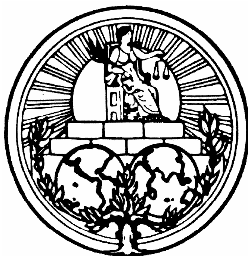

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Summary
Not an official document

Summary 2012/4
20 July 2012

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

Summary of the Judgment of 20 July 2012

The Court begins by setting out the history of the proceedings (paras. 1-14). It recalls that, on 19 February 2009, Belgium filed in the Registry of the Court an Application instituting proceedings against 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, for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice,] or to extradite him to Belgium for the purposes of criminal proceedings". In its Application, 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. The Court notes that in the said 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.

On 19 February 2009, in order to protect its rights, Belgium also filed a Request for the indication of provisional measures, on which the Court made an Order on 28 May 2009. In that Order, the Court 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.

I. HISTORICAL AND FACTUAL BACKGROUND (paras. 15-41)

The Court recalls that, 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. Overthrown on 1 December 1990, Mr. Habré requested political asylum from the Senegalese Government, a request which was granted; he has been living in Dakar ever since.

From 25 January 2000 onwards, a number of proceedings relating to crimes alleged to have been committed during Mr. Habré's presidency were instituted before both Senegalese and Belgian courts by Chadian nationals, Belgian nationals of Chadian origin and persons with dual

Belgian-Chadian nationality, together with an association of victims. The issue of the institution of proceedings against Mr. Habré was also referred by Chadian nationals to the United Nations Committee against Torture and the African Court on Human and People's Rights.

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, on the basis of which Belgium requested the extradition of Mr. Habré from Senegal and Interpol circulated a "red notice" serving as a request for provisional arrest with a view to extradition.

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".

The day after the delivery of the said judgment, Senegal referred to the African Union the issue of the institution of proceedings against Mr. Habré. In July 2006, the Union's Assembly of Heads of State and Government 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".

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 (that is to say, "to prosecute or extradite") 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".

By Note Verbale dated 4 May 2006, Belgium, having noted the absence of an official response from the Senegalese authorities to its earlier Notes and communications, 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 began to run from that point.

The Court further notes that the United Nations Committee against Torture found, in a decision of 17 May 2006, 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.

The Court then observes that, 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 664bis 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]". 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".

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.

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, making it possible to prosecute, try and punish "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".

As indicated above, on 19 February 2009, Belgium filed in the Registry the Application instituting the present proceedings before the Court. On 8 April 2009, during the hearings relating to the Request for the indication of provisional measures submitted by Belgium — at the end of which it 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" —, Senegal solemnly declared before the Court that it would not allow Mr. Habré to leave its territory while the case was pending. 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 Court goes on to observe that, by 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, accordingly, ordered it 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.

Following the delivery of that 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".

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, 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.

On 15 March 2011, 5 September 2011 and 17 January 2012, Belgium addressed to Senegal three further requests for the extradition of Mr. Habré. The first two requests were declared inadmissible; the third is still pending before the Senegalese courts.

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 (paras. 42-63)

Having recalled the two bases of jurisdiction relied on by Belgium — namely Article 30, paragraph 1, of the Convention against Torture and the declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court —, the Court notes that Senegal contests the existence of its 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 (paras. 44-55)

The Court recalls that, 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". In its final submissions, Belgium asked the Court 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. The Court notes that, for its part, 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 in the present case. The Court observes, therefore, 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 begins by examining this issue.

Relying on its earlier jurisprudence, the Court recalls in this connection 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), it being understood 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 also notes that the "dispute must in principle exist at the time the Application is submitted to the Court" (ibid.).

The Court begins by examining Belgium's first request 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. The Court notes that, while Belgium contends that the fact that Senegal did not comply with its obligation under Article 5, paragraph 2, "in a timely manner" produced negative consequences concerning the implementation of some other obligations under the Convention, it acknowledges, however, that Senegal has finally complied with its obligation through, on the one hand, its 2007 legislative reforms (which extend the jurisdiction of Senegalese courts over certain offences, including torture, war crimes, crimes against humanity and the crime of genocide allegedly committed by a foreign national outside Senegal's territory, irrespective of the nationality of the victim) and, on the other, its 2008 Constitutional amendment (which now precludes the principle of non-retroactivity in criminal matters from preventing the prosecution of an individual for acts which were crimes under international law at the time when they were committed).

