTINDE appends a separate opinion to the Judgment of the Court; Judge *ad hoc* SUR appends a dissenting opinion to the Judgment of the Court.

(Initialled) P. T.

(Initialled) Ph. C.

_____

DECLARATION OF JUDGE OWADA

1. I have voted in favour of the Judgment in support of all the points contained in its operative paragraph 122. Nevertheless, I entertain some divergence of views from the position taken by the present Judgment with regard to its methodology of handling the case before us. The divergence of views on the methodology relates mainly to the issue of how the Court should appreciate the nature of the present dispute and define its subject-matter. This difference surfaces specifically in two respects, the issue of jurisdiction and the issue of admissibility. I shall treat these issues as succinctly as possible, so that my approach to the present dispute may be made clear.

A. Jurisdiction

2. The present Judgment arrives at the conclusion in its paragraph 48 that:

> "The Court finds that any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed. Thus, the Court lacks jurisdiction to decide on Belgium's claim relating to the obligation under Article 5, paragraph 2."

3. In its letter of 17 February 2009 submitting the Application instituting the present proceedings, Belgium as Applicant specifies its cause of action for bringing the present dispute between Belgium and Senegal as consisting in "Senegal's failure to act on its obligation to punish crimes under international humanitarian law alleged against the former President of Chad, Mr. Hissène Habré, who is currently living in Dakar, Senegal" (Application, p. 3). In the Application itself, Belgium requests the Court to adjudge and declare that "the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré" and that "failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts" (Application, para. 16).

4. In its final submissions at the end of the oral proceedings, Belgium concludes as follows:

> "For the reasons set out in its Memorial and during the oral proceedings, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:
>
> 1. *(a)* Senegal breached its international obligations by failing to incorporate in due time in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
>
> *(b)* Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under other rules of international law by failing to bring criminal proceedings against Hissène Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings;"

5. Taken as a whole, these submissions of Belgium seem to make it clear that Belgium takes the position that the subject-matter of the dispute it has brought before the Court is the comprehensive whole of the entire conduct of Senegal in the Habré affair, in particular, its conduct of not proceeding to the prosecution of Mr. Habré, and of not extraditing Mr. Habré to Belgium in the absence of taking steps to proceed to the prosecution. It is thus the totality of the conduct of Senegal with respect to Mr. Habré in the years from 2000 up to 2009, when the case was filed by Application, in which Belgium charges Senegal with breach of its international obligations, *inter alia*, under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the "Convention").

6. Senegal's position has also consistently been that the Court lacks jurisdiction in relation to the whole of the Habré affair because "no dispute exists between the Parties" (Counter-Memorial of Senegal, p. 41, para. 162). Senegal contends that

> "[it has] never indicated that it opposed or refused to accept the principle or extent of the obligations implied by the Convention against Torture. At no time have the Parties in question held opposing views about the meaning or scope of their central obligation, to 'prosecute or extradite'." (Counter-Memorial of Senegal, pp. 33-34, para. 135.)

Within the section on jurisdiction of its Counter-Memorial, Senegal expounds its position by repeated references to the point that it has implemented steps all along to enable criminal proceedings to begin against Mr. Habré.

7. Senegal refers to Article 5 , paragraph 2, specifically at the end of its jurisdiction section. However, Senegal does so only in passing, and in the context of a series of measures taken by Senegal in carrying out its obligations under the Convention. The full relevant passage is as follows:

> "Furthermore, Belgium has obviously 'manufactured' a dispute in order to seise the Court. Given all of the amendments that have been made to the Code of Criminal Procedure to enable the Senegalese courts to prosecute offences committed abroad by foreigners once those offences have been classified as 'torture', how can it request the Court to adjudge and declare that:
>
> '1. *(a)* Senegal breached its international obligations by failing to incorporate in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'?
>
> How can a dispute exist as to the interpretation and application of the Convention when Senegal has fulfilled all its obligations?" (Counter-Memorial of Senegal, pp. 44-45, paras. 177-178 (quoting Belgium's submission in its Memorial).)

8. In its oral pleadings, Senegal adds little on the issue of jurisdiction. Senegal maintains its general position on the non-existence of a dispute which covers the entirety of the relevant obligations under the Convention by summarily stating that there is "no dispute between Belgium and Senegal on the application of the Convention against Torture" (CR 2012/4, p. 19, para. 46). Senegal specifically states that it "has never repudiated its duty" to try Mr. Habré (CR 2012/4, p. 28, para. 38). It also notes in a general manner that "Senegal has taken a number of

measures with a view to creating the conditions to try Hissène Habré, both from a legal and a practical standpoint." (CR 2012/5, p. 15, para. 9).

9. Despite these positions of the Parties, the Judgment, choosing to focus on the specific issue of Article 5, paragraph 2, of the Convention, concludes that "the Court lacks jurisdiction to decide on Belgium's claim relating to the obligation under Article 5, paragraph 2" (Judgment, paragraph 48).

10. The approach of Belgium is justified by, and in my view consistent with, the structure of the Convention, the purpose of which is to create a comprehensive legal framework for enforcing the principle *aut dedere aut judicare*, so that the culprit of the crime of torture may not get away with impunity. The Convention is not looked at as a mere collection of independent international obligations, where each violation is assessed separately on its own and independently of the others.

11. This methodology employed in the Judgment, when seen in light of the history of the present dispute as a whole, as well as the position taken by the Parties in arguing the case as described above, is in my view too formalistic and somewhat artificial. The Judgment has adopted a methodology that is too formalistic in the sense that it is engaging in an exercise of dismembering the organic whole of this legal framework which consists of an amalgamated whole of procedural steps starting with Article 4 and leading to Article 8 of the Convention, and of assessing each of these component elements separately to determine whether there was a dispute relating to each of these provisions of the Convention at the critical date, that is, the time of the filing of the Application.

12. Based on this analytical approach, the Judgment has come to the conclusion that, as far as the obligation under Article 5, paragraph 2, of the Convention is concerned, "the Court lacks jurisdiction to decide on Belgium's claim relating to the obligation under Article 5, paragraph 2" (Judgment, paragraph 48) —a claim contained in paragraph 1 *(a)* of its final submissions. In reaching this conclusion, the Judgment relies upon a purely formalistic and even largely artificial logic that by the time of the Application (in 2009) the situation had been rectified (though not remedied!), and there was thus no longer a dispute *on that specific point* between the Parties. This seems to me in a sense a distortion of the subject-matter of the present dispute.

13. In my opinion, the better view, which is in line with the object and purpose of the relevant Articles of the Convention, and thus of the Convention as a whole, would have been to interpret *the subject-matter of the dispute* between Belgium and Senegal to be one comprising in its scope the whole of the process of implementation by Senegal of the system of *aut dedere aut judicare* as contained in the Convention and to treat the whole of the Belgian claim defined within this overall scope as falling within the jurisdiction of the Court.

14. If we base ourselves on this approach, nothing substantive would change in terms of the main course of the reasoning part of the Judgment, nor of its operative part. The actual legal situation obtaining up to 2007, emanating from the absence of "such measures as may be necessary to establish its [i.e., Senegal's] jurisdiction over such offences [i.e., the offences allegedly committed by Mr. Habré]" (Convention, Art. 5, para. 2), had been rectified in 2007 — before the time of the Application in 2009 — but only partially in the entire context of the subject-matter of the dispute between the Parties.

Outside of this context, and as far as the question whether there was a case for breach of the obligation under Article 5 of the Convention by Senegal is concerned, it may of course be said that

the matter has become a moot point. Be that as it may, what is important is that the consideration of this particular point should not jurisdictionally be excluded from the scope of the competence of the Court under Article 30 of the Convention in proceeding to the examination of alleged breaches of Articles 6 and 7. This point constitutes a *legal* premise for such examination. In order to achieve this, it would be sufficient for the Court to make a declaratory finding that there had been a breach of the obligation under Article 5 of the Convention. This declaratory finding should then form the legal basis for its subsequent ruling on the breach of obligations under Articles 6 and 7 of the Convention. It is important to underline that this breach of the obligation under Article 5 is not just *a factual background* in light of which the issue of the violation of the obligation under Articles 6 and 7 could be examined. The latter is *a legal consequence* that flows directly from the Court's judicial determination that there had been a breach of the obligation under Article 5, paragraph 2, of the Convention.

B. Admissibility

15. I have voted in favour of operative paragraph 122, subparagraph (3), of the Judgment, to the extent that I can accept the Court's finding that the claims of Belgium are admissible. Nevertheless, I wish to underline that this finding of the Court is built on its reasoning that Belgium's entitlement to this standing derives from its status as a State party to the Convention, and nothing else.

16. In paragraph 66, the Judgment accepts that there exists a divergence of views between the Parties concerning Belgium's entitlement to bring a claim to the Court. The Judgment explains that:

> "The divergence of views between the Parties concerning Belgium's entitlement to bring its claims against Senegal before the Court with regard to the application of the Convention in the case of Mr. Habré raises the issue of Belgium's standing. For that purpose, Belgium based its claims not only on its status as a party to the Convention but also on the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré."

17. Nevertheless, without addressing the main aspect of this divergence of views between the Parties (referred to in paragraph 64 (Senegal) and paragraph 65 (Belgium) of the Judgment), which admittedly relates to an issue that belongs to the merits of the case, the Judgment chooses to focus exclusively on the issue of the status of Belgium as a party to the Convention for determining the issue of Belgium's standing in the present case. The Judgment, proceeding with the statement that it "will first consider whether being a party to the Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument" (Judgment, paragraph 67), goes on to expound the reason why Belgium, as a State party to the Convention, is entitled to its standing under the Convention.

18. In addressing the question of Belgium's standing in the present case in this way, the Judgment avoids squarely addressing the primary, though more contentious, claim of Belgium on the issue of its standing under the Convention — the claim that:

> "Belgium is not only a 'State other than an injured State', but has also the right to invoke the responsibility of Senegal as an 'injured State' under Article 42 *(b)* (i) of the Articles on State Responsibility. Indeed, Belgium, to quote the commentary of the International Law Commission is 'affected by the breach in a way which distinguishes

> it from the generality of other States to which the obligation is owed'. Indeed, Belgium is in a particular position as compared to all other States parties to the Torture Convention because, in this particular case, it has availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition. This is equally true with regard to general international law. And once again, the nationality of the victims is irrelevant in this regard as a matter of international law . . ." (CR 2012/6, p. 54, para. 60.)

19. In spite of this contention of Belgium, the Judgment focuses exclusively on the claim that Belgium is a State party to a Convention which allegedly creates obligations *erga omnes partes*. Thus the Judgment states:

> "The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention." (Judgment, paragraph 68.)

On that basis the Judgment concludes that:

> "Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible." (Judgment, paragraph 70.)

20. The Judgment dismisses Belgium's main argument, as quoted above, stating that "[a]s a consequence, there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré" (Judgment, paragraph 70).

21. Setting aside the issue of plausibility of this arguably controversial basis for entitlement of a State party to the Convention involving *erga omnes partes* obligations to seise the Court (see, in this respect, the separate opinion of Judge Skotnikov), what I wish to point out here is that this approach of the Judgment to recognize the standing of Belgium to bring the case before the Court will inevitably have its legal consequences upon the scope of the subject-matter of the dispute that is admissible before the Court and upon the nature and the scope of the claims on which Belgium can seise the Court in this dispute. The main contention of Belgium on admissibility was based on its special interest as an "injured State" (CR 2012/6, p. 54, para. 60). This contention, however, has now cautiously been avoided by the Judgment, ostensibly on the ground that the Court was concerned, at this phase of the proceedings, only with the issue of admissibility. This reluctance to face the issue, however, will, in my view, inherently have legal repercussions when the Judgment addresses the merits of the Belgian claims.

22. The legal consequence of adopting such an approach is that Belgium is entitled in its capacity as a State party to the Convention, like any other State party to the same Convention, only to insist on compliance by Senegal with the obligations arising under the Convention. It can go no further. Since the Judgment has not ruled upon the Belgian claim that it can claim "a particular position" (CR 2012/6, p. 54, para. 60) as an injured State, Belgium is in a legal position neither to claim the extradition of Mr. Habré under Article 5, paragraph 2, of the Convention as it seems to be claiming, nor to demand an immediate notification as a State party to which it is entitled under Article 6, paragraph 4, of the Convention.

23. It is to be added in any case that the legal situation under the Convention is that, as the Judgment states so clearly (Judgment, paragraph 95), extradition is nothing more than an option open to the States on whose territory an alleged offender is present in relation to the States parties referred to in Article 5, paragraph 1, of the Convention, and not an obligation to carry out in relation to any other States parties to the Convention, including those within the category of States referred to in Article 5, paragraph 1. Be that as it may, Belgium's standing as recognized by the present Judgment cannot allow Belgium in the present case to claim any special interest under Article 5 of the Convention. The request of Belgium contained in paragraph 2 *(b)* of its final submissions asking the Court to adjudge and declare that "[Senegal] extradit[e] Hissène Habré *to Belgium* without further ado" (emphasis added) has to fail on this ground.

(Signed) Hisashi OWADA.

SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Jurisdiction of the Court to entertain that part of Belgium's claim relating to obligations arising from customary international law — Existence of a dispute in that connection on the day of delivery of the Judgment — Lack of any rule of customary international law requiring Senegal to prosecute Mr. Hissène Habré before its courts for war crimes, crimes against humanity and the crime of genocide — Belgium's claim in that regard unfounded:

1. In this Judgment, the Court rules on the merits of only one part of Belgium's submissions, namely that relating to Senegal's breach of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter "the Convention"). After upholding its jurisdiction over that part of the Application (point 1 of the operative clause) and declaring the Application admissible in that regard (point 3 of the operative clause), the Court finds that Senegal has breached its conventional obligations (points 4 and 5 of the operative clause) and draws the appropriate conclusions, namely that Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him (point 6 of the operative clause).

2. I have voted in favour of all of those points of the operative clause. I approve not only of the conclusions reached by the Court on those various issues but also of the essence of the reasoning followed to reach them, even though I think that the Judgment's reasoning, in respect of a number of the points considered, would have benefited from being less succinct.

3. However, Belgium did not confine itself to reproaching Senegal with having breached its conventional obligations. The Applicant also contended that Senegal was required to prosecute Mr. Hissène Habré before its courts — unless it extradited him — for acts which could be characterized as war crimes, crimes against humanity and genocide and which do not come within the scope *ratione materiae* of the Convention against Torture. In support of that claim, Belgium

invoked customary international law, which, it argued, required Senegal to "prosecute or extradite" any person suspected of having committed acts coming within the categories thus defined.

4. The Court has declared that it lacks jurisdiction to hear that part of Belgium's Application, despite the fact that the Applicant, in order to found the jurisdiction of the Court, invoked not only Article 30 of the Convention — which could clearly only constitute a valid basis for the Court's jurisdiction in respect of those submissions relating to the alleged breach of conventional obligations — but also the optional declarations made by the two Parties under Article 36, paragraph 2, of the Statute of the Court, which are general in scope. Hence the Judgment makes no substantive ruling on Belgium's claims relating to Senegal's alleged breach of its obligations under customary international law.

5. It is on this point that I have regretfully been obliged to dissociate myself from the majority of my colleagues.

In my view, the Court should have ruled that it has jurisdiction to entertain the Applicant's submissions relating to customary international law (I). However, I do not think that the Court should have upheld those submissions on the merits; in my opinion, it should have dismissed them as unfounded (II).

I. The Court should have ruled that it has jurisdiction to entertain the Applicant's submissions based on customary international law

6. In point 2 of the operative clause, the Court

> "*Finds* that it has no jurisdiction to entertain the claims of the Kingdom of Belgium relating to alleged breaches, by the Republic of Senegal, of obligations under customary international law."

I cannot support that finding, for the reasons which I set out below.

7. The reason why the Court thus declined jurisdiction is set forth in paragraph 55 of the Judgment: "[A]t the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law." The conclusion the Court draws is that it has no jurisdiction to decide on the claim set out by Belgium in point 1 *(b)* of its final submissions (cited in paragraph 14 of the Judgment), because that claim refers to Senegal's

alleged obligations under customary international law concerning the criminal proceedings which the latter should bring against Mr. Hissène Habré, if it does not extradite him. Since the obligations which Senegal is accused of having breached do not derive from the Convention but from customary international law, the Court can only have jurisdiction over that issue on the basis of the Optional Clause declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court. However, this provision confers jurisdiction upon the Court over "legal disputes" between States that have recognized its jurisdiction as compulsory. Accordingly, the absence of a dispute on a specific issue leaves the Court without jurisdiction over that issue, and, from the Court's point of view, that is the case here.

8. I do not dispute the validity of several of the elements of this reasoning.

Firstly, it is clear that "the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium", as indicated in paragraph 45. Only one of those two bases of jurisdiction is relevant to the question which concerns us here (the other being Article 30 of the Convention against Torture, which is clearly inapplicable — and Belgium has not suggested otherwise — to that part of the Applicant's submissions which relates to Senegal's alleged breach of customary international law).

9. Secondly, if there is no dispute between the Parties before the Court (in respect of all or some of the issues which form the subject-matter of the Application), the Court has no jurisdiction to hear the case — or that part of the case over which no dispute exists. In actual fact, it might also be argued that an application concerning a question over which there is no dispute, and over which there was no dispute on the date when the Application was filed, would stand to fail on the ground of inadmissibility rather than lack of jurisdiction. However, in its decisions the Court has, for a very long time, clearly and consistently ruled lack of jurisdiction — though this makes little difference in practice — and it would not have been appropriate for it to depart from its case law.

10. Finally, I can also concur with the finding that, on the date when the Application was filed by Belgium, that is to say, 19 February 2009, there was no dispute between the Parties over Senegal's alleged failure to comply with the rules of customary international law supposedly

requiring it to initiate proceedings against Mr. Habré, if it does not extradite him. Paragraph 54 of the Judgment describes at some length the diplomatic exchanges which preceded the filing of the Application. It emerges that at no time during those preliminary exchanges did Belgium reproach Senegal with violating customary international law. Belgium confined itself to emphasizing the obligation under the Convention against Torture, and in particular Article 7, paragraph 1, thereof, to prosecute any person who is suspected of having committed acts of torture, or of complicity in torture, before the courts of the State in whose territory he is present, if he is not extradited to another State having jurisdiction to try him for the same acts.

11. My disagreement with the Judgment centres on the fact that the Court confines itself to the situation that prevailed "at the time of the filing of the Application" and refuses to take account of the present situation, as it emerges from the exchanges between the Parties during the judicial proceedings.

12. However, it is quite certain that, on the date of the present Judgment, a dispute does indeed exist between the Parties regarding the application of customary international law in the present case. Belgium has argued that Senegal has breached its obligation under customary international law to prosecute Mr. Habré before its courts, not only for acts of torture, but also for "war crimes, crimes against humanity and the crime of genocide alleged against him" (final submissions, 1 *(b)*). Senegal, for its part, without formally denying the existence of such an obligation, has argued that its conduct to date entails no breach by it of that obligation, for essentially the same reasons as those advanced by it to assert that it was not in breach of its conventional obligations: it has already taken several measures with a view to the trial, and has not hitherto had the means at its disposal that it would have needed to do more.

There is therefore no doubt that there does exist today a dispute between the Parties relating to the implementation of customary international law, just as there exists, and for the same reasons, a dispute between them concerning Senegal's compliance with its conventional obligations. The difference between these two aspects of the case is that the dispute relating to conventional law was revealed by the exchanges between the Parties even before the Application was introduced,

whereas the dispute relating to customary law only became apparent during their exchanges before the Court.

13. It follows from the above that the crucial question is which date is to be taken in order to determine the existence of a dispute between the Parties.

14. As a general rule, the conditions governing the jurisdiction of the Court must be fulfilled on the date when the Application is filed. However, the Court has, for a very long time, shown reasonable flexibility by accepting that a condition that was initially lacking could be met in the course of the proceedings, and that if not all the conditions for its jurisdiction were fulfilled at the start of the proceedings, the Court should therefore ascertain whether they had been fulfilled on the date of its Judgment. This line of case law, which began with the celebrated *Mavrommatis Palestine Concessions* case, was confirmed and even extended by the obligation to state reasons, which was adopted as a matter of principle in the Judgment on the Preliminary Objections in the *Croatia* v. *Serbia* case, in which the Court stated:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 441, para. 85.)

15. It is true that, more recently, in its Judgment in the *Georgia* v. *Russian Federation* case (Judgment of 1 April 2011), the Court referred to the date when the Application was filed in order to determine whether the condition relating to the existence of a dispute had been met. However, in that case it found that the condition had indeed been met on the date in question (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections*, Judgment of 1 April 2011, p. 47, para. 113).

16. The Court therefore had no need, in that case, to settle the question of which solution it should have adopted if the dispute, which had not existed on the date when the Application was

filed, had been clearly constituted on the date of the Judgment. In my opinion, the *Georgia* v. *Russian Federation* precedent does not therefore represent a departure from the former jurisprudence of the Court.

Moreover, the Court, very prudently, indicated in its statement of reasons, before moving on to consider specifically the exchanges between Georgia and the Russian Federation, that "[t]he dispute must *in principle* exist at the time the Application is submitted to the Court" (*ibid.*, p. 16, para. 30; emphasis added).

17. It is also true that in the same case, in order to assess whether the requirement for the Parties to attempt a negotiated settlement of the dispute had been met, the Court referred to the date of its seisin (*ibid.*, p. 54, para. 141). However, this in fact had no bearing on the solution, since in the opinion of the Court's majority — which I did not share — Georgia had never attempted to engage in negotiations with Russia with a view to resolving their dispute concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination, and that assessment would undoubtedly have been the same for the periods before and after the seisin of the Court.

18. In the present Judgment, the Court goes a particularly clear step further in the formalistic approach to the condition relating to the existence of a dispute: this is the first time in the Court's entire jurisprudence that it has declined to hear one part of a case on the basis of the lack of a dispute between the Parties, even though the dispute clearly exists on the date of the Court's Judgment and was apparent in the proceedings before the Court. One may wonder what the extent now is of the position of principle set out by the Court in the Judgment on Preliminary Objections in the *Croatia* v. *Serbia* case. I regret to note that the series of recent Judgments does not convey a great impression of consistency.

19. Let me mention one additional factor which distinguishes the present case from the *Georgia* v. *Russian Federation* precedent and which makes the extremely formalistic solution adopted here by the Court even more surprising. Whereas the Russian Federation had explicitly invoked, as grounds of inadmissibility, the lack of a dispute between the Parties crystallized on the

date when the Application was filed, Senegal has done nothing of the kind in the present case. It did indeed assert that there was no justiciable dispute before the Court, but not at all for the reasons adopted by the Court in support of point 2 of the operative clause. Senegal's argument was, in substance, that there was no dispute between it and Belgium in respect of any aspect of the Applicant's submissions — whether that part relating to conventional obligations or that part based on customary law — for the reason (which applies to the case as a whole) that the Parties did not disagree on the existence and scope of the obligations that were invoked and that the Respondent was making every possible effort to perform those obligations. This argument has no weight, as the Court has found in respect of that part of the submissions relating to conventional law; it should also have been rejected in respect of that part relating to customary law. Thus, the Court has raised ex officio the ground that the dispute relating to compliance with customary obligations did not exist on the date when the Application was filed, since Belgium had failed to address this issue in its previous diplomatic exchanges with Senegal.

20. I do not think that I need address here the procedural question of whether the Court could raise such a ground ex officio — without even notifying Belgium beforehand. For the reasons discussed above, I believe that the Court should simply have noted that a dispute between the Parties as regards compliance with customary international law existed on the date of its Judgment.

*

* *

II. The Court should have dismissed as ill-founded the Applicant's submissions relating to the alleged breach of obligations under customary international law

21. Although I disagree with the Judgment in respect of the issue of jurisdiction, as I have just described, I do not believe that the Court should have upheld Belgium's claims based on customary law. Indeed, in my opinion, there is no rule of customary international law requiring Senegal to prosecute Mr. Habré before its courts, either for the acts of torture, or complicity in torture, that are alleged against him — in that connection, there is indeed an obligation, but it is purely conventional — or for war crimes, crimes against humanity and the crime of genocide,

which do not come within the scope *ratione materiae* of the Convention against Torture — in that regard there is, at present, no obligation under international law.

22. It is true that neither in the written proceedings nor in its oral argument did Senegal dispute the existence of an obligation which, under customary international law, would require it to prosecute Mr. Habré for criminal acts in the above-mentioned categories.

But it is clear that if the Court had also accepted jurisdiction over this part of the case — as I believe it should have done — it would have been obliged to rule ex officio on the existence of the rules of customary law which Belgium claimed had been breached. As these are rules which, if they existed, would have universal scope, it stands to reason that it is not sufficient for the two Parties before the Court to agree on the existence of those rules, and, where appropriate, their scope, for the Court to register that agreement and to apply the alleged rules in question. It is for the Court alone to say what the law is and to do so, if necessary, ex officio — even if it is, in fact, somewhat unusual for it to find itself in such a situation.

23. In the present case, the Court found itself in a situation where it could have performed that function, as a result of one of the very many questions put by judges to the Parties at the end of the first round of oral argument.

24. The question was put by my esteemed colleague Judge Greenwood, who, in essence, asked Belgium to demonstrate: (i) that there is State practice in respect of the jurisdiction of domestic courts over war crimes and crimes against humanity when the alleged offence occurred outside the territory of the State in question and when neither the alleged offender nor the victims were nationals of that State; and (ii) that States consider that they are required, in such cases, to prosecute the alleged perpetrator of the offence before their own courts, or to extradite him.

25. The responses given by Belgium, initially during the second round of oral argument and later in a written document, do not come close to establishing the existence of a general practice and an *opinio juris* which might give rise to a customary obligation upon a country such as Senegal to prosecute a former foreign leader before its courts for crimes such as those of which Mr. Hissène Habré stands accused, unless it extradites him.

26. Let me begin by clarifying the subject-matter of the question that was before the Court in the present case, by distinguishing it from those which the Court, in any event, was not called upon to decide.

27. The Court was not called upon to determine whether the prohibition on acts of torture and other "international crimes" (a phrase I use for convenience, although I doubt its legal relevance), as laid down in the Convention against Torture and in various other multilateral treaties, is of a customary nature and accordingly applies even outside any conventional obligations. The answer is certainly in the affirmative, but that is not the question directly posed by Belgium's claim in the present case: Senegal has never been reproached with having committed, encouraged or facilitated such crimes. With regard to the prohibition on torture, the Judgment states (para. 99) that it is part of customary law and that it has even become a peremptory norm *(jus cogens)*, but that is clearly a mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element.

28. Nor did the Court have to decide whether customary law requires a State to prosecute individuals suspected of having committed crimes of the kind that are alleged here when those persons have the nationality of the State concerned, or when those crimes have been committed in that State's territory. Mr. Hissène Habré is not Senegalese, and the crimes of which he is suspected were not committed in Senegal. Thus the question of whether there exists in customary law an obligation upon States to exercise "territorial" jurisdiction or "active personal" jurisdiction for the purposes of punishing "international crimes" did not arise in the present case.

29. Nor did the Court have to determine whether there exists a customary obligation for a State to give its courts "passive personal jurisdiction", that is to say, a title of jurisdiction enabling them to try the alleged perpetrators of "international crimes" when the victim has the nationality of the State concerned. The reply is very probably negative: even the Convention against Torture does not require States parties to give themselves such "passive personal jurisdiction", since Article 5 (1) *(c)* only provides for such jurisdiction where the State party "considers it appropriate". But in any event, the question did not arise in the present case.

30. Finally, and this point deserves particular mention, the present case did not require the Court to determine — in any event not directly — whether customary international law enables States to provide their courts with universal jurisdiction over war crimes, crimes against humanity and the crime of genocide. In that regard, it may be contrasted with the *DRC* v. *Belgium* precedent, in which that issue was raised by the Applicant before subsequently being dropped (case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3). In fact, Belgium does not reproach Senegal with exercising universal criminal jurisdiction, but on the contrary with failing to exercise it, whereas, according to the Applicant, international law requires it do so. Consequently, the controversial issue of the legality of universal jurisdiction in international law (see on this point, in particular, the separate opinion of President Guillaume appended to the Judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 35) did not arise directly in the present case. Only if the Court had found that international law required States to establish universal criminal jurisdiction over the categories of offences in question would it have ruled, *a fortiori*, in respect of the legality of such jurisdiction. If, however, while examining the merits of the case, the Court had found that there is no rule of customary law requiring States to give themselves universal criminal jurisdiction, such a finding would have left entirely open the (separate) question of the legality of universal jurisdiction.

31. The question which the Court could not have avoided answering directly, had it accepted jurisdiction as I believe it should have done, is therefore the following: is there sufficient evidence, based on State practice and *opinio juris*, of a customary obligation for States to prosecute before their domestic courts individuals suspected of war crimes or crimes against humanity (which presupposes that they have provided their courts with the necessary jurisdiction), when there is no connecting link between the alleged offence and the forum State, that is to say, when the offence was committed outside the territory of that State and neither the offender nor the victim were nationals of that State?

32. In my opinion, the answer to that question is very clearly and indisputably no, regardless of whether or not the suspect is present in the territory of the State in question.

33. Belgium, in response to the question put by the Court, did indeed endeavour to demonstrate that such an obligation exists. However, it fell far short of doing so.

34. In a written document produced in reply to the above-mentioned question, Belgium supplied a list of States having incorporated into their domestic law provisions giving their courts "universal jurisdiction" to try war crimes committed in the course of a non-international conflict, which is the case of the crimes of which Mr. Habré is accused, and crimes against humanity (or certain of those crimes). It found a total of 51. Among those States, some of them make the exercise of such jurisdiction subject to the presence of the suspect in their territory, while others do not, but the list draws no distinction between the two cases.

35. Nevertheless, the information thus provided is quite insufficient to establish the existence of a customary obligation to prosecute the perpetrators of such crimes on the basis of universal jurisdiction, even when limited to the case where the suspect is present in the territory of the State concerned.

And this is for three reasons.

36. In the first place, the States in question represent only a minority within the international community, which is in any event insufficient to establish the existence of a universal customary rule.

37. Secondly, some of those States may have adopted such legislation on the basis of a particular interpretation of their conventional obligations, for example those under conventions of international humanitarian law regarding war crimes. Apart from the fact that such an interpretation is not universally shared, since other States parties to the same conventions have not taken similar action, such an approach does not demonstrate the existence of an *opinio juris*, that is to say, a belief that there exists an obligation to establish "universal jurisdiction" outside of any conventional obligations.

38. Thirdly and finally, certain States among the 51 — and probably many of them — may have decided to extend the jurisdiction of their courts over the crimes in question on the basis of a

purely unilateral choice and sovereign decision, without in any sense believing that they were required to do so by some international obligation, whether conventional or customary — but solely in the belief that international law entitled them to do so. Here again, the "opinio juris" is lacking.

39. Let me take France, for example, which is included in the "List of 51", and with which I am well acquainted. In the area which interests us here, France has only given its courts "universal" jurisdiction, that is to say, without any link to where the crime was committed or to the nationality of the perpetrator or the victim, in three instances: (1) for acts of torture; (2) for crimes covered by the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and (3) for crimes within the jurisdiction of the International Criminal Court (ICC) if the alleged offender usually resides in France. In the first case, France acted in accordance with its conventional obligations deriving from its status as party to the Convention against Torture. In the other two cases it adopted those provisions of its own free and sovereign choice, without considering as far as it was itself concerned — or asserting in relation to others — that States were required to do so.

The presence of France on the list prepared by Belgium, while not erroneous, is thus not an argument for the recognition of a customary international obligation, and doubtless the same could be said for many of the other States on the list.

40. Belgium itself at present no longer claims that it exercises universal jurisdiction, as a general rule, over "international crimes". Since the provisions of its Code of Criminal Procedure relating to the jurisdiction of its courts were radically modified by the Law of 5 August 2003, Belgium no longer provides those courts with jurisdiction over war crimes and crimes against humanity, except in those cases where it is required to do so under an international legal obligation; in principle, it requires a territorial or personal connection between the alleged crime and itself, a link which must normally exist on the date of the crime or, at the very least, that the suspect should have his principal residence in the territory of the Kingdom. The reason why the Belgian courts continue to investigate the complaints against Mr. Hissène Habré regarding acts other than those which could be characterized as acts of torture is that those complaints were made at a time when

Belgian legislation did provide for universal jurisdiction, and because of the transitional provisions of the Law of 5 August 2003; while withdrawing universal jurisdiction almost completely for the future, the latter provided that certain pending proceedings which had been instituted on the basis of the previous legislation would not be affected by that withdrawal.

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* *

41. In conclusion, I am sure that the claims submitted to the Court by Belgium on the basis of customary international law were, in any event, bound to fail.

The Court's refusal to find that it has jurisdiction in that regard has therefore not deprived Belgium of a success which, in any case, it could not have obtained.

(Signed) Ronny ABRAHAM.

SEPARATE OPINION OF JUDGE SKOTNIKOV

1. I support the Court's conclusions set forth in the operative clause. However, while I agree with the Court's ruling that Belgium's claims based on Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture are admissible (paragraph 3 of the operative clause), I respectfully submit that the Court has erred as to the grounds on which to base this finding.

2. In order to declare admissible Belgium's claims relating to Senegal's conduct, the Court could have confined itself to observing that Belgium has instituted criminal proceedings against Mr. Habré, in accordance with its legislation in force; that it has requested Mr. Habré's extradition from Senegal to Belgium; and that it has engaged in diplomatic negotiations with Senegal on the subject of Mr. Habré's prosecution in Senegal or his extradition to Belgium.

3. The Court has chosen instead to follow the route which leads it to conclude that any State party to the Convention against Torture has standing before this Court to invoke the responsibility of any other State party "with a view to ascertaining the [latter's] alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end" (Judgment, paragraph 69). Accordingly, in the view of the Court, Belgium is entitled to invoke Senegal's responsibility before this Court without necessarily having a special interest in Senegal's compliance with the Convention.

4. The route thus taken by the Court allows it to avoid dealing at the merits stage with the question as to whether Belgium has established its jurisdiction in respect of Mr. Habré in accordance with Article 5, paragraph 1, of the Convention, despite the fact that none of the alleged victims who have filed complaints against Mr. Habré was of Belgian nationality at the time of the alleged offences. This question, which is directly related to the issue of the validity of Belgium's request for Mr. Habré's extradition, is admittedly not an easy one to answer, especially given the fact that Belgium, subsequent to its request for Mr. Habré's extradition, repealed a part of its legislation which had allowed for the exercise of universal jurisdiction irrespective of the nationality of the alleged victims. The present case is left over from the brief period during which this legislation was in force.

5. During the oral phase, Belgium confirmed that it appeared before this Court as an injured State. Indeed, Belgium instituted the present proceedings precisely because it had exercised its jurisdiction in respect of Mr. Habré and requested his extradition from Senegal to Belgium. As is clear from the Application, Belgium was concerned that "the referral" of Mr. Habré's case to the African Union could have affected the prospect of Mr. Habré being extradited to Belgium under the terms of the Convention against Torture. Clearly, Belgium did not seise this Court simply as a State party to the Convention.

6. In the alternative, however, Belgium, responding to a question posed by one of the judges, claimed *locus standi* as a party other than an injured State. It seems that this contention was made as a precaution, in case the Court were to find, for example, that Belgium was precluded from claiming jurisdiction to prosecute Mr. Habré on account of the fact that it had abrogated the law which allowed it to exercise its jurisdiction in cases where the alleged victims did not have Belgian nationality at the time when the alleged offences were committed.

7. In any event, in its final submissions, Belgium clearly positions itself as an injured State, that is, as a party having a special interest in Senegal's compliance with the Convention. It has specifically requested the Court to adjudge and declare *inter alia* that Senegal is required to cease the internationally wrongful act:

"*(a)* by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or

(b) failing that, by extraditing Hissène Habré *to Belgium* without further ado." [Emphasis added.]

8. In the light of the above, the Court's decision not to pronounce on the question of whether Belgium has a special interest in Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré (see Judgment, paragraph 70) is surprising. One inevitable implication of this decision is that the issue of the validity of Belgium's request for extradition remains unresolved.

9. The Court has a duty under its Statute to settle disputes — when it has jurisdiction to do so — unless there are circumstances preventing it from proceeding with the adjudication of a claim or a part of it. Senegal has contested Belgium's entitlement to exercise passive personal jurisdiction in Mr. Habré's case. Accordingly, when the Court discards, without explanation, a part of Belgium's claim by reducing its status in the present proceedings to that of any State party to the Convention against Torture, it fails in this duty.

10. Moreover, regrettably, the Court's conclusion that Belgium, simply as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2 and Article 7, paragraph 1, of the Convention, is not properly explained, nor is it justified.

11. According to the Judgment (see paragraph 68), since the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world", the States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The Court observes that all States parties "have a legal interest" in the protection of the rights involved *(Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). In the same context, the Court recalls that, in its Advisory Opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it pointed out that:

> "[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

12. Needless to say, the dicta referred to by the Court are of fundamental importance. Indeed, indivisible obligations which are owed by any State party to all other States parties are contained in numerous instruments, in particular those dealing with the protection of human rights. But does this lead to a conclusion that a common interest is one and the same thing as a right of any State party to invoke the responsibility of any other State party before this Court, under the Convention against Torture, for an alleged breach of obligations *erga omnes partes*?

13. One would have expected the Court to have recourse to the interpretation of the Convention in order to support its conclusion. Instead, it confines itself to quoting from its Preamble and classifying this instrument as being similar to the Genocide Convention. This is hardly sufficient.

14. In order to confirm its view that the common interest shared by States parties to the Convention against Torture — and other instruments containing *erga omnes partes* obligations, such as the Genocide Convention — equates to a procedural right of one State party to invoke the

responsibility of another for any alleged breaches of such obligations, the Court would need to explain, for example, how such treaties could simultaneously envisage the right of a State party to make reservations to its jurisdiction. No such explanation is provided.

15. Furthermore, under the Convention against Torture, any State party has the right to shield itself not only from accountability before the Court but also from the scrutiny of the Committee against Torture. This scrutiny is based on the *erga omnes partes* principle but, tellingly, remains optional:

> "A State Party to this Convention may at any time declare . . . that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention . . . No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration." (Art. 21, para. 1.)

The Judgment does not address this issue.

16. If the logic adopted by the Court were correct, no such opt-out or opt-in clauses would have been allowed in the Convention. The simple truth is that the Convention does not go as far as the Court suggests.

17. Admittedly, there are treaties which allow invocation of responsibility by any State party, for example, the European Convention on Human Rights. However, this entitlement is expressly granted. Article 33 of the European Convention states that: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party." Interestingly, and most logically, no reservations to the jurisdiction of the European Court of Human Rights are allowed under the European Convention.

18. By contrast, in the view of the Court, an entitlement of each State party to the Convention against Torture to make a claim concerning the existence of an alleged breach by another State party is *implied* in the common interest of the States parties' compliance with the relevant obligations under the Convention against Torture (see Judgment, paragraph 69). No explanation is offered in support of this statement.

19. The Court does not mention the European Convention on Human Rights, or any other similar treaty. Accordingly, it does not offer its view as to how that which is expressly provided for in one treaty could simply be implied in another, in respect of the same — and rather important — entitlement. If one accepts the logic of the Judgment, it would make no difference whether such an express provision were included in or excluded from a treaty by its drafters. This cannot be right.

20. The Judgment cites no precedent in which a State has instituted proceedings before this Court or any other international judicial body in respect of alleged violations of an *erga omnes partes* obligation simply on the basis of it being a party to an instrument similar to the Convention against Torture. Nor does it mention the fact, which might be worth noting as a reflection of State practice — or rather the absence of it — that the inter-State human rights complaints mechanisms (including the one provided for in Article 21 of the Convention against Torture) have never been used.

21. The Judgment does not refer to the draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001, which do not support the Court's position. In its commentary to Article 48, which deals with invocation of responsibility by a State other than the injured State, the ILC notes that "certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party",

without in any way implying that such an entitlement is allowed in treaties which do not contain a specific provision to that effect (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 127). Moreover, the commentary to the draft Articles states in no ambiguous terms that:

> "[i]n order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. *a right of action specifically conferred by a treaty, or it must be considered an injured State*." (*Ibid.*, p. 117; emphasis added.)

No such right of action is conferred on States parties by the Convention against Torture.

22. I have to conclude with regret that the grounds which are intended to support the Court's correct ruling as to the admissibility of Belgium's claims do not seem to be founded in law, be it conventional or customary.

23. As a final remark pertaining to the Judgment as a whole, I would like to recall that in 2009, at the provisional measures stage of the current proceedings, Belgium summarized the dispute between itself and Senegal in the following way: first, "Senegal considers that its decision to transmit the case to the African Union . . . somehow fulfils Article 7 [of the Convention against Torture]" (CR 2009/10, p. 20, para. 13); secondly, "Senegal's present commitment to move, albeit slowly, towards a criminal trial derives in its view from the African Union 'mandate', not directly from its obligations under the Torture Convention" *(ibid.)*.