The Court considers 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. It concludes, therefore, that it lacks jurisdiction to decide on Belgium's claim relating to the obligation deriving from that treaty provision. It states, however, that 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.

The Court next considers Belgium's contention that Senegal breached two other treaty obligations, which 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" (Art. 6, para. 2) and, "if it does not extradite him", to "submit the case to its competent authorities for the purpose of prosecution" (Art. 7, para. 1). On this point, the Court notes that Senegal maintains that there is no dispute with regard to the interpretation or application of these provisions, not only because there is no dispute between the Parties concerning the existence and scope of the obligations contained therein, but also because it has met those obligations. On the basis of the Parties' diplomatic exchanges, the Court considers that Belgium's claims founded on the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention were positively opposed by Senegal; it concludes, therefore, that a dispute existed at the time of the filing of the Application and notes that this dispute still exists.

The Court observes that 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; Belgium later extended this request to cover war crimes and genocide, both in its Memorial and at the hearings. On this point, Senegal also contends that no dispute has arisen between the Parties.

The Court notes that, while it is the case that the Belgian international arrest warrant in respect of Mr. Habré — transmitted to Senegal with a request for extradition on 22 September 2005 — 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, 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. The Court considers that, 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 Court states that 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.

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, therefore, 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 determine whether there exists a legal basis of jurisdiction.

B. Other conditions for jurisdiction (paras. 56-63)

The Court next turns to the other conditions which should be met for it to have jurisdiction under Article 30, paragraph 1, of the Convention against Torture, under the terms of which: "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." 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 that request.

With regard to the first of these conditions, the Court asserts that it 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 means 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).

The Court notes that, while Belgium expressly stated that the numerous exchanges of correspondence and various meetings which were held between the Parties between 11 January 2006 and 21 June 2006 fell within the framework of the negotiating process under Article 30, paragraph 1, of the Convention against Torture, Senegal did not object to the characterization by Belgium of the diplomatic exchanges as negotiations. 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, negotiations did not make any progress towards resolving the dispute. Having noted that this divergence of the Parties' views persisted until the oral phase, the Court 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.

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 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 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." Having subsequently made a direct request to resort to arbitration in a Note Verbale of 20 June 2006, Belgium remarked, in that Note, that "the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded" and that 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".

The Court observes that Belgium reiterated this request for arbitration in its Note Verbale of 8 May 2007, to which Senegal failed to respond. Although 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, this does not mean that the condition that "the Parties are unable to agree on the organization of the arbitration" has not been fulfilled, since 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. The Court recalls that it has said, with regard to a similar treaty provision, that "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 Court concludes that 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.

In respect of the second condition laid down in Article 30, paragraph 1, of the Convention against Torture, namely that at least six months should pass after the request for arbitration before the case is submitted to the Court, the Court considers that, 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.

Having determined 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 that instrument. 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 (paras. 64-70)

The Court notes the divergence of views between the Parties concerning the standing of Belgium, which 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.

Relying on the object and purpose of the Convention, which is "to make more effective the struggle against torture . . . throughout the world", the Court finds 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, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. The Court considers that 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 implying that the obligations in question are owed by any State party to all the other States parties to the Convention. It follows that 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) and that 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.

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 treaty provisions are admissible. In view of this admissibility, the Court considers that there is no need for it 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 (paras. 71-117)

The Court recalls that, while in its Application instituting proceedings, Belgium requested it 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 that Convention by failing to bring criminal proceedings against Mr. Habré, unless it extradites him. The Applicant also pointed out during the proceedings that the obligations deriving from those two treaty provisions and Article 5 are closely linked with each other in the context of achieving the object and purpose of the Convention, which is to make more effective the struggle against torture. Hence, incorporating the appropriate legislation into domestic law (Art. 5, para. 2) would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts (Art. 6, para. 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 (Art. 7, para. 1).

The Court notes that Senegal contests Belgium's allegations and considers that it has not breached any provision of the Convention against Torture. The Respondent contends that the Convention breaks down the aut dedere aut judicare obligation into a series of actions which a State

should take and that the measures it has taken hitherto show that it has complied with its international commitments, which are, to a very large extent, left to the discretion of the State concerned. Having asserted that it has resolved not to extradite Mr. Habré, but to organize his trial and to try him, Senegal 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 the measures it has taken to restrict the liberty of Mr. Habré, pursuant to Article 6 of the Convention, as well as other measures taken in preparation for Mr. Habré's trial, contemplated under the aegis of the African Union, must be regarded as constituting the first steps towards fulfilling the obligation to prosecute laid down in Article 7 of the Convention.

The Court asserts that, although it has no jurisdiction over the alleged violation of Article 5, paragraph 2, of the Convention mentioned earlier, it should be noted that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture (Art. 5, para. 2) is a necessary condition for enabling a preliminary inquiry (Art. 6, para. 2), and for submitting the case to its competent authorities for the purpose of prosecution (Art. 7, para. 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.

The Court observes that the obligation for the State to criminalize torture and to establish its jurisdiction over it, which finds its equivalent in the provisions of many international conventions for the combating of international crimes, has to be implemented by the State concerned as soon as it is bound by the Convention. This obligation 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. In this connection, 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, to the extent that, on 4 July 2000 and 20 March 2001 respectively, the Dakar Court of Appeal and the Senegalese Court of Cassation were 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. The Court concludes that the delay in the adoption of the required legislation necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention. The Court, bearing in mind the link which exists between the different provisions of the Convention, then analyses 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 (paras. 79-88)

Having recalled that, 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", the Court notes that, while Belgium considers that the obligation deriving from this provision is a procedural one — in the sense that the said State 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 —, Senegal takes the view that it is simply an obligation of result, because the inquiry is aimed at establishing the facts, and 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. In any event, Senegal claims to have fulfilled the said obligation.

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. The Court considers that 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 Senegal to fulfil its obligation to make a preliminary inquiry. 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. It considers that 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.

The Court notes that, 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. The establishment of the facts at issue, which is an essential stage in that process, has been imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré. Moreover, Senegal did not open an inquiry into the facts in 2008, when a further complaint against Mr. Habré was filed in Dakar after the legislative and constitutional amendments made in 2007 and 2008.

Since Senegal itself stated in 2010 before the ECOWAS Court of Justice that no proceedings were pending or prosecution ongoing against Mr. Habré in Senegalese courts, the Court concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention by not immediately initiating a preliminary inquiry as soon as its competent authorities had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. The Court considers that that point was reached, at the latest, when the first complaint was filed against Mr. Habré in 2000.

B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention (paras. 89-117)

Having cited Article 7, paragraph 1, of the Convention, which provides: "[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", the Court observes that the obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the "obligation to prosecute"), which derives from this provision, 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. The authorities thus 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. In the present case, the Court is of the view that 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 (paras. 92-95)

The Court clarifies the nature and meaning of the obligation to prosecute by indicating that Article 7, paragraph 1, requires the State in whose territory the suspect is present 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 State is thus obliged to make a preliminary inquiry (Article 6, paragraph 2) immediately from the time that the suspect is present in its territory, it being understood that 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. The Court states that if, however, 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. 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 because, while extradition is an option offered to the State by the Convention, prosecution, on the other hand, is an international obligation laid down by 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 (paras. 96-105)

With respect to the question relating 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 Senegal (26 June 1987) and Belgium (25 June 1999), the Court, having found that there is no clear divergence between the Parties' views on the question, considers that 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, taking account of the fact that it appears in numerous international instruments of universal application and has been introduced into the domestic law of almost all States, and that acts of torture are regularly denounced within national and international fora.