For its part, Senegal responded that:

> "as a State it is bound by the 1984 Convention [against Torture]. The fact that an organization like the African Union may be involved in organizing the Habré trial in no way lessens Senegal's duties and rights as a party to the Convention. Indeed, it is as a party to the Convention, not pursuant to a mandate from the African Union, that the Republic of Senegal is fulfilling its obligations." (CR 2009/11, p. 18, para. 11.)

Accordingly, it seemed to me in 2009 that the Parties were in agreement on the points raised by Belgium and, therefore, that the dispute, as framed by the latter, had ceased to exist. In the light of this, I was expecting that Senegal would have taken swift action to comply with its obligations under the Convention against Torture. Unfortunately, this has not happened. Senegal concedes that there is a continuing dispute about the application of the Convention:

> "At issue before the Court is a difference between two States as to how the execution of an obligation arising from an international instrument to which both States are parties should be understood. That is the reality of the contentious proceedings that have been brought before the Court." (CR 2012/4, p. 28, para. 39.)

The above statement reflects the true nature of the dispute, which had persisted through twists and turns since the time that Belgium requested Mr. Habré's extradition from Senegal. This dispute has now been settled by the Court with a unanimous ruling to the effect that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.

(Signed) Leonid SKOTNIKOV.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. PROLEGOMENA

1. I have voted in favour of the adoption of the present Judgment in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), whereby the International Court of Justice (ICJ) has established violations of Articles 6(2) and 7(1) of the 1984 United Nations Convention against Torture[1], has asserted the need to take immediately measures to comply with the duty of prosecution under that Convention[2], and has rightly acknowledged that the absolute prohibition of torture is one of *jus cogens*[3]. Although I have agreed with the Court's majority as to most of the findings of the Court in its present Judgment, there are two points of its reasoning which I do not find satisfactory or consistent with its own conclusions, and on which I have a distinct reasoning, namely, the Court's jurisdiction in respect of obligations under customary international law, and the handling of the time factor under the U.N. Convention against Torture. I feel thus obliged to dwell upon them in the present Separate Opinion, so as to clarify the matter dealt with by the Court, and to present the foundations of my personal position thereon.

2. My reflections, developed in the present Separate Opinion, pertain to considerations at factual, conceptual and epistemological levels, on distinct points in relation to which I do not find the reasoning of the Court entirely satisfactory or complete. At the factual level, I shall dwell upon: a) the factual background of the present case: the regime Habré in Chad (1982-1990) in the findings of the Chadian Commission of Inquiry (Report of 1992); b) the significance of the decision of 2006 of the U.N. Committee against Torture; c) the clarifications on the case before the ICJ, in the responses to questions put to the contending parties in the course of the legal proceedings; and d) the everlasting quest for the realization of justice in the present case.

3. At the conceptual and epistemological levels, my reflections in the present Separate Opinion will focus on: a) urgency and the needed provisional measures of protection in the *cas d'espèce*; b) the acknowledgement of the absolute prohibition of torture in the realm of *jus cogens*; c) the obligations *erga omnes partes* under the U.N. Convention against Torture; d) the gravity of the human rights violations and the compelling struggle against impunity (within the law of the United Nations itself); e) the obligations under customary international law; and f) the *décalage* between the time of human justice and the time of human beings revisited (and the need to make time work *pro victima*).

4. In sequence, I will proceed to: a) a rebuttal of a regressive interpretation of the U.N. Convention against Torture; and b) the identification of the possible emergence of a new chapter in restorative justice. As to the reassuring assertion by the Court that the absolute prohibition of torture is one of *jus cogens* (para. 99), — which I strongly support, — I go further than the Court, as to what I perceive as the pressing need to extract the legal consequences therefrom, which the

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[1] Judgment's *dispositif*, paras. 4 and 5.

[2] Judgment's *dispositif*, para. 6.

[3] Court's reasoning, para. 99.

Court has failed to do. The way will then be paved, in the epilogue, for the presentation of my concluding reflections on the matter dealt with in the present Judgment of the Court.

II. The Factual Background of the Present Case: The Regime Habré in Chad (1982-1990) in the Findings of the Chadian Commission of Inquiry (Report of 1992)

5. In the written and oral phases of the proceedings before this Court, both Belgium and Senegal referred to the *Report* of the National Commission of Inquiry of the Chadian Ministry of Justice, concluded and adopted in May 1992. Thus, already in its *Application Instituting Proceedings* (of 19.02.2009), Belgium referred repeatedly to the findings of the 1992 *Report* of the Truth Commission of the Chadian Ministry of Justice, giving account of grave violations of human rights and of international humanitarian law during the Habré regime (1982-1990) in Chad[4]. Subsequently, in its *Memorial* (of 01.07.2010), in dwelling upon Chad under the regime of Mr. H. Habré, Belgium recalled that,

> "According to an assessment published in 1993 by the National Commission of Inquiry of the Chadian Ministry of Justice, Mr. Habré's presidency produced tens of thousands of victims. The Commission gives the following figures: — 'more than 40,000 victims; more than 80,000 orphans; more than 30,000 widows; more than 200,000 people left with no moral or material support as a result of this repression[5]'" (para. 1.10).

6. The aforementioned *Report* was also referred to in the course of the oral arguments at the provisional measures phase[6]. Subsequently, Belgium referred repeatedly to the *Report*, from the very start of its oral arguments on the merits of the case[7]. For its part, in its oral argument of 16.03.2012 before the Court, Senegal also referred to those findings of the Chadian Truth Commission, as evoked by Belgium[8]. Those findings were not controverted.

7. In my understanding, those findings ought to be taken into account in addressing the questions lodged with the Court in the present case, under the CAT Convention, one of the "core Conventions" on human rights of the United Nations. (This is of course without prejudice to the determination of facts by the competent criminal tribunal that eventually becomes entrusted with the trial of Mr. H. Habré). After all, the exercise of jurisdiction — particularly in pursuance to the principle *aut dedere aut judicare* — by any of the States Parties to the CAT Convention (Articles 5-7) is prompted by the *gravity* of the breaches perpetrated to the detriment of human beings, of concern to the members of the international community as a whole.

8. Bearing this in mind, the main findings set forth in the *Report* of the Chadian Truth Commission may here be briefly recalled, for the purposes of the consideration of the *cas d'espèce*. They pertain to: a) the organs of repression of the regime Habré in Chad (1982-1990); b) arbitrary detentions and torture; c) the systematic nature of the practice of torture of detained persons; d) extra-judicial or summary executions, and massacres. The corresponding passages of the *Report*, published in 1993, can be summarized as follows.

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[4]ICJ, *Application Instituting Proceedings* (of 19.02.2009, Belgium *versus* Senegal), pp. 13, 39, 57, 89 and 93.

[5]Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices — Rapport de la Commission d'enquête nationale du Ministère tchadien de la Justice* [*The Crimes and Misappropriations Committed by Ex-President Habré and his Accomplices — Report by the National Commission of Inquiry of the Chadian Ministry of Justice*], Paris, L'Harmattan, 1993, pp. 3-266.

[6]ICJ, document CR 2009/08, of 06.04.2009, pp. 18-19.

[7]Cf. ICJ, document CR 2012/2, of 12.03.2012, pp. 12 and 23.

[8]ICJ, document CR 2012/5, of 16.03.2012, p. 31.

1. The Organs of Repression of the Regime Habré in Chad (1982-1990)

9. According to the aforementioned *Report* of the Chadian Truth Commission, the machinery of repression of the Habré regime in Chad (1982 1990) was erected on the creation and function of four organs of his dictatorship, namely: the Directorate of Documentation and Security (*Direction de la Documentation et de la Sécurité* — DDS) or the "political police", the Service of Presidential Investigation (*Service d'Investigation Présidentielle* — SIP), the General Information [Unit] (*Renseignements Généraux* — RG) and the State Party (*Parti-État*), called the *Union Nationale pour l'Indépendance et la Révolution* — UNIR). And the *Report* added:

> "Tous ces organes avaient pour mission de quadriller le peuple, de le surveiller dans ses moindres gestes et attitudes afin de débusquer les prétendus ennemis de la nation et les neutraliser définitivement.
>
> La DDS est l'organe principal de la répression et de la terreur. De toutes les institutions oppressives du régime Habré, la DDS s'est distinguée par sa cruauté et son mépris de la vie humaine. Elle a pleinement accompli sa mission qui consiste à terroriser les populations pour mieux les asservir.
>
> Habré a jeté les bases de sa future police politique dès les premiers jours de sa prise de pouvoir. Au début, elle n'était qu'un embryon appelé 'Service de Documentation et de Renseignements' (…). Quant à la DDS telle qu'elle est connue aujourd'hui, elle a été créée par le décret n° 005/PR du 26 janvier 1983"[9].

10. The "territorial competence" of the DDS extended over "the whole national territory" and even abroad. No sector, public or private, escaped its supervision: — "Des agents ont été disséminés partout à travers le territoire à commencer par les préfectures, les sous-préfectures, les cantons et même les villages. Il a été implanté une antenne par circonscription. Celle-ci, pour superviser son territoire, recrute des agents locaux à titre d'indicateur ou informateur. Chaque antenne est composée d'un chef et d'un adjoint. (…)"[10]. Promotions were given in exchange for information[11]. The DDS aimed also at those who opposed the regime and were based in neighbouring countries, whereto it sent its agents to perpetrate murder or kidnappings[12]. The DDS was directly linked and subordinated to the Presidence of the Republic, as set forth by the decree which instituted the DDS; given the "confidential character" of its activities, there was no intermediary between President H. Habré and the DDS[13].

2. The Systematic Practice of Torture of Persons Arbitrarily Detained

11. The same *Report* adds that, in the period of the Habré regime, most victims were arbitrarily detained by the DDS, without knowing the charges against them. They were systematically tortured, either for "intimidation" or else as "reprisal"[14]. And the *Report* added that

> "La torture est une pratique institutionnalisée au sein des services de la DDS. Ainsi les personnes arrêtées sont systématiquement torturées puis détenues dans les

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[9] Ministère Tchadien de la Justice, *Les crimes et détournements de l'exPrésident Habré et de ses complices — Rapport de la Commission d'enquête nationale du Ministère tchadien de la Justice*, *op. cit. supra* n. (5), pp. 20-21.

[10] *Ibid*., pp. 21-22.

[11] *Ibid*., p. 22.

[12] *Ibid*., p. 22.

[13] He gave all the orders, and the DDS reported to him daily; *ibid*., p. 22. This was how, during his 8 years in power, he imposed a regime of terror in Chad.

[14] *Ibid*., p. 38.

cellules exiguës, dont les conditions de vie sont épouvantables et inhumaines. (…) [L]a DDS a pratiquement érigé la torture en système de travail et que la presque totalité de ses détenus y sont soumis d'une façon ou d'une autre, sans aucune distinction de sexe ou d'âge"[15].

12. And the Chadian Truth Commission proceeded in its account of the facts it found:

"Toute personne arrêtée par la DDS, que ce soit à N'Djamena ou en province, est systématiquement soumise au moins à une séance d'interrogatoire à l'issue de laquelle un procès-verbal d'audition est établi. La torture étant l'outil de préférence lors des interrogatoires, les agents de la DDS y recourent de façon systématique.

Plusieurs anciens détenus de la DDS ont fait état à la Commission d'Enquête de la torture et des mauvais traitements auxquels ils ont été soumis pendant leur détention. Des traces de ces tortures et des examens médicaux ont corroboré leurs témoignages"[16].

3. Extra-Judicial or Summary Executions, and Massacres

13. The *Report* of the Chadian Truth Commission also acknowledged cases of extra-judicial or summary executions, and of massacres:

"Durant huit années de règne, Hissein Habré avait instauré un régime où toute opinion politique contraire à la sienne pouvait entraîner la liquidation physique des ses auteurs. Ainsi, depuis son arrivée au pouvoir en juin 1982 jusqu'en novembre 1990, date de sa fuite, un grand nombre de Tchadiens étaient persécutés pour leur prise de position tendant à modifier sa politique autocratique. C'est pourquoi des familles entières ont été interpellées et détenues sans aucune forme de procès, ou tout simplement traquées et exterminées. (…)

Les personnes arrêtées par la DDS ont très peu de chance de sortir vivantes. Cette triste réalité est connue de tous les Tchadiens. Aussi, les détenus meurent généralement de deux façons: soit la mort lente qui survient après quelques jours ou quelques mois, soit la mort expéditive donnée par les bourreaux de Hissein Habré dès les premiers jours suivant l'arrestation. (…)

L'audition d'anciens détenus politiques a démontré avec force détails à l'appui les genres de mort de leurs camarades en détention. Certains mouraient d'épuisement physique dû aux conditions inhumaines de détention (...). D'autres par contre meurent par asphyxie. Entassés dans de minuscules cellules (…), les détenus s'éteignent les uns après les autres. (…)

Les enlèvements de nuit et les exécutions extra-judiciaires sont pratiqués régulièrement par les agents de la DDS sur les détenus. Ce sont généralement les agents les plus sanguinaires (…) qui procèdent aux sélections des prisonniers destinés à l'abattoir situé aux alentours de N'Djamena. Ces actes odieux et barbares visent une certaine catégorie de détenus"[17].

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[15] *Ibid*., p. 38. Such practice was conducted pursuant to superior orders, in the hierarchy of power; cf. *ibid*., pp. 38-39.

[16] *Ibid*., p. 39.

[17] *Ibid*., pp. 51 and 54.

4. The Intentionality of Extermination of Those Who Allegedly Opposed the Regime

14. In its remaining parts, the *Report* of the Chadian Truth Commission addressed aggravating circumstances of the oppression of the regime Habré, mainly the *intentionality* of the atrocities perpetrated. In its own words,

> "Le régime de Hissein Habré a été une véritable hécatombe pour le peuple tchadien; des milliers de personnes ont trouvé la mort, des milliers d'autres ont souffert dans leur âme et dans leur corps et continuent d'en souffrir.
>
> Tout au long de ce sombre règne, à N'Djamena comme dans le reste du pays, la répression systématique était la règle pour tous les opposants ou supposés opposants au régime.
>
> Les biens des personnes arrêtées ou recherchées étaient pillés et leurs parents persécutés. Des familles entières avaient été ainsi décimées.
>
> À l'intérieur du pays, des villages ont été complètement brûlés et leurs populations massacrées. Rien n'échappait à cette folie meurtrière et le pays tout entier était soumis à la terreur. (…)
>
> (...) Jamais dans l'histoire du Tchad il n'y a eu autant de morts. Jamais il n'y a eu autant de victimes innocentes. Au début de ses travaux, la Commission d'Enquête pensait avoir affaire, au pire des cas, à des massacres, mais plus elle avançait dans ses investigations, plus l'étendue du désastre s'agrandissait pour aboutir finalement au constat qu'il s'agissait plutôt d'une extermination. Aucun groupe ethnique, aucune tribu, aucune famille n'a été épargnée, exceptés les Goranes et leurs alliés. La machine à tuer ne faisait aucune différence entre hommes, femmes et enfants. La moindre protestation était assimilée à une révolte et entraînait de terribles représailles. Le peuple bâillonné et soumis assistait donc impuissant à son asphyxie progressive. Dès 1982, les prisons politiques ont proliféré au Tchad et n'ont pas désempli jusqu'à la chute du régime, en 1990. À N'Djamena comme en province, les arrestations étaient effectuées à un rythme frénétique. L'on était arrêté pour n'importe quel motif et même sans aucun motif. Il suffisait d'un mot mal placé, d'une vieille rancune non digérée par un Gorane ou n'importe quel agent de la DDS, voire d'un scénario monté de toutes pièces, pour se retrouver dans les sombres cachots de la DDS.
>
> Dans ces cachots, il mourait un nombre impressionnant de détenus. Les chiffres des détenus politiques recensés par la Commission d'enquête pour la période de 1982 à 1990 ainsi que ceux des personnes mortes pendant la même période défient toute imagination"[18].

15. The *Report* of the Chadian Truth Commission, published in 1993, was in fact concluded on 07.05.1992, with a series of recommendations[19]. Its over-all assessment was quite somber. In its own words,

> "Le bilan de huit ans de règne qu'a laissés Habré est terrifiant. La Commission ne cesse de se demander comment un citoyen, un enfant du pays a pu faire tant de mal, tant de cruauté à son peuple. L'image empruntée du 'révolutionnaire pur et dur' a vite cédé la place à celle d'un tyran minable et sanguinaire.

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[18] *Ibid*., pp. 68-69.

[19] Cf. *ibid*., pp. 98-99.

En récapitulant le mal qu'il a fait contre ses concitoyens, le bilan est lourd et bien sombre; il se chiffre à:

— plus de 40.000 victimes;

— plus de 80.000 orphelins;

— plus de 30.000 veuves;

— plus de 200.000 personnes se trouvant, du fait de cette répression, sans soutien moral et matériel.

Ajouter à cela les biens meubles et immeubles pillés et confisqués chez de paisibles citoyens, évalués à 1 milliard de francs CFA chaque année.

Huit ans de règne, huit ans de tyrannie (…). Pourquoi tant de mal, tant de haine à l'égard de son propre peuple? Valait-il la peine de lutter toute une décennie pour conquérir le pouvoir et en arriver là? Pour quel idéal et dans quel but Habré s'était-il battu? (…)

Que le régime de Habré et ce qui lui est arrivé servent de leçon à tous les Tchadiens, et en particulier aux gouvernants. Un sage disait: 'Le pouvoir, c'est comme une ombre et l'ombre n'est jamais éternelle'"[20].

III. THE DECISION OF MAY 2006 OF THE U.N. COMMITTEE AGAINST TORTURE

16. On 18.04.2001, a group of persons who claimed to be victims of torture during the regime Habré in Chad lodged a complaint with the U.N. Committee against Torture, supervisory organ of the U.N. Convention against Torture (CAT Convention). They did so under Article 22 of the CAT Convention, in the exercise of the right of individual complaint or petition[21]. The Committee then proceeded to the examination of the case of *Souleymane Guengueng et alii versus Senegal*. It should not pass unnoticed, at this stage, that the Committee was enabled to pronounce on this matter due to the exercise, by the individuals concerned, of their right of complaint or petition at international level.

17. Half a decade later, on 19.05.2006, the Committee against Torture adopted a decision, under Article 22 of the CAT Convention, on the case *Souleymane Guengueng et alii*, concerning the complaints of Chadian nationals living in Chad, who claimed to be victims of a breach by Senegal of Articles 5(2) and 7 of the CAT Convention[22]. The Committee did so taking into account the submissions of the complainants and of the respondent State, bearing in mind the factual background of the case as contained in the *Report* (of May 1992) of the National Commission of Inquiry of the Chadian Ministry of Justice[23]. In their complaint lodged with the

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[20] *Ibid*., p. 97.

[21] Article 22 of the CAT Convention has been accepted by both Senegal (on 16.10.1996) and Belgium (on 25.07.1999). Up to date, 64 of the 150 States Parties to the CAT Convention have accepted this optional clause of recognition of the competence of the U.N. Committee against Torture. For an up-dated digest of the consideration of complaints under Article 22 of the CAT Convention, cf. U.N., *Report of the Committee against Torture*, 45th-46th Sessions (2010-2011), U.N. doc. A/66/44, pp. 150-203.

[22] Paras. 1.1-1.3. The Committee (acting under Article 108(9) of its Rules of Procedure) requested Senegal, as an interim measure, not to expel Mr. H. Habré and to take all necessary measures to prevent him from leaving the country (other than an extradition), — a request to which Senegal acceded.

[23] Para. 2.1.

U.N. Committee against Torture, the complainants claimed, as to the facts, that, between 1982 and 1990, they were tortured by agents of Chad who answered directly to Mr. H. Habré, the then President of Chad during the period at issue.

18. The Committee referred to the aforementioned *Report* by the National Commission of Inquiry established by the Chadian Ministry of Justice (cf. *supra*), giving account of 40.000 "political murders" and "systematic acts of torture" allegedly committed during the H. Habré regime. The Committee recalled that, after being ousted by Mr. Idriss Déby in December 1990, Mr. H. Habré took refuge in Senegal, where he has been living ever since. The Committee further recalled the initiatives of legal action (from 2000 onwards) against Mr. H. Habré, in Senegal and in Belgium. The Committee then found the communication admissible and considered that the principle of universal jurisdiction enunciated in Articles 5(2) and 7 of the CAT Convention implies that the jurisdiction of States Parties "must extend to *potential* complainants in circumstances similar to the complainants"[24].

19. As to the merits of the communication in the case *Souleymane Guengueng et alii*, the Committee, after reviewing the arguments of the parties as to the alleged violations of the relevant provisions of the CAT Convention, noted that Senegal had not contested the fact that it had not taken "such measures as may be necessary" under Article 5(2). The Committee found that Senegal had not fulfilled its obligations under that provision[25]. In reaching this decision, the Committee deemed it fit to warn, in its decision of 19.05.2006, that

> "the reasonable time-frame within which the State Party should have complied with this obligation [under Article 5(2) of the CAT Convention] has been considerably exceeded"[26].

20. As to the alleged breach of Article 7 of the CAT Convention, the Committee noted 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"; it further observed that the objective of Article 7 is "to prevent any act of torture from going unpunished"[27]. The Committee also pondered that Senegal or any other State Party "cannot 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"[28]. The Committee found that Senegal was under an obligation to prosecute Mr. H. Habré for alleged acts of torture, unless it could demonstrate that there was not sufficient evidence to prosecute (at the time of the complainants' submission of their original complaint of January 2000).

21. The Committee recalled that the decision of March 2001 by the Court of Cassation had put an end to any possibility of prosecuting Mr. H. Habré in Senegal, and added that since Belgium's request of extradition of September 2005, Senegal also had the choice to extradite Mr. H. Habré. As Senegal decided neither to prosecute nor to extradite him, the Committee found that it had failed to perform its obligations under Article 7 of the CAT Convention[29]. The Committee then concluded that Senegal had violated Articles 5(2) and 7 of the CAT Convention; it

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[24]Para. 6.4, and cf. paras. 6.1-6.5.

[25]Paras. 9.1-9.6.

[26]Para. 9.5.

[27]Para. 9.7.

[28]Para. 9.8.

[29]Paras. 9.7-9.12.

added that its decision in no way influenced 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"[30]. This decision of the Committee against Torture is, in my view, of particular relevance to the present case before this Court[31].

IV. THE CASE BEFORE THE ICJ: RESPONSES TO QUESTIONS PUT TO THE CONTENDING PARTIES

1. Questions Put to Both Parties

22. At the end of the public hearings before this Court, I deemed it fit to put to the two contending parties, on 16.03.2012, the following questions:

"(...) Première question:

1. *En ce qui concerne les faits* à l'origine de la présente affaire, quelle serait selon vous, en tenant compte du coût estimatif allégué ou éventuel que représenterait l'organisation du procès de M. Habré au Sénégal, la valeur probante du rapport de la Commission d'enquête nationale du Ministère tchadien de la Justice?

Deuxième question:

2. *En ce qui concerne le droit*:

a) Comment doit être interprétée l'obligation de 'soumet[tre] l'affaire [aux] autorités [nationales] compétentes pour l'exercice de l'action pénale' énoncée au paragraphe 1 de l'article 7 de la Convention des Nations Unies contre la Torture? Les mesures que le Sénégal soutient avoir prises à ce jour suffisent-elles, selon vous, pour considérer qu'il a été satisfait à l'obligation énoncée audit paragraphe?

b) En vertu du paragraphe 2 de l'article 6 de la Convention des Nations Unies contre la Torture, tout État partie sur le territoire duquel se trouve une personne soupçonnée d'avoir commis une infraction (visée à l'article 4) doit 'proc[é]de[r] immédiatement à une enquête préliminaire en vue d'établir les faits'. Comment cette obligation doit-elle être interprétée? Les mesures que le Sénégal soutient avoir prises à ce jour

[30]Paras. 9.12 and 10.

[31]Cf. also section XV, *infra*.

> suffisent-elles, selon vous, pour considérer qu'il a été satisfait à l'obligation lui incombant en vertu de cette disposition de la Convention des Nations Unies contre la Torture ?"[32].

2. Reponses by Belgium

23. Concerning the *first* question I posed[33], Belgium gave its response on the basis of the relevant rules of Belgian law, and invited Senegal to elaborate on the rules applicable under Senegalese law. Belgium contended that Belgian law espouses the principle of "*liberté de la preuve*" in criminal contexts, which, according to Belgium, entails, first, the free choice of evidence and, secondly, allows the trial judge to have discretion to assess its probative value. Belgium pointed out that the Belgian Court of Cassation has upheld this principle many times[34]. Belgium further argued that the corollary of the principle of "*liberté de la preuve*" is that of firm conviction, whereby the judge can only uphold the charges in case all the evidence submitted to him by the prosecutor warrants the firm conviction that the individual has committed the offence he is charged with.

24. Belgium contended, in addition, that, essentially, any type of evidence is thus admissible, as long as it is rational and recognized, by reason and experience, as capable of convincing the judge. Belgium also alleged that, in accordance with the general legal principle of respect for the rights of the defence, any evidence taken into account by the judge in a criminal case must be subjected to adversarial argument. Belgium contended that the judge in a criminal case may take into consideration all the evidence which has been gathered abroad and which has been transmitted to the Belgian authorities, such as, a copy of the *Repor*t of the National Commission of Inquiry of the Chadian Ministry of Justice (hereinafter: "the *Report*"), as long as that evidence does not violate the right to a fair trial. Belgium further argued that the judge will determine the legality of the evidence obtained abroad based on the following considerations: whether the foreign law allows the evidence used; whether or not this evidence is consistent with the rules of international

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[32]ICJ, document CR 2012/5, of 16.03.2012, pp. 42-43. Translation:

"(…) First question:

1. *As to the facts* which lie at the historical origins of this case, taking into account the alleged or eventual projected costs of the trial of Mr. Habré in Senegal, what in your view would be the probatory value of the Report of the National Commission of Inquiry of the Chadian Ministry of Justice?

Second question:

2. *As to the law*:

a) Pursuant to Article 7(1) of the United Nations Convention against Torture, how is the obligation to 'submit the case to its competent authorities for the purpose of prosecution' to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill the obligation under Article 7(1) of the United Nations Convention against Torture?

b) According to Article 6(2) of the United Nations Convention against Torture, a State Party wherein a person alleged to have committed an offence (pursuant to Article 4) is present, 'shall immediately make a preliminary inquiry into the facts'. How is this obligation to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill its obligation under this provision of the United Nations Convention against Torture?"

[33]Namely: — "*As to the facts* which lie at the historical origins of this case, taking into account the alleged or eventual projected costs of the trial of Mr. Habré in Senegal, what in your view would be the probatory value of the Report of the National Commission of Inquiry of the Chadian Ministry of Justice?"

[34]ICJ, document CR 2012/6, of 19.03.2012, p. 21. Belgium argues that the Court of Cassation has found that "in respect of criminal law, when the law does not lay down a particular method of proof, the trial judge in fact assesses the probative value of the evidence, submitted in due form, on which he bases his opinion", Belgian Court of Cassation, 27.02.2002, Pas., 2002, p. 598 *[translation by the Registry]*.

law directly applicable in the domestic courts and with Belgian public policy rules; and, whether the evidence was obtained in compliance with the foreign law, in so far as the judge has been seized of a dispute in this connection[35].

25. Belgium further claimed that when the international arrest warrant against Mr. Habré was issued, the Belgian investigating judge took account, in particular, of the evidence contained in the *Report*. Thus, — to conclude, — Belgium argued that, while keeping in mind that it is for the trial judge to rule on the probative value of the *Report* at issue, it could certainly be used as evidence in proceedings against Mr. Habré. Belgium added that the use of the *Report* could save a considerable amount of time and money in pursuit of the obligation to prosecute, even if — and Belgium referred to Senegal's arguments in this regard — it is not possible to point to "lack of funds or difficulties in establishing a special budget as exonerating factors" concerning the responsibility of the State which is obliged to prosecute or, failing that, to extradite[36].

26. As to the *second* question I posed[37], Belgium argued that there are three steps to be taken pursuant to Article 6 of the Convention against Torture (CAT Convention): "*first*, to secure the offender's presence; *second*, to conduct, immediately, a preliminary inquiry; and, *third*, to notify, immediately, certain States what is going on, including in particular reporting to them its findings following the preliminary inquiry and indicating whether it intends to exercise jurisdiction". As to the first requirement of Article 6, Belgium argued that it never contested that Senegal fulfilled this first step, even though from time to time, Belgium has had serious concerns about Senegal's continuing commitment to this obligation, given certain statements by high-level officials of Senegal.

27. As concerns Article 6(2), Belgium argued that Senegal's counsel did not make arguments in this regard during the oral hearings. Belgium claimed that Article 6 is a common provision in Conventions containing *aut dedere aut judicare* clauses (as, e.g., in the Hague and Montreal Conventions concerning Civil Aviation), and referred to the United Nations Study of such clauses, to the effect that the preliminary steps set out in the Conventions, including "measures (...) to investigate relevant facts", are indispensable to allow the proper operation of the mechanism for the punishment of offenders in the relevant conventions. Belgium went on to argue that the nature of the investigation required by Article 6(2) depended to some extent on the legal system concerned, and the circumstances of the particular case. It contended, however, that from the structure of the *aut dedere aut judicare* provisions of the Convention against Torture, the reference to a preliminary inquiry in Article 6(2), is of the kind of preliminary investigation which precedes the submission of the matter to the prosecuting authorities.

28. Belgium claimed that Article 6(4) makes it clear that the preliminary inquiry should lead to findings, and that the main purpose of the inquiry is to enable the State in whose territory the alleged offender is present, to take a decision on whether it intends to take jurisdiction, and to report its findings to other interested States so that they may take a decision whether or not to seek extradition. In Belgium's submission, "[t]he preliminary inquiry referred to in Article 6, paragraph 2, thus requires the gathering of first pieces of evidence and information, sufficient to permit an informed decision by the competent authorities of the territorial State whether a person

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[35]ICJ, document CR 2012/6, of 19.03.2012, p. 21.

[36]ICJ, document CR 2012/6, of 19.03.2012, p. 22.

[37]Namely: — "According to Article 6(2) of the United Nations Convention against Torture, a State Party wherein a person alleged to have committed an offence (pursuant to Article 4) is present, 'shall immediately make a preliminary inquiry into the facts'. How is this obligation to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill its obligation under this provision of the United Nations Convention against Torture?"

should be charged with a serious criminal offence and brought to justice"[38]. Belgium concluded by claiming that there is no information before the Court speaking to any preliminary inquiry on the part of Senegal.

29. As to my question concerning the *interpretation of Article 7*[39], Belgium first argued that the obligation under Article 7(1) is closely related to the obligations under Articles 5(2), and 6(2) of the CAT Convention, — which in its view Senegal has also violated, — and Belgium further claimed in this regard that "the breach of Article 7 flowed from the breach of the other two provisions". Belgium explained that "[t]he absence of the necessary legislation, in clear breach of Article 5, paragraph 2, until 2007/2008 meant that Senegal's prosecutorial efforts were doomed to failure. So the prosecutorial efforts undertaken in 2000 and 2001 cannot be seen as fulfilling the obligation laid down in Article 7, paragraph 1, of the Convention"[40].

30. Belgium claimed that the obligation in Article 7 of the CAT Convention "to submit the case to the competent authorities for the purpose of prosecution" is carefully worded as it would not seem realistic "*to prosecute whenever allegations are made*". In this regard, Belgium argued that:

> "What can be required is that the case is submitted to the prosecuting authorities for the purpose of prosecution; and that those authorities 'shall take their decision in the same manner as the case of any ordinary offence of a serious nature' — in paragraph 2 of Article 7, with which paragraph 1 should be read, provides. What is at issue here, in particular, is the need for the prosecuting authorities to decide whether the available evidence is sufficient for a prosecution"[41].

31. Belgium then referred to the negotiating history of Article 7 and argued that the same language is now found in many of the *aut dedere aut judicare* clauses that follow the Hague Convention[42] model, including the CAT Convention. Referring to the *travaux préparatoires* of the latter, Belgium argued that it was decided that the language should follow the "well-established language" of the Hague Convention[43]. Belgium also claimed that "the fact that there is no absolute requirement to prosecute does not mean that the prosecuting authorities have total discretion, and that a State may simply do nothing", and contended that, like any other international obligation, it must be performed in good faith.

32. Belgium referred to the object and purpose of the CAT Convention stated in its concluding preambular paragraph — "to make more effective the struggle against torture" — which means, in its view, that the prosecuting authorities start "a prosecution if there is sufficient evidence, and that they do so in a timely fashion". After referring to expert writing on the *travaux préparatoires* of the Hague Convention, for guidance in the interpretation of Article 7 of the

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[38]ICJ, document CR 2012/6, of 19.03.2012, pp. 42-44. Belgium also cites the *Commentary*, by Nowak and McArthur, in this sense: "[s]uch criminal investigation is based on the information made available by the victims and other sources as indicated in Article 6(1) and includes active measures of gathering evidence, such as interrogation of the alleged torturer, taking witness testimonies, inquiries on the spot, searching for documentary evidence, etc."; M. Nowak, E. McArthur *et alii*, *The United Nations Convention Against Torture — A Commentary*, Oxford, Oxford University Press, 2008, p. 340.

[39]Namely: — "Pursuant to Article 7(1) of the United Nations Convention against Torture, how is the obligation to 'submit the case to its competent authorities for the purpose of prosecution' to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill the obligation under Article 7(1) of the United Nations Convention against Torture?"

[40]ICJ, document CR 2012/6, of 19.03.2012, p. 46.

[41]*Ibid*., p. 46.

[42]Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16.12.1970, *U.N. Treaty Series*, vol. 860, p. 105 (I-12325).

[43]ICJ, document CR 2012/6, of 19.03.2012, pp. 46-47.

CAT Convention[44], Belgium concluded that Senegal is in breach of its obligation under Article 7 of the CAT Convention, notwithstanding the fact that the prosecuting authorities acted in the year 2000, without success, which in its view was not sufficient to fulfill its obligations under the CAT Convention.

33. Belgium further contended that, since 2000-2001, Senegal has taken no action to submit any of the allegations against Mr. H. Habré to the prosecuting authorities, a fact which Belgium submitted to be a "matter of particular concern given that the allegations against Mr. H. Habré were renewed in the Belgian extradition request of 2005, and in the further complaint laid in Senegal in 2008, not to speak of the information now publicly available concerning the crimes that have been committed when Hissène Habré was in power in Chad, and for which he allegedly bears responsibility"[45].

3. Responses by Senegal

34. In respect of my *first* question (*supra*), Senegal pointed out, as far as the pertinent provisions of domestic law in force in Senegal are concerned, that the *Report* of the Chadian Truth Commission "can only be used for information purposes and is not binding on the investigating judge who, in the course of his investigations conducted by means of an international letter rogatory, may endorse or disregard it". Senegal added that the *Report* is not binding on the trial judge examining the merits of the case, and thus the value of the *Report* is "entirely relative"[46].

35. As to my *second* question (*supra*), Senegal argued that, even before it adhered to the CAT Convention, it had already endeavoured to punish torture, and as such it had established its jurisdiction in relation to Article 5(3) of the Convention, on the basis of which Mr. Habré was indicted in 2000 by the senior investigating judge when the competent Senegalese authorities had been seised with complaints. Senegal further claims that pursuant to Article 7(3) of the Convention, Mr. Habré "was able to avail himself of the means of redress made available by Senegalese law to any individual implicated in proceedings before criminal courts, without distinction of nationality, on the same basis as the civil parties"[47].

36. Senegal also added that, further to the judgment of 20.03.2001 of the Court of Cassation, and the mission of the Committee against Torture in 2009, Senegal adapted its legislation to the other provisions of the CAT Convention. Senegal further claimed that the investigating judge, in criminal proceedings, may be seised either by a complaint with civil-party application or by an application from the Public Prosecutor to open an investigation. Concerning the preliminary inquiry, Senegal claimed that its aim is to establish the basic facts and that it does not necessarily lead to prosecution, as the prosecutor may, upon review of the results of the inquiry, decide that there are no grounds for further proceedings[48].

37. Senegal further claimed that the CAT Convention does not contain a "general obligation to combat impunity" as a legal obligation with the effect of requiring universal jurisdiction to be established and that an obligation of result is not in question, "since the fight against impunity is a process having prosecution or extradition as possible aims under the said Convention". Senegal questioned the purpose of establishing universal jurisdiction in the case of a State which already has a legal entitlement to exercise territorial jurisdiction, which, in its view is the most obvious principle in cases of competing jurisdiction. Senegal recalled that, in 2009, it established its jurisdiction concerning offences covered by the CAT Convention.

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[44] *Ibid*., pp. 46-48.

[45] *Ibid*., p. 48.

[46] ICJ, document CR 2012/7, of 21.03.2012, p. 32.

[47] *Ibid*., pp. 32-33.

[48] *Ibid*., p. 33.

38. Senegal further recalled the Court's Order on the request for provisional measures of 2009 to the effect that the Parties seemed to differ on the "time frame within which the obligations provided for in Article 7 must be fulfilled or [on the] circumstances (financial, legal or other difficulties)". Senegal argues that the obligation *aut dedere aut judicare* remains an obligation either to extradite or, in the alternative, to prosecute, given that international law does not appear to "give priority to either alternative course of action".[49]

39. Senegal contended, moreover, that "[t]he obligation to try, on account of which Senegal has been brought before the Court, cannot be conceived as an obligation of result" but rather an obligation of means, where "the requirement of wrongfulness is fulfilled only if the State to which the source of the obligation is attributable has not deployed all the means or endeavours that could legitimately be expected of it in order to achieve the results expected by the authors of the rule". Senegal referred to [some] international jurisprudence and argued that international law does not impose obligations of result on member States.

40. Senegal concluded by arguing that the measures it has taken thus far are largely sufficient and satisfy the obligations laid down in Articles 6(2) and 7(1) of the CAT Convention. Senegal thus argued that once it "undertook major reforms to allow the trial to be held, including constitutional reforms, it may be considered to have satisfied its obligation of means or of 'best efforts', so as not to give the appearance of a State heedless and not desirous of implementing its conventional obligations. It may not have done this to a sufficient extent, but it has made sufficient progress in terms of acting to achieve such a result"[50].

4. General Assessment

41. In the light of the aforementioned, it is significant that, for the arrest warrant against Mr. Habré, the evidence contained in the *Report* of the Chadian Truth Commission was taken into account by the Belgian investigating judge. Furthermore, — as also pointed out by Belgium, — that *Report* can certainly be taken into account as evidence in legal proceedings against Mr. H. Habré, it being for the trial judge or the tribunal to rule on its probative value. Senegal itself acknowledged that the *Report* at issue can be taken into account for information purposes, without being "binding" on the investigating judge; it is for the judge (or the tribunal) to rule on it.

42. There thus seems to be a disagreement between Belgium and Senegal as to the consideration of the evidence considered in the *Report*. In any case, the *Report* cannot be simply overlooked or ignored, it cannot be examined without care. It is to be examined together with all other pieces of evidence that the investigating judge or the tribunal succeeds in having produced before him/it, for the purpose of ruling on the matter at issue. The present case concerns ultimately a considerable total of victims, those murdered, or arbitrarily detained and tortured, during the Habré regime in Chad (1982-1990).

43. As to the answers provided by the contending parties to my questions addressed to them, whether in their view the steps that Senegal alleges to have taken to date, were sufficient to fulfill its obligations under Articles 6(2) and 7(1) of the U.N. Convention against Torture, an assessment of such answers ensues from the consideration of the doctrinal debate on the dichotomy between alleged obligations of means or conduct, and obligations of result. I am of the view that the obligations under a treaty of the nature of the U.N. Convention against Torture are not, as the respondent State argues, simple obligations of means or conduct: they are obligations of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*. I feel obliged to expand on the foundations of my personal position on this matter.

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[49] *Ibid*., p. 34.

[50] *Ibid*., pp. 35-36.

V. PEREMPTORY NORMS OF INTERNATIONAL LAW (*JUS COGENS*): THE CORRESPONDING OBLIGATIONS OF RESULT, AND NOT OF SIMPLE CONDUCT

44. In my understanding, the State obligations, — under Conventions for the protection of the human person, — of prevention, investigation and sanction of grave violations of human rights and of International Humanitarian Law, are not simple obligations of conduct, but rather obligations of result[51]. It cannot be otherwise, when we are in face of peremptory norms of international law, safeguarding the fundamental rights of the human person. Obligations of simple conduct may prove insufficient; they may exhaust themselves, for example, in unsatisfactory legislative measures. In the domain of *jus cogens*, such as the absolute prohibition of torture, the State obligations are of due diligence and of result. The examination of the proposed distinction between obligations of conduct and obligations of result has tended to take place at a purely theoretical level, assuming variations in the conduct of the State, and even a succession of acts on the part of this latter[52], and without taking sufficient and due account of a situation which causes irreparable harm to the fundamental rights of the human person.