However, the Court states that, pursuant to the provisions of Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter of treaty interpretation, 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. It thus 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. It follows that the obligation to prosecute does not apply to such acts. This was confirmed by the United Nations Committee against Torture in its decision of 23 November 1989 in the case of O.R., M.M. and M.S. v. Argentina, in which it stated that "'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention".

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 it on 26 June 1987. It notes however that, since the complaints against Mr. Habré include a number of serious offences allegedly committed after that date, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. The Court further asserts that, 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.

With respect to the question concerning the effect of the date of entry into force of the Convention, for Belgium, on the scope of Senegal's obligation to prosecute, the Court observes a notable divergence between the Parties' views. While 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, given that the obligation provided for in Article 7, paragraph 1, belongs, according to the Respondent, to "the category of divisible erga omnes obligations" and 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.

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 (the same conclusion also being valid in respect of Art. 6, para. 2). 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.

3. Implementation of the obligation laid down in Article 7, paragraph 1 (paras. 106-117)

The Court recalls the respective positions of the Parties regarding the implementation of the obligation to prosecute. Belgium, while recognizing that the time frame for implementation of the said obligation depends on the circumstances of each case, and in particular on the evidence gathered, considers, in the first instance, 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, since procrastination on that State's part could violate both the rights of the victims and those of the accused. Belgium is also of the opinion that the financial difficulties invoked by Senegal cannot justify the fact that the latter has done nothing to conduct an inquiry and initiate proceedings. Finally, the Applicant alleges that Senegal's referral of the matter to the African Union in January 2006 does not exempt it from performing its obligations under the Convention, particularly since, at its Seventh session in July 2006, 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". Belgium further contends that Senegal cannot rely on its domestic law, or the judgment of the ECOWAS Court of Justice of 18 November 2010, in order to avoid its international responsibility.

The Court notes that, 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 and that, in referring the matter to the African Union, it was never its intention to relieve itself of its obligations. In respect of the judgment of the ECOWAS Court of Justice, Senegal observes that it is not a constraint of a domestic nature, asserting that, while bearing in mind its duty to comply with its conventional obligation, it is nonetheless subject to the authority of that court, which 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.

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, that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré and that the referral of the matter to the African Union cannot justify Senegal's delays in complying with its obligations under the Convention. 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.

The Court notes that, 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, which is why proceedings should be undertaken without delay. In the present case, the Court concludes 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 (paras. 118-121)

The Court recalls 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. Belgium also 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.

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. 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.

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.

VI. OPERATIVE CLAUSE (para. 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.

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.

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Declaration of Judge Owada

Judge Owada states that, although he has voted in favour of the Judgment in support of all the points contained in its operative paragraph, he nevertheless entertains some divergence of views from the position taken by the Judgment with regard to the methodology of handling the case.

On the issue of jurisdiction, Judge Owada points out that, in their pleadings, both Parties focus upon the entire conduct of Senegal in the Habré affair. Belgium alleges that Senegal failed to act on its obligation to punish crimes under international humanitarian law alleged against Mr. Habré. Senegal claims that it has never repudiated its duty to try Mr. Habré and that no dispute exists between the Parties. According to Judge Owada, despite the Parties' positions, the Judgment chooses to focus on the specific issue of Article 5, paragraph 2, of the Convention, concluding that the Court lacks jurisdiction to decide on Belgium's claim relating to Senegal's obligation under that Article.

In Judge Owada's opinion, the better approach would have been to interpret the subject-matter of the dispute 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 as falling within the jurisdiction of the Court. In Judge Owada's view, the purpose of the Convention is to create a comprehensive legal framework for enforcing the principle of aut dedere aut judicare. Judge Owada states that 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.

Judge Owada adds that it would have been 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, in Judge Owada's view, should form the legal basis for the Court's subsequent ruling on the breach of obligations under Articles 6 and 7 of the Convention. Judge Owada emphasizes that the violation of the obligations under Articles 6 and 7 is a legal consequence that flows directly from the Court's determination that there had been a breach of the obligation under Article 5, paragraph 2, of the Convention.

On the matter of admissibility, Judge Owada accepts the Court's finding that the claims of Belgium are admissible, but wishes to underline that this finding of the Court is built on its reasoning that Belgium's entitlement to standing derives from its status as a State party to the Convention, and nothing else. In addressing the question of Belgium's standing in this way, Judge Owada notes that 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 it has the right to invoke the responsibility of Senegal as an "injured State" under Article 42 (b) (i) of the Articles on State Responsibility.

Judge Owada emphasizes that the legal consequence of adopting this approach is that Belgium is entitled in its capacity as a State party to the Convention, like any other State party, only to insist on compliance by Senegal with the obligations arising under the Convention. It can go no further. According to Judge Owada, since the Judgment has not ruled upon the Belgian claim that it can claim a particular position as an injured State, Belgium is therefore in a legal position neither to claim the extradition of Mr. Habré under Article 5, paragraph 2, of the Convention, nor to demand an immediate notification as a State party to which it is entitled under Article 6, paragraph 4, of the Convention.

Judge Owada adds that, in any case, the legal situation under the Convention is that, as the Judgment clearly states, extradition is nothing more than an option open to States on whose territory an alleged offender is present, and is not an obligation. Judge Owada emphasizes that, be that as it may, Belgium's standing as recognized by the present Judgment cannot allow Belgium to claim any special interest under Article 5 of the Convention. As a result, Judge Owada concludes that the request of Belgium contained in paragraph 2 (b) of its final submissions, asking the Court to adjudge and declare that Senegal extradite Mr. Habré to Belgium without further ado, has to fail on this ground.

Separate opinion of Judge Abraham

In his separate opinion, Judge Abraham first sets out the grounds on which the Court should, in his view, have found that it had jurisdiction to entertain the claims of Belgium relating to customary international law. Judge Abraham considers that the Court was wrong to find that there was no dispute between the Parties concerning this aspect of Belgium's claim. As a general rule, the conditions governing the jurisdiction of the Court must be met on the date when the Application is filed, but Judge Abraham recalls that the Court accepts that a condition that was initially lacking can be met during the course of the proceedings. In the present case, the exchanges between the Parties before the Court concerning Belgium's claims arising under customary international law show that a dispute on this aspect of the case clearly exists at the time of the Judgment, even if the existence of that dispute had not been established when the case was submitted to the Court. Judge Abraham therefore concludes that the Court should have found that it had jurisdiction, pursuant to the optional declarations made by the Parties under Article 36 (2) of the Statute of the Court, to entertain that part of the claim concerning alleged breaches of obligations under customary international law.

Judge Abraham is moreover of the view that Belgium's claims relating to this aspect of the case could not have been upheld by the Court on the merits. In his opinion, there is at present no customary rule compelling States to prosecute persons suspected of war crimes, crimes against humanity or genocide before domestic courts where the alleged offences occur outside the territory of that State and neither the perpetrator nor the victims are nationals of that State, regardless of whether or not the suspect is present in the territory of the State in question. Consequently, the claims presented by Belgium on the basis of customary international law were, in any event, doomed to fail.

Separate opinion of Judge Skotnikov

Judge Skotnikov supports the Court's conclusions set forth in the operative clause. However, he is of the view that the Court has erred as to the grounds on which to base its finding that Belgium's claims are admissible.

In the opinion of Judge Skotnikov, 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.

The Court has chosen instead 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. This allows the Court 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 is directly related to the issue of the validity of Belgium's request for Mr. Habré's extradition.

During the oral phase, Belgium confirmed that it appeared before this Court as an injured State. In the alternative Belgium, responding to a question posed by one of the judges, claimed locus standi as a party other than an injured State. 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. Therefore, 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 is surprising. One inevitable implication of this decision is that the issue of the validity of Belgium's request for extradition remains unresolved.

Judge Skotnikov considers that 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 because the States parties have a common interest in attaining the goals of the Convention, is not properly explained, nor is it justified.