45. If the corresponding obligations of the State in such a situation were not of result, but of mere conduct, the doors would then be left open to impunity. The handling of the case of Mr. Hissène Habré to date serves as a warning in this regard. Over three decades ago, when the then *rapporteur* of the U.N. International Law Commission (ILC) on the International Responsibility of the State, Roberto Ago, proposed the distinction between obligations of conduct and of result, some members of the ILC expressed doubts as to the viability of distinguishing between the two types of obligation; after all, in order to achieve a given result, the State ought to assume a given behaviour[53]. In any case, obligations of result admitted the initial free choice by the State of the means to comply with them, of obtaining the results due.

46. The aforementioned distinction between the two kinds of obligations introduced a certain hermeticism into the classic doctrine on the matter, generating some confusion, and not appearing much helpful in the domain of the international protection of human rights. Despite references to a couple of human rights treaties, the essence of R. Ago's reasoning, developed in his dense and substantial *Reports* on the International Responsibility of the State, had in mind above all the framework of essentially inter-State relations. The ILC itself, in the *Report* of 1977 on its work, at last reckoned that a State Party to a human rights treaty has obligations of *result*, and, if it does not abide by them, it cannot excuse itself by alleging that it has done all that it could to comply with them, that it has behaved in the best way to comply with them; on the contrary, such State has the duty to attain the *result* required of it by the conventional obligations of protection of the human person.

47. Such binding obligations of *result* (under human rights treaties) are much more common in international law than in domestic law. The confusion generated by the dichotomy of obligations of conduct and of result has been attributed to the undue transposition into international law of a distinction proper to civil law (*droit des obligations*); rather than "importing" inadequately distinctions from other branches of Law or other domains of legal theory, in my view one should rather seek to ensure that the behaviour of States is such that it will abide by the required result, of securing protection to human beings under their respective jurisdictions. Human

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[51]Cf., to this effect: IACtHR, case of the *Dismissed Employees of the Congress versus Peru* (Interpretation of Judgment of 30.11.2007), Dissenting Opinion of Judge Cançado Trindade, paras. 13-29; IACtHR, case of the *Indigenous Community Sawhoyamaxa versus Paraguay* (Judgment of 29.03.2006), Separate Opinion of Judge Cançado Trindade, para. 23; IACtHR, case *Baldeón García versus Peru* (Judgment of 06.04.2006), Separate Opinion of Judge Cançado Trindade, paras. 11-12.

[52]A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato* (…), *op. cit. infra* n. (55), pp. 50-55 and 128-135.

[53]Report reproduced *in*: Appendix I: *Obligations of Result and Obligations of Means*, *in* I. Brownlie, *State Responsibility — Part I*, Oxford, Clarendon Press, 2001 [reprint], pp. 241-276, esp. pp. 243 and 245.

rights treaties have not had in mind the dichotomy at issue, which is vague, imprecise, and without practical effect.

48. It is thus not surprising to find that the distinction between so-called obligations of conduct and of result was discarded from the approved 2001 draft of the ILC on the International Responsibility of States, and was met with criticism in expert writing[54]. Moreover, it failed to have any significant impact on international case-law. The ECtHR, for example, held in the case of *Colozza and Rubinat versus Italy* (Judgment of 12.02.1985), that the obligation under Article 6(1) of the European Convention of Human Rights was one of result. For its part, the ICJ, in the case of the *Hostages (U.S. Diplomatic and Consular Staff) in Tehran* (Judgment of 24.05.1980), ordered the respondent State to comply promptly with its obligations, which were "not merely contractual", but rather imposed by general international law (para. 62); the ICJ singled out "the imperative character of the legal obligations" incumbent upon the respondent State (para. 88), and added that

> "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights" (para. 91).

49. One of such principles is that of respect of the dignity of the human person. Thus, in so far as the safeguard of the fundamental rights of the human person is concerned, the obligations of the State — conventional and of general international law — are of *result*, and not of simple conduct, so as to secure the effective protection of those rights. The absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of *result*, endowed with a necessarily objective character, and the whole conceptual universe of the law of the international responsibility of the State has to be reassessed in the framework of the international protection of human rights[55], encompassing the origin as well as the implementation of State responsibility, with the consequent and indispensable duty of reparation.

50. In the framework of the International Law of Human Rights, — wherein the U.N. Convention against Torture is situated, — it is not the result that is conditioned by the conduct of the State, but, quite on the contrary, *it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms of protection of the human person*. The conduct of the State ought to be the one which is conducive to compliance with the obligations of result (in the *cas d'espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered it impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly "good conduct" of the State concerned.

51. This would be inadmissible; we are here in before obligations of *result*. To argue otherwise would amount to an exercise of legal formalism, devoid of any meaning, that would lead to a juridical absurdity, rendering dead letter the norms of protection of the human person. In sum and conclusion on this point, the absolute prohibition of torture is, as already seen, one of *jus cogens*; in an imperative law, conformed by the *corpus juris* of the international protection of the

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[54]Cf., e.g., I. Brownlie, *State Responsibility — Part I*, *op. cit supra* n. (53), pp. 241, 250-251, 255-259, 262, 269-270 and 276; J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", *in Mélanges offerts à P. Reuter — Le droit international: unité et diversité*, Paris, Pédone, 1981, pp. 190, 198 and 200-204; P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", 188 *Recueil des Cours de l'Académie de Droit International de La Haye* (1984) pp. 47-49; and cf. also P.-M. Dupuy, "Reviewing the Difficulties of Codification: On Ago´s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", 10 *European Journal of International Law* (1999) pp. 376-377.

[55]A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato — Contributo allo Studio degli Obblighi Internazionali*, Milano, Giuffrè Ed., 2003, pp. 166-171; F. Urioste Braga, *Responsabilidad Internacional de los Estados en los Derechos Humanos*, Montevideo, Edit. B de F, 2002, pp. 1-115 and 139-203; L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht, Nijhoff, 1995, pp. 141-142 and 149, and cf. pp. 145, 150-152 and 156.

fundamental rights of the human person, the corresponding obligations of the State are ineluctable, imposing themselves *per se*, as obligations necessarily of *result*.

VI. The Everlasting Quest for the Realization of Justice in the Present Case

52. With these clarifications in mind, it would be helpful to proceed, at this stage, to a brief view of the long-standing endeavours, throughout several years, to have justice done, in relation to the grave breaches of human rights and International Humanitarian Law reported to have occurred during the Habré regime (1982-1990). Those endeavours comprise legal actions in domestic courts, requests of extradition (at inter-State level), some other initiatives at international level, and an initiative of entities of the African civil society. The way would then be paved for a brief review of the initiatives and endeavours to the same effect of the African Union in particular, given its influence in the orientation of the conduction of international affairs in the African continent.

1. Legal Actions in Domestic Courts

53. On 25-26.01.2000 the first complaints were lodged by Chadian nationals in Dakar, Senegal, against Mr. Hissène Habré, accusing him of the practice of torture (crimes against humanity). On 03.02.2000 a Senegalese judge, after hearing the victims, indicted Mr. H. Habré, and placed him under house arrest. But on 04.07.2000 the Dakar Appeals Court dismissed the indictment, ruling that Senegalese courts had no jurisdiction to pursue the charges because the crimes were not committed in Senegal.

54. On 30.11.2000, new complaints were filed against Mr. H. Habré, this time in Brussels, by Chadian victims living in Belgium. On 20.03.2001, Senegal's Appeals Court stood by its view, in ruling that Mr. H. Habré could not stand trial because the alleged crimes were not committed in Senegal. In 2002 (26 February to 07 March), a Belgian investigating judge (*juge d'instruction*), in a visit to Chad, interviewed victims and former accomplices of Mr. H. Habré, visited detention centres and mass graves, and took custody of DDS documents. At the end of a four-year investigation, on 19.09.2005, he issued an international arrest warrant *in absentia* in respect of Mr. H. Habré. Senegal, however, refused to extradite him to Belgium.

55. Parallel to new developments, — at international level, — from the end of 2005 to date, at domestic level new complaints were filed, on 16.09.2008, against Mr. H. Habré in Senegal, accusing him again of the practice of torture (crimes against humanity). Earlier on, on 31.01.2007, Senegal's National Assembly adopted a law allowing Senegalese courts to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when committed outside of Senegal (thus removing a previous legal obstacle); it later amended its constitution.

2. Requests of Extradition

56. To the above initiatives of legal actions at domestic law level, four requests by Belgium to date, of extradition of Mr. H. Habré, are to be added. As to the first Belgian request of extradition, of 22.05.2005, the Dakar Appeals Court decided, on 25.11.2005, that it lacked jurisdiction to deal with it. On 15.03.2011, Belgium presented a second extradition request, declared inadmissible by the Dakar Appeals Court in its decision of 18.08.2011. Later on, a third extradition request by Belgium, of 05.09.2011, was again declared inadmissible by the Dakar Appeals Courts in its decision of 10.01.2012. Belgium promptly lodged a fourth extradition request (same date). To those requests for extradition, one could add the whole of the diplomatic

correspondence exchanged between Belgium and Senegal, reproduced in the dossier of the present case[56] before this Court.

3. Initiatives at International Level

57. On 24.01.2006 the African Union (A.U.), meeting in Khartoum, set up a "Committee of Eminent African Jurists", to examine the H. Habré case and the options for his trial. In its following session, after hearing the report of that Committee, the A.U., on 02.07.2006, asked Senegal to prosecute H. Habré "on behalf of Africa". In the meantime, on 18.05.2006, the U.N. Committee against Torture found, in the *Souleymane Guengueng et alii* case (*supra*) that Senegal violated the CAT Convention[57] and called on Senegal to prosecute or to extradite Mr. H. Habré. Shortly after the ICJ's Order of 28.05.2009 in the present case opposing Belgium to Senegal, the President and another member of the U.N. Committee against Torture embarked on an unprecedented visit *in situ* to Senegal, from 04 to 07.08.2009, to seek the application of the Committee's own decision of May 2006 in the *cas d'espèce*.

58. In the meantime, on 11.08.2008, a Chadian national residing in Switzerland (Mr. Michelot Yogogombaye) lodged an application against Senegal before the African Court on Human and Peoples' Rights (AfCtHPRP) with a view to suspend the "ongoing proceedings" aiming to "charge, try and sentence" Mr. Hissène Habré. On 15.12.2009, the AfCtHPR decided that it had no jurisdiction to entertain the application at issue, since Senegal had not made a declaration accepting the jurisdiction of the AfCtHPR to hear such applications, pursuant to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights (on the establishment of the AfCtHPR).

59. In the period 2008-2010, moreover, given Senegal's refusal to prepare for the trial of Mr. H. Habré unless it received full funding for it, the European Union and the A.U. sent successive delegations to negotiate on the issue with Senegal. In the meantime, on 18.11.2010, the ECOWAS Court of Justice ruled that Senegal ought to try Mr. H. Habré by a special jurisdiction or an *ad hoc* tribunal, to be created for that purpose. On 24.11.2010, a donors' international roundtable held in Dakar secured the full funding to cover all the estimated costs of the proceedings of the trial of Mr. H. Habré[58]. Shortly afterwards, on 31.01.2011, the A.U. called for the "expeditious" start of the trial of Mr. H. Habré, on the basis of the ECOWAS Court decision (cf. *infra*).

60. On 24.11.2011, the *rapporteur* of the CAT Convention on the follow-up of communications (or petitions) sent a letter to the Permanent Mission of Senegal to the United Nations, reminding it of its obligation *aut dedere aut judicare* under the Convention, and took note of the fact that, until then, no proceedings had been initiated by Senegal against Mr. H. Habré. Earlier on, on 12.01.2011, the same *rapporteur* had sent another letter to Senegal's Permanent Mission to the U.N., recalling the State Party's obligation under Article 7(1) of the CAT Convention, now that the full funding for the trial of Mr. H. Habré had been secured (*supra*).

61. For its part, the Office of the U.N. High Commissioner for Human Rights (OHCHR) also expressed its concern with the delays in opening up the trial of Mr. H. Habré; on 18.03.2011, the OHCHR urged Senegal to comply with its duty of prosecution[59]. Later on, the OHCHR requested

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[56]Cf. Annexes to Belgium's *Memorial*, vol. II, of 01.07.2010, docs. B.1-26.

[57]This was the first time the Committee found a breach of the duty to prosecute (Article 7 of the CAT Convention), in a decision that has been seen as corresponding to "the letter, spirit and purpose of Article 7, namely, to avoid safe havens for torturers"; M. Nowak, E. McArthur *et alii*, *The United Nations Convention against Torture — A Commentary*, *op. cit. supra* n. (38), p. 363.

[58]Cf. UNHCR/Refworld, "African Union Calls for 'Expeditious' Start to Habré Trial", www.unhcr.org-refworld, doc. of 31.01.2011, p. 2.

[59]U.N./OHCHR, www.ohchr.org/news, of 18.03.2011, p. 1.

Senegal not to extradite (as then announced) Mr. H. Habré to Chad (where he had already been sentenced to death *in absentia*), pondering that "[j]ustice and accountability are of paramount importance and must be attained through a fair process and in accordance with human rights law"[60]. Shortly afterwards, the OHCHR warned, on 12.07.2011, that Mr. H. Habré was

> "continuing to live with impunity in Senegal, as he has done for the past 20 years. It is important that rapid and concrete progress is made by Senegal to prosecute or extradite Habré to a country willing to conduct a fair trial. This has been the High Commissioner's position all along. It is also the position of the African Union (A.U.), as well as of much of the rest of the international community. It is a violation of international law to shelter a person who has committed torture or other crimes against humanity, without prosecuting or extraditing him"[61].

4. Initiative of Entities of African Civil Society

62. In addition to these three exhortations (of the U.N. Committee against Torture itself, the African Union, and the *rapporteur* of the CAT Convention), on 21.07.2010, Nobel Peace Prize winners Archbishop Desmond Tutu and Shirin Ebadi *el alii*, as well as 117 African human rights groups from 25 African countries, likewise called upon Senegal to move forward with the trial of Mr. H. Habré, for political killings and the systematic practice of torture, after more than 20 years of alleged difficulties to the detriment of the victims[62].

63. In their call for the fair trial of Mr. H. Habré, Archbishop D. Tutu and the other signatories stated:

> "We, the undersigned NGOs and individuals urge Senegal rapidly to begin legal proceedings against the exiled former Chadian dictator Hissène Habré, who is accused of thousands of political killings and systematic torture from 1982 to 1990.
>
> The victims of Mr. Habré's regime have been working tirelessly for 20 years to bring him to justice, and many of the survivors have already died. (…) Instead of justice, the victims have been treated to an interminable political and legal soap opera (…)"[63].

64. After recalling the facts of the victims' quest for justice, they stated that a fair trial for Mr. H. Habré in Senegal "should be a milestone" in the fight to hold "the perpetrators of atrocities (…) accountable for their crimes". They added that this would moreover show that "African courts are sovereign and capable of providing justice for African victims for crimes committed in Africa". They thus urged the authorities "to choose justice, not impunity, and to move quickly towards the trial of Hissène Habré"[64].

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[60]U.N./OHCHR, "Senegal Must Review Its Decision to Extradite Hissène Habré to Chad", www.ohchr.org/news, of 10.07.2011, p. 1.

[61]U.N./OHCHR, www.ohchr.org/news, of 12.07.2011, p. 1.

[62]Cf. Human Rights Watch (HRW), "Senegal/Chad: Nobel Winners, African Activists Seek Progress in Habré Trial", www.hrw.org/news, of 21.07.2010, p. 1; HRW, "U.N.: Senegal Must Prosecute or Extradite Hissène Habré", www.hrw.org/news, of 18.01.2001, p. 1.

[63]FIDH [Fédération internationale des ligues des droits de l'homme], "Appeal […] for the Fair Trial of Hissène Habré", www.fidh.org/news, of 21.07.2010, p. 1.

[64]*Ibid*., p. 1.

VII. THE SEARCH FOR JUSTICE: INITIATIVES AND ENDEAVOURS OF THE AFRICAN UNION

65. The above review, to be completed, requires closer attention to the initiatives and endeavours of the African Union (reflected in the *Decisions* adopted by its Assembly), in the same search for justice in the *Hissène Habré* case. Thus, at its 6th ordinary session, held in Khartoum, Sudan, the Assembly of the African Union adopted its Decision 103(VI), on 24.01.2006, wherein it decided to establish a Committee of Eminent African Jurists "to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial"[65]. It requested the aforementioned Committee to submit a report at the following Ordinary Session in July 2006.

66. At its 7th ordinary session, held in Banjul, Gambia, the Assembly of the African Union adopted its Decision 127(VII), on 02.07.2006, whereby it took note of the report presented by the Committee of Eminent African Jurists. It noted that, pursuant to Articles 3(h), 4(h) and 4(o) of the Constitutive Act of the African Union, "the crimes of which Hissène Habré is accused fall within the competence of the African Union". Furthermore, the Assembly of the African Union mandated the Republic of Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial".

67. At its 8th ordinary session, held in Addis Ababa, Ethiopia, the Assembly of the African Union adopted Decision 157(VIII), on 30.01.2007, whereby the African Union commended Senegal for its efforts on "the implementation of the Banjul Decision", encouraged it "to pursue its initiatives to accomplish the mandate entrusted to it", and appealed to the international community to mobilize the financial resources required for the trial. Two years later, at its 12th ordinary session, held again in Addis Ababa, from 01 to 03.02.2009, the Assembly of the African Union adopted Decision 240(XII), whereby it called on "all Member States of the African Union, the European Union and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to the African Union Commission".

68. At its following 13th ordinary session, held in Sirte, Libya, from 01 to 03.07.2009, the Assembly of the African Union adopted Decision 246(XIII), whereby it reiterated its "appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the AU mandate to prosecute and try Hissène Habré"[66]. Next, at its 14th ordinary session, held in Addis Ababa, Ethiopia, from 31.01 to 02.02.2010, the Assembly of the African Union adopted Decision 272(XIV), wherein it requested "the Government of Senegal, the Commission and Partners, particularly the European Union to continue with consultations with the view to ensuring the holding of the Donors' Round Table as soon as possible". At its 15th ordinary session, held in Kampala, Uganda, the Assembly of the African Union adopted Decision 297(XV), on 27.07.2010, to the same effect.

69. At its 16th ordinary session, held in Addis Ababa, Ethiopia, on 30-31.01.2011, the Assembly of the African Union adopted Decision 340 (XVI), whereby it confirmed "the mandate given by the African Union (AU) to Senegal to try Hissène Habré". Furthermore, it welcomed the conclusions of the Donors Round Table concerning the funding of Mr. Habré's trial and called on Member States, all partner countries and relevant institutions to disburse the funds pledged at the Donors Round Table. Moreover, the Assembly requested the "Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré through a special tribunal with an international character".

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[65] It further took note of the briefing by President Wade of Senegal and President Obasanjo, the outgoing Chairperson of the African Union, on the *Hissène Habré* case.

[66] It also invited the partner countries and institutions to take part in the Donors Round Table, scheduled to be held in Dakar, Senegal.

70. At its 17th ordinary session, held in Malabo, Equatorial Guinea, the Assembly of the African Union adopted Decision 371(XVII), on 01.07.2011, whereby it reiterated its decision (of January 2011) "confirming the mandate given to Senegal to try Hissène Habré on behalf of Africa". The Assembly of the African Union urged Senegal

> "to carry out its legal responsibility in accordance with the United Nations Convention against Torture, the decision of the United Nations (U.N.) Committee against Torture, as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial".

Next, at its 18th ordinary session, held in Addis Ababa, Ethiopia, on 29-30 January 2012, the Assembly of the African Union adopted Decision 401(XVIII), whereby it requested the "Commission to continue consultations with partner countries and institutions and the Republic of Senegal and subsequently with the Republic of Rwanda with a view to ensuring the expeditious trial of Hissène Habre and to consider the practical modalities as well as the legal and financial implications of the trial".

71. As it can be apprehended from the aforementioned Decisions, the African Union has been giving attention to the *Hissène Habré* case on a consistent basis, since 2006. Although the African Union does not have adjudicatory powers, it has felt obliged to assist Senegal in the pursuit of its obligation to bring Mr. H. Habré to justice; it thus appears to give its own contribution, as an international organization, to the rule of law (at national and international levels) and to the corresponding struggle against impunity. One can note that, as time progressed, the language of the Decisions of the Assembly of the African Union has gradually strengthened.

72. This is evidenced, in particular, by the language utilized in its Decision 371(XVII), adopted on 01.07.2011, wherein the Assembly of the African Union reiterated its previous decision "confirming the mandate given to Senegal to try Hissène Habré on behalf of Africa", and *urged* Senegal "to carry out its legal responsibility" in accordance with the U.N. Convention against Torture, the decision adopted by the U.N. Committee against Torture, as well as "the said *mandate to put Hissène Habré on trial expeditiously* or extradite him to any other country willing to put him on trial"[67]. The emphasis shifted from the collection of funds for the projected trial of Mr. H. Habré to the *urgency* of Senegal's compliance with its duty of prosecution, in conformity with the relevant provisions of the U.N. Convention against Torture.

VIII. URGENCY AND THE NEEDED PROVISIONAL MEASURES OF PROTECTION

73. In the period which followed the ICJ decision (Order of 28.05.2009) not to order provisional measures, Senegal's pledge before the Court to keep Mr. H. Habré under house surveillance and not to allow him to leave Senegal pending its much-awaited trial seemed at times to have been overlooked, if not forgotten. First, concrete moves towards the trial were not made, amidst allegations of lack of full funding (which was secured on 24.11.2010). Next, in early July 2011, Senegal announced that Mr. H. Habré would be returned to Chad on 11.07.2011 (where he had been sentenced to death *in absentia* by a court for allegedly planning to overthrow the government).

74. In its Order of 28.05.2009, the ICJ had refrained from indicating the provisional measures of protection, given Senegal's assurance that it would not permit Mr. H. Habré to leave the country before the ICJ had given its final decision on the case (para. 71 of the Order); the ICJ then found that there was not "any urgency" to order provisional measures in the present case (para. 73). Yet, on 08.07.2011, the then President of Senegal (Mr. A. Wade) wrote to the

[67] [Emphasis added].

government of Chad and to the African Union to announce the imminent expulsion of Mr. H. Habré back to Chad, scheduled for 11.07.20111 (*supra*). On the eve of that date, Senegal officially retracted its decision, on 10.07.2011, given the international outcry that promptly followed, including from the U.N. High Commissioner for Human Rights[68].

75. Had the return of Mr. H. Habré to Chad been effected by Senegal in such circumstances, it would have been carried out in breach of the principle of good faith (*bona fides*). The fact that it was seriously considered, and only cancelled in the last minute under public pressure, is sufficient reason for serious concern. There is one lesson to be extracted from all that has happened in the present case since the Court's unfortunate Order of 28.05.2009: I was quite right in casting a solitary and extensive Dissenting Opinion appended to it, sustaining the need for the ordering or indication of provisional measures of protection, given the *urgency* of the situation, and the possibility of irreparable harm (which were evident to me, already at that time).

76. A promise of a government (any government, of any State anywhere in the world) does not suffice to efface the urgency of a situation, particularly when fundamental rights of the human person (such as the right to the realization of justice) are at stake. The ordering of provisional measures of protection has the additional effect of dissuading a State not to incur into a breach of treaty. It thus serves the prevalence of the rule of law at international level. The present case leaves a lesson: the ordering of provisional measures of protection, guaranteeing the rule of law, may well dissuade governmental behaviour to avoid further incongruencies and not to incur into what might become additional breaches of international law.

77. In my extensive Dissenting Opinion appended to the Court's Order of 28.05.2009, I insisted on the issuance of provisional measures of protection, given the manifest urgency of the situation affecting the surviving victims of torture (or their close relatives) during the Habré regime in Chad (paras. 50-59), and the probability of irreparable damage ensuing from the breach of the right to the realization of justice (paras. 60-65). After all, the present case had been lodged with the Court under the U.N. Convention against Torture. Ever since, I have never seen any persuasive argument in support of the decision not to order provisional measures in the present case. All that has been said so far evolves around an empty *petitio principii*: the Court's decision was the right one, as was taken by a large majority (the traditional argument of authority, the *Diktat*).

78. The fact is that majorities, however large they happen to be, at times also incur into mistakes, and this is why I am more inclined to abide by the authority of the argument, rather than *vice-versa*. My position is that the Court should have ordered the provisional measures of protection in its decision of 28.05.2009, having thus assumed the role of *guarantee* of the relevant norms of the U.N. Convention against Torture. It should have gone beyond the short-sighted inter-State outlook, so as to behold the fundamental rights of the human person that were (and are) at stake in the present case, under the U.N. Convention against Torture.

79. Unilateral acts of States — such as, *inter alia*, promise — were conceptualized in the traditional framework of the inter-State relations, so as to extract their legal effects, given the "decentralization" of the international legal order. Here, in the present case, we are in an entirely distinct context, that of *objective* obligations established under a normative Convention — one of the most important of the United Nations, in the domain of the international protection of human rights, embodying an absolute prohibition of *jus cogens*, — the U.N. Convention against Torture. In the ambit of these obligations, a pledge or promise made in the course of legal proceedings before the Court does not remove the prerequisites (of urgency and of probability of irreparable damage) for the indication of provisional measures by the Court.

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[68]HRW, "*Habré* Case: Questions and Answers on *Belgium versus Senegal*", www.hrw.org/news, of 29.03.2012, p. 5.

80. This is what I strongly upheld in my aforementioned Dissenting Opinion of 28.05.2009 (para. 78), and what successive facts ever since leave as a lesson. When the prerequisites of provisional measures are present, — as they in my view already were in May 2009, as confirmed by the successive facts, — such measures are to be ordered by the Court, to the benefit of the subjects of rights to be preserved and protected (such as the right to the realization of justice). Accordingly, in my Dissenting Opinion I deemed it fit to ponder that:

> "(…) A decision of the ICJ indicating provisional measures in the present case, as I herein sustain, would have set up a remarkable precedent in the long search for justice in the theory and practice of international law. After all, this is the first case lodged with the ICJ on the basis of the 1984 U.N. Convention against Torture (…).
>
> (…) [T]he prerequisites of urgency and the probability of irreparable harm were and remain in my view present in this case (...), requiring from it the indication of provisional measures. Moreover, there subsist, at this stage, — and without prejudice to the merits of the case, — uncertainties which surround the matter at issue before the Court, despite the amendment in February 2007 of the Senegalese Penal Code and Code of Criminal Procedure.
>
> Examples are provided by the prolonged delays apparently due to the alleged high costs of holding the trial of Mr. H. Habré, added to pre-trial measures still to be taken, and the lack of definition of the time still to be consumed before that trial takes place (if it does at all). Despite all that, as the Court's majority did not find it necessary to indicate provisional measures, the Court can now only hope for the best.
>
> This is all the more serious in the light of the nature of the aforementioned *obligations* of the States Parties to the U.N. Convention against Torture. (…)
>
> This Court should in my view have remained seized of the matter at stake. It should not have relinquished its jurisdiction in the matter of provisional measures, on the ground of its reliance on what may have appeared the professed intentions of the parties, placing itself in a position more akin to that of a conciliator, if not an expectator. Had the Court done so, it would have assumed the role of the guarantor of the compliance, in the *cas d'espèce*, of the conventional obligations by the States Parties to the U.N. Convention against Torture in pursuance of the principle *aut dedere aut judicare*" (paras. 80, 82-84 and 88).

81. This point is not to pass unnoticed here. Fortunately, — for the sake of the realization of justice in the light of the integrity of the obligations enshrined into the U.N. Convention against Torture, — Mr. H. Habré did not escape from his house surveillance in Dakar, nor was he expelled from Senegal. The acknowledgment of the urgency of the situation was at last made by the ICJ: it underlies its present Judgment on the merits of the case, which it has just adopted today, 20 July 2012, wherein it determined that Senegal has breached Articles 6(2) and 7(1) of the U.N. Convention against Torture, and is under the duty to take "without further delay" the necessary measures to submit the case against Mr. H. Habré to its competent authorities for the purpose of prosecution (para. 121 and resolutory point 6 of the *dispositif*).

IX. THE ABSOLUTE PROHIBITION OF TORTURE IN THE REALM OF *JUS COGENS*

82. The victims' everlasting ordeal in their quest for the realization of justice in the present case becomes even more regrettable if one bears in mind that the invocation of the relevant provisions of the U.N. Convention against Torture (Articles 5-7) in the present case takes place in connection with the absolute prohibition of torture, a prohibition which brings us into the domain

of *jus cogens*. One would have thought that, in face of such an absolute prohibition, the *justiciables* would hardly face so many obstacles in their search for the realization of justice. This would be so in a world where justice prevailed, which is not ours. The time of human justice is not the time of human beings; ours is a world where one has to learn soon how to live with the surrounding irrationality, in order perhaps to live a bit longer.

1. The International Legal Regime against Torture

83. Yet, despite of the difficulties arisen in the *cas d'espèce*, the truth is that there is today an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, — a prohibition which falls under the domain of *jus cogens*. Such international legal regime has found judicial recognition; thus, in the case of *Cantoral Benavides versus Peru* (merits, Judgment of 18.08.2000), for example, the Inter-American Court of Human Rights (IACtHR) stated that

> "a true international legal regime has been established of absolute prohibition of all forms of torture" (para. 103).

84. Such absolute prohibition of torture finds expression at both *normative* and *jurisprudential* levels. The basic principle of humanity, rooted in the human conscience, has arisen and stood against torture. In effect, in our times, the *jus cogens* prohibition of torture emanates ultimately from the universal juridical conscience, and finds expression in the *corpus juris gentium*. Torture is thus clearly prohibited, as a grave violation of the International Law of Human Rights and of International Humanitarian Law, as well as of International Criminal Law. There is here a normative convergence to this effect; this is a definitive achievement of civilization, one that admits no regression.

85. In the domain of the International Law of Human Rights, the international legal regime of absolute prohibition of torture encompasses the United Nations Convention (of 1984, and its Protocol of 2002) and the Inter-American (1985) and European (1987) Conventions against torture, in addition to the Special *Rapporteur* against Torture (since 1985) of the former U.N. Human Rights Commission (HRC) and the Working Group on Arbitrary Detention (since 1991) also of the former HRC (which pays special attention to the *prevention* of torture)[69]. The three aforementioned co-existing Conventions to combat torture are basically complementary *ratione materiae*[70]. Moreover, in the domain of International Criminal Law, Article 7 of the 1998 Rome Statute of the International Criminal Court (ICC) includes the crime of torture within the ICC's jurisdiction. Torture is in fact prohibited in any circumstances.

86. As the IACtHR rightly warned, in its Judgments in the case of the *Gómez Paquiyauri Brothers versus Peru* (of 08.07.2004, paras. 111-112), as well as of *Tibi versus Ecuador* (of 07.09.2004, para. 143), and of *Baldeón García versus Peru* (of 06.04.2006, para. 117), the

> "Prohibition of torture is complete and non-revocable, even under the most difficult circumstances, such as war, 'the struggle against terrorism' and any other crimes, states of siege or of emergency, of civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies".

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[69] In addition to these mechanisms, there is the U.N. Voluntary Contributions Fund for Victims of Torture (since 1983).

[70] Cf., in this regard, A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 345-352.

The IACtHR was quite clear in asserting, e.g., in its Judgment in the case of *Maritza Urrutia versus Guatemala* (of 27.11.2003, para. 92), and reiterating in its Judgments in the cases of *Tibi versus Ecuador* (of 07.09.2004, para. 143), of the *Brothers Gómez Paquiyauri versus Peru* (of 08.07.2004, para. 112), and of *Baldeón García versus Peru* (of 06.04.2006, para. 117), that

> "There exists an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, a regime which belongs today to the domain of *jus cogens*".

87. Likewise, in the case of *Caesar versus Trinidad and Tobago* (Judgment of 11.03.2005), the IACtHR found that the conditions of detention to which the complainant had been subjected (damaging his health — his physical, psychological and moral integrity) amount to an inhuman and degrading treatment, in breach of Article 5(1) and (2) of the American Convention on Human Rights, which "enshrines precepts of *jus cogens*" (para. 100). And later on, in the case of *Goiburú et al. versus Paraguay* (Judgment of 22.09.2006), the IACtHR reasserted the absolute prohibition of torture and enforced disappearance of persons, in the realm of *jus cogens*, and acknowledged the duty to fight impunity with regard to those grave violations (with the due investigation of the occurrences), so as to honour the memory of the victims and to guarantee the non-repetition of those facts (para. 93).

88. The IACtHR and the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY) are the two contemporary international tribunals which have most contributed so far to the jurisprudential construction of the absolute prohibition of torture, in the realm of *jus cogens*[71]. For its part, the ICTFY, in the same line of reasoning, held, in its Judgment (Trial Chamber, of 10.12.1998) in the *Furundžija* case, that torture is "prohibited by a peremptory norm of international law", it is a prohibition of *jus cogens* (paras. 153 and 155). Likewise, in its Judgment (Trial Chamber, of 16.11.1998) in the *Delalić et al.* case, the ICTFY asserted that the prohibition of torture is of conventional and customary international law, and is a norm of *jus cogens* (paras. 453-454).

89. This view was reiterated by the ICTFY in its Judgment (Trial Chamber, of 22.02.2001) in the *Kunarac* case, wherein it stated that

> "Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus cogens*" (para. 466).

Other statements of the kind by the ICTFY, as to the *jus cogens* prohibition of torture, are found in its Judgment (Appeals Chamber, of 20.02.2001) in the *Delalić et al*. case (para. 172 n. 225), as well as in its Judgment (Trial Chamber, of 31.03.2003) in the *Naletilić et. al*. case, wherein it affirmed that

> "Various judgments of the Tribunal have considered charges of torture as a grave breach of the Geneva Conventions of 1949, a violation of the laws and customs of war and as a crime against humanity. The *Celebici* Trial Judgment stated that the prohibition of torture is a norm of customary international law and *jus cogens*" (para. 336).

90. The *ad hoc* International Criminal Tribunal for Rwanda (ICTR), in turn, contributed to the normative convergence of International Human Rights Law and contemporary International Criminal Law as to the absolute prohibition of torture, in interpreting, in its decision (Chamber I)

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[71] Cf., recently, A.A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law", *in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington D.C., General Secretariat of the OAS, 2009, pp. 3-29.

of 02.09.1998 in the case of *J.-P. Akayesu*, the term "torture" as set forth in Article 3(f) of its Statute, in accordance with the definition of torture set forth in Article 1(1) of the U.N. Convention against Torture, namely,

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act that he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (para. 681).

91. The European Court of Human Rights (ECtHR), for its part, has also pronounced on the matter at issue, to the same effect. Thus, in its Judgment (Grand Chamber) of 12.11.2008, on the *Demir and Baykara versus Turkey* case, it held that the prohibition of torture has "attained the status of a peremptory norm of international law, or *jus cogens*", and added that this finding was "incorporated into its case-law in this sphere" (para. 73). In a broader context, of prohibition of inhuman and degrading treatment (encompassing mental suffering), the reasoning developed by the ECtHR in its Judgment of 02.03.2010, in the *Al-Saadoon and Mufdhi versus United Kingdom* case, leaves room to infer an acknowledgment of a normative hierarchy in international law, giving pride of place to the norms that safeguard the dignity of the human person.

92. The aforementioned development conducive to the current absolute (*jus cogens*) prohibition of torture has taken place with the awareness of the horror and the inhumanity of the practice of torture. Testimonies of victims of torture — as in the proceedings of contemporary international human rights tribunals — give account of that. Even before the present era, some historical testimonies did the same. One of such testimonies, — a penetrating one, — is that of Jean Améry, himself a victim of it. In his own words,

> "(…) la torture est l'événement le plus effroyable qu'un homme puisse garder au fond de soi. (…) Celui qui a été torturé reste un torturé. La torture est marquée dans sa chair au fer rouge, même lorsque aucune trace cliniquement objective n'y est plus repérable. (…) [C]elui qui vient de réchapper de la torture et dont la douleur se calme (…) se sent gagné par une sorte de paix éphémere, propice à la réflexion. (…) Si ce qui reste de l'expérience de la torture peut jamais être autre chose qu'une impression de cauchemar, alors c'est un immense étonnement, et c'est aussi le sentiment d'être devenu étranger au monde, état profond qu'aucune forme de communication ultérieure avec les hommes ne pourra compenser. (…) Celui qui a été soumis à la torture est désormais incapable de se sentir chez soi dans le monde. L'outrage de l'anéantissement est indélébile. La confiance dans le monde qu'ébranle déjà le premier coup reçu et que la torture finit d´éteindre complètement est irrécupérable. (…) Celui qui a été martyrisé est livré sans défense à l'angoisse. C'est elle qui dorénavant le mènera à la baguette de son sceptre. Elle — mais aussi ce qu'on appelle les ressentiments. Car ils demeurent (…)"[72].

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[72] Jean Améry, *Par-delà le crime et le châtiment*, Arles, Babel/Actes Sud, 2005 [reed.], pp. 61, 83-84, 92 and 94-96. And cf. Jean Améry, *At the Mind´s Limits*, Bloomington, Indiana Univ. Press, 1980 [reed.], pp. 22, 34 and 38-40: — "(...) torture is the most horrible event a human being can retain within himself. (…) Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected. (...) The person who has survived torture and whose pains are starting to subside (…) experiences an ephemeral peace that is conducive to thinking. (...) If from the experience of torture any knowledge at all remains that goes beyond the plain nightmarish, it is that of a great amazement and a foreignness in the world that cannot be compensated by any sort of subsequent human communication. (...) Whoever has succumbed to torture can no longer feel at home in the world. (...) The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully will not be regained. (…) One who was martyred is a defenseless prisoner of fear. It is fear that henceforth reigns over him. Fear — and also what is called resentments. They remain (…)".

93. The present Judgment of the ICJ in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* contributes decisively to the consolidation of the international legal regime against torture. To this effect, the Court significantly states that

> "In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).
>
> That prohibition is grounded on a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims, the International Covenant on Civil and Political Rights of 1966, General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora." (para. 99)

94. One of the features of the present-day international legal regime against torture is the establishment of a mechanism of continuous monitoring of a *preventive* character. This is illustrated by the 2002 Optional Protocol of the 1984 U.N. Convention against Torture, as well as the preventive inspections under the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Article 2). In this regard, I deemed it fit to point out, in my Concurring Opinion in the case of *Maritza Urrutia versus Guatemala* (IACtHR, Judgment of 27.11.2003), that such development has

> "put an end to one of the remaining strongholds of State sovereignty, in permitting scrutiny of the *sancta sanctorum* of the State — its prisons and detention establishments, police stations, military prisons, detention centers for foreigners, psychiatric institutions, among others, — of its administrative practices and legislative measures, to determine their compatibility or not with the international standards of human rights. This has been achieved in the name of superior common values, consubstantiated in the prevalence of the fundamental rights inherent to the human person" (para. 11).

2. Fundamental Human Values Underlying that Prohibition

95. Human conscience has awoken to the pressing need for decisively putting an end to the scourges of arbitrary detention and torture. The general principles of the law, and the fundamental human values underlying them, play a quite significant and crucial role here. Such fundamental values have counted on judicial recognition in our times. Thus, the ECtHR, for example, asserted, in the *Soering versus the United Kingdom* case (Judgment of 07.07.1989), that the absolute prohibition of torture (even in times of war and other national emergencies) expresses one of the "fundamental values of [contemporary] democratic societies" (para. 88). Subsequently, in the *Kalashnikov versus Russia* case (Judgment of 15.07.2002), the ECtHR stated that Article 3 of the European Convention on Human Rights

> "enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour" (para. 95).

96. In the *Selmouni versus France* case (Judgment of 28.07.1999), the ECtHR categorically reiterated that Article 3 of the European Convention

> "enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime,

> the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols ns. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation (...)" (para. 95).

In that same Judgment, the European Court expressed its understanding that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (para. 101)[73].

97. Like the ECtHR, also the IACtHR singled out the fundamental human values underlying the absolute prohibition of torture. Thus, in the case of *Cantoral Benavides versus Peru* (merits, Judgment of 18.08.2000), pondered that certain acts which were formerly classified as inhuman or degrading treatment, should from now on be classified distinctly, as torture, given the "growing demands" for the protection of fundamental human rights (para. 99). This, in the understanding of the IACtHR, required a more vigorous response in facing "infractions to the basic values of democratic societies" (para. 99). In the *Cantoral Benavides* case, the IACtHR, with its reasoning, thus purported to address the consequences of the absolute prohibition of torture.