Indeed, 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 Judge Skotnikov questions whether this leads to a conclusion that the common interest of the States parties in ensuring the prevention of acts of torture 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. The Court's position to the effect that any State party does have such a right is not based on the interpretation of the Convention. In fact, its provisions which allow any State party to shield itself from accountability before the Court as well as from the scrutiny of the Committee against Torture point to the opposite conclusion.

Judge Skotnikov observes that 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 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 the draft Articles, the Commission 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."

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

Accordingly, Judge Skotnikov concludes 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.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 16 parts, Judge Cançado Trindade begins by explaining that, although he has concurred with his vote to the adoption of the present Judgment in the case concerning Questions Relating to the Obligation to Prosecute or Extradite, for supporting the establishment by the ICJ of violations of Articles 6(2) and 7(1) of the 1984 U.N. Convention against Torture (CAT Convention), its assertion of the pressing need to take measures to comply with the duty of prosecution under that Convention, and its correct acknowledgment of the absolute

prohibition of torture as one of jus cogens, — yet, there were two points of the Court's reasoning that he found inconsistent with its own conclusions, and on which he has 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.

2. He thus feels bound, and cares, to leave on the records the foundations of his own personal position thereon, and on certain other related issues. His reflections, developed in the present Separate Opinion, pertain — as he indicates in part I — to considerations at factual, conceptual and epistemological levels, on distinct points in relation to which he does not find the reasoning of the Court entirely satisfactory or complete. As to factual considerations, he begins by reviewing the factual background of the present case, as reported in the findings (of 1992) of the Chadian Commission of Inquiry, as to the regime Habré in Chad (part II).

3. Such findings, — referred to by both Belgium and Senegal in the written and oral phases of the proceedings before this Court, — comprise: a) the organs of repression of the regime Habré in Chad (1982-1990); b) the systematic practice of torture of persons arbitrarily detained; c) the extra-judicial or summary executions; and d) massacres, and the intentionality of extermination of those who allegedly opposed the regime. According to the 1992 Report of the Truth Commission of the Chadian Ministry of Justice, — referred to by both Belgium and Senegal, — the numerous grave violations of human rights and of international humanitarian law committed during the Habré regime left 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".

4. Judge Cançado Trindade next reviews the decision (of 19.05.2006) of the U.N. Committee against Torture in the case (lodged with it by the alleged victims on 18.04.2001) of Souleymane Guengueng et alii versus Senegal (part III). The petitioners or authors of the communication were 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. The Committee, — after referring to the findings in the 1992 Report of the Chadian Truth Commission (supra), and further recalling the initiatives of legal action (from 2000 onwards) on the part of the alleged victims against Mr. H. Habré, in Senegal and in Belgium, — found the communication or petition 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".

5. As to the merits, the Committee found that Senegal had not fulfilled its obligations under Article 5(2) of the U.N. Convention against Torture; the Committee pondered that "the reasonable time-frame" within which the State Party should have complied with the obligation under Article 5(2) of the CAT Convention had been "considerably exceeded". The Committee found that Senegal was under an obligation to prosecute Mr. H. Habré for alleged acts of torture; as Senegal decided, so far, neither to prosecute nor to extradite him, the Committee found that it had failed to perform its obligations also under Article 7 of the CAT Convention. The Committee then concluded that Senegal violated Articles 5(2) and 7 of the CAT Convention, — a decision of particular relevance to the present case before this Court.

6. Next, and still with regard to factual considerations, Judge Cançado Trindade reviews the responses provided by both Belgium and Senegal to the questions he deemed fit to put to both parties (part IV), at the end of the public hearings before the Court (on 16.03.2012). The probative value of the evidence produced, and invoked by the parties, appeared clear; in any case, — he adds, — it is for the competent tribunal to be eventually entrusted with the trial of Mr. H. Habré to

pronounce on the issue. Moving on to the "everlasting quest for the realization of justice" in the present case, Judge Cançado Trindade reviews (part VI): a) legal actions in domestic courts (in Senegal and Belgium); b) Belgium's requests of extradition; c) initiatives at international level (e.g., African Court on Human and Peoples' Rights, Court of Justice of the Economic Community of West African States [ECOWAS], U.N. Committee against Torture and the rapporteur of the CAT Convention on the follow-up of communications or petitions, Office of the U.N. High Commissioner for Human Rights); c) initiative of entities of African civil society; and d) initiatives and endeavours of the African Union (part VII).