98. In effect, the practice of torture, in all its perversion, is not limited to the physical injuries inflicted on the victim; it seeks to annihilate the victim's identity and integrity. It causes chronic psychological disturbances that continue indefinitely, making the victim unable to continue living normally as before. Expert opinions rendered before international tribunals consistently indicate that torture aggravates the victim's vulnerability, causing nightmares, loss of trust in others, hypertension, and depression; a person tortured in prison or detention loses the spatial dimension and even that of time itself[74].

99. As to the devastating consequences of the (prohibited) practice of torture, and the irreparable damage caused by it, I pondered, in my Separate Opinion in the case *Tibi versus Ecuador* (IACtHR, Judgment of 07.09.2004), that

> "Furthermore, the practice of torture (whether to obtain a confession or information or to cause social fear) generates a disintegrating emotional burden that is transmitted to the next of kin of the victim, who in turn project it toward the persons they live with. The widespread practice of torture, even though it takes place within jails, ultimately contaminates all the social fabric. The practice of torture has sequels not only for its victims, but also for broad sectors of the social milieu affected by it. Torture generates psychosocial damage and, under certain circumstances, it can lead to actual social breakdown. (…)
>
> The practice of torture is a hellish threat to civilization itself. One of the infallible criteria of civilization is precisely the treatment given by public authorities of any country to detainees or incarcerated persons. F.M. Dostoyevsky warned about this in his aforementioned *Memoirs from the House of the Dead* (1862); for him, the degree of civilization attained by any social milieu can be assessed by entering its jails

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[73] In the *cas d'espèce*, the ECtHR found the respondent State responsible for the torture inflicted on Selmouni (paras. 105-106). — A similar line of reasoning can be found, e.g., in the Judgment (of 07.09.2004) of the IACtHR in the case of *Tibi versus Ecuador* (para. 143), wherein it likewise found the respondent State responsible for the torture inflicted on the victim (para. 165).

[74] IACtHR, case *Tibi versus Ecuador* (Judgment of 07.09.2004), Separate Opinion of Judge Cançado Trindade, para. 21.

and detention centers[75]. Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim, undermining his or her physical or mental resistance; thus, it treats the victim as a "mere means" (in general to obtain a confession), flagrantly violating the basic principle of the dignity of the human person (which expresses the Kantian concept of the human being as an "end in himself"), degrading him, in a perverse and cruel manner[76], and causing him truly irreparable damage" (paras. 22 and 24).

100. For its part, the ICTFY stated, in the aforementioned 1998 Judgment in the *Furundžija* case, that

> "Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate" (para. 154).

101. Another pertinent decision of the ICTFY disclosing the close attention it dispensed to fundamental human values is its Judgment (Trial Chamber II, of 17.10.2002) in the *Simić* case, wherein, in singling out the "substantial gravity" of torture, it pondered that

> "(…) The right not to be subjected to torture is recognized in customary and conventional international law and as a norm of *jus cogens*. It cannot be tolerated. It is an absolute assault on the personal human dignity, security and mental being of the victims. As noted in *Krnojelac*, torture 'constitutes one of the most serious attacks upon a person's mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment'" (para. 34).

102. One decade ago, within the IACtHR, I upheld the view, which I reiterate herein, that *jus cogens* is not a closed juridical category, but rather one that evolves and expands[77]. An ineluctable consequence of the assertion and the very existence of *peremptory* norms of International Law is their not being limited to the conventional norms, to the law of treaties, and their encompassing every and any juridical act, and extending themselves to general international law. *Jus cogens* being, in my understanding, an open category, it expands itself in response to the necessity to protect the rights inherent to each human being in every and any situation. The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the realm of the international *jus cogens*[78]. It is in the domain of international responsibility that *jus cogens* reveals its wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence — even beyond that — on the very *foundations* of a truly universal international law[79].

103. Jurisprudence of distinct international tribunals is, thus, perfectly clear in stating the reaction of *ratione materiae* Law, regarding absolute prohibition of torture, in all its forms, under any and all circumstances, — a prohibition that, in our days, falls under international *jus cogens*,

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[75]Cf. F.M. Dostoyevski, *Souvenirs de la maison des morts* [1862], Paris, Gallimard, 1977 (reed.), pp. 35-416.

[76]J.L. de la Cuesta Arzamendi, *El Delito de Tortura*, Barcelona, Bosch, 1990, pp. 27-28 and 70.

[77]IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, Concurring Opinion of Judge Cançado Trindade, paras. 65-73.

[78]*Ibid*., paras. 68-69.

[79]*Ibid*., para. 70.

with all its juridical consequences for the States responsible. In rightly doing so, it has remained attentive to the underlying fundamental human values that have inspired and guided it. This is a development which cannot be overlooked, and is to continue, in our days.

X. OBLIGATIONS *ERGA OMNES PARTES* UNDER THE U.N. CONVENTION AGAINST TORTURE

104. The CAT Convention sets forth the absolute prohibition of torture, belonging to the domain of *jus cogens* (*supra*). Obligations *erga omnes partes* ensue therefrom. Significantly, this has been expressly acknowledged by the two contending parties, Belgium and Senegal, in the proceedings before the Court. They have done so in response to a question I put to them, in the public sitting of the Court of 08.04.2009, at the earlier stage of provisional measures of protection in the *cas d'espèce*. The question I deemed it fit to put to both of them was as follows:

> "Dans ces audiences publiques il y a eu des références expresses de la part de deux délégations aux droits des Etats ainsi qu'aux droits des individus. J'ai alors une question à poser aux deux Parties. Je la poserai en anglais pour maintenir l'équilibre linguistique de la Cour. La question est la suivante: — 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 and, if so, what are their *legal nature, content and effects?* Who are the *subjects* of those rights, States having nationals affected, or all States Parties to the aforementioned Convention? Whom are such rights opposable to, only the States concerned in a concrete case, or any State Party to the aforementioned Convention?"[80].

105. In response to my question, Belgium began by recalling the obligation to prosecute or extradite, incumbent upon States Parties to the CAT Convention, under Articles 5(2) and 7(1), and pointing out that

> "where there is an obligation of one State to other States, those States have a corresponding right to performance of that obligation"[81].

The obligation set out in Articles 5(2) and 7(1) "gives rise to a correlative right" (of States Parties) to secure compliance with it[82]. This right, — Belgium proceeded, — has a "conventional character", being founded on a treaty, and "[t]he rule *pacta sunt servanda* applies in this respect"[83].

106. Thus, — it went on, — all States Parties to the CAT Convention are entitled to seek ensuring compliance with the conventional obligations, — in accordance with the rule *pacta sunt servanda*, — undertaken by each State Party in relation to all other States Parties to the CAT Convention[84]. Belgium then added:

> "In the case *Goiburú et al. versus Paraguay* [2006], 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

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[80] ICJ, document CR 2009/11, of 08.04.2009, p. 25.

[81] ICJ, *Response of Belgium to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009*, doc. BS 2009/15, of 15.04.2009, p. 2, paras. 4-5.

[82] *Ibid*., p. 2, para. 7.

[83] *Ibid*., p. 3, para. 8.

[84] *Ibid*., p. 3, para. 11.

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 (…):

> '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]][85]".

In sum, — as Belgium put it, — the rights set forth in the 1984 U.N. Convention against Torture "are therefore opposable to *all* the States Parties to that Convention"[86].

107. For its part, Senegal began its response to my question by likewise recalling the obligation to prosecute or extradite under Articles 5(2) and 7(1) of the CAT Convention[87], and added:

> "The *nature* of the international obligation to prohibit torture has undergone a major change. From being a conventional obligation of relative effect, it has had an *erga omnes* effect attributed to it"[88].

Senegal then expressly acknowledged "the existence of indivisible obligations *erga omnes*", as restated by the ICJ on a number of occasions from 1970 onwards[89]. Next, Senegal reckoned that States Parties to the CAT Convention have "the right to secure compliance with the obligation" set forth in Articles 5(2) and 7(1)[90] .

108. From the responses given by Belgium and Senegal to my question, it is clear that they both share a proper understanding of the *nature* of the obligations incumbent upon them under the CAT Convention. Such obligations grow in importance in face of the *gravity* of breaches (*infra*) of the absolute prohibition of torture. They conform the *collective guarantee* of the rights protected thereunder. If those breaches are followed by the perpetrators' impunity, this latter, instead of covering them up, adds further gravity to the wrongful situation: to the original breaches (the acts of torture), the subsequent victims' lack of access to justice (denial of justice) constitutes an additional violation of the protected rights. For years, within the IACtHR, I insisted on the jurisprudential construction of the material expansion of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their two dimensions, the horizontal (*vis-à-vis* the international community as a whole) as well as the vertical (projection into the domestic law

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[85][[3]] Inter-American Court of Human Rights, Judgment of 22.09.2006, para. 132, and in particular note n. 87, which provides a full list of the relevant universal instruments, including the 1984 Convention; cf. also the Separate Opinion of Judge Cançado Trindade, paras. 67-68.

[86]ICJ, *Response of Belgium to the Question…*, *op. cit. supra* n. (81), p. 5, para. 14.

[87]ICJ, *Response of Senegal to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009*, doc. BS 2009/16, of 15.04.2009, p. 1, para. 1.

[88]*Ibid*., p. 1, para. 2.

[89]*Ibid*., p. 2, paras. 3-4.

[90]*Ibid*., p. 2, paras. 5-6.

regulation of relations mainly between the individuals and the public power of the State)[91]; I now reiterate my position in the present case concerning *Questions Relating to the Obligation to Prosecute or Extradite*, decided today by the ICJ.

XI. The Gravity of the Human Rights Violations and the Compelling Struggle against Impunity

1. Human Cruelty at the Threshold of Gravity

109. In effect, in addition to its horizontal expansion, *jus cogens* also projects itself on a vertical dimension, i.e., that of the interaction between the international and national legal systems in the current domain of protection (*supra*). The effect of *jus cogens*, on this second (vertical) dimension, is to invalidate any and all legislative, administrative or judicial measures that, under the States' domestic law, attempt to authorize or tolerate torture[92]. The absolute prohibition of torture, as a reaction of *ratione materiae* Law as here envisaged, in both the horizontal and the vertical dimensions, has implications regarding the longstanding struggle against impunity and the award of reparations due to the victims.

110. As to the first (horizontal) dimension, in my understanding, the "*intérêt pour agir*" of States Parties to the CAT Convention grows in importance, in the light of the gravity of the breaches under that Convention. It would be a mistake to attempt to "bilateralize" contentious matters under the CAT Convention (like in traditional inter-State disputes), which propounds a distinct outlook of initiatives thereunder, to prevent torture and to struggle against it. Even in a wider horizon, this trend was already discernible in the years following the adoption of the CAT Convention in 1984.

111. Thus, in 1988, the Senegalese jurist Kéba Mbaye, in his thematic course at The Hague Academy of International Law, rightly observed that a State's "*intérêt pour agir*" goes beyond a simple interest, in that it is a concept of procedural law. And, in the present stage of evolution of international law, it is widely reckoned that States can exercise their "*intérêt pour agir*" not only in pursuance of their own interests, but also of common and superior values, and, under some U.N. Conventions, in pursuance of shared fundamental values by means of an "objective control"[93]. This is what I refer to as the *collective guarantee* of human rights treaties, by the States Parties themselves. This is notably the case of the U.N. Convention against Torture; the "*intérêt pour agir*" thereunder is fully justified given the *gravity* of the breaches at issue, acts of torture in all its forms.

112. The cruelty of the systematic practice of torture cannot possibly be forgotten, neither by the victims and their next-of-kin, nor by their social *milieu* at large. In this connection, I have already reviewed the findings of the 1992 *Report* of the Chadian Commission of Inquiry[94]. The Truth Commission's *Report* gives a sinister account of the methods of torture utilized during the Habré regime, with illustrations[95], in addition to pictures of the mass graves[96]. The findings of the

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[91]Cf., in this sense, IACtHR, case *La Cantuta versus Peru* (Judgment of 29.11.2006), Separate Opinion of Judge Cançado Trindade, paras. 51 and 60.

[92]Cf. E. de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law", 15 *European Journal of International Law* (2004) pp. 98-99.

[93]Kéba Mbaye, "L´intérêt pour agir devant la Cour Internationale de Justice", 209 *Recueil des Cours de l´Académie de Droit International de La Haye* (1988) pp. 257 and 271.

[94]Cf. section II, *supra*.

[95]Cf. Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices — Rapport de la Commission d'enquête nationale..., op. cit. supra*, n. (5), pp. 111-123, 137-146 and 148-149.

[96]Cf. *ibid*., pp. 150-154.

Chadian Truth Commission have been corroborated by humanitarian fact-finding by non-governmental organizations (NGOs). Although the *Association des Victimes de Crimes et Répressions Politiques au Tchad* (AVCRP) was established in N'djamena on 12.12.1991, the files of the archives of the "political police" (the DDS) of the Habré regime were reported to have been discovered in N'Djaména only one decade later, in May 2001, by Human Rights Watch (HRW)[97].

113. In another report, of the same year 2001, Amnesty International (A.I.) stated that, in addition to the information contained in the Chadian Truth Commission's *Report* (*supra*), most of the information in its own possession came from accounts of surviving victims of torture themselves, or from other detainees. According to such sources, the Chadian government of Hissène Habré

> "applied a deliberate policy of terror in order to discourage opposition of any kind. Actual and suspected opponents and their families were victims of serious violations of their rights. Civilian populations were the victims of extrajudicial executions, committed in retaliation for armed opposition groups' actions on the basis of purely ethnic or geographical criteria. Thousands of people suspected of not supporting the government were arrested and held in secret by the DDS. Thousands of people died on DDS premises — killed by torture, by the inhuman conditions in which they were detained or by a lack of food or medical care"[98].

114. The 2001 report by A.I. proceeded that, during the Hissène Habré regime in Chad,

> "the practice of torture was, by all accounts, an 'institutional practice' used to extract confessions, to punish or to instil fear. (...) According to survivors, Hissein Habré personally gave the order for certain people to be tortured. Other sources say that he was often present during torture sessions. (...) Political prisoners were interrogated as a rule by members of the security service at DDS headquarters in N'Djaména. In some cases, they were interrogated and held at the presidential palace after being tortured. (...)
>
> According to survivors, some of the most common forms of torture were electric shocks, near-asphyxia, cigarette burns and having gas squirted into the eyes. Sometimes, the torturers would place the exhaust pipe of a vehicle in their victim's mouth, then start the engine. Some detainees were placed in a room with decomposing bodies, others suspended by their hands or feet, others bound hand and foot. Two other common techniques consisted of gripping the victim's head between two small sticks joined by cords, which were twisted progressively (...). Some prisoners were subjected to particularly brutal beatings during their interrogation. (...)"[99].

115. In a subsequent report, of 2006, A.I. added that many detainees were held at the prison of the *Camp des Martyrs*, not far from the so-called "*piscine*" (a former swimming pool that had been covered over with concrete and divided into several cells below ground level), wherein they were "subjected to torture". A form of torture that became sadly well-known as practiced in the Habré regime in Chad was the "*arbatachar*", which consisted of "choking the prisoner by tying his

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[97]Cf. UNHCR, "African Union: Press Senegal on Habré Trial", www.unhcr.org/news, of 28.01.2009, p. 1; HRW, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, vol. 17, July 2005, n. 10(A), p. 5; and cf. S. Guengueng, *Prisonnier de Hissène Habré...*, *op. cit. infra* n. (102), pp. 135 and 153.

[98]A.I., [Report:] *The Habré Legacy*, AI Index AFR-20/004/2001, of October 2001, p. 10, and cf. p. 26.

[99]*Ibid*., pp. 26-27.

wrists to his ankles from behind"[100], up to a point of stopping the blood circulation and causing paralysis[101]. Moreover, in the personal account of a surviving victim, — complainant before the U.N. Committee against Torture, — very recently published in 2012,

> "La DDS prenait plaisir à créer des situations pour rendre les prisonniers malades ou pour provoquer l'épidémie comme la malaria, l'oedème pulmonaire, etc., afin de faire mourir très vite, et à la fois beaucoup de prisonniers.
>
> Selon mes constats, pendant les deux ans et cinq mois que j'ai eu à vivre dans les quatre différentes prisons de la DDS, cette police politique avait tous les moyens de sauver la vie aux détenus. Comme leur mission était de terroriser et d'exterminer le peuple tchadien, ils faisaient donc tout pour faire mourir les prisonniers.
>
> (...) Les responsables et tout comme les agents de la DDS, n'éprouvaient aucun sentiment humanitaire vis-à-vis des détenus"[102].

2. The Inadmissibility of Impunity of the Perpetrators

116. It is in no way surprising that the reparations due to victims in cases of torture have revealed a dimension that is both individual and collective or social. Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or handling with indifference the consequences of criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The practice of torture, aggravated by the impunity of the perpetrators, contaminates the whole social *milieu* wherein it took place.

117. As I deemed it fit to warn in the IACtHR, in my Separate Opinion in the case of the *"Street Children"* (*Villagrán Morales et al. versus Guatemala*, Reparations, Judgment of 26.05.2001),

> "Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others" (para. 22).

118. The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered. This is still an evolving matter, but the right of those victims to fair and adequate reparation is addressed today on the basis of recognition of the central role of the integrity of said victims, of the human person. Realization of justice, with due reparations, helps to reorganize human relations and restructure the psyche of victims. Realization of justice must take place from the standpoint of the integral nature of the personality of the victims. Reparations at least mitigate or soothe the suffering of the victims, in conveying to them the sense of the realization of justice.

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[100] A.I., [Report:] *Chad: Voices of Habré's Victims*, AI Index AFR-20/009/2006, of August 2006, p. 6.

[101] Cf. Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices — Rapport de la Commission d'enquête nationale..., op. cit. supra*, n. (5), p. 42; S. Guengueng, *Prisonnier de Hissène Habré..., op. cit. infra* n. (102), p. 121.

[102] Souleymane Guengueng, *Prisonnier de Hissène Habré — L'expérience d'un survivant des geôles tchadiennes et sa quête de justice*, Paris, L'Harmattan, 2012, pp. 79-80.

119. Such reparations cannot be disrupted by undue invocations of State sovereignty or State immunity, as I have pointed out in two recent cases adjudicated by this Court[103]. Likewise, the struggle against impunity for grave violations of human rights and of International Humanitarian Law cannot be dismantled by undue invocations of State sovereignty or State immunity. The hope has been expressed of advances in this respect:

> "(…) Progressivement, l'idée d'irresponsabilité, sous couvert de souveraineté ou d'immunité, recule, tout au moins pour une série d'actes atroces désormais qualifiés de 'crimes internationaux'. Cela constitue une source d'espoir considérable pour tous les mouvements citoyens et de défense des droits humains, pour tous les oubliés de la Terre"[104].

120. In the case *Bulacio versus Argentina* (Judgment of 18.09.2003), the IACtHR held as "inadmissible" any measure of domestic law intended to hinder the investigation and sanction of those responsible for violations of human rights (para. 116), thus leading to impunity. In my Separate Opinion in the case *Bulacio*, I pondered *inter alia* that

> "*Reparatio* does not put an end to what occurred, to the violation of human rights. The wrong was already committed[105]; *reparatio* avoids the aggravation of its consequences (by the indifference of the social *milieu*, by the impunity, by the oblivion). (…) *Reparatio* disposes again, reestablishes order in the life of the surviving victims, but it cannot eliminate the pain that is already ineluctably incorporated into their daily existence. The loss is, from this angle, rigorously irreparable. (…) *Reparatio* is a reaction, in the realm of Law, to human cruelty, manifested in the most diverse forms: violence in dealing with fellow human beings, the impunity of those responsible on the part of the public power, the indifference and the oblivion of the social *milieu*.
>
> This reaction of the breached legal order (the *substratum* of which is precisely the observance of human rights) is ultimately moved by the spirit of human solidarity. This latter, in turn, teaches that the oblivion is inadmissible, by the absence it implies of any solidarity whatsoever of the living with their deceased. (…) Death has over centuries been linked to what is supposed to be the revelation of destiny, and it is especially in facing death that each person becomes aware of his or her individuality[106]. (…) The rejection of the indifference and the oblivion, and the guarantee of non-repetition of the violations, are manifestations of the links of solidarity between those victimized and potential victims, in the violent world, empty of values, wherein we live. It is, ultimately, an eloquent expression of the links of solidarity that unite the living to their deceased[107]. Or, more precisely, of the links of solidarity that unite the deceased to those who survive them (…)" (paras. 37-40).

121. As to the present case before this Court concerning *Questions Relating to the Obligation to Prosecute or Extradite*, the facts speak for themselves. As I deemed it fit to warn in

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[103]ICJ, case concerning the *Jurisdictional Immunities of States* (Germany *versus* Italy, Greece intervening; Judgment of 03.02.2012), Dissenting Opinion of Judge Cançado Trindade, paras. 1-316; ICJ, case *A.S. Diallo* (Guinea *versus* D.R. Congo, Reparations, Judgment of 19.06.2012), Separate Opinion of Judge Cançado Trindade, paras. 1-101.

[104]L. Joinet (dir.), *Lutter contre l'impunité*, Paris, Éds. La Découverte, 2002, p. 125.

[105]Human capacity to promote good and to commit evil has not ceased to attract the attention of human thinking throughout the centuries; cf. F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Gedisa Edit., 1988, pp. 9-196; A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier, 1949, pp. 5-412.

[106]Ph. Ariès, *Morir en Occidente — desde la Edad Media hasta Nuestros Días*, Buenos Aires, A. Hidalgo Ed., 2000, pp. 87, 165, 199, 213, 217, 239 and 251.

[107]On these links of solidarity, cf. my Separate Opinions in the case *Bámaca Velásquez versus Guatemala* (IACtHR, Judgments on the merits, of 25.11.2000, and on reparations, of 22.02.2002).

my earlier Dissenting Opinion in the Court's Order of 28.05.2009 (not indicating provisional measures of protection) in the *cas d'espèce*,

> "The several years of impunity following the pattern of systematic State-planified crimes, perpetrated — according to the Chadian Truth Commission — by State agents in Chad in 1982-1990, render the situation, in my view, endowed with the elements of gravity and urgency (…). The passing of time with impunity renders the gravity of the situation even greater, and stresses more forcefully the urgency to make justice to prevail" (para. 60).

122. In the present Judgment on the merits in the case opposing Belgium to Senegal, the Court recalls the *ratio legis* of the CAT Convention. After recalling the sixth preambular paragraph of the CAT Convention[108], the Court states that

> "The States Parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State Party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States Parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present" (para. 68).

123. The Court here captures the *rationale* of the CAT Convention, with the latter's denationalization of protection, and assertion of the principle of universal jurisdiction. Yet, in doing so, the Court does not resist the temptation to quote itself, rescuing its own language of years or decades ago, such as the invocation of "legal interest" (in the *célèbre obiter dictum* in the *Barcelona Traction* case of 1970), or "common interest" (expressions used in the past in different contexts). In order to reflect in an entirely faithful way the *rationale* of the CAT Convention, the Court, in my understanding, should have gone a bit further: more than a "common interest", States Parties to the CAT Convention have a *common engagement* to give *effet utile* to the relevant provisions of the Convention; they have agreed to exercise its *collective guarantee*, in order to put an end to the impunity of the perpetrators of torture, so as to rid the world of this heinous crime. *We are here in the domain of obligations, rather than interests*. These obligations emanate from the *jus cogens* prohibition of torture.

124. In sum, as to this particular point, the development, in recent years, — acknowledged also in expert writing, — leading to the formation and consolidation of a true international legal regime against torture (cf. *supra*), has contributed to the growing awareness as to the pressing need and the compelling duty to put an end to impunity. In effect, the response to the diversification of

[108] Which expresses the desire "to make more effective the struggle against torture (…) throughout the world". Article 2(1) of the CAT Convention adds that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

sources of human rights violations, and the struggle against the impunity of its perpetrators[109], are challenges which call for the enhancement of the existing mechanisms of protection and the devising of new forms of protection. Impunity, besides being an evil which corrodes the trust in public institutions, remains an obstacle which international supervisory organs have not yet succeeded to overcome fully.

125. However, some of the Truth Commissions, established in recent years in certain countries, with distinct mandates and varying results of investigations, have constituted a positive initiative in the struggle against that evil[110]. Another positive initiative is represented by the recent endeavours, within the United Nations, towards the establishment of an international penal jurisdiction of permanent character; they have resulted in the creation (by the U.N. Security Council), in 1993 and 1994, of the two *ad hoc* international criminal tribunals, for ex-Yugoslavia and Rwanda, respectively, — followed by the adoption (by the U.N. Conference of Rome) of the 1998 Statute of the International Criminal Court (ICC), followed by the adoption of the first permanent international criminal jurisdiction. Attentions turn now to the evolving position of the individual victims before the ICC, opening up what appears to be a new chapter in the longstanding history of restorative justice[111].

3. The Position of Chad against Impunity

126. There is another element to be here taken into account: the records of the present case concerning *Questions Relating to the Obligation to Prosecute or Extradite* give account of Chad's position against impunity. References in this regard include: a) official pronouncements by Chad concerning the trial of Mr. H. Habré, in connection with the right of victims to the realization of justice and the need to fight against impunity[112]; b) Chad's decision to lift Mr. H. Habré's immunity in 1993, as confirmed in 2002[113]; c) claims that Chad joined in efforts to gather the

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[109]Cf. J.A. Carrillo Salcedo, *Dignidad frente a Barbarie — La Declaración Universal de Derechos Humanos Cincuenta Años Después*, Madrid, Ed. Trotta, 1999, pp. 105-145; N. Rodley, *The Treatment of Prisoners under International Law*, Paris/Oxford, UNESCO/Clarendon Press, 1987, pp. 17-143. Cf. also N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford, Oxford University Press, 1995, pp. 3-381; S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1997, pp. 3-303; Kai Ambos, *Impunidad y Derecho Penal Internacional*, Medellín, Found. K. Adenauer et alii, 1997, pp. 25-451; Y. Beigbeder, *International Justice against Impunity — Progress and New Challenges*, Leiden, Nijhoff, 2005, pp. 45-235; [Various Authors,] *Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 1-330; N.S. Rodley, "Impunity and Human Rights", *in Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* (Proceedings of the Siracusa Conference, September 1998, ed. C.C. Joyner), Ramonville St.-Agne, Érès, 1998, pp. 71-78.

[110]Cf., *inter alia*, [Various Authors,] "Humanitarian Debate: Truth and Reconciliation Commissions", 88 *International Review of the Red Cross* (2006) n. 862, pp. 225-373; P.B. Hayner, *Unspeakable Truths — Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., N.Y,/London, Routledge, 2011, pp. 1-337; A. Bisset, *Truth Commissions and Criminal Courts*, Cambridge, Cambridge University Press, 2012, pp. 1-199; P.B. Hayner, "Fifteen Truth Commissions — 1974 to 1994: A Comparative Study", 16 *Human Rights Quarterly* (1994) pp. 598-634; [Various Authors,] *Truth Commissions: A Comparative Assessment* (Seminar of the Harvard Law School, of May 1996), Cambridge/Mass., Harvard Law School, 1997, pp. 16-81.

[111]Cf. section XV, *infra*.

[112]Cf. ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43 (citing "*Communiqué de presse du Ministère des affaires étrangères du Tchad*", of 22.07.2011).

[113]Cf. *Memorial of Belgium*, of 01.07.2010, p. 10, para. 1.29, and p. 57, para. 4.44, and Annex C.5; ICJ, document CR 2012/2, of 12.03.2012, p. 23, para. 21; and ICJ, document CR 2012/3, of 13.03.2012, p. 21, para. 41.

financial resources for the trial of Mr. H. Habré in Senegal[114]; and d) Chad's recent statements in support of the extradition of Mr. H. Habré to Belgium[115].

127. In this respect, Belgium refers, in its *Memorial*, to the fact that, in 1993, Chad had, in so far as it was necessary, "lifted the immunities which Mr. Habré may have sought to claim"[116]. In the same vein, Belgium submitted a letter addressed by the Minister of Justice of Chad to the Belgian *Juge d'instruction*, dated 07.10.2002, confirming the lifting of any immunity of Mr. H. Habré[117]. Furthermore, it stems from the records of the present case that Chad, among other States, reportedly agreed to assist financially Senegal in the trial of Mr. H. Habré[118]. Belgium claims, in this regard, that,

> "despite the gestures of support of the European Union, the African Union and other States — including Belgium and Chad — in particular for the funding of the Hissène Habré trial in Senegal, the latter has not yet performed the obligations incumbent on it under international law in respect of the fight against impunity for the crimes concerned"[119].

128. Moreover, as to Belgium's request for extradition, and in light of Senegal's failure to prosecute Mr. H. Habré so far, it also appears from the records of the present case that Chad does not oppose the extradition of Mr. H. Habré to Belgium[120]. In fact, on 22.07.2011, the Ministry of Foreign Affairs, African Integration and International Co-operation of Chad stated that:

> "Despite the many national, continental and international initiatives, it appears increasingly unlikely that the former dictator will be tried under the circumstances preferred by the AU [the African Union]. Recent developments confirm this impression.
>
> It seems more difficult than ever to fulfil the conditions, in particular the legal conditions, for the trial of Mr. Hissène Habré to be held on African soil.
>
> In light of this situation, and given the victims' legitimate right to justice and the principle of rejection of impunity enshrined in the Constitutive Act of the African Union, the Government of Chad requests that preference should be given to the option of extraditing Mr. Habré to Belgium for trial. This option, which was explicitly considered among others by the African Union, is the most suitable under the circumstances"[121].

129. In sum and conclusion, as it can be perceived from the aforementioned, the records of the present case demonstrate that Chad has been consistently supporting the imperative of the fight against impunity, in so far as the case of Mr. H. Habré is concerned. The records of the case make Chad's position clear, to the effect that Mr. H. Habré must be brought to justice, in Senegal or

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[114]. ICJ, document CR 2012/2, of 12.03.2012, pp. 47-48.

[115]Given its view that a trial of Mr. H. Habré in Africa would seem difficult to realize; cf. ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43 (citing "*Communiqué de presse du Ministère des affaires étrangères du Tchad*", of 22.07.2011).

[116]ICJ, *Memorial of Belgium*, of 01.07.2010, p. 10, para. 1.29.

[117]Cf. *ibid*., Annex C.5.

[118]ICJ, document CR 2012/2, of 12.03.2012, p. 47, para. 20.

[119]Cf. *ibid*., p. 48, para. 21(3).

[120]ICJ, document CR 2012/6, of 19.03.2012, pp. 24-25.

[121]*Ibid*., p. 25, para. 43.

elsewhere[122]. Last but not least, the position of Chad is further confirmed by its statement before the U.N. Human Rights Committee, — the supervisory organ of the U.N. Covenant on Civil and Political Rights, — on the occasion of the consideration of Chad's initial report on measures undertaken to implement the provisions of the Covenant. In responding to questions put to it, the Delegation of Chad, stressing its commitment to the struggle against impunity, declared, on 17.07.2009, that

> "sous le régime de Hissène Habré, rien n'a été fait pour rétablir l'état du droit, puisque c'était une dictature. (…) Toutefois, le gouvernement actuel veut faire avancer les choses, et surtout combattre l'impunité, à tous les niveaux (…). Lutter contre l'impunité politique est une entreprise de longue haleine, mais le Gouvernement travaille activement dans ce sens.
>
> Le Tchad demande haut et fort que Hissène Habré soit jugé, mais le Sénégal, à qui incombe cette tâche, invoque des difficultés financières. (…)"[123].

4. The Struggle against Impunity in the Law of the United Nations

130. The final document of the II World Conference of Human Rights (Vienna, 1993), — of which I keep vivid memories[124], — the *Vienna Declaration and Programme of Action*, cared to include, in its part II, two paragraphs (60 and 91) on the compelling struggle against impunity (of perpetrators of torture), which read as follows:

> "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture, and prosecute such violations, thereby providing a firm basis for the rule of law. (…)
>
> The [II] World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue".

131. In pursuance to the call of the 1993 World Conference of the United Nations, the [former] U.N. Commission on Human Rights, and its [former] Sub-Commission on the Promotion and Protection of Human Rights, engaged themselves in producing, in 1997, a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (restated by the Commission in 2005)[125]. Later on, also in pursuance of the aforementioned call of the II World Conference on Human Rights, the [former] U.N. Commission on Human Rights adopted its resolution 2003/72, of 25.04.2003, wherein it deemed it fit to emphasize "the importance of

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[122]Cf., e.g., ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43.

[123]U.N./Comité des Droits de l'Homme, 96ème. Session — 2636e. séance (of 17.07.2009), document CCPR/C/SR.2636, of 25.09.2009, p. 5, paras. 15-16. And cf. also: U.N. Human Rights Committee, "Human Rights Committee Considers Report of Chad", www.unog.ch/news, of 17.07.2009, p. 9.

[124]A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2nd. ed., vol. I, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 1-640; A.A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994) pp. 9-57.

[125]Cf. U.N. document E/CN.4/Sub.2/1997/20/Rev.1, Annex II, of 02.10.1997, pp. 13-25; and cf. U.N./CHR, resolution 1998/53, of 17.04.1998. Cf., more recently, U.N./CHR, document E/CN.4/2005/102/Add.1, Annex, of 08.02.2005, pp. 5-19. And cf. also L. Joinet (*rapporteur*), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Civiles y Políticos) - Informe Final*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/20, of 26.06.1997, pp. 1-34; and, for the economic, social and cultural rights, cf. El Hadji Guissé (special *rapporteur*), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Económicos, Sociales y Culturales) — Informe Final*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/8, of 23.06.1997, pp. 1-43.

combating impunity to the prevention of violations of international human rights and humanitarian law" as well as "the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law" (paras. 1-2). The resolution urged States to "give necessary attention" to the matter (para. 1), and recognized that

> "crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law, and (…) perpetrators of such crimes should be prosecuted or extradited by States (…)" (para. 10).

The resolution further urged "all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes" (para. 10).

132. Moreover, the *dossier* of the present case before the Court contains other pertinent elements which cannot pass unnoticed herein. Belgium's *Memorial*, for example, refers to numerous resolutions of the U.N. General Assembly and Security Council urging States to combat impunity in connection with grave violations of human rights[126], — a point reiterated in its oral arguments[127]. The U.N. Human Rights Committee (supervisory organ of the U.N. Covenant on Civil and Political Rights), in its *general comment n. 31* (of 2004), asserted, in connection with violations of the Covenant rights, that

> "States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant" (para. 18).

133. After singling out, as particularly grave violations, the crimes of torture, of summary and arbitrary executions, and enforced disappearances of persons, the Human Rights Committee warned that "the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations" (para. 18). The Committee further warned as to the need "to avoid continuing violations" (para. 19), and drew attention to the "special vulnerability of certain categories" of victims (para. 15).

XII. Obligations under Customary International Law: A Precision as to the Court's Jurisdiction

134. I turn now to another issue, dealt with in the present Judgment, in relation to which my reasoning is distinct from that of the Court. May I begin by recalling the fundamental human values underlying the absolute prohibition of torture, which I have already referred to (cf. *supra*). May I add, at this stage, that such prohibition is one of both *conventional* as well as *customary* international law. And it could not be otherwise, being a prohibition of *jus cogens*. In this sense, the 2005 study on *Customary International Humanitarian Law* undertaken by the International Committee of the Red Cross (ICRC) sustains that:

> - "Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited" (Rule 90)[128].

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[126]ICJ, *Memorial of Belgium*, of 01.07.2010, vol. I, pp. 63-66, paras. 4.69-4.70.

[127]ICJ, document CR 2012/3, of 13.03.2012, pp. 24-26.

[128]ICRC, *Customary International Humanitarian Law* —- vol. I: *Rules*, Cambridge, Cambridge University Press, 2005 [reprint 2009], p. 315.

And it goes on to summarize, on the basis of an extensive research, that

> "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts"[129].

135. Likewise, in its *general comment n. 2* (of 2008), focused on the implementation by States Parties of Article 2 of the CAT Convention[130], the U.N. Committee against Torture acknowledged the Convention's absolute (*jus cogens*) prohibition of torture as being also one of customary international law. It ensues from the *jus cogens* character of this prohibition that States Parties are under the duty to remove any obstacles that impede the eradication of torture; they are bound to take "positive effective measures" to ensure that (para. 4), and "*no exceptional circumstances whatsoever* may be invoked" by them to attempt to justify acts of torture (para. 5). Stressing the CAT Convention's "overarching aim of preventing torture and ill-treatment" (para. 11), *general comment n. 2* of the Committee against Torture further stated that each State Party "should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control" (para. 15), and then drew attention to the needed protection for individuals and groups made vulnerable by discrimination or marginalization (paras. 20-24).

136. Having voted in favour of the conclusions reached by the Court in the present Judgment in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), I feel, however, obliged to lay down in the present Separate Opinion my understanding, distinct from the Court's reasoning, corresponding to operative paragraph (2) of the *dispositif* of the present Judgment. May I, at first, recall that, in the *cas d'espèce*, Belgium requested the Court to declare that Senegal has breached an obligation under customary international law for its failure to bring criminal proceedings against Mr. H. Habré concerning core international crimes[131]. In this respect, the Court concludes, in paragraph 55, that

> "at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium's claims related thereto".

137. The Court then goes on to consider whether it has jurisdiction on the basis of Article 30(1) of the Convention against Torture (CAT Convention). In operative paragraph (2) of the *dispositif*, the Court finds that "it has no jurisdiction" to entertain Belgium's claims relating to Senegal's "alleged breaches" of "obligations under customary international law". It is important to be clear as to why the Court has not entertained, in the present case, Belgium's claim that Senegal breached certain obligations under customary international law.

138. The Court first proceeded to determine, on the basis of the facts of the *cas d'espèce*, whether there was a dispute between the contending parties concerning Senegal's alleged violations of customary international law obligations. The question as to whether there is a dispute between the parties concerning the corresponding obligations under customary international law turns on factual considerations. The question pertains to whether, on the basis of the factual framework of the present case, a dispute existed between the parties, at the time of the filing of the application,

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[129] *Ibid*., vol. I: *Rules*, p. 315, and cf. pp. 316-319; and cf. also ICRC, *Customary International Humanitarian Law* — vol. II: *Practice* — Part 1, Cambridge, Cambridge University Press, 2005, pp. 2106-2160.

[130] U.N. document CAT/C/GC/2, of 24.01.2008, pp. 1-8, paras. 1-27.

[131] Cf. *Memorial of Belgium*, of 01.07.2010, p. 83, Submission 1(b); *Final Submissions of Belgium*, of 19.03.2012, Submission 1(b).

concerning Senegal's obligation under customary international law to take action with regard to core international crimes[132].

139. As the Court notes in paragraph 45 of the present Judgment, "the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium". It has long been established that "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[133]. In this context, the Court's *jurisprudence constante*, as recalled in the present Judgment, is to the effect that the Court's determination of the existence of a dispute "must turn on an examination of the facts" (para. 46)[134].

140. In the present case, the Court considered the facts, as they were presented to it, in order to decide whether there was a dispute between the contending parties concerning the claims that Senegal had breached obligations under customary international law. The Court found that the diplomatic exchanges between the parties, prior to Belgium's institution of the present proceedings, disclosed that Belgium did not refer to Senegal's alleged obligations under customary international law to take action against Mr. H. Habré for core international crimes. It followed that there could not have existed a disagreement (or a difference of opinion) between the parties, as to Senegal's alleged obligations under customary international law in relation to the prosecution of Mr. H. Habré for the commission of core international crimes, at the time when Belgium filed the application.

141. It is clear that, in the present case, the Court's determination of whether there was a dispute on this question, rested on purely factual considerations of the case at issue. This is, in my view, *distinct from an examination by the Court of whether there is a legal basis of jurisdiction* over claims of alleged breaches of customary international law obligations. The Court's consideration of Belgium's claim that Senegal allegedly breached obligations under customary international law, as well as its conclusion thereon, stand in stark contrast to its examination of whether it has jurisdiction under the terms of Article 30(1) of the CAT Convention. As to the latter, the Court considers the *legal* conditions pursuant to Article 30(1) of the Convention in order to assess whether there is a *legal basis of jurisdiction* according to the terms of that provision.

142. Contrastingly, with regard to the claim of alleged breaches of customary international law obligations, the Court's analysis hinges on *factual* considerations of the present case (cf. para. 55). In my perception, paragraph 55 and operative paragraph (2) of the *dispositif* of the present Judgment are not to be understood as meaning that the Court lacks jurisdiction to entertain claims of breaches of a State's alleged obligations under customary international law (e.g., to prosecute perpetrators of core international crimes, such as raised in this case). As in the circumstances of the *cas d'espèce* the dispute between the Parties at the time of the filing of the application — did not include claims of alleged breaches by Senegal of obligations under customary international law, the Court improperly stated that it did not have jurisdiction to dwell upon those alleged breaches.

143. The Court, in my view, did not express itself well. The proper understanding of paragraph 55, in combination with operative paragraph (2) of the *dispositif* of the present Judgment, is, in my understanding, that the determination that the facts of the present case do not disclose a dispute between the parties as to Senegal's alleged breach of obligations under customary international law, is not the same as the finding that the Court presumably does not have

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[132]Its determination is based upon the consideration of the circumstances of the present case (and particularly on the fact that, in the diplomatic correspondence between the parties, Belgium did not refer to its claim that Senegal has an obligation under customary international law to prosecute those accused of the perpetration of core international crimes).

[133]PCIJ, *Mavrommatis Palestine Concessions* case, Judgment n. 2, Series A, 1924, p. 11.

[134]The Court considers whether there is a dispute by examining, *inter alia*, the position of the contending parties (including their exchanges), as disclosed in the records of the case.

jurisdiction to entertain the claims of alleged breaches of obligations under customary international law.

144. What the Court really wished to say, in my perception, is that *there was no material object for the exercise of its jurisdiction* in respect of obligations under customary international law, rather than a lack of its own jurisdiction *per se*[135]. The finding that, in the circumstances of the present case, a dispute did not exist between the contending parties as to the matter at issue, *does not necessarily mean that, as a matter of law, the Court would automatically lack jurisdiction*, to be exercised in relation to the determination of the existence of a dispute concerning breaches of alleged obligations under customary international law.

XIII. A RECURRING ISSUE: THE TIME OF HUMAN JUSTICE AND THE TIME OF HUMAN BEINGS

1. As Unfortunate *Décalage* to Be Bridged

145. Already in my earlier Dissenting Opinion in the Court's Order of 28.05.2009 (not indicating provisional measures of protection) in the present case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), I deemed it fit to address the *décalage* to be bridged between the brief time of human beings (*vita brevis*) and the often prolonged time of human justice (paras. 46-64). I stressed the crucial importance of the incidence of the time element, — to the effect of avoiding undue delays, — for the realization of justice in the present case (paras. 74-84). In this respect, in that Dissenting Opinion I deemed it fit to warn that

> "(…) As to the obligations corresponding to that right to be preserved, the segment *aut judicare* of the enunciation of the principle of universal jurisdiction, *aut dedere aut judicare*, forbids undue delays in the realization of justice. Such undue delays bring about an irreparable damage to those who seek justice in vain; furthermore, they frustrate and obstruct the fulfillment of the object and purpose of the U.N. Convention against Torture, to the point of conforming a breach of this latter[136].
>
> (…) It is the gravity of human rights violations, of the crimes perpetrated, that admits no prolonged extension in time of the impunity of the perpetrators, so as to honour the memory of the fatal victims and to bring relief to the surviving ones and their relatives. In my understanding, even more significant than retribution is the judicial recognition of human suffering[137], and only the realization of justice can *alleviate* the suffering of the victims caused by the irreparable damage of torture.
>
> (…) [W]ith the persistence of impunity in the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, the *passing* of time will continue hurting people, much more than it normally does, in particular those victimized by the absence of human justice. The time of this latter is not the time of human beings.
>
> (...) This is all the more serious in the light of the nature of the aforementioned *obligations* of the States Parties to the U.N. Convention against Torture. (...)" (paras. 63, 75, 77 and 84).

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[135] As already pointed out, the Court's finding concerning Belgium's claim that Senegal breached certain obligations under customary international law is based on the specific factual background of the present case, and particularly on the fact that Belgium did not refer, in its diplomatic correspondence or otherwise, to such obligations.

[136] Cf., to this effect, A. Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement*, The Hague, Nijhoff, 1999, p. 227.

[137] The right to be herein preserved, the right to justice, is inextricably linked to [non-pecuniary] reparation.

146. The often prolonged delays in the operation of human justice seem to disclose an indifference to the brevity of human existence, to the time of human beings. But this is not the only means whereby the administration of human justice, in its handling of the time factor, seems to operate against the expectation of justice on the part of human beings. One example is found in the undue invocation of non-retroactivity in relation to *continuing* wrongful situations of obstruction of access to justice extending themselves in time (cf. *infra*). Another example is afforded by the undue invocation of prescription in situations of the kind. Whether we look forth, or else back in time, we are faced with injustice in the handling of the time factor, making abstraction of the *gravity* of the breaches of Law, to the detriment of victimized human beings.

147. In the present case concerning Mr. H. Habré, prescription has already been duly discarded by the 2006 *Report* of the A.U. Committee of Eminent African Jurists (para. 14). And, in my view, the invocation is likewise to be discarded in the present case, for the reasons that I lay down in section XIV, *infra*, of the present Separate Opinion. One cannot lose sight of the fact that those who claim to have been victimized by the reported atrocities of the Habré regime in Chad (1982-1990) have been waiting for justice for over two decades, and it would add further injustice to them to prolong further their ordeal by raising new obstacles to be surmounted[138]. One has to bridge the unfortunate *décalage* between the time of human justice and the time of human beings.

148. The time factor cannot be handled in a way that leads to injustice. Certain conceptions, which took shape a long time ago in a historical context entirely distinct from the one with which we are confronted in the present case, cannot be mechanically applied herein. It should, moreover, be kept in mind that the passing of time does not heal the profound scars in human dignity inflicted by torture. Such scars can even be transmitted from one generation to another. Victims of such a grave breach of their inherent rights (as torture), who furthermore have no access to justice (*lato sensu*, i.e., no realization of justice), are victims also of a *continuing* violation (denial of justice), to be taken into account as a whole, without the imposition of time-limits decharacterizing the continuing breach[139], until that violation ceases.

149. The passing of time cannot lead to subsequent impunity either; oblivion cannot be imposed, even less so in face of such a grave breach of human rights and of International Humanitarian Law as torture. The imperative of the preservation of the integrity of human dignity stands well above pleas of non-retroactivity and/or prescription. It is high time to bridge the unfortunate *décalage* between the time of human justice and the time of human beings. Articles 5(2), 6(2) and 7(1) — interrelated as they are — of the CAT Convention forbid undue delays; if, despite the requirements contained therein, undue delays occur, there are breaches of those provisions of the CAT Convention. This is clearly what has happened in the present case, in so far as Articles 6(2) and 7(1) of the CAT Convention are concerned, as rightly upheld by this Court[140].

150. It has already been pointed out that, in its decision of 19.05.2006 in the *S. Guengueng et alii versus Senegal* case, the U.N. Committee against Torture found that the "reasonable time-frame" for the State concerned to take the necessary measures, in pursuance of the principle of universal jurisdiction, under Article 5(2) of the CAT Convention, had been, already by then, "considerably exceeded". With such a prolonged delay, the same applied in respect of Article 6(2) of the CAT Convention, which expressly determines that the State Party concerned "shall

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[138]HRW, *The Trial of Hissène Habré: Time is Running Out for the Victims*, vol. 19, January 2007, n. 2, pp. 1, 14 and 19.

[139]On the notion of "continuing situation" in international legal thinking, cf. ICJ, case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Counter-Claim, Order of 06.07.2010), Dissenting Opinion of Judge Cançado Trindade, paras. 55-94.

[140]Operative paragraphs (4) and (5) of the *dispositif* of the present Judgment.

immediately[141] make a preliminary inquiry into the facts". This has not been done to date. And the same also applies to the measure, — submission of the case to the competent authorities for the purpose of prosecution, — also in pursuance of the principle of universal jurisdiction, under Article 7(1) of the CAT Convention. This has not been done to date either.

151. Although the breach of Article 5(2) ceased in 2007, with the adoption by Senegal of legislative reforms to bring its domestic law into conformity with Article 5(2) of the CAT Convention, the other continuing breaches of Articles 6(2) and 7(1) of the CAT Convention persist to date. These provisions of the CAT Convention are meant, as I perceive them, *to bridge the unfortunate gap between the time of human justice and the time of human beings*, by purporting to avoid, and not to allow, undue delays. Non-compliance with such provisions, as in the present case so far, perpetuates the unfortunate gap between the time of human justice and the time of human beings.

152. This is even more regrettable, bearing in mind that everyone lives within time, — the existential time of each one. The irreversible passing of time not only leaves its marks in the aging body, but also marks its flow in one's conscience. Each person is ineluctably linked more to her own existential time (which cannot be changed) than to the space where she lives (which can be changed). Each person lives inevitably within her own time, *conscious* that it will come to an end. If one's life-time is marked by injustice and impunity, one is left with the impression, after the occurrence of all the atrocities, that nothing seems to have happened at all[142].

153. To live within time can thus at times be particularly painful, the more one is conscious of the brevity of one's lifetime. Even if nothing wrongful had happened, to live within one's time, and to accept the effect of its implacable passing upon oneself, up to the end of one's existence, is already difficult. To feel the existential time pass with injustice prevailing, and surrounded by indifference, is all the more painful; the passing of time in such circumstances is on the verge of becoming truly unbearable. Prolonged and definitive injustice may lead — and not seldom has led — victims of grave violations of human rights into despair. The graver the violation, the greater the likelihood of this to happen. Impunity is an additional violation of human rights.

2. Making Time Work *Pro Victima*

154. In the domain of the International Law of Human Rights, which is essentially victim-oriented, the time factor is to be made to operate *pro victima*. As to the principle *aut dedere aut judicare* set forth in Article 7(1), it has already been indicated that *aut judicare* is ineluctably associated with the requirement of absence of undue delays. For its part, extradition, largely dependent upon the existence of treaties and the interpretation given to them in the circumstances of each case, is bound to remain largely discretionary. What comes promptly into the fore in the *cas d'espèce* is the requirement of expeditious inquiry into the facts for the purpose of prosecution, a duty incumbent upon States Parties to the CAT Convention. The duty of prosecution is further singled out by the requirement, under Article 4 of the CAT Convention, of criminalization of all acts of torture under domestic law, taking into account "their grave nature". Extradition comes into the picture only in case of the absence of prosecution.

155. In this connection, the recent Judgment (of 2010) of the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice), cannot be seen as an obstacle to Senegal's compliance with its obligations under Article 7 of the CAT Convention. In fact, it can at first be argued, as Belgium does[143], that Senegal has been in non-compliance with its

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[141][Emphasis added].

[142]Cf. Jean Améry, *Levantar la Mano sobre Uno Mismo — Discurso sobre la Muerte Voluntaria* [*Hand an sich legen — Diskurs über den Freitod*, 1976], Valencia, Pre-Textos, 2005 (reed.), pp. 67, 91-92 and 143.

[143]ICJ, document CR 2012/3, of 13.03.2012, p. 17.

obligations under the CAT Convention (such as those under Article 7) for years, well before the Judgment of the ECOWAS Court was delivered in 2010[144]. In this connection, I find Senegal's reiterated contentions (in its *Counter-Memorial*[145] and oral arguments[146]) of alleged difficulties ensuing from the Judgment of the ECOWAS Court of Justice of 2010 unpersuasive. They do not — cannot — bear an impact on compliance with its obligations under the CAT Convention.

156. Likewise, they cannot be invoked in a way that generates further delays in the realization of justice. A supervening decision of an international tribunal (the ECOWAS Court of Justice) cannot encroach upon the current exercise of the judicial function of another international tribunal (the ICJ), performing its duty to pronounce on the interpretation and application of the CAT Convention, — one of the "core Conventions" of the United Nations in the domain of human rights, — in order to make sure that justice is done. As the ICJ rightly stated in the present Judgment,

> "The Court considers that Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice" (para. 111).

157. It is my view that coexisting international tribunals perform a *common mission* of imparting justice, of contributing to the common goal of the *realization of justice.* The decision of any international tribunal is to be properly regarded as contributing to that goal, and not as disseminating discord[147]. There is here a convergence, rather than a divergence, of the *corpus juris* of the International Law of Human Rights and International Criminal Law, for the correct interpretation and application by international tribunals.

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[144]Thus, from the start it does not seem reasonable to rely on this recent ECOWAS Judgment to attempt to justify that continuing non-compliance, largely predating the latter Judgment. Moreover, Senegal's continuing non-compliance with the obligation *aut dedere aut judicare*, enshrined in Article 7 of the CAT Convention, has created a situation whereby Mr. H. Habré has been in house surveillance for an extended period of time, — according to the pleadings of the Parties since 2000; cf. ICJ, document CR 2012/4, of 15.03.2012, p. 21, para. 7. Cf. also ICJ, *Counter-Memorial of Senegal*, p. 3. — It may thus be argued that the delay in prosecuting (or extraditing) him, while still keeping him under house surveillance (amounting to a preventive detention), is contrary to his right to be tried without undue delay; furthermore, at present this calls into question whether Senegal has truly intended so far to prosecute Mr. H. Habré. In addition, arguments as to the question of non-retroactivity seem hardly convincing; for criticisms, cf., e.g., V. Spiga, "Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga", 9 *Journal of International Criminal Justice* (2011) pp. 5-23; A.D. Olinga, "Les droits de l'homme peuvent-ils soustraire un ex-dictateur à la justice? L'affaire *Hissène Habré* devant la Cour de Justice de la CEDEAO", 22 *Revue trimestrielle des droits de l´homme* (2011) n. 87, pp. 735-746; K. Neldjingaye, "The Trial of Hissène Habré in Senegal and Its Contribution to International Criminal Law", *in Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 185-196.

[145]ICJ, *Counter-Memorial* of Senegal, vol. I, paras. 67-70, 77, 85, 115-119, 176 and 241.

[146]ICJ, document CR 2012/4, of 15.03.2012, paras. 22, 42-43, 47, 51-53, 55-56, 58-59, 65, 69 and 71; ICJ, document CR 2012/5, of 16.03.2012, paras. 12.22, 16.16-18 and 20-21, and 27.11-12; ICJ, document CR 2012/7, of 21.03.2012, paras. 14.26, 17.8 and 24.25-26.

[147]Accordingly, it should not pass unnoticed, in this connection, that Mr. H. Habré has been in custody (under house surveillance) for some years (ICJ, document CR 2012/5, of 16.03.2012, p. 21). The submission of the case for purpose of prosecution without undue delay would thus avoid what amounts to a preventive detention for an excessively prolonged period of time, without trial; A. Boulesbaa, *The U.N. Convention on Torture...*, *op. cit. supra* n. (136), p. 225, and cf. pp. 226-227, on the question of pre-trial detention and its impact on the rights of the accused. In the present case, the undue delay in submitting the case to prosecution has thus also caused unreasonable delay in Mr. H. Habré's preventive detention, and that is contrary to basic postulates proper to the International Law of Human Rights; cf., e.g., Article 14(3) of the U.N. Covenant on Civil and Political Rights, providing for the right "to be tried without undue delay". — Moreover, the principle *aut dedere aut judicare* (in particular the obligation *aut judicare*), set forth in Article 7(1) of the CAT Convention, forbids undue delays, which would militate against the object and purpose of the Convention; cf., to this effect, J.H. Burgers and H. Danelius, *The United Nations Convention against Torture*, Dordrecht, Nijhoff, 1988, p. 137, and cf. also n. (136), *supra*.

XIV. THE TIME FACTOR: A REBUTTAL OF A REGRESSIVE INTERPRETATION OF THE CONVENTION AGAINST TORTURE

158. Paragraph 99 of the present Judgment, wherein the ICJ expressly acknowledges that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)", is in my view one of the most significant passages of the present Judgment. My satisfaction would have been greater if the Court dwelt further upon it, and developed its reasoning on this particular issue, as it could and should, thus fostering the progressive development of international law. The Court, however, promptly turned around in the following paragraph, and started treading on troubled waters, embarking — to my regret — on a regressive interpretation of the relevant provision (Article 7(1)) of the CAT Convention.

159. In any case, up to now, the Court has not shown much familiarity with, nor strong disposition to, elaborate on *jus cogens*; it has taken more than six decades for it to acknowledge its existence *tout court*, in spite of its being one of the central features of contemporary international law. In effect, immediately after identifying the manifestation of *jus cogens* in the customary international law prohibition of torture (para. 99), the Court has indulged into a consideration, *sponte sua*, of non-retroactivity of treaty provisions. The Court has done so (paras. 100 to 104) adding an unnecessary — if not contradictory — element of confusion to its own reasoning.

160. It has done so, *sponte sua*, without having been asked to pronounce itself on this point, — alien to the CAT Convention, — neither by Belgium nor by Senegal. It has done so despite the fact that the CAT Convention, unlike other treaties, does not provide for, nor contains, any temporal limitation or express indication on non-retroactivity. It did so by picking out one older decision (of 1989) of the U.N. Committee against Torture that suited its argument, and at the same time overlooking or not properly valuing more recent decisions of the Committee *a contrario sensu*, wherein the Committee overruled its previous decision relied upon by the Court in its reasoning.

161. The Court has referred approvingly to (para. 101) an earlier decision of the Committee against Torture (of 23.11.1989) in the case *O.R. et al. versus Argentina*, whereby the Committee found that the CAT Convention did not apply to acts of torture allegedly committed before the entry into force of the Convention in Argentina[148]. Yet, the Committee has, ever since, adopted a different approach, as illustrated in two subsequent cases. Thus, in 2003, in the case of *Bouabdallah Ltaief versus Tunisia*, the Committee considered allegations of acts of torture allegedly committed in 1987, notwithstanding the fact that the Convention entered into force for Tunisia in 1988[149]. In other words, the Committee did not distinguish between acts allegedly committed before the entry into force of the CAT Convention for Tunisia and those allegedly perpetrated thereafter.

162. Similarly, more recently, in 2006, in the case of *Suleymane Guengueng et al. versus Senegal*[150], — which pertains to a similar factual background as the present case before this Court, — the Committee again did not make any distinction between the facts that are reported to have taken place *before* the entry into force of the Convention for Senegal and those alleged to have occurred *afterwards*. Thus, it can be considered that the more recent approach of the Committee, as illustrated by these two decisions of 2003 and of 2006, has been to apply the

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[148]CAT, case *O.R. et al. versus Argentina*, communications ns. 1/1988, 2/1988 and 3/1988, Decision of 23.11.1989, para. 7.3, *Official Records of the General Assembly*, 45th Session, Supplement n. 44 (doc. A/45/44), Annex V, p. 108, paras. 7.2-7.4 and 8.

[149]CAT, case *Bouabdallah Ltaief versus Tunisia*, communication n. 189/2001, Decision of 14.11.2003, *Official Records of the General Assembly*, 59th Session, Supplement n. 44 (doc. A/59/44), Annex VII, p. 207, paras. 1.2, 2.1 and 10.1-10.9.

[150]CAT, case *Suleymane Guengueng et al. versus Senegal*, communication n. 181/2001, U.N. Convention against Torture — doc. C/36/D/181/2001, Decision of 19.05.2006). And cf. section III, *supra*.

CAT Convention without distinguishing between acts alleged to have occurred *before* the Convention entered into force for the respondent State, and those alleged to have occurred *thereafter*.

163. The fact is that the more recent decisions of the Committee against Torture provide no support to the reasoning of the Court on this particular point. Moreover, the Court has overlooked, or not valued properly, the responses given by the contending parties to a question put to them from the bench, in a public sitting of the Court. In its response, Belgium recalled the object and purpose of the CAT Convention and the two more recent cases decided by the Committee against Torture (in the *B. Ltaief* and the *S. Guengueng* cases, *supra*), and contended, as to the procedural obligations under Article 7 of the CAT Convention, that

> "There is nothing unusual in applying such procedural obligations to crimes that occurred before the procedural provisions came into effect. There is nothing in the text of the Convention, or in the rules of treaty interpretation, that would require that Article 7 not apply to alleged offenders who are present in the territory of a State Party after the entry into force of the Convention for that State, simply because the offences took place before that date. Such an interpretation would run counter to the object and purpose of the Convention. (…) [T]he procedural obligations owed by Senegal are not conditioned *ratione temporis* by the date of the alleged acts of torture. (…) That does not involve a retroactive application of the Convention to the omissions of Senegal. All these omissions took place after both States, Belgium and Senegal, became Parties to the Convention and became mutually bound by the procedural obligations contained therein"[151].

164. Likewise, in its response, Senegal, much to its credit, acknowledged the importance of the obligations, "binding on all States", pertaining to the "punishment of serious crimes under International Humanitarian Law", such as those in breach of the prohibition of torture. Turning to the procedural obligations under Article 7(1) of the CAT Convention, Senegal added that

> "it does not deny that the obligation provided for in the Convention can be applied to the offences allegedly committed before 26 June 1987, when the Convention entered into force for Senegal"[152].

165. The Court, notwithstanding, has proceeded to impose a temporal limitation *contra legem* to the obligation to prosecute under Article 7(1) of the CAT Convention (para. 100, *in fine*). There were other points overlooked by the Court in this respect. For example, it has not taken into account that occurrences of systematic practice of torture conform *continuing situations* in breach of the CAT Convention[153], to be considered as a whole, without temporal limitations decharacterizing it, until they cease. Nor has it taken into account the distinct approaches of domestic criminal law and contemporary international criminal law, with regard to pleas of non-retroactivity.

166. And nor has the Court taken into account that such pleas of non-retroactivity become a moot question wherever the crimes of torture had already been prohibited by customary international law (as in the present case) at the time of their repeated or systematic commission. Ultimately, — and summing up, — the Court has pursued, on this particular issue, a characteristic

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[151]ICJ, *Questions Put to the Parties by Members of the Court at the Close of the Public Hearing Held on 16 March 2012: Compilation of the Oral and Written Replies and the Written Comments on Those Replies*, doc. BS-2012/39, of 17.04.2012, pp. 50-52, paras. 49 and 52.

[152]*Ibid*., p. 52.

[153]On the notion of *continuing situation* in international legal thinking, cf. ICJ, case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy; counter-claim), Order of 06.07.2010, Dissenting Opinion of Judge Cançado Trindade, paras. 60-94.

voluntarist reasoning, focused on the will of States within the confines of the strict and static inter-State dimension. But it so happens that the CAT Convention (the applicable law in the *cas d'espèce*) is rather focused on the victimized human beings, who stand in need of protection. It is further concerned to guarantee the non-repetition of crimes of torture, and to that end it enhances the struggle against impunity. Human conscience stands above the will of States.

167. The Court has pursued a negative or self-restricted approach to its jurisdiction. In respect of Article 5(2) of the CAT Convention, what does not exist here is the *object* of a dispute over which to exercise its jurisdiction; the Court, in my understanding, remains endowed with jurisdiction, with its authority or aptitude to say what the Law is (to do justice), to pronounce on the CAT Convention, and to determine, *inter alia*, that the dispute concerning Article 5(2) has ceased, but it will nevertheless take into account — as it has done (cf. para. 48) — its *effects* in relation to its determination of the breaches by the respondent State of Articles 6(2) and 7(1) of the CAT Convention. The three aforementioned provisions of the CAT Convention are ineluctably interrelated. By the same token, the Court retains its jurisdiction to pronounce upon the corresponding customary international law prohibition of torture. This is a point which requires clarification.

168. Accordingly, it would seem inconsistent with the object and purpose of the CAT Convention if alleged perpetrators of torture could escape its application when found in a State in respect of which the Convention entered into force only *after* the alleged criminal acts occurred (as a result of the temporal limitation which the Court regrettably beheld in Article 7(1)). Worse still, although the present Judgment rightly recognizes that the prohibition of torture has attained the status of *jus cogens* norm (para. 99), it promptly afterwards fails to draw the necessary consequences of its own finding, in unduly limiting the temporal scope of application of the CAT Convention. The Court has insisted on overlooking or ignoring the persistence of a *continuing situation* in breach of *jus cogens*.

XV. A NEW CHAPTER IN RESTORATIVE JUSTICE?

169. This brings me to my remaining line of considerations in the present Separate Opinion. In our days, there is a growing awareness of, and a growing attention shifted to, the sufferings of victims of grave breaches of the rights inherent to them, as well as to the corresponding duty to provide reparation to them. This has become, in our days, a legitimate concern of the international community, envisaging the individual victims as members of humankind as a whole. The International Law of Human Rights has much contributed to this growing consciousness. And contemporary International Criminal Law also draws further attention to the duty to provide reparation for those sufferings in the quest for the realization of justice.

170. Much has been written on restorative justice, and it is not my intention to review the distinct trends of opinion on the matter within the confines of the present Separate Opinion. Yet, the issue cannot pass unnoticed here, and there is in my view one point to be made. In historical perspective, there are traces of restorative justice in the presence, from ancient to modern legal and cultural traditions, of the provision of compensation due to victims of wrongful acts, attentive to their rehabilitation but also to avoid reprisals or private revenge. As administration of justice was gradually brought under centralized State control (during the Middle Ages), there was a gradual shift from the provision of compensation into retributive justice, a tendency which came to prevail in the XVIIIth century, with the multiplication of criminal law codes, turning attention to the punishment of offenders rather than the redress to individual victims[154].

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[154] I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 13-24, and cf. pp. 25, 27 and 35-38.

171. By then, restorative justice may have faded, but did not vanish. By the mid-XXth century (from the sixties onwards), with the emergence of victimology[155], restorative justice began again to attract greater attention and to gain in importance. Throughout the second half of the XXth century, the considerable evolution of the *corpus juris* of the International Law of Human Rights, being essentially *victim-oriented*, fostered the new stream of restorative justice, attentive to the needed rehabilitation of the victims (of torture). Its unprecedented projection nowadays into the domain of international criminal justice — in cases of core international crimes — makes us wonder whether we would be in face of the conformation of a new chapter in restorative justice.

172. If so, given the gravity of those core international crimes such as the one of torture, one would likely be facing, nowadays, a coexistence of elements proper to both restorative and retributive justice, in reaction to particularly grave and systematic violations of their rights suffered by the victims. The realization of justice appears, after all, as a form of reparation itself, rehabilitating — to the extent possible — victims (of torture). May I just point out that I do not conceive restorative justice as necessarily linked to reconciliation; this latter can hardly be imposed upon victims of torture, it can only come spontaneously from them[156], and each of them has a unique psyche, reacting differently from others. There is no room here for generalizations. I consider restorative justice as necessarily centred on the rehabilitation of the victims of torture, so as to render it possible to them to find bearable to keep on relating with fellow human beings, and, ultimately, to keep on living in this world.

173. Restorative justice grows in importance in cases of grave and systematic violations of human rights, of the integrity of human beings, such as the abominable practice of torture. Reparation to the victims naturally envisages their rehabilitation. The [former] U.N. Commission on Human Rights itself recognized, in its resolution 2003/72 (of 25.04.2003), that, for the victims of grave violations of human rights, "public knowledge of their suffering and the truth about the perpetrators" (including their accomplices) of those violations, are "essential steps" towards their rehabilitation (para. 8).

174. It should be kept in mind that the restorative nature of redress to victims is nowadays acknowledged in the domain not only of the International Law of Human Rights, but also of contemporary International Criminal Law (the Rome Statute of the ICC). Yet, the matter at issue is susceptible of further development, bearing in mind the vulnerability of the victims and the gravity of the harm they suffered. In so far as the present case before this Court is concerned, the central position is that of the human person, the victimized one, rather than of the State.

XVI. EPILOGUE: CONCLUDING REFLECTIONS

175. The factual background of the present case discloses a considerable total of victims, according to the fact-finding already undertaken, among those murdered, or arbitrarily detained and tortured, during the Habré regime in Chad (1982-1990). The absolute prohibition of torture being one of *jus cogens*, — as reckoned by the ICJ itself in the present Judgment, — the obligations under a "core human rights Convention" of the United Nations such as the Convention against Torture are not simple obligations of means or conduct: they are, in my understanding, obligations necessarily of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*, generating obligations *erga omnes partes* under the Convention against Torture.

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[155] Cf. IACtHR, case *Tibi versus Ecuador* (Judgment of 07.09.2004), Separate Opinion of Judge A.A. Cançado Trindade, paras. 16-17.

[156] A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, Annex II: "Responsabilidad, Perdón y Justicia como Manifestaciones de la Conciencia Jurídica Universal", pp. 267-288.

176. To the original *grave* violations of human rights, there follows an additional violation: the *continuing situation* of the alleged victims' lack of access to justice and the impunity of the perpetrators of torture (and their accomplices). This wrongful continuing situation is in breach of the U.N. Convention against Torture as well as of the customary international law prohibition of torture. I dare to nourish the hope that the present Judgment of the ICJ, establishing violations of Articles 6(2) and 7(1) of the Convention against Torture, and asserting the duty of prosecution thereunder, will contribute to bridge the unfortunate gap between the time of human justice and the time of human beings. It is about time that this should happen. Time is to be made to work *pro persona humana*, *pro victima*.

177. In this second decade of the XXIst century, — after a far too long a history, — the principle of universal jurisdiction, as set forth in the CAT Convention (Articles 5(2) and 7(1)), appears nourished by the ideal of a universal justice, without limits in time (past or future) or in space (being transfrontier). Furthermore, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole. There is nothing extraordinary in this, if we keep in mind that, in historical perspective, international law itself precedes the inter-State dimension, and even the States themselves. What stands above all is the imperative of universal justice. This is in line with jusnaturalist thinking[157]. The contemporary understanding of the principle of universal jurisdiction discloses a new, wider horizon.

178. In it, we can behold the universalist international law, the new universal *jus gentium* of our times[158], — remindful of the *totus orbis* of Francisco de Vitoria and the *societas generis humani* of Hugo Grotius. *Jus cogens* marks its presence therein, in the absolute prohibition of torture. It is imperative to prosecute and judge cases of international crimes — like torture — that shock the conscience of mankind. Torture is, after all, reckoned in our times as a grave breach of International Human Rights Law and International Humanitarian Law, prohibited by conventional and customary international law; when systematically practiced, it is a crime against humanity. This transcends the old paradigm of State sovereignty: individual victims are kept in mind as belonging to humankind; this latter reacts, shocked by the perversity and inhumanity of torture.

179. The advent of the International Law of Human Rights has fostered the expansion of international legal personality and responsibility, and the evolution of the domain of reparations (in their distinct forms) due to the victims of human rights violations. I have addressed this significant development — which I refer to herein — in my recent Separate Opinion (paras. 1-118) appended to the Court's Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (of 01.02.2012). This development has a direct bearing on reparations due to victims of torture.

180. Here, the suffering and the needs of those victims are to be kept in mind. Rehabilitation of victims plays an important role here, bringing to the fore a renewed vision of restorative justice. In effect, restorative justice, with its ancient roots (going back in time for some millennia, and having manifested itself in earlier legal and cultural traditions around the world), seems to have reflourished again in our times. This is due, in my perception, to the recognition that: a) a crime such as torture, systematically practiced, has profound effects not only on the victims and their next-of-kin, but also on the social *milieu* concerned; b) punishment of the perpetrators cannot be

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[157] On the influence of natural law doctrines, cf., *inter alia*, e.g., M. Henzelin, *Le principe de l´universalité en droit pénal international — Droit et obligation pour les États de poursuivre et juger selon de principe de l´universalité*, Bâle/Genève/Munich/Bruxelles, Helbing & Lichtenhahn/Faculté de Droit de Genève/Bruylant, 2000, pp. 81-119, 349-350 and 450.

[158] Cf. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law — Part I", 316 *Recueil des Cours de l'Académie de Droit International de La Haye* (2005) pp. 432-439.

dissociated from rehabilitation of the victims; c) it becomes of the utmost importance to seek to heal the damage done to the victims; d) in the hierarchy of values, making good the harm done stands above punishment alone; and e) the central place in the juridical process is occupied by the victim, the human person, rather than by the State (with its monopoly of sanction).

181. We look here beyond the traditional inter-State outlook, ascribing a central position to the individual victims, rather than to their States. Had the inter-State dimension not been surmounted, not much development would have taken place in the present domain. The struggle against impunity is accompanied by the endeavours towards the rehabilitation of the victims. The realization of justice, with the judicial recognition of the sufferings of the victims, is a form of the reparation due to them. This is imperative, we have here moved from *jus dispositivum* to *jus cogens*.

182. Identified with general principles of law enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the International Law for humankind. In prohibiting torture in any circumstances whatsoever, *jus cogens* exists indeed to the benefit of human beings, and ultimately of humankind. Torture is absolutely prohibited in all its forms, whichever misleading and deleterious neologisms are invented and resorted to, to attempt to circumvent this prohibition.

183. In the aforementioned move from *jus dispositivum* to *jus cogens*, this absolute prohibition knows no limits in time or space: it contains no temporal limitations (being a prohibition also of customary international law), and it ensues from a peremptory norm of a *universalist* international law. *Jus cogens* flourished and asserted itself, and has had its material content expanded, due to the awakening of the universal juridical conscience, and the firm support it has received from a lucid trend of international legal thinking. This latter has promptly discarded the limitations and shortsightedness (in space and time) of legal positivism, and has further dismissed the myopia and fallacy of so-called "realism".

184. Last but not least, the emancipation of the individual from his own State is, in my understanding, the greatest legacy of the consolidation of the International Law of Human Rights — and indeed of international legal thinking — in the second half of the XXth century, amounting to a true and reassuring juridical revolution. Contemporary International Criminal Law takes that emancipation into account, focusing attention on the individuals (victimizers and their victims). Not only individual rights, but also the corresponding State duties (of protection, investigation, prosecution, sanction and reparation) emanate directly from international law. Of capital importance here are the *prima principia* (the general principles of law), amongst which the principles of humanity, and of respect for the inherent dignity of the human person. This latter is recalled by the U.N. Convention against Torture[159]. An ethical content is thus rescued and at last ascribed to the *jus gentium* of our times.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[159] Second preambular paragraph.

SEPARATE OPINION OF JUDGE YUSUF

The Court's jurisdiction cannot be founded on Article 30 of the CAT — The conditions contained in Article 30 have not been met — Negotiations between the Parties were never deadlocked — Negotiations continued even after submission of the case to the Court — There was no inability to agree on arbitration — No proposals were made by either Party on modalities for the organization of arbitral proceedings — Only inability to agree on organization of arbitration triggers Court's jurisdiction — This was not the case here — Judgment elevates preliminary inquiry to level of full investigation — No general standard for conduct of such inquiries exists — The nature and scope of preliminary inquiry is determined by domestic law — Senegal conducted such an inquiry in 2000, but failed to do so in 2008 — Distinction should have been made between the two events — Obligation under Article 7, paragraph 1 of the CAT is to submit case for prosecution — Failure to do so engages State's international responsibility — Extradition is an option, but not an obligation under the CAT — State may extradite suspect only to relieve itself of its obligation to prosecute.

I. Introduction

1. I feel bound to append this separate opinion for several reasons. First, contrary to the conclusions of the Court, I am of the view that the jurisdiction of the Court in the present case can not be founded on Article 30 of the Convention against Torture (CAT) since the conditions set out in that provision have not been met. Secondly, I have voted against sub-paragraph 4 of the operative part of the Judgment because I believe that the choice of means for the conduct of the preliminary inquiry prescribed by Article 6, paragraph 2, of the CAT, as well as the scope of such inquiry, is determined by the State party on whose territory the suspect is present in accordance with its domestic law. Consequently, there was no valid reason, in my view, for the Court to conclude that the circumstances and procedures related to the questioning of Mr. Habré by the Senegalese investigating judge in February 2000, followed by his indictment by the same judge, did not constitute a preliminary inquiry. Thirdly, it is my view that the nature and meaning of the obligation laid down in Article 7, paragraph 1, of the CAT could have been further elaborated and clarified in the Judgment, particularly in view of the fact that Belgium continued to insist on the extradition of Mr. Habré while Senegal was preparing for his prosecution in its territory, and mobilizing funds for that purpose.

II. Jurisdiction

2. In its application to the Court, Belgium invoked two separate bases of jurisdiction. It relied equally on the Declarations made by Belgium and Senegal under Article 36, paragraph 2, of the Court's Statute and on Article 30 of the United Nations Convention against Torture (CAT). I believe that the Court has jurisdiction on the basis of the declarations made by Belgium and Senegal under Article 36, paragraph 2, respectively on 17 June 1958 and 2 December 1985. The Court's jurisdiction cannot, however, be founded in the present case on Article 30 of the CAT.

3. Four conditions have to be met, under Article 30 of the CAT, for the Court to have jurisdiction on disputes between Parties to the Convention. First, there has to be a dispute between the Parties concerning the application or interpretation of the Convention. Secondly, the dispute has to be one which cannot be settled by negotiation. Thirdly, one of the Parties to the dispute must have requested that it be submitted to arbitration. Fourthly, if within six months from the date of the request, the Parties are unable to agree on the organization of the arbitration, any one of them may refer the dispute to the ICJ. The Parties agree that these conditions are cumulative. Thus, all four must be met before the jurisdiction of the Court can be established. As explained below, it is

my view that two of these conditions have not been met, namely: *(a)* the condition that the dispute could not be settled through negotiation; and *(b)* that the Parties must have been unable to agree on the organization of the arbitration. I will examine these conditions below.

A. A dispute which "cannot be settled through negotiation"

4. It should be stressed at the outset that Article 30 of the CAT refers to a dispute which "cannot be settled through negotiation", a condition that is vastly different from the formula used in other conventions where the reference is to a dispute which "is not settled by negotiation". The latter expression, viz. "is not settled by negotiation", implies a factual finding, and not an assessment of whether a deadlock or a refusal by one of the Parties has occurred.

5. The Court rightly notes in paragraph 57 of the Judgment that

> "[t]he requirement that the dispute 'cannot be settled through negotiation' could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that . . . 'no reasonable probability exists that further negotiations would lead to a settlement' (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345)."

The Court does not, however, draw the correct conclusions from these statements, particularly on the strength of the evidence before it in this case.

This evidence clearly shows that neither a deadlock nor an impasse was ever reached in the negotiations between the Parties, and that those negotiations continued for a long time even after the filing of Belgium's application with the Court. Thus, there is nothing in the material placed before the Court by the Parties which indicates that the dispute could not be settled through negotiations and that the Parties fully and definitively gave up any hope of reaching a settlement through negotiations. The fact that the negotiations between the Parties were never permanently interrupted, but were resumed on many occasions, even after the filing of the application by Belgium, demonstrates that the possibility of a settlement through negotiations never disappeared.

6. Ascertaining whether negotiations have taken place, but have not resulted in the settlement of the dispute, in accordance with the condition stipulated in certain conventions regarding "a dispute which is not settled by negotiations", is a question of factual verification and requires no inquiry into the exhaustion of the possibilities of settling the dispute through negotiations. The formula used in the CAT, i.e., "cannot be settled through negotiations" requires such an inquiry and a determination by the Court that further negotiations became futile and showed no reasonable probability that they could result in a settlement of the dispute. This determination does not appear to have been made in the Judgment. As a matter of fact, in assessing whether the dispute was one which could not be settled by negotiation, the Court limited itself to the consideration of the Notes Verbales by Belgium to Senegal of 11 January 2006, 9 March 2006, 4 May 2006 and 20 June 2006. These Diplomatic Notes form the only evidence that the Court relies on to conclude that

> "[t]here was no change in the respective positions of the Parties concerning the prosecution of Mr. Habré's alleged acts of torture during the period covered by the above exchanges. The fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute." (Judgment, paragraph 59.)

7. It is true that in its Note Verbale of 20 June 2006, which Senegal affirmed not to have received, Belgium noted that "the attempted negotiation with Senegal, which started in

November 2005" had not succeeded, and accordingly asked Senegal to submit the dispute to arbitration (Memorial of Belgium, Ann. B.11). But this was not, and cannot be considered, clear evidence of an impossibility to settle the dispute through negotiations. It simply reflects the viewpoint of one of the Parties, which apparently wanted to submit the dispute to arbitration. The material placed before the Court by both Parties contains additional evidence of continued negotiations between the Parties up to, and beyond the date of submission of Belgium's Application to the Court. This additional evidence shows that the positions of the Parties continued to evolve, particularly with the adoption by Senegal in 2007 of constitutional and legislative reforms aimed at facilitating the prosecution of Mr. Habré in Senegal for crimes allegedly committed in Chad, and the consequent co-operation between the Parties, both directly as well as through the African Union and the European Union, to mobilize the necessary funds for the organization of Mr. Habré's trial in Senegal.

8. To illustrate the evolution of the positions of the Parties through their diplomatic exchanges from 2007 and until very recently (17 January 2012), reference may be made to, *inter alia*, Senegal's Notes Verbales of 18 July 2007 and 5 October 2007, in which it announced the intention to organize a meeting of potential donors and informed Belgium of its decision to organize the Hissène Habré trial (Memorial of Belgium, Ann. D.14 and B.15). Further diplomatic correspondence was sent by Senegal to Belgium on 5 October 2007, and 7 December 2007 regarding the organization of the donor meeting and the financial aspects of the trial (Memorial of Belgium, Ann. D.16).

On 2 December 2008, in a Note Verbale to Senegal, Belgium refers to the dispute between the Parties regarding the interpretation and application of the provisions of the CAT, and takes note of the constitutional and legislative amendments adopted by Senegal with a view to the submission for prosecution to its competent authorities of the case of Mr. Habré (Memorial of Belgium, Ann. B.16). Belgium reaffirms, in the same Note Verbale, its readiness to establish the necessary modalities for international judicial co-operation with Senegal on the Habré case, in particular through the transmission to Senegal of the dossier compiled by the Belgian investigating judge following a letter rogatory from the competent Senegalese authorities. In this context, Belgium also confirms the readiness of the Belgian investigating judges to receive the Senegalese judges responsible for the Hissène Habré case, and requests Senegal to provide it with the contact details of the Senegalese judges in charge of the investigation and prosecution of the case. Finally, Belgium expresses in this Note Verbale, the hope that this co-operation would result in decisive progress in the coming few weeks.

These exchanges clearly constitute, in my view, an evolution of the positions of the Parties and indicate the emergence of new factors (modification of Senegalese legislation, preparations for the organization of trial, co-operation in the mobilization of funds for the trial, offer of judicial co-operation by Belgium and of the transmission of the Habré dossier compiled by its magistrates) indicating a clear evolution of the negotiations and of the positions of the Parties subsequent to the period, and to the Notes Verbales, on the basis of which the Court concluded that the condition set forth in Article 30, paragraph 1, of the CAT has been met.

9. Moreover, after the filing of its Application before the Court, and until recently, Belgium continued its exchanges with Senegal on the financing of the trial of Hissène Habré in Senegal, on its own financial contribution to such a trial, as well as judicial co-operation on the basis of the international letter rogatory requested by Belgium in its Note Verbale of 2 December 2008 (Memorial of Belgium, Ann. B.16). Thus, in a Note Verbale of the Embassy of Belgium in Dakar to the Senegalese Ministry of Foreign Affairs on 23 June 2009, Belgium extended an invitation to the Senegalese investigating judges responsible for the case to visit Belgium to meet with their Belgian counterparts and offered to bear the costs of the visit (Memorial of Belgium, Ann. B.17).

The Senegalese authorities welcomed this offer and designated two of the investigating judges to travel to Belgium (Note Verbale of 14 September 2009, Memorial of Belgium, Ann. B.19).

The negotiations and discussions on the letter rogatory held between the Foreign Ministers of Senegal and Belgium on 26 May 2010 constitute further evidence of the continuation of negotiations between the Parties. Likewise, In November 2010, Belgium attended the donors' round-table in Dakar, in which the participants discussed the budget for organizing the Habré trial in Senegal, and made co-operation arrangements amongst themselves, including between Belgium and Senegal. Indeed, Belgium pledged a maximum of €1 million to the organization of the trial (Counter-Memorial of Senegal, Anns. 5, 10-4, and 11).

10. Negotiations continued as recently as 17 January 2012, when Belgium submitted a fourth extradition request to Senegal. Belgium noted, in its Note Verbale of 17 January 2012, that without prejudice to the case pending before the ICJ, it is in favour of the Habré trial being organized in Africa by the country on whose territory Mr. Habré is present. In addition, Belgium confirmed that it was still ready to co-operate with Senegal by judicial means, and this on 17 January 2012. Is it persuasive, under such circumstances, for the Court to conclude that the dispute could not be settled through negotiation or that negotiations had been exhausted and offered no further prospect for the settlement of the dispute already in 2006 allowing for resort to arbitration under Article 30 of the CAT?

B. The inability of the Parties to agree on the organization of the arbitration

11. The requirement under Article 30 relating to the inability of the Parties "to agree on the organization of the arbitration" implies, in my view, an attempt to initiate the organization of the arbitration, or a suggestion of modalities by one or both Parties regarding such organization, on which the Parties have, however, failed to agree. The proposal or initiative by one or both Parties, showing an effort to organize arbitration, is to be distinguished from the request for arbitration and has to be subsequent to it. In the present case, it does not appear to me that either of the two Parties has made a proposal or has attempted to initiate the organization of an arbitration on whose terms the Parties failed to agree. As a matter of fact, Belgium does not even claim that it has done anything regarding the organization of an arbitration, and limits its arguments to the fact that it requested Senegal to submit the dispute to an arbitration, and subsequently reminded Senegal of that request.

12. In its reply to a question posed by a member of the Court, Belgium stated that: "a State requesting arbitration under Article 30 is not required to make proposals for, or even to raise questions concerning the organization of the arbitration at the outset or at any specific moment" (CR 2012/6, p. 40, para. 14 (Wood)). It is also recognized in the Judgment that "Belgium did not make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings". Nonetheless, the Court concludes that: "this does not mean that the condition that 'the Parties are unable to agree on the organization of the arbitration' has not been fulfilled. A State may defer proposals concerning these aspects to the time when a positive response is given in principle to its request to settle the dispute by arbitration." (Judgment, paragraph 61.)

This is in my view an erroneous interpretation of the provision on arbitration in Article 30 of the CAT. In the first instance, it is very clear from a simple reading of the text that it is not enough to request the submission of the dispute to arbitration. Such a request must be followed by an effort or a proposal to organize arbitration proceedings, which is either opposed by the other Party, or does not result in an agreement between the Parties. Thus, it is only a failure to agree on the organization of arbitration, in the sense that an attempt had been made to organize or to propose

modalities for the organization of arbitration without, however, reaching an agreement, which triggers the possibility to refer the dispute to the Court. Secondly, it should be recalled that, in the present case, following Belgium's initial reference to the arbitration procedure on 4 May 2006, Senegal responded by acknowledging and taking note of the "possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the (Convention)" (Memorial of Belgium, Ann. B9). In light of such acknowledgement, the onus lay on Belgium, as the requesting State, to take steps to suggest the procedure for organizing the said arbitration.

The present case is thus different from *DRC* v. *Rwanda* and from *Libya* v. *USA*, where the Conventions concerned included similar treaty provisions. Unlike, for example, the Respondent in the *Libya* v. *USA* case, Senegal did not express an intention to reject the proposal for arbitration. On the contrary, Senegal took note of Belgium's request to submit the matter to arbitration in its Note Verbale of 9 May 2006 (Memorial of Belgium, Ann. B10). Belgium should have followed this up with a proposal on the modalities for the organization of the arbitration, rather than reiterate a request to submit the dispute to arbitration. The condition that the Parties were unable "to agree on the organization of the arbitration" contained in Article 30 must be met before the matter can be referred to the Court for adjudication. Absent such clear disagreement on the organization of arbitral proceedings, the dispute cannot be submitted to the Court, and if any one of the Parties does so, the Court has to declare that it lacks jurisdiction. This is the case here, and the Court should have concluded, in my view, that it had no jurisdiction under Article 30 of the CAT.

III. Senegal's obligation to make immediately a preliminary inquiry into the facts

13. I find the reasoning of the Court, according to which the interrogation by the investigating judge in 2000 does not amount to a preliminary inquiry under Article 6, paragraph 2, of CAT, very unpersuasive, and disagree with its conclusion that the events of 2000 may be lumped together with those of 2008 where Senegal clearly failed to conduct a preliminary inquiry following a further complaint against Mr. Habré, after the legislative and constitutional amendments made by Senegal in 2007. The Court should have made a clear distinction between the steps taken by Senegal in 2000, and the absence of an inquiry following the complaints submitted to the Senegalese authorities in 2008.

14. The CAT provides little guidance on the specifics of the preliminary inquiry required by Article 6, paragraph 2. The Judgment also fails to shed light on what is meant by a preliminary inquiry under Article 6, paragraph 2, of the CAT and consequently provides no reliable basis for the assessment of whether or not Senegal, through the actions undertaken by its investigating judge, was able to satisfy the requirements of this provision of the Convention. Instead, in paragraph 83 of the Judgment, the concept of a preliminary inquiry under the convention appears to have been elevated to the level of a full investigation. In that paragraph, the Court notes that the preliminary inquiry provided for in Article 6, paragraph 2, is

> "intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned."

15. The preliminary inquiry provided for under Article 6, paragraph 2, of the CAT can only be based, at that stage of the investigations, on the information made available by the victims or by those who have filed the complaint against the suspect and brought his presence in the country, and the crimes allegedly committed by him, to the attention of the authorities. Moreover, the nature of

the inquiry to be carried out under this provision will depend to a large extent on the legal system concerned, and on the particular circumstances of the case. It would therefore be erroneous to suggest, as paragraph 83 of the Judgment appears to do, that a general standard for the conduct of such inquiries exists.

The Court rightly observes in paragraph 86 that the choice of means for conducting the preliminary inquiry remains in the hands of the States parties, taking account of the case in question. This observation however stands in contradiction with the Court's findings that the indictment of Mr. Habré by the Senegalese investigating judge in 2000 is insufficient to fulfil the obligation in Article 6, paragraph 2. Without a proper assessment of Senegal's legal system and practice, the Court cannot conclusively state that

> "The questioning at first appearance which the investigating judge at the *Tribunal régional hors classe* in Dakar conducted in order to establish Mr. Habré's identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré." (Judgment, paragraph 85.)

In coming to this conclusion, the Court disregards Senegal's explanation that under its legal system

> "in criminal proceedings, the investigating judge may be seised either by a complaint with civil-party application or by an application from the Public Prosecutor to open an investigation. The preliminary inquiry is aimed simply at enabling the basic facts to be established; it does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for further proceedings." (CR 2012/7, p. 34, paras. 39-40, (Thiam); see also CR 2012/7, p. 17, para. 7.)

16. It does not also appear logical to assume that an indictment would have been issued by a Senegalese magistrate without a preliminary inquiry. While Senegal did not provide adequate material to show the exact nature of the inquiry carried out by the competent authorities following the allegations against Mr. Habré, the conduct of an inquiry, particularly one of a preliminary nature, is implicit in the fact that Mr. Habré was indicted by the investigating magistrate, and placed under house arrest. The Court should not have been so dismissive of the peculiarities of the Senegalese legal system, and the manner in which the indictment of Mr. Habré was arrived at, particularly in view of the fact that the exact nature and scope of the preliminary inquiry is determined on the basis of domestic law.

17. Thus, it is my view that the only instance in which Senegal failed to comply with its obligation to carry out a preliminary inquiry was the one relating to the lack of action by the competent Senegalese authorities following the filing of new allegations of torture against Mr. Habré in 2008. The Court should have, therefore, noted that notwithstanding the possibility that Senegal may have met its obligations under Article 6, paragraph 2, in 2000, Senegal was under an obligation to conduct such an inquiry in 2008 when, following the legislative and constitutional reforms in 2007, new allegations of torture were brought against Mr. Habré. Despite the fact that four investigating judges were assigned to the case, there is no evidence that a preliminary inquiry, even of the same nature and scope as the one conducted in 2000, was ever carried out. It is on the basis of this failure to conduct a preliminary inquiry in 2008 that the Court should have found that Senegal breached its obligations under Article 6, paragraph 2, and not by setting aside the inquiry and the indictment of 2000.

IV. The nature and meaning of the obligation in Article 7, paragraph 1

18. I believe that the Court could have brought further clarification to the meaning and nature of the obligation *aut dedere aut judicare* contained in Article 7, paragraph 1, of CAT, which is at the heart of the present case. The prevalence of the formula *aut dedere aut judicare*, which can be found in over 60 multilateral instruments, has led to some confusion within legal scholarship over the relationship between extradition and prosecution in conventional clauses containing this formula. Used loosely, the expression can be misleading as it is generally understood to mean an obligation to extradite or prosecute. However, depending on the legal instrument under consideration, the obligation may be placed on prosecution, rather than extradition, or vice-versa. It is for this reason that the statement contained in paragraph 95 of the Judgment is useful, but could have benefited from further elaboration and elucidation. In that paragraph the Court notes that, within the context of the CAT, the choice between extradition or submission for prosecution does not mean that the two alternatives are to be given the same weight. Rather, "[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State" (Judgment, paragraph 95).

19. Despite the importance of this clarification, the Court stops short of elaborating further on the meaning of the obligation, and differentiating the formula in Article 7, paragraph 1, of the CAT from that of the conventions which impose an obligation to extradite. Such elaboration is necessary to avoid ambiguity, especially with respect to the interpretation of treaties containing the formula *aut dedere aut judicare*. The Conventions containing the formula *aut dedere aut judicare* may be divided generally into two broad categories: *(a)* clauses that impose an obligation to extradite, and in which prosecution becomes an obligation only after the refusal of extradition; and *(b)* clauses that impose an obligation to prosecute, with extradition being an option available to the State. The latter category also includes clauses that impose an obligation to prosecute, but extradition becomes an obligation if the State fails to submit the case for prosecution.

20. Multilateral instruments belonging to the first category include the 1929 International Convention for the Suppression of Counterfeiting Currency where the obligation to initiate proceedings against the suspect is "subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence" (Art. 9 (2)). Further illustration of this type of provision can be found in Article 15 of the African Union Convention on Preventing and Combating Corruption which provides that

> "where a State Party in whose territory any person charged with or convicted of offences is present and has refused to extradite that person on the basis that it has jurisdiction over offences, the requested State Party shall be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution . . ."

Additionally, Article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography provides that

> "if an extradition request is made with respect to an offence described in Article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution".

21. It is clear that category *(a)* conventions are structured in a manner that extradition to the State in whose territory the crime is committed is given priority. In the majority of these treaties, there is no general obligation on States parties to prosecute the alleged offender. On the contrary, prosecution by the State on whose territory the alleged offender is found only becomes an obligation if a request for extradition has been refused, or certain factors such as nationality of the suspect exist.

22. In category *(b)* conventions, it is evident that extradition is not given the same predominance. For example, a State party under the 1949 Geneva Conventions is obligated to prosecute persons alleged to have committed grave breaches of these conventions. However, "if it prefers, and in accordance with the provisions of its own legislation", it may "hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case". In these conventions the State on whose territory the alleged offender is found is not obliged to extradite him. Other modifications to the formula include Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, on which Article 7, paragraph 1, of CAT is modelled. Prosecution is clearly given priority, and a State party is obligated to prosecute, or submit a case for prosecution, regardless of the existence of an extradition request. Even where an extradition request has been made, some conventions, such as the 1949 Geneva Conventions, do not require extradition, while others can be interpreted, in accordance with the object and purpose of the particular treaty, as establishing an obligation to extradite if the State refuses to prosecute.

23. This clarification is important in the present case, since, as noted in paragraph 50 of the Judgment, it has repeatedly appeared in the correspondence between the Parties as well as in their pleadings before the Court that the two obligations were often placed on the same footing as alternatives within the context of the CAT. For instance in its Note Verbale of 11 January 2006, Belgium stated its interpretation of the Convention, specifically the obligation "*aut dedere aut judicare*" as "only laying obligations on a State, in this case, in the context of the extradition application of Mr. Hissène Habré, the Republic of Senegal" (Memorial of Belgium, Ann. B.7). Similarly, Belgium made clear to Senegal in its Note Verbale of 9 March 2006, that negotiations which it claimed were under way were with regard to "the extradition application in the case of Mr. Hissene Habré, in application of [Article 30 of the Convention against Torture]" (Memorial of Belgium, Ann. B.8). Furthermore, in its Application, Belgium requested the Court to adjudge and declare that "failing the prosecution of Mr. H[issène] Habré, the Republic of Senegal is obliged to extradite him to *the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts*" (emphasis added). Belgium also insisted during the oral proceedings that Article 7, paragraph 1, of the Convention is to be interpreted as requiring the forum State "to submit the case to its competent authorities for the purpose of prosecution, unless it extradites that person to the State which so requests" (CR 2012/2, p. 15, para. 13, (Rietjens)). Additionally, counsel for Belgium argued that the preliminary inquiry required in Article 6, paragraph 2, was necessary to "implement the obligation to prosecute or, in default of prosecution, *to extradite if an extradition request has been made*" (CR 2012/3, p. 11, para. 11, (Wood); emphasis added).

24. Belgium had no right to insist upon the extradition of Mr. Habré, and Senegal was under no obligation to extradite him to Belgium, as long as Senegal complied with its obligation to submit Mr. Habré's case to its competent authorities for prosecution. It is only the violation of the obligation to submit the case for prosecution which engages the responsibility of the State on whose territory the suspect is present. Should such a State, however, prefer to extradite the suspect, instead of prosecuting him or her in its tribunals, it has the choice of doing so. Additionally, with

respect to extradition within the context of the Convention against Torture, it should be stressed that the State to which a request for extradition has been made is not under an obligation to extradite the suspect to the requesting State. Thus, Senegal had no obligation to extradite Mr. Habré to Belgium, unless it decided to do so simply because it wanted to relieve itself of the obligation to submit his case for prosecution by its own authorities and on its territory.

(Signed) Abdulqawi A. YUSUF.

DISSENTING OPINION OF JUDGE XUE

1. In principle, I agree with the Judgment that Senegal as a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (the Convention) should submit without delay the case of Mr. Hissène Habré to the competent authorities for the purpose of prosecution, if it decides not to extradite him. However, I disagree with the majority of the Members of the Court on a number of important issues in the Judgment. As required by my judicial duty, I shall explain my dissent.

1. The issue of admissibility

2. In the proceedings, Senegal objects to the admissibility of Belgium's claims and maintains that Belgium is not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to submit the Hissène Habré case to its competent authorities for the purpose of prosecution, unless it extradites him. In particular, Senegal argues that none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the alleged acts were committed (Judgment, paragraph 64). Belgium does not dispute that fact but contends that the case is not about diplomatic protection, and "under the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform" (Judgment, paragraph 65). It notes in its Application that "as the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction" (*ibid.*).

3. This dispute between the Parties with respect to the qualification of passive nationality apparently has a direct bearing on the question of admissibility; should the nationality of the victim be established at the time of the commission of the alleged acts, Belgium's claim is obviously inadmissible.

4. Indeed, this case is different from diplomatic protection where nationality serves as a nexus between an injured individual and its State so as to give the latter entitlement to invoke international responsibility of the wrongful State for the protection of the individual. Nationality principle, however, is not exclusively applicable in diplomatic protection cases in international law. It is also relevant in international criminal law cases where nationality provides one of the bases for jurisdiction. In the present case, it defines and determines the entitlement of a State party in the exercise of its jurisdiction to prosecute and the right to request for extradition from another State party.

5. Under Article 5, paragraph 1 *(c)*, of the Convention, it is provided that jurisdiction can be established over torture offences by a State party "when the victim is a national of that State if that State considers it appropriate". The Convention does not specify whether such passive nationality should be established at the time of the occurrence of tortuous acts, nor does it prescribe it as a necessary ground; it leaves certain discretion to each State party to decide. In this case, therefore, Belgium's law and practice have relevance to the issue.

6. Belgium established absolute universal jurisdiction over crimes under international humanitarian law in 1993 (the 1993 law), including jurisdiction based on passive nationality. On 23 April 2003 and 5 August 2003, Belgium amended the 1993 law, by which it restricted, among others, the temporal condition of passive nationality, i.e., nationality should be established at the time of the events instead of at the time of filing a case (the 2003 law). The 2003 law provides to

the extent that on the count of a crime under international humanitarian law committed abroad, *criminal prosecution can be exercised only when the victim is, at the time of the events, Belgian, or having been staying effectively in Belgium for at least three years*. In its decision No. 68/2005 of 13 April 2005, the Belgian Court of Arbitration, while upholding the constitutionality of the 2003 law, referred to the legislative intention of the said amendment and stated that

> "as for the criterion of personal ties with the country, the lawmaker deemed *it was necessary to introduce certain limits as regards the principle of the capacity to be a defendant in proceedings; it is necessary that at the time of the events, the victim be of Belgian nationality or be effectively staying in Belgium, in a usual, legal manner for at least three years*" (emphasis added).

7. It also points out that such limits are imposed in order to avoid "an obviously abusive political use of this law", since there are people

> "who settled in Belgium for the sole purpose of obtaining the possibility, as under the auspices of the law of June 16, 1993 governing the prevention of serious violations of international humanitarian law and Article 144 *ter* of the Judicial Code, of securing the jurisdiction of the Belgian courts for violations of which these persons claim they are the victims" (Court of Arbitration, Judgment of 13 April 2005, communicated by the Agent of the Republic of Senegal to the Court on 13 April 2012).

Belgium's 2003 law should in no way be regarded as incompatible with the object and purpose of the Convention in the struggle against torture, although its legislative limits to passive nationality restrain Belgium's right to exercise its jurisdiction over torture.

8. By its own legislative and judicial acts, particularly the jurisdictional limits its 2003 law imposes on passive nationality, Belgium is therefore precluded from denying the applicability of the nationality rule in case it wishes to exercise passive personal jurisdiction. As a State party requesting for extradition under Article 7, paragraph 1, of the Convention, Belgium has to, as a matter of law, establish its entitlement to exercise jurisdiction.

9. It is noted that during the written pleadings, Belgium claims that the transitional provisions to the 2003 Law provide to the extent that if investigative measure has already been taken on the date of entry into force of the 2003 law and at least one complainant was a Belgian national at the time the criminal proceedings were initiated, the Belgian courts shall continue to exercise jurisdiction. In this case, Mr. A. Aganaye, a Belgian national as of 19 June 1998, filed the case against Mr. Habré in the Belgian courts in 2000. Moreover, numerous investigative measures were taken before the entry into force of the 2003 law.

10. It is clear to the Court that, among the complainants against Mr. Habré in the Belgian courts, only Mr. A. Aganaye was a Belgian national. Two others were with dual nationalities of Chad and Belgium. None of them was a Belgian national at the time of the events and all were naturalized in Belgium well after the events of the commission of torture in Chad. This nexus for passive national jurisdiction was apparently fragile. Belgium does not provide any evidence to show that such national link is not solely meant to secure the jurisdiction of the Belgian courts and as such, "displayed an 'obvious link attaching him to Belgium', to use the words of the Belgian Court of Arbitration" (Court of Arbitration, Judgment No. 104/2006 of 21 June 2006, communicated by the Agent of the Republic of Senegal to the Court on 13 April 2012).

11. In answering one of the questions put forward by a Member of the Court in regard to Belgium's entitlement to invoke Senegal's responsibility in the Court, Belgium argues that "it is not the nationality of the alleged victims which is the basis of the entitlement of a State to invoke the responsibility of another State. What is relevant is to whom the obligation breached is owed." (CR 2012/6 (Wood), p. 52, para. 56.) This argument implicitly changes Belgium's original claim from a request for extradition to a general right to monitor treaty implementation. Under the Convention, whether Senegal owes an obligation to Belgium to extradite, first and foremost, depends on whether Belgium has entitlement to exercise jurisdiction in accordance with Article 5 of the Convention.

12. The Court, regrettably and questionably, fails to address this crucial issue presented by Senegal in the Judgment. Instead of interpreting Article 5, paragraph 1, of the Convention, the Court bases its reasoning on the notion obligations *erga omnes partes*, which in my opinion, goes far beyond treaty interpretation, deviating from the established jurisprudence of the Court.

13. In examining the issue of Belgium's standing, the Court focuses on the question "whether being a party to the Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument" (Judgment, paragraph 67). It states that,

> "The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present." (Judgment, paragraph 68.)

Taken from the *obiter dictum* of *Barcelona Traction* Judgment (*Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32, para. 33), the Court defines such obligations as obligations *erga omnes partes*.

14. By virtue of the nature of such *erga omnes partes* obligations, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke Senegal's responsibility for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1. Therefore, Belgium's claims are admissible. This conclusion is abrupt and unpersuasive.

15. In the first place, the Court's reference to the *Barcelona Traction* case misuses the *obiter dictum* in that Judgment in several aspects. In that case the Court specifically drew the distinction between obligations owed to the international community as a whole and those arising vis-à-vis another State. It stated that "[b]y their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." *(Ibid.)* In terms of standing, however, the Court only spelt out the conditions for the breach of obligations in bilateral relations and stopped short of the question of standing in respect of obligations *erga omnes*. The Court apparently referred to substantive law rather than procedural rules, with no indication to change the state of the law in the sense that there is no general standing resident with each and every State to bring a case in the Court for the vindication of a communal interest.

16. Since the *Barcelona Traction* Judgment, the Court has referred to obligations *erga omnes* in a number of cases (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 199, paras. 155-157; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 31-32, para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 147). In none of them, it has pronounced that the existence of a common interest alone would give a State entitlement to bring a claim in the Court.

17. Secondly, the Court's conclusion on obligations *erga omnes partes* in this case is not in conformity with the rules of State responsibility. Even though prohibition of torture has become part of *jus cogens* in international law, such obligations as to make immediately a preliminary inquiry and the obligation to prosecute or extradite are treaty rules, subject to the terms of the Convention. Notwithstanding the fact that the State parties have a common interest in their observance, by virtue of treaty law, the mere fact that a State is a party to the Convention does not, in and by itself, give that State standing to bring a case in the Court. Under international law, it is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring a claim against another State for the breach of such obligations in the Court. A State party must show what obligations that another State party owes to it under the Convention have been breached. Such "injury", to use the language in Article 42 of the International Law Commission's Articles on State Responsibility, distinguishes the State from other State parties as it is "specially affected" by the breach. These procedural rules in no way diminish the importance of prohibition of torture as *jus cogens*. *Jus cogens*, likewise, by its very nature, does not automatically trump the applicability of these procedural rules (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment of 3 February 2012, paras. 93-95).

18. By adopting the notion *erga omnes partes*, it seems that the Court has blurred the distinction between the claimant State and the other State parties by prescribing a general right to invoke international responsibility in the Court. As a requesting State for extradition, Belgium, provided that its jurisdiction is properly established under Article 5, is entitled to bring a claim against Senegal for the alleged breach of Article 7, paragraph 1, of the Convention. Belgium's entitlement to raise a claim against Senegal for breach of its obligations to make immediately a preliminary inquiry under Article 6, paragraph 2, and the obligation to prosecute under Article 7, paragraph 1, should be tenable only if such claim is intrinsically connected with its request for extradition. As a matter of fact, the dispute between the Parties arose over the interpretation and application of the principle *aut dedere aut judicare* under Article 7, paragraph 1. In other words, Belgium's Application rests on the terms of the Convention rather than the existence of a common interest. When the Court, in addressing the issue of standing, states that

> "any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end" (Judgment, paragraph 69),

I am afraid that its pronouncement can find no support of State practice in the application of the Convention.

19. Thirdly, the Court's conclusion on admissibility is contrary to the terms of the Convention. In order to achieve the object and purpose of the Convention, a reporting and monitoring system is established under Articles 17-20 of the Convention to supervise the implementation of the Convention by the State parties. Besides, a communication mechanism is created under Article 21, by which a State party may send communications to the Committee against Torture to the effect that it considers that another State party is not fulfilling its obligations under this Convention. These mechanisms are designed exactly to serve the common interest of the State parties in the compliance with the obligations under the Convention. The Court's concern in the reasoning that, should a special interest be required for making a claim concerning the cessation of an alleged breach by another State, in many cases no State would be in the position to make such a claim (Judgment, paragraph 69), is therefore unfounded.

20. Under the Convention, conditions for the operation of these mechanisms demonstrate that the State parties in no way intended to create obligations *erga omnes partes* in Article 6, paragraph 2, and Article 7, paragraph 1.

21. Under Article 22, communications can be made only upon prior declaration by a State party recognizing the competence of the Committee and can be made only against those State parties that have made a declaration to the same effect. The Committee will not receive and consider any communications if such communication concerns a State party that has not made such a declaration.

22. Furthermore, under Article 30, paragraph 2, each State may, at the time of signature or ratification of the Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article, particularly with regard to the jurisdiction of the International Court of Justice.

23. Obviously, if the State parties had intended to create obligations *erga omnes partes*, as pronounced by the Court, Articles 21 and Article 30, paragraph 1, should have been made mandatory rather than optional for the State parties. In accordance with treaty law, any interpretation and application of the object and purpose of the Convention should not contradict, or even override the clear terms of the treaty.

2. Relationship between the obligations concerned

24. On the question of jurisdiction, the Court finds that the dispute between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed. The Court therefore lacks jurisdiction to rule on that issue. However, the Court is of the view that it may still have to consider the *consequences* of Senegal's conduct on the compliance with other obligations under the Convention, provided its jurisdiction is established. This fragmented approach to the interpretation and application of treaty provisions, in my view, is problematic in law.

25. Belgium in its submissions asks the Court to adjudicate and declare that Senegal breached its obligation under Article 5, paragraph 2. The reason that the Parties have no dispute over this point, as found by the Court, is that Senegal accepts the decision of the Committee against Torture in 2006 that it breached its obligation under Article 5, paragraph 2, for failing to take necessary measures to establish jurisdiction in its domestic law in due time. The Court's decision on lack of jurisdiction over Article 5, paragraph 2, has two legal implications: one is that the Court eschews the need to pronounce on the merits of the issue, namely, Senegal's breach of its

obligation under Article 5, paragraph 2, has ceased to exist by the time of Belgium's institution of the Application; secondly, Senegal's obligation to make a preliminary inquiry under Article 6, paragraph 2, and obligation to prosecute under Article 7, paragraph 1, of the Convention are separated from the obligation under Article 5, paragraph 1, in the Court's reasoning.

26. In the establishment of universal jurisdiction under the Convention, Articles 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, are intrinsically interrelated; Article 5, paragraph 2, is the precondition for the implementation of the other two provisions for the exercise of universal jurisdiction. In other words, without established jurisdictional ground, the competent authorities of a State party would not be able to fulfil the obligation to prosecute or take a decision on a request for extradition from another State party. This is a matter of international law as well as internal law, but first and foremost international law in this case.

27. In the Judgment, although the Court recognizes "the fact that the required legislation had been adopted only in 2007 *necessarily* affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention" (Judgment, paragraph 77; emphasis added), it has nevertheless found Senegal's conduct before 2007 relevant for the consideration of its obligations under these Articles. Under criminal law, legal proceedings for prosecution must be based on a sound jurisdictional ground. As Senegal failed to duly adopt necessary measures to establish universal jurisdiction in its domestic law, its competent authorities dismissed the legal proceedings against Mr. Habré for lack of jurisdiction. At the international level, this means Senegal did not meet its obligation under Article 7 of the Convention, a finding by the Committee against Torture. Again, Senegal does not contest that point.

28. In the present case, given the indivisible nature of the treaty obligations under the aforesaid three provisions, Senegal's failure to fulfil its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, is not, as the Court states, due to its domestic law, (Judgment, paragraph 113), but due to its failure to fulfil its obligation under Article 5, paragraph 2. The fact that Senegal's breach of its obligation under Article 5, paragraph 2, ceased to exist in 2007 has consequential effect on Senegal's implementation of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1. That is to say, after Senegal established universal jurisdiction over torture offences, it should immediately conduct criminal investigation against Mr. Habré so as to decide whether to submit him to prosecution or extradite him in accordance with Article 7, paragraph 1, of the Convention. Therefore, the relevant time for the consideration of whether or not Senegal has breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, should be the time since Senegal adopted necessary legislation in 2007 rather than from 2000, or even earlier.

29. With regard to Article 6, paragraph 2, the Court finds that "the Senegalese authorities did not immediately initiate a preliminary inquiry as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture" (Judgment, paragraph 88). It also considers that Senegal failed to make such an inquiry in 2008 when a further complaint against Mr. Habré was filed in Dakar. In my view, in 2000 when the first complaint was filed in the Senegalese courts, the Senegal competent authorities did take legal action and indicted him. As far as the complaint in 2008 is concerned, the fact is that by 2008 Senegal had already been in the process of preparing for the trial of Mr. Habré. The evidence before the Court demonstrates the following facts:

30. In July 2006, the Assembly of the African Union of Heads of State and Government, by Decision 127 (VII), *inter alia*, "decides to consider the Hissène Habré case as falling within the competence of the African Union . . . mandates Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial" (Memorial of Belgium, paras. 1.68-1.71, Ann. F.2; Counter-Memorial of Senegal, para. 106).

31. On 5 October 2007, in a Note Verbale sent from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, Senegal informed Belgium that it had decided to organize the trial of Mr. Habré and invited Belgium to a meeting of potential donors to finance the trial (Memorial of Belgium, Ann. B.15).

32. On 6 October 2008, only days after the filing of the aforesaid complaints against Mr. Habré in the Senegalese courts, Mr. Habré seised the ECOWAS Court of Justice against the trial over his case to be conducted by Senegal.

33. These facts, among others, reveal that by 2008 the Hissène Habré case was well under way. It had passed the stage of preliminary inquiry for the decision whether or not the alleged perpetrator should be brought to trial; when Senegal decided to prosecute Mr. Habré, it must have possessed the necessary facts for that decision. Under such circumstances, the Court's pronouncement on the obligation to make a preliminary inquiry under Article 6, paragraph 2, seems unnecessarily formalistic. Indeed, as the Court itself points out, "the choice of means for conducting the inquiry remains in the hands of the State parties, taking account of the case in question" (Judgment, paragraph 86). It is also true by this stage Senegal has the competence to decide whether it is still necessary to conduct a preliminary inquiry.

3. Obligation *aut dedere aut judicare* under Article 7, paragraph 1

34. Under Article 7, paragraph 1, "[t]he 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".

35. On the nature and meaning of the obligation *aut dedere aut judicare* as laid down in Article 7, paragraph 1, the Court states that the obligation requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for his extradition. On a general ground, this pronouncement is in line with the object and purpose of the Convention. In the present case, the Court's statement by implication refers to Senegal's conduct before Belgium's first request for extradition was raised. As stated above, Senegal's failure to bring Mr. Habré to trial during that time was primarily due to the breach of its obligation under Article 5, paragraph 2, of the Convention. Whether Senegal has breached its obligation under Article 7, paragraph 1, should be considered from the time after it adopted necessary legislation and established universal jurisdiction over torture.

36. In the present case, the essential question rests on the issue of Belgium's request for extradition. I agree with the Court that extradition is an option for the State concerned. It is up to that State to decide whether or not to extradite the alleged suspect. On the relations between the two options, extradition or prosecution, the Court is of the view that

> "the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State." (Judgment, paragraph 95.)

I beg to disagree with this interpretation of Article 7, paragraph 1.

37. The object and purpose of the Convention is to establish the broadest possible jurisdiction in order to effectively fight against torture throughout the world. The establishment of universal jurisdiction and extradition bases between the State parties aims at preventing "safe haven" for the perpetrator. If the State where the alleged offender is present decides to extradite him to the requesting State, the requested State would be relieved from the obligation to prosecute. Should the State decide otherwise not to submit the case to its own competent authorities for prosecution, it is obliged under Article 7, paragraph 1, to submit the case to the extradition proceedings. Logically, if the State concerned has taken the decision to prosecute, by virtue of general principles of criminal justice that no one should be tried twice for the same offence, the extradition request should be rejected.

38. In the present case, despite Senegal's repeated assurance that it has decided to prosecute Mr. Habré to fulfil its obligation under Article 7, paragraph 1, Belgium has persistently pressed its request for extradition. As a matter of fact, it has presented its latest request to Senegal for extradition of Mr. Habré on 17 January 2012. On 15 May 2012, Senegal notified the Court that with complete documents received from Belgium, the matter is now under the consideration of the Senegalese competent authorities. In light of the foregoing events, it is clear that in Belgium's view Senegal has not yet taken the decision whether to prosecute or extradite. Before Senegal has yet decided to prosecute, as a State party, Belgium is entitled under Article 7, paragraph 1, to request for extradition of Mr. Habré, provided the issue of admissibility is settled. While the decision on extradition is still pending, however, it is questionable for Belgium to claim that Senegal has breached its obligation under Article 7, paragraph 1, for failing to prosecute, because such claim would directly contradict Belgium's own request for extradition. Instead of addressing the treaty relations between the Parties under Article 7, paragraph 1, the Court, unfortunately, focuses on Senegal's obligation to prosecute.

39. If Senegal's obligation to prosecute is presumed or mandated, Belgium's request for extradition may be deemed playing a different role: monitoring the implementation of Senegal's obligations under the Convention. It is true that Belgium's request for extradition has actually pushed the process to bring Mr. Habré to prosecution, but to give a State party an entitlement to monitor the implementation of any State party on the basis of *erga omnes partes*, certainly goes beyond the legal framework of the Convention. Article 7, paragraph 1, does not provide the State requesting extradition with a right to urge the requested State to prosecute. It only allows the requesting State to claim its right to request for extradition if the requested State has failed to implement its obligation to prosecute or extradite. When the decision on prosecution is taken or extradition request is being considered under due process, it is questionable for the Court to pronounce that Senegal has breached its obligation under Article 7, paragraph 1.

4. Other relevant issues

40. The Court states in the Judgment that

> "the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré . . . Moreover, the referral of the matter to the African Union . . . cannot justify the latter's delays in complying with its obligations under the Convention." (Judgment, paragraph 112.)

41. The Court is fully aware that the Hissène Habré case is now under the purview of the African Union (AU). Evidence before the Court shows that none of the decisions taken by the Organization or other regional organs, e.g., ECOWAS Court of Justice, can be considered as contrary to the object and purpose of the Convention; all of them reinforce Senegal's obligation under the Convention to bring Mr. Habré to prosecution. It would only do justice to say that the AU's decision adopted in July 2006 that urged Senegal to ensure that Hissène Habré be tried in Africa and by the Senegalese courts actually accelerated Senegal's process to amend its national law in accordance with the provisions of the Convention and paved the way for the trial of Mr. Habré. Since 2007, after Senegal adopted the necessary measures and established universal jurisdiction over torture, as the regional political organ, the AU has been a facilitating factor in the process. Nowhere can the Court ascertain that Senegal's referral of the Hissène Habré case to the AU was intended to delay the implementation of its obligations under the Convention.

42. More importantly, even if the AU ultimately decides to establish a special tribunal for the trial of Mr. Habré, Senegal's surrender of Mr. Habré to such a tribunal could not be regarded as a breach of its obligation under Article 7, paragraph 1, because such a tribunal is created precisely to fulfil the object and purpose of the Convention; neither the terms of the Convention nor the State practice in this regard prohibit such an option.

43. With respect to the delays in Senegal's implementation of its obligations under the Convention, for the reasons stated previously, I am of the view that the Court should look at Senegal's conduct since it established universal jurisdiction over torture in 2007. As a member of ECOWAS, Senegal has the obligation to respect the jurisdiction of ECOWAS Court of Justice and wait for it to pronounce on the case submitted by Mr. Habré. If this procedure had caused delay, such delay was legally justifiable.

44. As a State party to the Convention, Senegal cannot justify its failure to implement its obligations by financial difficulties. The Court should not nevertheless downplay the practical difficulties that Senegal faces in the preparation of the trial, categorically disregarding the financial difficulties that Senegal may face in the trial.

45. With over 40,000 victims and several hundreds of witnesses mainly from abroad, investigation and collection of evidence alone could be a heavy task for Senegal. The experiences of many existing international/special criminal tribunals have proved that a trial on such a large scale could go on for years, even decades, with astronomical sums of money budgeted from international organizations and donated by States. Take the Special Court for Sierra Leone (SCSL) for example, the institution was established under the United Nations Security Council resolution 1315 (2000) in 2002. The original estimate for the lifespan of the SCSL was three years and the total budget for it was estimated at US$76 million. After several extensions, the Court still functions today and its costs have amounted to over US$200 million.

46. The Special Tribunal for Lebanon (STL) also offers an illustrative example. The STL was established by the United Nations Security Council resolution 1757 in 2007 and started to operate in 2009, with 49 per cent of its budget from Lebanon and 51 per cent from contributions. From 2009 to 2012, in three years' time of its operation, the total budget has reached US$172 million. In February 2012, the mandate of the STL was renewed for another three years. The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) is even more telling. The ICTY has been in existence for nearly 20 years by now. In the past decade, its annual budget on average has been around US$140 million.

47. These examples explain that, being the first case of its kind under the Convention, the trial of the Hissène Habré case needs political as well as financial support from the international community, particularly the AU and donor countries. It is only prudent for Senegal to get things ready before the prosecution starts.

48. In light of the foregoing considerations, I feel obliged to give my dissent to the decision of the Court. Although I disagree with the Court that Senegal has breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention since it adopted the necessary legislation and established universal jurisdiction over torture in 2007, I wish to reiterate my view that Senegal should take its decision on Belgium's request for extradition as soon as possible so as to, as it declared, submit the case of Mr. Habré to the competent authorities for prosecution.

(Signed) XUE Hanqin.

DECLARATION OF JUDGE DONOGHUE

Agrees with Court that Article 7, paragraph 1, sets forth an obligation to prosecute, not an obligation to extradite — Extradition relieves a State party from the obligation to prosecute — No need for Court to decide whether Belgium falls within Article 5, paragraph 1, because duties under Article 6, paragraph 2, and Article 7, paragraph 1, are erga omnes partes *— Not obvious that conclusions regarding substantive obligations of the Convention should be reached in the context of admissibility, rather than on the merits — Temporal scope of obligation to prosecute does not extend to alleged offences from prior to Convention's entry into force — Senegal not precluded from prosecuting earlier offences — Court's analysis not limited by positions advanced by the Parties.*

1. I agree with the Judgment rendered by the Court today and submit this declaration in order to address in additional detail the meaning and effect of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter, the "Convention"), which play such an important role in the Court's reasoning.

2. Taken as a whole, Articles 4 to 7 of the Convention strike a powerful blow against impunity. Articles 4 and 5 provide the necessary conditions for States parties to initiate proceedings against alleged offenders, by requiring States parties to criminalize torture and to establish jurisdiction over torture in certain specified contexts. For purposes of this case, it is especially significant that Article 5, paragraph 2, requires a State party to establish its jurisdiction over an alleged offender found in its territory, even if the alleged acts of torture occurred outside of its territory and neither the alleged offender nor the victims are of its nationality. But States parties are not merely required to create the conditions that would permit them to prosecute alleged torturers. Instead, Articles 6 and 7 require a State party to take a series of related, specific steps if it finds an alleged offender in its territory, including placing the individual in custody, conducting an immediate inquiry and submitting the case to prosecution, if it does not extradite the alleged offender. The question whether Senegal complied with these obligations, in particular, those under Article 6, paragraph 2, and Article 7, paragraph 1, is at the heart of this case.

3. The obligations of the State in which an alleged offender is found — especially the obligation contained in Article 7, paragraph 1 — are often described by the shorthand phrase "extradite or prosecute" or *"aut dedere aut judicare"*. That phrase is misleading because it suggests an obligation to extradite. I agree with the Court, however, that this is not the correct understanding of Article 7, paragraph 1, and that the obligation under Article 7, paragraph 1, is to submit a case for prosecution.

4. Article 7, paragraph 1, provides:

> "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."

From the text alone, it is clear that prosecution and extradition are not on equal footing. The provision obligates a State party to "submit the case to its competent authorities for prosecution". Extradition relieves the State party from that obligation. The option of extradition in lieu of submission to prosecution is an important component of the anti-impunity provisions of the

Convention; there are many circumstances in which extradition might be the more effective means of bringing an alleged offender to justice. Nonetheless, extradition is not required by this provision nor by any other provision of the Convention.

5. In the present case, the Parties have devoted considerable attention to Belgium's extradition requests and to the fact that, to date, Senegal has not extradited Mr. Habré. It bears emphasis, however, that the Court does not come to any conclusions regarding those extradition requests.

6. Given that the obligation in Article 7, paragraph 1, is to submit the case for prosecution, it is important to consider what triggers that obligation. Article 7, paragraph 1, requires the State in the territory of which the alleged offender is found to submit the case for prosecution "if it does not extradite [the alleged offender]". Does this mean that the obligation to submit a case for prosecution only arises when there has been an extradition request? Again, the attention given by the Parties to Belgium's extradition requests might suggest that Senegal's obligation to submit Mr. Habré's case for prosecution flows from the failure to extradite, but, like the Court, I do not reach this conclusion. Instead, I agree with the conclusion in the Judgment that the obligation to submit a case to prosecution is independent of an extradition request.

7. The closely-related obligations contained in Articles 6 and 7 arise as a result of the presence of the alleged offender in the territory of the State party. Under Article 6, when a State party finds an alleged offender in its territory, it must place the alleged offender in custody, immediately make a preliminary inquiry into the facts and notify other States parties that would have a basis under the Convention to exercise jurisdiction. Notably, the obligation to hold the alleged offender in custody applies "only for such time as is necessary to enable any criminal or extradition proceedings to be *instituted*" (Art. 6, para. 1; emphasis added). Thus, the obligations in Article 6 plainly arise before any extradition proceedings have commenced. If Article 7 required submission of a case for prosecution only after an extradition request, the placement of the individual in custody and the conduct of a preliminary inquiry in the absence of such a request would be without purpose.

8. The Court's conclusion that the obligations under Articles 6 and 7 are independent of an extradition request is important to its analysis of Belgium's standing in this Court. Belgium's extradition requests did not give rise to Senegal's duties under Articles 6 and 7; those duties were a consequence of the presence in Senegal of an individual alleged to be responsible for torture. The Court therefore has no need to decide whether Belgium falls within Article 5, paragraph 1, of the Convention (which refers to the exercise of jurisdiction by a State "[w]hen the victim is a national of that State"). This is why, in considering standing, the Court need not concern itself with the fact that none of the complainants in the proceedings underlying the Belgian extradition requests had Belgian nationality when the alleged offences occurred.

9. The Court makes a number of important observations in the course of its conclusion that Belgium has standing to pursue this case against Senegal. Having established that the duty to prosecute is triggered by the presence of the alleged offender (and thus is not conditioned on an extradition request), the Court considers to whom that duty is owed. I agree with the Court that Senegal's duties to conduct a preliminary inquiry and to submit Mr. Habré's case for prosecution is owed to all States parties. Here, it is again important to bear in mind the combined package of obligations comprising Articles 4 to 7 of the Convention.

10. Articles 4 and 5 unquestionably impose a duty on States parties to put in place legislation. This duty must correspond to a right on the part of some or all of the other State parties; this is inherent in the nature of treaty relations. A State party's adherence to this duty to legislate is of consequence to all other State parties, so it is difficult to see why the duty would be owed to some State parties but not to others. In addition, under Article 6, a State party incurs the duty to place the individual in custody and immediately to make a preliminary inquiry, whenever an individual allegedly responsible for torture is present in its territory, without limitation as to the location of the alleged offence or the nationality of the victim or alleged offender. Once again, a breach of these obligations is of consequence to all States parties. For each of these provisions, therefore, it can be said that the State in the territory of which the offender is found has duties that correspond to rights on the part of all other States parties.

11. If the text of Article 7, paragraph 1, is considered in isolation from the related obligations in Articles 4, 5 and 6, it might be argued that the obligation set forth in Article 7, paragraph 1, is owed not to all States parties, but only to certain States. In particular, Article 7, paragraph 1, requires submission for prosecution "in cases contemplated in Article 5". This might be seen to suggest that the duty to submit a case for prosecution is owed only to States that fit within Article 5: the State in the territory of which the offence allegedly occurred; the State of the offender's nationality; and the State of the victim's nationality (if that State exercises jurisdiction based on a victim's nationality). This more parsimonious approach would greatly reduce the potency of the related obligations in Articles 4 to 7 of the Convention. It would mean, for example, that the State where the alleged offender is located owes no duty to any other State in a situation in which the alleged torture occurs in its territory and the victim and alleged offender are nationals of that State. The territorial State would be free to accord impunity to the alleged offender. The problem would persist if the alleged offender fled to the territory of another State. The State in the territory of which the alleged offence occurred (which, in this example, is also the State of nationality of the alleged offender and of the victim) might decide not to invoke the responsibility of the State in the territory of which the alleged offender is located. If the latter State owes no duty to any other State party, the alleged offender will enjoy precisely the sort of safe haven that the Convention was intended to eliminate. These situations are hypothetical, but they are not far-fetched. They serve to illustrate that the obligations at issue could be entirely hollow unless they are obligations *erga omnes partes*.

12. For these reasons, I conclude that the duties imposed by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention are duties *erga omnes partes*. This characterization may not fit every provision of the Convention. Moreover, an "extradite or prosecute" provision in another treaty would give rise to a duty to a particular State if, in fact, it required extradition.

13. As a consequence of its conclusion that the duties under Article 6, paragraph 2, and Article 7, paragraph 1, are owed to all States parties, the Court concludes that Belgium has standing in this Court to invoke Senegal's responsibility in respect of the alleged breach of these duties. The Court integrates into a single step its understanding of the primary rules specified in the Convention; their *erga omnes* character; and the secondary rules of State responsibility (i.e., that Belgium may invoke Senegal's responsibility). In all respects, the Court's analysis turns on substantive law.

14. These issues of substantive law might well have been examined as part of the Court's analysis of the merits. In the Judgment, however, the Court frames the issue as a question of standing, which, in turn, it treats as an aspect of admissibility. As the Court has stated before, objections to admissibility "normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there

are reasons why the Court should not proceed to an examination of the merits" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America) Judgment, I.C.J. Reports 2003*, p. 177, para. 29). Such reasons could include "a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120).

15. It is not obvious that the content of certain duties imposed by the Convention Against Torture, or the question as to which State parties those duties are owed, should fall within this category of obstacles to the exercise of the Court's jurisdiction. The Court's decision to address these questions under the rubric of admissibility is without practical effect in the present case, in which jurisdiction, admissibility and the merits were all considered in the same phase of the proceedings. The matter may require further analysis and elaboration in future cases in which an Application is premised on obligations *erga omnes partes*.

16. In respect of the question of standing, I have also considered that the compromissory clause of the Convention permits States to opt out of the jurisdiction of this Court (see Art. 30, para. 2). The suggestion has been made that this flexibility as to dispute resolution undermines the conclusion that a State's duties to conduct an immediate inquiry and to submit a case for prosecution are duties *erga omnes partes*. That reasoning would apply to many human rights treaties that permit flexibility as to dispute resolution mechanisms. I am not convinced that such institutional provisions detract from the *erga omnes partes* character of particular obligations.

17. When the Court concluded that the *erga omnes* character of a norm could not itself be the basis for the Court's jurisdiction, it observed that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64). The *erga omnes partes* character of provisions of the Convention against Torture defines the duties of all States parties, as a matter of substantive law. All States parties have an obligation to implement those duties in good faith, regardless of the dispute resolution mechanisms associated with the particular treaty. Thus, I do not see how flexibility as to dispute resolution mechanisms could erode the substance of a State's duties under a treaty. They are, once again, "two different things". The fact that the Court chose to analyse Belgium's substantive rights as a question of admissibility does not change this conclusion.

18. I have one final point regarding the interpretation of Article 7, paragraph 1, relating to the temporal scope of the obligation to submit a case for prosecution. I agree with the Court that Senegal's obligation to submit Mr. Habré's case to prosecution does not extend to offences that allegedly occurred prior to entry into force of the Convention. As the Court observes, treaties are not interpreted to bind parties in relation to facts that took place prior to their entry into force unless a different intention is established. This presumption is of particular relevance when considering treaty provisions that impose obligations in the field of criminal law. The obligation to submit a case for prosecution can be interpreted to apply to acts allegedly committed before entry into force only if the Convention also requires a State party to criminalize torture retroactively (under Art. 4) and to establish its jurisdiction retroactively (under Art. 5). There is nothing in the treaty, nor, to my knowledge, in the *travaux préparatoires*, indicating such an intention.

19. There is an important distinction, however, between the conclusion that Senegal is not required by the treaty to prosecute for offences that allegedly occurred before the entry into force of the Convention and the question whether it has discretion to do so. As the Court notes, nothing in the Convention precludes Senegal from submitting for prosecution offences that occurred before entry into force of the Convention. Looking beyond the Convention, Article 15 of the 1966 International Covenant on Civil and Political Rights reflects a general prohibition on retroactive criminal laws, which also is a part of many national legal systems. Nonetheless, the Covenant admits of exceptions for offences that previously had been recognized as crimes. A State might therefore decide to prosecute an alleged offender in respect of acts of torture committed prior to enactment of a particular statute because it concludes that the conduct in question was criminal even before enactment of that particular statute. But the prospect that such retroactive application of a statute would be lawful does not mean that the Convention *requires* a State party to enact retroactive criminal statutes. I agree with the Court that the Convention cannot be interpreted to have imposed *sub silentio* an obligation to enact retroactive criminal laws.

20. I also note that the Court's conclusion on the temporal scope of Article 7, paragraph 1, does not free Senegal from the obligation to prosecute Mr. Habré, because the claims made against Mr. Habré include many serious offences allegedly committed after 26 June 1987, as is clear from the complaints filed in Senegalese and Belgian courts.

21. The dispositive paragraphs of today's Judgment bind only the Parties. Nonetheless, the Court's interpretation of a multilateral treaty (or of customary international law) can have implications for other States. The far-reaching nature of the legal issues presented by this case is revealed by the number of questions posed by Members of the Court during oral proceedings. The Court would be ill-advised in such circumstances to confine itself to the legal conclusions advanced by the two States that happen to appear before it. In *Jurisdictional Immunities of the State* (*(Germany* v. *Italy: Greece intervening)*, Judgment of 3 February 2012), for example, two States from a single region, with a common legal tradition, agreed on many aspects of the law governing foreign State immunity. Because its conclusions had implications for other States, however, the Court conducted its own analysis of customary international law. In interpreting the Convention against Torture, the Court once again wisely has not limited itself to positions advanced by the Parties.

(Signed) Joan E. DONOGHUE.

SEPARATE OPINION OF JUDGE SEBUTINDE

Two bases of jurisdiction invoked by Belgium — Cumulative preconditions for the Court's jurisdiction based on Article 30, paragraph 1, of the Convention — The existence of a dispute concerning the interpretation or application of the Convention — The precondition that the dispute "cannot be settled through negotiation" has not been met — The preconditions of prior request for arbitration and failure to agree on the organization of such arbitration within six months from the date of the arbitration request have not been met — The Court cannot exercise jurisdiction over the dispute on the basis of Article 30, paragraph 1, of the Convention against Torture — Jurisdiction pursuant to the Parties' declarations under Article 36, paragraph 2, of the Statute of the Court — The dispute concerning Senegal's obligations under the Convention against Torture falls within the scope of Court's jurisdiction on the basis of Article 36, paragraph 2, of the Statute — Court's jurisdiction is not precluded by virtue of the Parties' reservations to their declarations pursuant to Article 36, paragraph 2, of the Statute — Court's jurisdiction pursuant to Article 36, paragraph 2, of the Statute does not extend to the alleged violations by Senegal of its obligations other than those arising under the Convention against Torture.

1. I have voted in favour of the operative part of the Judgment including point (1) where the Court

> "*Finds* that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which the Kingdom of Belgium submitted to the Court in its Application filed in the Registry on 19 February 2009;".

2. That finding is premised upon the reasoning and conclusions of the Court found in Part II of the Judgment, in particular that

> "Given that the conditions set out in Article 30, paragraph 1, of the Convention against Torture have been met, the Court concludes that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.
>
> Having reached this conclusion, the Court does not find it necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute." (Judgment, paragraph 63.)

3. Whilst I agree that the Court does have jurisdiction to entertain Belgium's Application to the extent indicated in the Judgment, I am respectfully of the view that such jurisdiction can only derive from the Parties' declarations pursuant to Article 36, paragraph 2, of the Statute of the Court, and not from the provisions of Article 30, paragraph 1, of the Convention against Torture (hereinafter referred to as "the Convention"). In this regard, past jurisprudence of the Court shows that in interpreting and applying treaty provisions similar to those of Article 30, paragraph 1, of the Convention, the Court has set a standard of compliance. It is my considered opinion that in the present case, the preconditions of negotiations and arbitration have not been fulfilled and that consequently, that standard has not been met. What follows is my analysis of the facts and the Parties' submissions upon which I base my opinion and conclusions in that regard.

I. JURISDICTION BASED ON ARTICLE 30, PARAGRAPH 1, OF THE CONVENTION AGAINST TORTURE

4. To establish the jurisdiction of the Court, Belgium relies, firstly, on the compromissory clause contained in Article 30, paragraph 1, of the Convention and secondly, on the declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court (Memorial of Belgium, Ann. A.2).

5. Senegal challenges the Court's jurisdiction under Article 30, paragraph 1, of the Convention, as well as the admissibility of Belgium's claims. First, it argues that there is no "dispute" between the Parties in respect of which the Court could exercise jurisdiction. Secondly, it maintains that Belgium's application must be declared inadmissible because Belgium has not exhausted the avenues of "negotiation" and "arbitration" before referring the matter to the Court (Counter-Memorial of Senegal, para. 121.).

6. It should be noted that although Senegal refers to Belgium's alleged non-fulfilment of the procedural requirements laid down in Article 30, paragraph 1 of the Convention as rendering Belgium's claim "inadmissible", this objection clearly pertains to jurisdiction and must thus be examined in that context (see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 39-40, para. 88).

7. In its Order of 28 May 2009, the Court held that it had prima facie jurisdiction under Article 30 of the Convention (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 53). It also concluded that there is consequently "no need to ascertain, at this stage of the proceedings, whether the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute might also, prima facie, afford a basis on which the Court's jurisdiction could be founded" (*ibid*., p. 151, para. 54). However, in the Order, the Court also indicated that this provisional conclusion is without prejudice to the Court's final decision on the question of whether it has jurisdiction to deal with the merits of the case (*ibid*., p. 155, para. 74).

8. Article 30, paragraph 1, of the Convention provides as follows:

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

Both Senegal and Belgium are parties to the Convention which is binding upon them as from 26 August 1987 and 25 July 1999, respectively. Neither Party entered any reservation or made any relevant declaration in relation to jurisdiction of the Court under Article 30 thereof.

9. It is apparent from the language of Article 30, paragraph 1, that in order for the Court to have jurisdiction on this basis, the following four conditions must be fulfilled. Firstly, a dispute must have existed between the Parties concerning the interpretation or application of the Convention (see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 148-149, para. 46). Secondly, the Parties must have failed to settle the dispute through negotiations (see also *ibid.*, pp. 149-150, para. 49). Thirdly, failing settlement through negotiation, either Party must

have requested that the dispute be submitted to arbitration. Lastly, the Parties must have failed to agree on the organization of the arbitration within six months from the date when such arbitration was requested (see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 150, para. 51). As the Court has confirmed in respect of a compromissory clause of a similar type, these conditions are cumulative (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* pp. 38-39, para. 87). An examination of the facts in this case clearly shows that not all the above conditions were fulfilled at the time of the filing of the Application as required by Article 30, paragraph 1, of the Convention.

A. Was there a dispute between the Parties concerning the interpretation or application of the Convention at the time Belgium's Application was filed on 19 February 2009?

10. Regarding the first condition, I am in complete agreement with the Court's analysis of the facts, as well as its findings and conclusion that "any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed" and that the Court therefore "lacks jurisdiction to decide on Belgium's claim relating to the obligation under Article 5, paragraph 2." (Judgment, paragraph 48). Furthermore, I am in agreement with the Court's analysis of the facts, findings and conclusion with regard to Belgium's claim under Article 6**,** paragraph 2 and Article 7, paragraph 1, that

> "Given that Belgium's claims based on the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention were positively opposed by Senegal, the Court considers that a dispute in this regard existed by the time of the filing of the Application. The Court notes that this dispute still exists." (Judgment, paragraph 52.)

B. Was the dispute between Belgium and Senegal one that could not be settled through negotiations?

11. Regarding the second condition, Belgium contends that notwithstanding several diplomatic exchanges with Senegal requesting the latter to prosecute Mr. Habré for alleged acts of torture, or alternatively to extradite him to Belgium, Senegal has not "initiated or sought to prolong the negotiations" rendering the dispute "not capable of being settled through negotiation." (Memorial of Belgium, para. 3.22). In Belgium's view, the negotiations which started in November 2005, had proven futile by June 2006 (Memorial of Belgium, paras. 3.18-3.21 and 3.21), a fact expressly communicated to Senegal in Belgium's Note Verbale of 20 June 2006 (Memorial of Belgium, Ann. B.11).

12. Senegal argues that no negotiations within the meaning of Article 30, paragraph 1 of the Convention have ever taken place between the Parties as there "[h]as never been any offer [by Belgium], to negotiate; never any of the exchanges characteristic of diplomatic negotiations." (Counter-Memorial of Senegal, paras. 121 and 190). Senegal contends that Belgium failed in its duty to negotiate in as far as its diplomatic exchanges consisted of general questions aimed at eliciting factual information concerning the status of the proceedings or about the Senegalese Government's plans in respect of the Habré case, to which questions Senegal had always provided answers (Counter-Memorial of Senegal, paras. 190, 195, 200 and 204).

13. In line with the well-established jurisprudence of this Court and its predecessor, the requirement that "a dispute cannot be settled through negotiation", is met only where genuine

attempts at negotiations, aimed at resolving the dispute, have actually taken place between the Parties and have failed or become futile or deadlocked (see *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections*, Judgment of 1 April 2011, para. 159, citing earlier cases). The Court explained that negotiation differs from "mere protests or disputations" and "requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" (*ibid.*, para. 157).

14. Concerning the substance of negotiations envisaged under this condition, the Court has stated that whilst "the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction" (*ibid.*, p. 59, para. 161), these negotiations must, at the very least, "relate to the subject-matter of the treaty containing the compromissory clause" *(ibid.)*.

15. Finally, the obligation to negotiate entails not only an obligation to enter into negotiation, "but also to pursue them as far as possible, with a view to concluding agreements [even if] an obligation to negotiate does not imply an obligation to reach agreement" (*ibid.*, para. 158, citing earlier cases).

16. In light of the above standard, it is necessary to examine whether the facts before the Court demonstrate: *(a)* that Belgium made genuine attempts to enter into negotiations with Senegal and if so, whether the former pursued those negotiations as far as possible with a view to resolving the dispute between the Parties; and *(b)* that these negotiations had proven unsuccessful before Belgium submitted its Application to the Court on 19 February 2009 (see also *ibid.*, p. 59, para. 162). The diplomatic exchanges on record show that the dispute between the Parties arose at the earliest in late 2005 when Belgium submitted to Senegal its first extradition request in respect of Mr. Habré.

17. In the Note Verbale of 11 January 2006 (Memorial of Belgium, Ann. B.7), Belgium stated that it is providing clarifications to Senegal concerning its extradition request of 22 September 2005, "in the framework of the negotiation procedure covered by Article 30 of the [Convention]". In its Note Verbale of 9 March 2006 (Memorial of Belgium, Ann. B.8), Belgium stated:

> "As the procedure for negotiation with regard to the extradition application in the case of Mr. Hissène Habré, in application of Article 30 of the [Convention] is under way, Belgium wishes to point out that it interprets the provisions of Articles 4, 5.1c, 5.2, 7.1, 8.1, 8.2, 8.4 and 9.1 of the [Convention] as requiring the State on whose territory the alleged author of an offence under Article 4 of the [Convention] is located to extradite this offender, unless it has judged him on the basis of the charges covered by said article.
>
> Belgium would therefore be grateful if the Government of Senegal would be so kind as to inform it as to whether its decision to transfer the Hissène Habré case to the African Union is to be interpreted as meaning that the Senegalese authorities no longer intend to extradite him to Belgium or to have him judged by their own Courts."

18. Two months later, in its Note Verbale of 4 May 2006 (Memorial of Belgium, Ann. B.9), Belgium expressed concerns about the absence of an official reaction by Senegal to its previous diplomatic notes. It reiterated its interpretation of Article 7 of the Convention as "requiring the State on whose territory the alleged offender is located to extradite him unless it has judged him" and emphasized that "[a]n unresolved dispute regarding this interpretation would lead to recourse

to the arbitration procedure provided for in Article 30 of the [Convention]". In a Note Verbale of 9 May 2006 (Memorial of Belgium, Ann. B.10), Senegal considered that it had provided its response to Belgium in respect of the extradition request in its earlier Notes, and stated that by referring the Habré case to the African Union it was "acting in accordance with the spirit of the principle '*aut dedere aut punire*'". Senegal also "[took] note of the possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the Convention". In its response in a Note Verbale of 20 June 2006 (Memorial of Belgium, Ann. B.11), Belgium, considering that Senegal had acknowledged that these diplomatic exchanges were taking place within the framework of negotiation under Article 30 of the Convention and recalling that Belgium had wished to open negotiation with Senegal in respect of its interpretation of the Convention, pointed out that "the attempted negotiation with Senegal . . . ha[d] not succeeded".

19. In my view, these diplomatic exchanges demonstrate a genuine attempt by Belgium at negotiating with Senegal the issue of Senegal's compliance with its substantive obligations under the Convention. It is, however, doubtful whether by June 2006 Belgium had in fact pursued these negotiations as far as possible with a view to settling the dispute. This question is especially justified in light of the short period of time that had lapsed by that point since Belgium's first reference to negotiations in January 2006, and given that only a few Notes had been exchanged between the Parties during this period. In this regard, it is recalled that the short period of time in which the diplomatic exchanges were made between the Parties in the framework of negotiation, does not per se preclude the failure or a deadlock of negotiations, as the Permanent Court of International Justice noted in the *Mavrommatis Palestine Concessions* case, where it stated:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 13; emphasis in the original.)

20. Such was the situation in the case concerning *United States Diplomatic and Consular Staff in Tehran*, where the attempts by the United States to negotiate with Iran were met with complete refusal of the Iranian Government to enter into any discussion of the matter or to have contact with representatives of the United States, leading the Court to conclude, despite the very short period of time between the occurrence of the dispute and the date of the application to the Court, that this dispute was one "not satisfactorily adjusted by diplomacy" within the meaning of the relevant jurisdictional clause (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980,* p. 15, para. 26 and p. 27, para. 51).

21. However, the situation in the present case is not comparable to that cited above. Senegal's reply, albeit not immediate, to Belgium's Notes of 11 June, 9 March and 4 May 2006, can hardly be seen as expressing a refusal to discuss the issue of its compliance with the Convention or as adopting any such position in this regard which could be viewed as irreconcilable with Belgium's claims. To the contrary, in the Note Verbale of 9 June 2006, Senegal merely clarified, in reply to Belgium's inquiry, that its courts have declined to rule on Belgium's extradition request due to lack of jurisdiction, and that it considers itself as already "acting in accordance with the spirit of the principle '*aut dedere aut judicare*'" by having referred the Habré case to the AU for recommendation as to the further course of action in this regard. Whilst this statement attests to the existence of a dispute between the Parties as to Senegal's compliance with its obligations under the Convention, it does not in my view, demonstrate a failure or collapse of negotiation on the matter.

22. Furthermore, after Belgium's Note Verbale of 20 June 2006 whereby Belgium declared negotiation as "unsuccessful", there were further diplomatic exchanges between the Parties indicating that Belgium nonetheless continued *de facto* to negotiate with Senegal with a view to resolving the dispute, including expressing its willingness to support Senegal's efforts to prosecute Mr. Habré by its own Court as long as that is done within a reasonable period (Belgium's Note Verbale of 8 May 2007 (Memorial of Belgium, Ann. B.14) and 2 December 2008 (Memorial of Belgium, Ann. B.16)). Notably, in its last Note Verbale before its Application to the Court, dated 2 December 2008 (Memorial of Belgium, Ann. B.16), Belgium merely noted the legislative changes by Senegal enabling the prosecution of Mr. Habré in Senegal, and reiterated its offer of judicial co-operation on the matter.

23. In my view, the diplomatic exchanges between the Parties indicate that negotiations on the matters in dispute between the Parties continued right up to December 2008 and cannot be considered to have failed by June 2006, nor, for that matter, at any other time prior to the date of Belgium's Application on 19 February 2009. In this regard, I respectfully disagree with the findings and conclusions of the Court to the effect that "the condition set forth in Article 30, paragraph 1, of the Convention that the dispute cannot be settled by negotiation has been met" (Judgment, paragraph 59). This brings me to the third requirement, namely, whether either of the Parties requested for arbitration as a means of settling the dispute.

C. Did Belgium request that the dispute be submitted to arbitration?

24. Belgium submits that it announced the possibility of having recourse to arbitration in its Note Verbale of 4 May 2006 and that Senegal took note of this possibility in the latter's Note Verbale of 9 May 2006 (Memorial of Belgium, para. 3.23; CR 2012/2, p. 27, para. 34 and p. 61, para. 49). Belgium further argues that it formally requested recourse to arbitration under mutually agreed conditions in its Note Verbale of 20 June 2006, and that it repeated the request in its Note Verbale of 8 May 2007, but that its request had "met with no answer" from Senegal, either in the ensuing six months or thereafter (Memorial of Belgium, paras. 3.23-3.28). In response to a question by a Member of the Court concerning the interpretation of the arbitration requirement in Article 30, paragraph 1, of the Convention, Belgium opined that the condition that the Parties are unable to agree on the organization of the arbitration within six months from the arbitration request "is met if, for any reason, the period expires without agreement on the arbitration" (CR 2012/6, p. 39, para. 11). In Belgium's view, Article 30, paragraph 1, does not require that a State requesting to submit the dispute to arbitration must also propose any aspect of the organization or the time-frame of the arbitration (*ibid.*, p. 40, para. 14).

25. In response, Senegal argues that the criteria requiring the request by one of the Parties for arbitration, as well as the lapse of a six-month period without the parties being able to agree on the organization of the arbitration, have not been met (Counter-Memorial of Senegal, paras. 121 and 214). It maintains that Belgium made only one "evasive" reference to arbitration in its Note Verbale of 20 June 2006, which cannot be considered as constituting a clear and formal proposal for arbitration to which Senegal could possibly have replied in order to fulfil the requirement under Article 30, paragraph 1, of the Convention (Counter-Memorial of Senegal, paras. 207-210).

26. In the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court, in interpreting a similar compromissory clause contained in Article 29 of the Convention on the Elimination of all forms of Discrimination against Women, held that

> "[T]he lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept." *(Democratic Republic of*

the Congo v. *Rwanda*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 41, para. 92.)

27. In the present case, Belgium first mentions the prospect of arbitration in its Note Verbale of 4 May 2006 in the following terms:

> "As indicated in its last approach of 10 March 2006, Belgium interprets Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him unless it has judged him.
>
> *An unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure* provided for in Article 30 of the [Convention].
>
> In view of the willingness already expressed by Senegal to combat impunity for the most serious crimes such as those of which Mr. Hissène Habré is accused, Belgium once more insists on Senegal respecting the obligations arising from the [Convention] and responding to the request by the Belgian authorities accordingly." (Emphasis added.)

Five days later, Senegal in its Note Verbale of 9 May 2006 responded, *inter alia*, as follows:

> "(2) With regard to the interpretation of Article 7 of the [Convention], the Embassy considers that by transferring the Hissène Habré case to the African Union, Senegal, in order not to create a legal impasse, is acting in accordance with the spirit of the principle *'aut dedere aut punire'* the essential aim of which is to ensure that no torturer can escape from justice by going to another country.
>
> (3) By taking this case to the highest level on the continent, Senegal, while respecting the separation of powers and the independence of its judicial authorities, has thus opened up throughout Africa, new prospects for upholding human rights and combating impunity.
>
> (4) *As to the possibility of Belgium having recourse to the arbitration procedure* provided for in Article 30 of the [Convention], the Embassy *can only take note of this*, restating the commitment of Senegal to the excellent relationship between the two countries in terms of cooperation and the combating of impunity." (Emphasis added.)

28. Taken at face value, Belgium's Note Verbale of 4 May 2006 cannot be regarded as "a request to submit the dispute to arbitration" within the meaning of Article 30**,** paragraph 1, of the Convention. In my opinion, what the diplomatic exchange did was to alert Senegal to the prospect that Belgium reserved its right, at some future date, to refer the dispute, if unresolved, to arbitration within the framework of Article 30, paragraph 1, of the Convention. Indeed**,** Senegal appears to have interpreted that Note Verbale in this way, merely noting that prospect. Senegal's response in this regard cannot be described as "non-responsive" or "a rejection of an arbitration request" within the meaning of established case law.

29. In my view, the closest that Belgium came to putting a direct request for arbitration to Senegal was in its Note Verbale of 20 June 2006, wherein it stated, *inter alia***:**

> "While confirming to Senegal its attachment to the excellent relationship between the two countries, and while following with interest the action carried out by the African Union in the context of combating impunity, Belgium cannot fail to point out that the attempted negotiation with Senegal, which started in November 2005, has

> not succeeded and, in accordance with Article 30.1 of the Torture Convention consequently asks Senegal to submit the dispute to arbitration under conditions to be agreed mutually."

The above statement raises questions as to whether under Article 30, paragraph 1, of the Convention, Belgium**,** by shifting the burden to Senegal to submit the dispute to arbitration, rather than Belgium itself taking that initiative, the latter can be said to have "requested for arbitration". I doubt that that is the case. Nonetheless, Senegal did not respond to Belgium's request within six months or at all and perhaps the Court is justified in interpreting Senegal's silence as "the absence of any response on the part of the State to which the request for arbitration was addressed" (Judgment, paragraph 61).

30. Be that as it may, I am of the considered opinion that, in light of my earlier conclusion that neither Belgium nor Senegal had pursued negotiations regarding the dispute as far as they possibly could before concluding that they had failed, and given that the procedural requirements of negotiation and arbitration under Article 30, paragraph 1, of the Convention, are cumulative, I am not convinced that the preconditions for the Court's jurisdiction under that provision have fully been met.

31. Accordingly, I am of the view that given that the procedural requirements laid down in Article 30, paragraph 1, of the Convention against Torture had not been met at the date of the Application on 19 February 2009, the Court cannot exercise jurisdiction over the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2 and Article 7, paragraph 1 of the Convention on the basis of Article 30, paragraph 1, thereof. This brings me to the issue of whether in the absence of jurisdiction pursuant to Article 30**,** paragraph 1, of the Convention, the Court can exercise jurisdiction based on the Parties' declarations pursuant to Article 36, paragraph 2, of the Court's Statute. This is an issue the Court did not address, having concluded in light of its findings that it was not necessary to do so (Judgment, paragraph 63).

II. JURISDICTION BASED ON THE PARTIES' DECLARATIONS OF ACCEPTANCE OF COMPULSORY JURISDICTION OF THE COURT UNDER ARTICLE 36, PARAGRAPH 2, OF THE STATUTE OF THE COURT

32. Belgium sought to found the jurisdiction of the Court on the declarations of acceptance of compulsory jurisdiction of the Court made by the Parties under Article 36, paragraph 2, of the Statute of the Court, the text of which is reproduced in the Judgment (paragraph 42).

33. Belgium's declaration, in effect since 17 June 1958, applies to "legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement" (Judgment, paragraph 42). Senegal's declaration, in effect since 2 December 1985, extends to "all legal disputes arising after the present declaration", save for: *(a)* disputes in regard to which the parties have agreed to have recourse to some other method of settlement; and *(b)* disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal *(ibid.)*. Thus, by virtue of reciprocity applied to the two declarations of acceptance, the competence of the Court extends to all legal disputes arising between the Parties after 2 December 1985 with the exception of disputes in regard to which the Parties have agreed to have recourse to some other method of settlement and dispute concerning questions which fall exclusively within the domestic jurisdiction of one of the Parties.

34. Only Belgium submitted arguments on this issue, maintaining that the Court has jurisdiction under Article 36, paragraph 2, of its Statute, over the entire dispute between the Parties, both with regard to the Convention and with regard to other rules of conventional and customary international law (Memorial of Belgium, para. 3.44; CR 2012/2, p. 65, para. 5). First, as regards the existence of a dispute, Belgium argues that the Parties disagree as to the application and interpretation of conventional and customary international obligations regarding the punishment of torture, crimes against humanity, war crimes and genocide (Memorial of Belgium, para. 3.34). In Belgium's view Senegal had not only failed to prosecute or extradite Mr. Habré for the international crimes alleged against him, but had also shown, "through its actions and inaction", that "it did not interpret conventional and customary rules in the same way as Belgium" (Memorial of Belgium, para. 3.35). Secondly, in respect of the temporal limits of the Court's jurisdiction under Article 36 declarations, Belgium contends that the dispute between the Parties crystallized when it became apparent that Senegal would neither extradite Mr. Habré to Belgium nor prosecute him, and thus relates to the facts occurring entirely after the two dates of application of the Parties' respective declarations of acceptance, falling clearly within the temporal scope of the Court's jurisdiction (Memorial of Belgium, paras. 3.37-3.40; CR 2012/2, p. 68, para. 14). Finally, Belgium contends that the Court's jurisdiction under the Article 36, paragraph 2, declarations is not excluded by virtue of the exceptions contained therein, since the Parties have neither agreed on another method of settling this dispute nor does the dispute, relating to violations of conventional or customary rules of international law, fall within the exclusive jurisdiction of either Party (Memorial of Belgium, paras. 3.41-3.43; see also CR 2012/2, pp. 68-69, paras. 15-16).

35. In response to a question by a Member of the Court concerning the relationship between the exceptions contained in the Belgium's and Senegal's respective declarations of acceptance in respect of other modes of dispute settlement, Belgium maintains that these exceptions do not affect the Court's jurisdiction on the basis of Article 30 of the Convention, since that provision refers to negotiations and arbitration as procedural preconditions to be fulfilled prior to the seisin of the Court, rather than as "alternative" modes of dispute settlement. Furthermore, in Belgium's view, the Court's jurisprudence confirms that different sources of the Court's jurisprudence, in the present case the declarations under Article 36, paragraph 2, of the Statute of the Court and Article 30 of the Convention, are independent from each other and are not mutually exclusive (CR 2012/6, pp. 29-32, paras. 10-17). Belgium emphasizes that the Court's jurisdiction pursuant to Article 30 of the Convention in respect of the dispute under the Convention is additional to the Court's jurisdiction under Article 36, paragraph 2, of the Court's Statute, which also applies to that dispute as well as to the other issues in dispute between Belgium and Senegal in the present proceedings (CR 2012/6, p. 36, para. 3).

A. Article 36 declarations as the basis for jurisdiction of the Court in respect of the alleged violations of the Convention

36. The Court has previously dealt with the question of multiple bases of jurisdiction. In the *Electricity Company of Sofia and Bulgaria* case, the Permanent Court of International Justice held that multiple bases of jurisdiction were not mutually exclusive: a treaty recognizing the jurisdiction of the Court did not prevent declarations of acceptance of the Court's jurisdiction having the same effect (*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 76). Similarly, in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, the Court found that when seised on the basis of Article 36, paragraph 2, which did not contain a precondition of negotiations, it did not matter that the basis of jurisdiction under the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") was more restrictive (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 322, para. 109).

37. This was affirmed in principle in the case concerning *Territorial and Maritime Dispute*, where the Court held that the "provisions of the Pact of Bogotá and the declarations made under the optional clause represent two distinct bases of the Court's jurisdiction which are not mutually exclusive" and noted that "the scope of its jurisdiction could be wider under the optional clause than under the Pact" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 873, paras. 136-137). Importantly, however, Article 36 declarations in that case were not subject to the reservation excluding disputes "in regard to which the parties have agreed . . . to have recourse to another method of pacific settlement".

38. Belgium also relies on the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (*Jurisdiction and Admissibility*, *Judgment, I.C.J. Reports 1988*, p. 85, para. 36) in support of its proposition that titles of jurisdiction are separate and independent. According to Belgium,

> "the declaration of acceptance of Honduras contained a reservation equivalent to those in question in the present case. Despite the existence of that reservation, the Court confirmed that the two titles of jurisdiction were independent, rejecting the Honduran argument to the contrary." (CR 2012/6, pp. 30-31, para. 13.)

Specifically, in the *Border and Transborder Armed Actions* case, the Court held that the compromissory clause in the Pact of Bogotá, providing for the Court's jurisdiction, could be limited only by reservations made under the pact, and not by incorporating reservations made by a State party in its declaration under Article 36, paragraph 2, of the Statute of the Court (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 88, para. 41).

39. Further, while Belgium is correct in suggesting that Article 30 should be interpreted as establishing preconditions for the seisin of the Court rather than as an "agreement" of the Parties to settle their Convention-related disputes through negotiation or arbitration rather than by recourse to the Court, this still leaves open the question of whether the Court may entertain a Convention-related dispute on the basis of the Article 36 declarations where these preconditions have not been met. On this point, Belgium's argument that there is no presumption of primacy of a restrictive rule over an extensive rule, on the basis that the Court had implied this in the *Cameroon* v. *Nigeria* case in 1998, is not without merit and must be considered carefully.

40. Indeed in the *Cameroon* v. *Nigeria* case, the Court noted that both States had referred to the UNCLOS, which provided for settlement of disputes, *inter alia*, by contentious proceedings before the Court, if no agreement could be reached within a reasonable period of time. The UNCLOS was one of the treaties which governed the dispute between the Parties, and which the Court had to interpret, in that case. However, the Court held that as it had been seised under Article 36, paragraph 2, of its Statute, which did not provide for any precondition of negotiation, it did not matter whether negotiations had taken place prior to the submission of the dispute (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 321-322, para. 109). In the present case, Belgium is invoking both Article 30, paragraph 1, of the Convention and Article 36, paragraph 2, of the Statute of the Court, as additional but independent bases for the Court's jurisdiction. Given that the Parties have accepted the Court's jurisdiction under Article 36, paragraph 2, of its Statute, and that Article 30, paragraph 1, of the Convention does not fall within the scope of their reservation excluding other agreements for the pacific settlement of disputes, I am of the tentative view that the failure to fulfil the conditions required under Article 30, paragraph 1, of the Convention has no bearing on the Court's jurisdiction under Article 36, paragraph 2, of the Statute of the Court, even in relation to a dispute concerning Senegal's obligations under the Convention.

B. Article 36 declarations as the basis for jurisdiction of the Court in respect of the claims relating to international crimes other than those subject to the Convention

41. With regard to the question of whether the Court has jurisdiction in respect of the alleged breaches by Senegal of its obligations other than those arising under the Convention, there is no evidence before the Court that there was, as Belgium claims, a dispute between the Parties as to the application and interpretation of conventional and customary international obligations regarding the punishment of torture, crimes against humanity, war crimes and genocide at the date of Belgium's Application on 19 February 2009. The record before the Court shows that in the diplomatic exchanges between the Parties in the period prior to 19 February 2009, no claim was ever made by Belgium relating to Senegal's breach of any international obligations other than those under the Convention.

42. Accordingly, I am of the view that the Court does not have jurisdiction to examine Belgium's claims concerning the alleged violation by Senegal of its obligation *aut dedere aut judicare* on the basis of rules of international law other than the Convention.

(Signed) Julia SEBUTINDE.

DISSENTING OPINION OF JUDGE *AD HOC* SUR

[Translation]

The decision relies on the reasoning of an advisory opinion rather than that of the settlement of a dispute — Jurisdiction of the Court — Subject-matter and critical date of the dispute are not sufficiently determined by the Court; doubts as to the satisfaction of the precondition that it has proved impossible to organize arbitration; unfounded refusal of the Court to examine the dispute relating to customary rules — Admissibility of Belgium's Application — Irrelevance of Belgium's passive criminal jurisdiction: the Court should have ruled on that point; absence of an obligation erga omnes partes *on which Belgium's Application could be founded; inadmissibility of the said Application — Merits — Senegal's breach of Article 6, paragraph 2, of the Convention against Torture; disappearance of the dispute relating to Article 5 of the Convention; no breach of Article 7, paragraph 1, by Senegal; Senegal has a permanent obligation to refer the case to its competent authorities for the purpose of prosecution; Belgium is not entitled to obtain extradition from Senegal on the basis of the Convention: regrettable silence of the operative clause on this point.*

1. Much to my regret, I could not endorse several parts of the Judgment's operative clause and some fundamental points of its reasoning. I am therefore appending a dissenting opinion to the Judgment of the Court in the present case.

2. The general purpose of this opinion is to raise a question mark over the way in which the Court has conceived of its task, which is to settle a legal dispute between States in accordance with international law. I wonder if the Court has not in fact set about responding to a request for an advisory opinion on the nature and authority of the Convention against Torture, rather than examining in a fair and balanced way the arguments and conduct of the Parties.

3. On the other hand, of course, some opinions are not unlike indirect settlements of unspoken or implicit disputes, and the Court's advisory role is as much a part of its judicial mission as its role in contentious cases. However, the fact remains that a judicial settlement is only a substitute for a diplomatic one, and in my view it must offer a full, balanced and clear response to

all of the parties' arguments and claims. This is especially important given the non-compulsory nature of the Court's jurisdiction and the need for the parties to trust that their views have been heard and taken into consideration.

4. In this case, it is my impression that the Court had to work as quickly as possible and that, so long as a majority was achieved in respect of the solution adopted, the reasoning was of lesser importance, except in order to confirm certain principles — the Court's interpretation of which seems to be as hurried as it is lacking in legal basis — relating to the Convention against Torture. The Court appears to have given itself the task of stating the law, if not making the law in an abstract and general way, in order to ensure its prime position at the heart of the international legal system. By way of example, let us take the reference to *jus cogens* which appears in the reasoning, a reference which is entirely superfluous and does not contribute to the settlement of the dispute, as will be seen. The purpose of this *obiter dictum* is to acknowledge and give legal weight to a disputed notion, whose substance has yet to be established. Thus, the dispute is used for other ends, namely as a starting-point for further developments outside of its scope.

5. These general observations can be divided into three parts: the jurisdiction of the Court, the admissibility of Belgium's Application, which, in my view, is at the heart of the dispute, and finally the merits of the case.

I. JURISDICTION OF THE COURT

6. Senegal did not raise preliminary objections, and so the questions relating to jurisdiction were ruled on at the same time as the merits. Belgium relied on both Article 30 of the Convention against Torture — an arbitral and judicial settlement clause — and the joint effect of the unilateral declarations of acceptance by the two Parties of the optional jurisdiction of the Court. In my view, there are three questions which were neither examined nor resolved satisfactorily by the Judgment. The first relates to the subject-matter of the dispute and its critical date; the second to the precondition that the recourse to arbitration provided for in Article 30 of the Convention has proved impossible; and the third to the Court's jurisdiction in relation to the customary rules invoked by Belgium.

Subject-matter and critical date of the dispute

7. In fact, the Court has not adopted a position on these points and thus some aspects remain up in the air. Subject-matter and critical date are linked to the extent that the dispute derives from a request made by one party to the other, to which the latter refuses to accede. These requests may evolve, in such a way that the resulting dispute may also change: parts of it may be resolved and parts may persist; certain aspects may even be altered in some measure. That is why it is necessary for the Court to fix the critical date of the dispute at the same time as its subject-matter, or to indicate all of the critical dates which may exist across the various stages of a dispute which is still evolving.

8. So, what is the subject-matter of the dispute? Does it concern the interpretation of the Convention against Torture, as claimed by Belgium and rejected by Senegal? Belgium contends that the Convention obliges Senegal to establish its criminal jurisdiction so that it may try persons suspected of violating the Convention who are present in its territory; to immediately make an inquiry into the facts invoked; and to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite the individual concerned. Belgium considers that Senegal has breached these four obligations by failing to amend in a timely manner its domestic criminal legislation; by failing to make the necessary preliminary inquiry; by failing to submit the case to its competent authorities; and by failing to extradite Hissène Habré — the successive requests made to this end all having been rejected by the Senegalese courts to which they were referred. In particular, Belgium claims that it has a right to demand that Senegal perform these obligations and to invoke the latter's responsibility if it fails to do so.

9. Beyond that direct right which is claimed by Belgium, Senegal does not dispute any of these obligations in principle. It has continually stated that it is committed to organizing the trial of Hissène Habré; it advises Belgium to re-issue its extradition request so that it complies with Senegalese law; and it points out that its domestic rules, both constitutional and legislative, have been modified to allow for a trial to be held in Senegal. It considers that the approaches it has made to the regional African authorities so as to receive help with the organization of a trial do not

constitute an abandonment of its efforts to institute proceedings, especially given the fact that Belgium has itself supported these efforts with the promise of financial assistance.

10. *A priori*, therefore, the dispute does not concern the interpretation of the Convention since, rightly or wrongly, both States appear to agree on the content of the obligations contained therein — to prosecute or extradite. But are they correct, when the Convention simply requires that the case be submitted to the competent authorities for the purpose of prosecution and when, as the Court correctly points out, it is not established that prosecution and extradition are alternatives, or that the two should be given equal weight? If we accept this interpretation, however, which both Parties seem to share, there is no dispute between them, but there is one over an alleged delay by Senegal in the implementation and performance of these obligations. This is a question on the merits and, to some extent, involves an assessment of the relevant facts and conduct, to which I shall return later. Such is not the view taken by the Court, which adopts its own definition of the dispute, although it fails to set out exactly what that definition is and proceeds to examine aspects of the dispute without first having clearly identified it, together with its critical date or successive critical dates.

11. On this subject, I must point out that the circumstances changed between 2009, when Belgium's request for the indication of provisional measures was examined, and 2012, the year of the Judgment. In 2009, I believed that the dispute no longer had any object, since Senegal had confirmed that it was committed to organizing a trial and to exercising its criminal jurisdiction in accordance with the Convention, either by submitting the case to its domestic courts or by working towards the creation of an *ad hoc* tribunal. Three years later, those efforts have been unsuccessful. It is legitimate, therefore, to question the reasons for this delay. In the light of this, it is my view that a dispute does exist. However, keeping to the Parties' common position, that dispute seems to concern, *a priori*, the application of the Convention against Torture and Senegal's delay in this respect, rather than its interpretation.

12. Such is not the view of the Court, which finds that there is a dispute — of which it has its own reading — relating to the interpretation of the Convention. Rather than defining the dispute in

general terms, the Court considers it in parts. This leads it to find, for example, that the part of the dispute relating to Senegal's failure to establish its criminal jurisdiction in respect of suspects present in its territory ended in 2007, on the date of the adoption of the measures concerned. It implicitly dismisses another part of the dispute — that relating to the financial difficulties mentioned by Senegal — since Senegal has never invoked these as justification for a breach of its obligations. However, the Court substitutes the Parties' apparently convergent positions with its own interpretation of the Convention against Torture in respect of at least two points: first with regard to the *erga omnes partes* character of the obligations laid down in the Convention, and then to the difference in nature between the obligation to submit the case to the competent authorities for the purpose of prosecution and the obligation to extradite. In so doing, it departs from the Parties' reasoning in order to develop its own interpretation. Thus, although the Court relies on a difference of interpretation, it is in fact its interpretation which differs from that of the Parties, rather than the Parties' interpretations which differ from each other.

13. The Court is perfectly founded in so doing, since it falls to it to determine the subject-matter of the dispute. Nevertheless, I am far from convinced by the interpretation that the Convention establishes an *erga omnes partes* obligation to submit the case to the competent authorities for the purpose of prosecution. What is more, it seems to me that this interpretation is either a deliberate tactic to establish the admissibility of a questionable Belgian Application, or a means of achieving an end other than the settlement of the dispute, namely, to give the Convention against Torture the status of an *erga omnes* norm. The two things may even go hand-in-hand: one being the object of a sort of sacralization of the Convention, the other being the means by which to achieve it. It is in this respect in particular that the Court's reasoning seems to me to be more like that of an advisory opinion, abstract and general in its application, than that of the settlement of an individual dispute limited to specific States. In that context, establishing the exact nature of the dispute and its critical date or dates becomes of secondary importance. I shall return to this point in connection with the merits, since the critical date or dates determine how Senegal's delay in the implementation of the Convention is assessed.

Arbitration

14. The Court did not uphold Senegal's argument that one of the conditions of its jurisdiction, namely, that it has proved impossible to organize arbitration between the Parties, has not been met in this instance. It simply observes that Belgium made known to Senegal that it wished to have recourse to arbitration and that this request went unanswered, Senegal merely taking note of it. It is true that this rejection of Senegal's argument is in keeping with earlier jurisprudence and that the Court is not formalistic on this point. Regrettably so, perhaps, since a minimal amount of formalism would avoid any ambiguity in the matter. When the Court sets out Belgium's approaches on the subject of arbitration, it attributes to them a continuity, coherence and clarity that is far from evident in the documents furnished to the Court. On the contrary, these are somewhat confusing, intentionally or otherwise, making it impossible clearly to discern the Parties' positions in this respect and the continuity of Belgium's position in particular.

15. In its communications with Senegal, Belgium has always pursued three approaches in parallel: negotiations — another precondition to the seisin of the Court —, and there is no question that these have taken place, with no prospect of success; judicial co-operation, as provided for in Article 9 of the Convention against Torture, which is of a different nature; and the request for arbitration, which was not followed by any additional details, such as an indication of the subject-matter of the dispute to be submitted to the arbitral tribunal, proposals relating to the composition of that tribunal or the substantive rules to be examined. The request for arbitration was, however, sometimes accompanied, often followed, and as such obscured, by other approaches from Belgium concerning the continuation of negotiations or proposals of judicial co-operation, in such a way that Senegal might question in good faith whether the request for arbitration was still valid, or whether it had been superseded by proposals of a return to judicial co-operation or negotiations, that is to say, by another means of settling, or even preventing, the alleged dispute. For its part, Senegal took note of the request for arbitration, but this request was not followed by any concrete proposals from Belgium regarding the practical details of its organization. The Convention, however, makes a clear distinction between these two stages.

16. Although, in fact, I subscribe to the Court's finding that, since arbitration could not be organized, this precondition of its jurisdiction has been met, I am nevertheless disappointed that the Court did not take this opportunity to clarify the condition in question. The Court could have stated that, in order to avoid any confusion in the matter, a request for arbitration should be put to the other party in an autonomous, distinct and separate way, with no other communication extraneous to the request, and should clearly set out the dispute in question and the essential organizational arrangements of the said arbitration. There would therefore be no ambiguity about a refusal by the party approached or its silence over a given period, or about the failure of negotiations concerning the organization of the arbitration. In my view, this is not true of the present proceedings, especially since the subjects of the dispute — extradition, delay in adopting the domestic measures to enable Senegal to exercise its criminal jurisdiction, delay in referring the case to the competent authorities for the institution of proceedings — remained undetermined until the filing of the Application with the Court.

Customary rules

17. The Court found that it did not have jurisdiction to rule on Belgium's allegations that Senegal had breached other rules of international law, in particular a possible customary rule containing the obligation to prosecute or extradite, which has given its title to the present Judgment. It had jurisdiction on another basis: the convergent declarations of Belgium and Senegal recognizing the jurisdiction of the ICJ. In my view, the Court has completely failed to justify its refusal. It seems to me, therefore, that this refusal is unfounded in law and that proper consideration has not been given to Belgium's claim in this respect. Senegal also deserved clarification on this point.

18. I am sorry to note that this declaration of lack of jurisdiction appears to be the result of a twofold concern. On the one hand, to avoid being drawn into a lengthy discussion which might delay the deliberation in the case, and thus to simplify the dispute by confining it to the Convention against Torture; on the other, to avoid having to find that the customary rule invoked by Belgium did not exist, so as not to hinder its possible subsequent establishment in customary law, and thus to maintain the uncertainty surrounding this point, pending further developments. Despite the

Court's silence — perhaps even on account of it — it seems clear that the existence of a customary obligation to prosecute or extradite, or even simply to prosecute, cannot be established in positive law. It was necessary to determine that in order to respond to Belgium's claim. To my mind, the Court should have declared that it had jurisdiction over this issue and considered it on the merits. In this respect, I believe that it has failed fully to carry out its task of settling the dispute. For that reason, I voted against this part of the operative clause.

II. ADMISSIBILITY OF BELGIUM'S APPLICATION

19. This, to my mind, is the central point of the case, and the aspect of the Court's decision with which I find it hardest to agree. Is Belgium entitled to request that Senegal perform obligations which the former claims are incumbent upon it under the Convention? What right can it assert? Is it a State injured by a possible breach, meaning that it may seek the finding of the alleged breach and reparation for it? Belgium puts forward two arguments to this effect. On the one hand, it argues that it has passive criminal jurisdiction, since Belgian nationals have filed complaints against Hissène Habré in Belgium, which justifies its extradition request. This is in fact its principal argument. On the other hand, it contends that its status as a party to the Convention is, in itself, grounds for requesting as a non-injured State that Senegal should initiate proceedings and, if it fails to do so, should extradite Mr. Habré to Belgium. It was this second argument that was pushed to the fore during the proceedings before the Court and which, in the end, appeared to take precedence over the first, thereby demonstrating that Belgium had been forced to take account of the weakness of that first argument.

20. In the present Judgment, the Court decided not to examine Belgium's passive criminal jurisdiction, despite the fact that this served as the basis of the latter's conduct throughout the dispute, and was indeed a fundamental argument in its Application. The Court resorts to an economy of means, regrettable in that it fails to address all of the Parties' arguments, whether positive or negative. The Court also avoids noting that this basis, i.e., the passive criminal jurisdiction of Belgium, cannot be relied upon in this case. The Court simply upholds another basis of admissibility: the existence of an obligation *erga omnes partes*, which was invoked only

belatedly, whose foundation is doubtful to say the least and which, in my view, the Court fails to justify in any way.

Irrelevance of Belgium's passive criminal jurisdiction

21. Belgium initially founded its extradition request, and its right to request that the case be submitted to the competent authorities for the purpose of prosecution in Senegal, on its passive criminal jurisdiction, on account of the Belgian nationality of some of the alleged victims. However, the Belgian nationals in question had only acquired that nationality several years after the facts, and thus relying on this naturalization vis-à-vis Senegal raised difficulties, since Senegal only recognizes Belgium's passive jurisdiction in respect of victims who possessed Belgian nationality at the time of the facts. Under the Convention against Torture, the parties are not obliged to establish their passive criminal jurisdiction, meaning that the other parties are not obliged to recognize it, in particular when their own criminal law makes no provision for it. Accordingly, Belgium's request for extradition became inadmissible, as did its right to request that Senegal exercise its criminal jurisdiction, since it no longer had a direct right to invoke as an injured State.

22. Belgium's reliance on its passive criminal jurisdiction was not simply theoretical. It can be seen in its unwavering conduct throughout the case. Indeed, it was only after having registered and addressed in Belgium the complaints of the alleged victims, five years after the filing of those complaints, that Belgium transmitted an extradition request to Senegal. That is when it considered that it had a direct right entitling it to seek extradition or the institution of proceedings in Senegal. The basis for that entitlement is the complaints filed in Belgium. This conduct alone demonstrates that Belgium did not, therefore, envisage relying on any basis other than this passive criminal jurisdiction. It was this which it cited at the outset of the dispute and which was the basis of its initial Application, even if it was not the reason behind its belated ratification of the Convention against Torture. Naturalization, ratification, the filing of complaints in Belgium: they all followed on from one another within the space of a few months with propitious speed, indeed almost simultaneously.

23. Although Belgium founded the request it made in 2005 on a right or special interest which it claimed to enjoy under the Convention by sole virtue of its capacity as a State party, on the basis of an alleged obligation *erga omnes partes*, it should have made that request as soon as it became a party to the Convention, in 1999. It should have called at that time for the opening of proceedings in Senegal, proceedings which would have been owed to it irrespective of any complaints and simply in its capacity as a party to the Convention against Torture. Above all, since Belgium considers that the alleged breach dates back to 2000, that is to say, to the point when complaints against Hissène Habré failed in Senegal, it should have raised the matter then. It would even have been justified in so doing, I would reiterate, as soon as it became a party to the Convention, since the presence of Hissène Habré in Senegalese territory was common knowledge, as were the allegations against him.

24. Belgium's lack of action at that stage demonstrates that it did not hold this interpretation of the Convention at the time. If a complaint by an individual which has not resulted in proceedings being brought is necessary for an inter-State dispute to exist and for implementation of the Convention to be required, that amounts to "privatizing" an *erga omnes partes* obligation which, if it exists, must be borne directly and exclusively by the States parties. On the other hand, if the title invoked is passive criminal jurisdiction, there is justification for complaints being a prerequisite for extradition requests. In other words, *erga omnes partes* jurisdiction takes effect immediately and is not dependent on individual complaints, whereas a title of specific criminal jurisdiction invoked by one party against another supposes that the exercise of such jurisdiction was initiated by victims or their dependants and that the State having that title claims it in respect of the State addressed. I shall return to this point, overlooked by the Court, when examining whether or not there is an *erga omnes partes* obligation in the Convention against Torture to submit a case to the competent authorities for the purpose of prosecution, failing extradition.

25. Thus, Belgium's entire conduct up to and including the oral proceedings was founded on its passive criminal jurisdiction. For example, it is on this ground that it requested on several occasions, including quite recently, the extradition of Hissène Habré, each time on the basis of complaints of alleged victims. The Court, of course, is not bound by this reasoning. In

determining and interpreting the rules that it applies, it may invoke other elements and base its finding on its own considerations. It was in response to a question put by one of the judges that Belgium focused on its particular position as a non-injured State, which is the basis for the Court's positive ruling on the admissibility of the Application. The Court should explain and justify its position legally. In my view, it merely asserts that there is an *erga omnes partes* obligation incumbent on Senegal, an examination of which demonstrates the weakness, if not lack, of legal bases in the Convention itself.

Non-existence of the obligation *erga omnes partes* which is invoked

26. The obligation for the parties, as soon as the alleged perpetrator of an offence as defined in the Convention is discovered in territory under their jurisdiction, to submit the case to their competent authorities for the purpose of prosecution is a procedural obligation, but not a substantive one, since it may be that proceedings cannot take place, for reasons which are not of interest to us here. The Court considers that this obligation is valid *erga omnes partes*, meaning that all parties may call for its performance, regardless of whether they have a specific connection to the alleged victims. To this end, it puts forward three general and undifferentiated principles or presuppositions, none of which is truly demonstrated, and which even appear to be contradicted by an examination of the Convention.

27. The three presuppositions in question are the following. First, there are certain treaties establishing obligations *erga omnes partes*. Second, the Convention against Torture is one of these, because it falls into a particular category of treaties, a category which, incidentally, is overlooked by the Vienna Convention on the Law of Treaties codifying customary law on the subject. Third, all of the obligations contained in the Convention fall into this category, in particular the obligation to submit the case to the competent authorities for the institution of criminal proceedings. I shall refer briefly to the first assertion because, supposing it to be true in positive law, it would in no way imply that the Convention against Torture, particularly the Convention in its entirety, meets the conditions that are laid down.

28. *(a)* On this first point, the Court invokes the dictum of the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*) relating to *erga omnes* obligations. This is of no relevance to the present case because it pertains to obligations of conventional, not customary origin and because, moreover, the Court has ruled that it does not have jurisdiction to take cognizance of customary rules in the context of the present dispute. The Court also invokes a dictum from its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (I.C.J. Reports 1951)*, which concerned a treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, and therefore obligations *erga omnes partes*. In those proceedings, however, the Court noted that the rules in question were customary ones that were obligatory irrespective of participation in the Convention. What is more, it used this finding to temper the right to make reservations having effect for other States, by stipulating that the reservation must be compatible with the object and purpose of the Convention. It is a paradox to invoke some form of international public order so as to justify making reservations to it — and, in any event, that disregards the *erga omnes partes* character of the provisions to which such reservations may be made.

29. These two cases involved either an *obiter dictum* or a finding that was not essential to the settlement of the dispute or the response to the question. Here, by contrast, the *erga omnes partes* effect is crucial to admissibility, and thus must be considered carefully. It might have been possible to consider whether the rule invoked by Belgium was customary as well as conventional. However, the Court cannot rule on this point because of its declaration that it lacks jurisdiction. In any event, obligations should be distinguished from their normative, conventional or customary framework. A treaty may contain obligations of differing natures, and the *erga omnes partes* character of a treaty as a whole cannot be presumed or inferred from the presence of an *erga omnes partes* obligation therein.

30. *(b)* With respect to the second point, the provisions of the Convention must therefore be considered one by one, in order to distinguish between those which have an *erga omnes* character and those which do not. To reason otherwise would be to adopt an approach to the question that is

more ideological than legal. In my view, regarding the Convention as a unit — even though reservations may be made to it, including in respect of the very definition of torture, even though some requirements are optional and others discretionary, and even though certain stipulations reflect customary rules while others do not — has no legal basis. The legal issue is thus the interpretation of the Convention against Torture and not its inclusion by declaration of the Court in a specific category of treaties said to create *erga omnes partes* obligations by their nature. The Court relies implicitly on the draft Articles of the International Law Commission (the "ILC") on Responsibility of States. However, it is far from accepted that these express international customary law in the matter, and the adoption of a convention codifying the international responsibility of States has never been seriously envisaged, due to a lack of agreement on the subject. How can a norm of positive law be drawn from this without further explanation?

31. The ILC itself believed that the articles relating to "States other than injured States" fell within the realm of progressive development, i.e., that they were not part of customary law as *lex lata*. In this case, I fear that the Court's desire to support their establishment has taken precedence over the objective consideration of a dispute which it has to settle "in accordance with international law", under the terms of Article 38 of its Statute. It is on this very questionable basis, however, that the Court founds the admissibility of Belgium's Application, even though this contradicts the actual conduct of the latter in the present case. It is essential not to start from a general presupposition, but to interpret the relevant provision of the Convention against Torture which lays down the obligation for every State party to submit "to its competent authorities for the purpose of prosecution" any person suspected of committing the offences referred to in the Convention present in its territory.

32. This provision should not be confused with those which call for measures aimed at the prevention of torture or the establishment of the parties' criminal jurisdiction in the matter. Furthering the fight against torture begins with measures providing for its absolute prohibition, in all circumstances and under any pretexts, as laid down in Article 2 of the Convention against Torture. Prevention is key: if prosecution is necessary, it is already too late. The universal prohibition of torture is thus a customary rule; the same is not true of the obligation to prosecute.

In my view, there is no question that the prohibition of torture is also an *intransgressible obligation*, in the sense of the Court's Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (I.C.J. Reports 1996 (I))*. However, this definition does not automatically apply; nor does it extend in either law or fact to all other obligations in the Convention.

33. With regard to the prohibition of torture, the notion of an "intransgressible obligation" is certainly preferable to a reference to *jus cogens*, since the latter is supposed to render incompatible treaties null and void. Is a treaty in which States would mutually authorize the practice of torture really conceivable? It is rather by material actions that the obligation is breached. In any case, the obligation relates to physical and psychological conduct, in other words, the orders and instructions given and the premeditated acts in question, rather than to international treaties. This is clear from the terms of Article 2, in particular. Such acts call for individual criminal sanctions, and the raising of their systematic condemnation to the level of an international norm has no tangible effect other than the moral satisfaction of those pronouncing it.

34. *(c)* As for the third point, the provision establishing the obligation to submit the case to the competent authorities for the purpose of prosecution is clearly of a different nature to the prohibition of torture itself. Its interpretation must be based on the general rule of interpretation as set forth in the Vienna Convention on the Law of Treaties between States, which is considered and applied by all States, including those not party to it, as reflecting customary law. This rule is unquestionably better established than that which seeks recognition of the rights of "States other than injured States". The general rule of interpretation refers to the text of the treaty according to the natural and ordinary meaning of its terms, while also taking account of its context, including the practice followed by States in the application of the treaty, the intention of the parties, and the treaty's object and purpose.

35. The Court does not appear to have taken account of these directives. Rather, it has adopted a teleological interpretation, constructing, on the basis of a purpose which is said by it to govern all of the provisions, an obligation *erga omnes partes* which is not substantiated by the text

or the intention of the parties, and even less so by their practice. Furthermore, the Court does not even attempt to consider the above directives, confining itself to unfounded assertions of principle. The object and purpose of the Convention, as determined by the Court, have superseded and removed all other considerations. In this respect, the Court seems anxious to appear up to date, in touch with certain courts, notably the international criminal courts, and not outmoded by comparison. However, what is involved here is interpreting a convention, not conducting a trial.

36. If one first considers *the text* of the Convention against Torture, it can be observed that the parties do not form a single homogeneous group which assumes the same obligations and can claim the same rights. For example, the parties are not all obliged to establish their criminal jurisdiction on the same basis. A general obligation exists only for jurisdiction in respect of persons present in the parties' territory; this is termed universal jurisdiction — which is an overstatement, since it concerns only the parties. Passive criminal jurisdiction, as has been pointed out, is optional. Only those parties which themselves have a title of criminal jurisdiction opposable to other States may request extradition on the basis of the Convention. Here is already an area in which rights and obligations are differentiated.

37. It should be added that the Convention contains a particular mechanism, set forth in Articles 17 to 24, which make provision for the establishment of a Committee against Torture. Article 21 of the Convention specifically authorizes States parties to refer to that Committee failures to give effect to the provisions of the Convention. A State acting in this context need not have a subjective interest. It may thus be considered that a common interest, collectively protected and guaranteed, is accepted and established. However, this special procedure does not concern all parties. It is dependent upon their express consent. Moreover, they can unilaterally withdraw this consent at any point (Art. 21, para. 2).

38. It would be very difficult, therefore, to argue that the parties all have the right to request performance of an *erga omnes partes* obligation to seise the competent authorities for the purpose of prosecution. That procedure can only be applied on the basis of specific provisions, the parties' acceptance of which is optional and may be withdrawn at any time. It can only be implemented

between those parties which have consented to it. If the obligation were *erga omnes partes*, participation in the procedure provided for in Article 21 would not be optional but compulsory, giving a specific substance to that *omnes partes* character. On the other hand, the very existence of such an optional procedure demonstrates the lack of a general right of action outside and independent of the protection of a direct right of a State party. Its object is even to compensate for the absence of such a right, while at the same time drawing attention to that absence.

39. Finally, it should be added that the Court's jurisdiction and the recourse to arbitration provided for in Article 30 of the Convention are also optional, which creates a further distinction between the parties, between those who may claim respect for their rights before independent courts and those who may not. Regrettable or not, it is very difficult to establish an *erga omnes partes* public order on such bases, to introduce verticality into a system which is by nature horizontal, in which parties' rights and obligations must be considered not in a general and abstract way, but on a party-by-party basis, according to the commitments they have made and their individual circumstances.

40. Lastly, if an obligation *erga omnes partes* does exist, as the Court states, this obligation is not dependent on complaints by individuals, as noted above. It is incumbent on the parties' government authorities; it falls to them to initiate public proceedings, and where they do not take action, they are at the same time showing that they are in no way obliged to do so. Article 7, paragraph 1, of the Convention is clear on this subject: "The State Party . . . shall . . . submit the case." This is particularly true of the obligation immediately to make a preliminary inquiry into the allegations, an obligation which is incumbent directly on the parties and which may be carried out independently of a complaint. By waiting, in practice, for complaints to be filed before they turn to the mechanisms for prosecution provided for by the Convention, the parties show that they do not consider themselves to be bound by an obligation *erga omnes partes*.

41. More broadly, the *practice of the parties* could compensate for these limitations of the text by pointing to a common understanding of the Convention and by exercising a perceived and accepted right to demand that the competent authorities be seised when a suspect is present in a

party's territory. The Convention has been in force for 25 years and practice should not be lacking. Unfortunately, there is no evidence to support this. If anything, it is the opposite. Which parties have demanded that another State party which is sheltering individuals suspected of torture in its territory should seise its competent authorities, and when? Who, for example, has protested to the United States, or to other States parties to the Convention, regarding the continuation of numerous acts of torture whose existence was not disputed but indeed justified in the eyes of the States in question on grounds of security? Belgium itself rejected the notion of universal criminal jurisdiction, following pressure from the United States. It may be supposed that it has attempted to resurrect it here, vis-à-vis Senegal, undoubtedly a much easier prospect.

42. In the context of this dispute in particular, which parties to the Convention have called for Chad to prosecute the perpetrators of or accomplices in alleged acts of torture, even though the majority of the victims — and the perpetrators — are of Chadian origin and, for the most part, still in Chadian territory? According to the Court's logic, 150 parties would have been in a position to do so. Has Belgium troubled itself to do this? Has it requested that Chad prosecute the persons suspected? The Court does not seem concerned by this practice, or rather negative practice, which is nevertheless pertinent for establishing the existence of a right belonging to "States other than injured States". This further demonstrates that, in reality, Belgium has founded its conduct on nothing more than its purported status as an injured State, by virtue of its passive criminal jurisdiction.

43. For its part, Chad has been a party to the Convention against Torture since 9 July 1995, before Belgium even. The obligation to prosecute the perpetrators of or accomplices in the corresponding crimes fully applies to it, since criminal jurisdiction is retroactive, even when the accusations are not. It is clear from the case file that Belgium sought and obtained the judicial co-operation of Chad on the condition that prosecution take place elsewhere, without the involvement of the latter. Moreover, when Belgium therefore declares that it is worried about the victims, in practice it appears more concerned about putting Senegal on trial; for its part, Senegal is seeking to organize a trial for Hissène Habré which involves it only very indirectly.

44. It is therefore my conclusion that the obligation *erga omnes partes* to which the Court refers has been produced like a rabbit from a magician's hat. It has not been established that the Convention against Torture creates an *erga omnes partes* obligation to seise the competent authorities for the purpose of prosecution and, consequently, a right enabling every party to demand its performance regardless of whether it has a special title to do so, i.e., an infringement of its direct right to prosecute under the terms of its own jurisdiction. Accordingly, Belgium's Application cannot be based on a right belonging to all the parties or on its passive jurisdiction, which was not even taken into consideration by the Court. In my view, therefore, Belgium's Application against Senegal is not admissible, and the Court's decision in no way makes it so. Senegal undoubtedly has an obligation to seise the competent authorities for the purpose of prosecution, and it does not deny that, but this obligation is not owed to Belgium.

45. Which States parties, therefore, are legally entitled to demand that one or more parties seise their competent authorities for the purpose of prosecution, if not every party has that right solely on the basis of their participation in the Convention against Torture? To my mind, it is those which are obliged to establish their criminal jurisdiction under Article 5, paragraph 1, of the Convention, either because the offences in question were committed in their territory, or because the persons suspected possess their nationality. The right to ask other parties to consider prosecution is the balance to and compensation for that obligation, the complement to their own obligation.

46. They are also entitled to seek extradition on the basis of their own criminal jurisdiction, without this being granted automatically, since the requested State will only consent to it under certain conditions as laid down in the Convention. Belgium does not meet those conditions, and cannot obtain the extradition of Hissène Habré solely on the basis of its passive criminal jurisdiction. I am disappointed that the Court has failed to make this clear in the operative clause of the Judgment, even though it states it in its reasoning. It was, however, one of Belgium's formal requests in its submissions. Here too, by failing to rule on this point, the Court has only partially resolved the dispute, which leads us on to the merits.

III. MERITS

47. I voted in favour of the Court's jurisdiction, despite the reservations I have expressed on the subject of the alternative arbitration procedure, a condition which, in my view, was not entirely satisfied. Logically, this opinion should end here, because, since I consider Belgium's Application to be inadmissible, there is no longer any need to consider the questions on the merits. I voted on the merits of the case for three reasons. First, because I respect the decision of the Court. Second, because it is the usual practice to do so — judges vote on each point individually, in an independent fashion. And, finally, because the applicable rules make no provision for abstentions and require that either a "yes" or "no" vote be cast. I would have misgivings about voting against some points in the operative clause which I consider to be well founded. I shall therefore set out some observations on the merits, by way of explaining my votes.

Article 6, paragraph 2, of the Convention against Torture

48. In particular, I am of the view that Senegal's breach of its obligation, laid down in Article 6, paragraph 2, of the Convention against Torture, immediately to make "a preliminary inquiry into the facts" when a person suspected of offences is discovered in its territory, is established. This obligation is not dependent on measures establishing in domestic law the jurisdiction required by the Convention, and therefore does not entail any conditions additional to the ratification of the said Convention. It appears to me that, even if one considers that the necessary preliminary inquiry may depend under domestic law on the seisin of a judicial authority, the obligation is formulated in clear and precise terms which offer neither ambiguity nor an escape route. In particular, the inquiry may furnish useful information should the State party find itself seised of an extradition request when it has no intention of organizing a trial itself. Therefore, I voted in favour of the finding that Senegal has breached this obligation (point 4 of the operative clause).

Article 5 of the Convention against Torture

49. I also agree with the Court's finding that the dispute relating to the establishment of Senegal's jurisdiction under Article 5 of the Convention against Torture ceased to exist when Senegalese domestic law was modified to enable the holding of a trial, which in practice occurred

even before the filing of Belgium's Application. This was a preparatory act, clearly indicating Senegal's intention to exercise its criminal jurisdiction, given that the modification of Senegalese law was carried out following the transmission of the arrest warrant by Belgium.

50. On the other hand, I disagree with the idea that modifying domestic law to meet a treaty obligation must be carried out immediately and contemporaneously — or even simultaneously — with ratification. It seems to me that it all depends on the domestic law in question. What the international customary rules relating to the law of treaties stipulate is that the necessary modifications should be carried out within a reasonable time-limit. The practice of States and their *opinio juris* appear well established in this respect. It is true that the Court retains some ambiguity in its form of words on this point and that it adopts a prudent wait-and-see approach — and rightly so, since this point is hardly relevant to the present dispute.

Article 7, paragraph 1, of the Convention against Torture

51. I cannot subscribe to point 5 of the operative clause, which finds that Senegal has breached the obligation to submit the case to the competent authorities for the purpose of prosecution. The Court recalls the exact sense of that obligation perfectly, rejecting the contention that it contains an "obligation to prosecute", since the Convention gives free rein to the provisions of the parties' domestic laws in this respect. The competent authorities should therefore be seised, but this does not necessarily result in the instigation of proceedings, either because there is insufficient evidence, or in the light of the desirability of prosecution under the domestic laws based on this principle.

52. As I indicated in respect of the Court's jurisdiction, the subject-matter of the dispute is, in my view, Senegal's delay in referring the case to its competent authorities for the purpose of prosecution. Both Parties fervently disagree on this point, which is at the heart of the dispute. The question is therefore whether or not Senegal's delay can be justified. In my eyes, it is, for the following reasons.

53. First, a comparison with Belgium's conduct: once complaints had been filed in Belgium, it took five years for the latter to investigate the case and to refer it to Senegal, in 2005. Second,

Senegal's conduct following that referral: Senegal immediately initiated the necessary reforms of its domestic law, which were carried out in 2007; it kept Hissène Habré under house arrest, preventing him from leaving its territory, and concerned itself with organizing a trial. Belgium contributed to these efforts, promising financial support for the holding of such a trial. The time which elapsed between then and the filing of Belgium's Application is no greater than the time which has elapsed since, meaning that an appraisal of the situation is not necessarily unfavourable to Senegal.

54. It may also be noted that it is not clear from the case file whether or not Chad informed Senegal of the lifting of Hissène Habré's immunity from criminal proceedings, as it did Belgium. However, unlike the Rome Statute for example, the Convention does not state that the immunity of public authorities is unenforceable in proceedings instituted before domestic courts. I would add that the notion of "competent authorities for the purpose of prosecution" may be interpreted in a fairly broad manner, since the Convention against Torture neither prescribes nor suggests that this must be a judicial authority. When the Senegalese government authorities are taking concrete measures towards the organization of a trial and, in that connection, have requested and obtained international co-operation towards that end, can it be said that criminal jurisdiction is not being exercised? Finding that there has been a breach by Senegal in this respect ignores the existence of what is an ongoing procedure, instead of encouraging it.

55. The date on which the present decision was made did not allow the Court to take account of the most recent developments in Senegal's position. Senegal has made known in a number of communications, following the written and oral proceedings before the Court, the various decisions of its government authorities in preparation for a trial. The Court did not examine or follow up on these, probably because they were introduced late and had not been subject to challenge, Belgium not having commented on them. But it was for the Court to decide whether that should be the case and whether the adversarial principle should be applied. Moreover, Belgium received these communications and was in a position to make its views known in its own communications, in the same way as Senegal.

56. Nothing would have been easier than to wait a few weeks longer for this purpose, to seek Belgium's point of view where appropriate, and to take note of the planned institution, in principle, of the necessary proceedings. I regret that this was not done, and would recall here that judicial settlement is a substitute for diplomatic settlement. That is why I cannot support the finding that Senegal is already in breach of its obligation to submit the case for prosecution, when prosecution has been decided upon in principle and a very short time-limit fixed for the opening of judicial proceedings. If that time-limit had not been respected, I would have supported the finding that there had been a breach. However, I am not convinced that making such a ruling here and now will speed up the proceedings, since the dispute is now effectively considered to have been settled at the international judicial level.

57. I am therefore of the view that, in the context of its task of settling the dispute, the Court could have focused on the substance of the Hissène Habré case and of the dispute, rather than considering them from a formal or procedural point of view. What actually matters, in order to fulfil the object and purpose of the Convention against Torture, is that a trial should take place and that justice is delivered for the victims. If there is a trial to organize, it is that of Hissène Habré, not that of Senegal. And if there is a State about which questions may be asked, then in my view that State is Chad, far more so than Senegal. To my mind, it would have been more constructive to take account of and encourage the efforts which Senegal has made since Belgium's first request regarding the organization of a trial.

Permanent obligation to seise the Senegalese judicial authorities

58. On the other hand, I fully subscribe to the majority's finding, in point 6 of the operative clause, that Senegal has an obligation to refer the case to its judicial authorities for the purpose of prosecution, irrespective of whether or not there is a dispute and irrespective of the Court's decision. This is not the corollary of a breach and a condition of its cessation, but the normal and undisputed application of a primary obligation resulting from a commitment by Senegal. It is not dependent on the finding of a breach. Senegal must in any event respect and perform this obligation, and it declares itself committed to do so in the very near future.

Belgium does not have the right to obtain extradition on the basis of the Convention against Torture

59. Finally, I am disappointed that there is nothing in the operative clause about the request concerning the extradition of Hissène Habré to Belgium, made by the latter in its submissions. The Court has rightly noted that the obligation to seise the competent authorities and the obligation to extradite, as alleged by Belgium, should not be given the same weight and are not alternatives. Although extradition, if granted, undoubtedly relieves the State concerned of its obligation to seise its competent authorities, no State is obliged to agree to extradition unless the State seeking it has a direct entitlement, either on the basis of an international commitment of the requested State or under its domestic law. Consequently, Belgium is not entitled to obtain extradition in this instance on the basis of the Convention.

60. In my view, this point should have been included in the operative clause, given that it relates to a request made to the Court by Belgium in its submissions. It is nevertheless clear in the reasoning that Belgium, which is not an "injured State", does not have a right to exercise vis-à-vis Senegal in order to obtain the extradition of Hissène Habré. But this request made by Belgium is not addressed in the operative clause. Here too, it may be noted that the dispute has only partially been resolved. It is nonetheless the Court's practice to reject unsubstantiated submissions. That could usefully have been done here.

(Signed) Serge SUR.