7. Moving on to his considerations at the conceptual and epistemological levels, Judge Cançado Trindade sustains the view (part V) that 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", as "we are in face of peremptory norms of international law, safeguarding the fundamental rights of the human person. (...). In the domain of jus cogens, such as the absolute prohibition of torture, the State obligations are of due diligence and of result" (para. 44). Otherwise, — he adds, — "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" (para. 45).

8. He further explains that the aforementioned distinction between the two kinds of obligations "introduced a certain hermeticism into the classic doctrine on the matter, generating some confusion" (resulting from the undue transposition into international law of a distinction proper to civil law/droit des obligations), and not appearing much helpful in the domain of the international protection of human rights (paras. 46-47). It is thus not surprising to find — he proceeds — that the said distinction has been highly criticized in legal doctrine, and has failed to have any significant impact on international case-law. Obligations endowed with an imperative character are to be complied with, in the light of fundamental principles enunciated in the Universal Declaration of Human Rights, one of such principles being that of respect of the dignity of the human person.

9. 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. In the framework of the International Law of Human Rights, wherein the U.N. Convention against Torture is situated, — Judge Cançado Trindade proceeds, — "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)" (para. 50).

10. Judge Cançado Trindade stresses the manifest urgency surrounding the present case (affecting the surviving victims of torture, or their close relatives), since the Court's Order of 28.05.2009; in his view, as he sustained in his (previous) Dissenting Opinion appended to that Order, the Court should have then indicated provisional measures of protection (part VIII), to avoid all the uncertainties that have taken place ever since, and to assume the role of a guarantor under the U.N. Convention against Torture. In his view, the Court was mistaken not to have ordered provisional measures of protection, as

> "[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 (...) serves the prevalence of the rule of law at international level" (para. 76).

11. Judge Cançado Trindade further criticizes the attitude of "laisser passer" of the Court's Order of 28.05.2009; in his own words,

"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" (para. 79).

12. The acknowledgment of the urgency of the situation, — he adds, — has at last been made by the ICJ: it underlies its present Judgment on the merits of the case, wherein it has 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 dispositif).

13. Judge Cançado Trindade then moves on to an issue he ascribes the utmost importance: the absolute prohibition of torture in the realm of jus cogens (part IX). He singles out, to start with, the conformation of a true international legal regime against torture, which finds expression at both normative and jurisprudential levels. In this respect, he examines, first, the international instruments on the matter, demonstrating that torture is 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, in his perception, a normative convergence to this effect. And secondly, he examines the relevant international case-law which provides judicial recognition of the existence of such international legal regime of absolute prohibition of all forms of torture.

14. In logical sequence, Judge Cançado Trindade addresses the fundamental human values underlying that prohibition, after observing that "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" (para. 92), of its devastating consequences. And he adds that

"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" (para. 84).

15. On the basis of his examination of the pertinent case-law of contemporary international tribunals, Judge Cançado Trindade further warns that

> "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" (para. 98).

16. In his next line of considerations (part X), Judge Cançado Trindade observes that, as the CAT Convention sets forth the absolute prohibition of torture, belonging to the domain of jus cogens, obligations erga omnes partes ensue therefrom. He recalls that, significantly, this had been expressly acknowledged by the two contending parties, Belgium and Senegal, in the proceedings before the Court, in response to a question he put to both of 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.

17. Such obligations erga omnes partes, — he proceeds, — grow in importance in face of the gravity of breaches of the absolute prohibition of torture, and conform the collective guarantee of the rights protected under the CAT Convention. He then supports the "material expansion" of jus cogens and the corresponding obligations erga omnes of protection, "in their two dimensions", namely, the horizontal (vis-à-vis the international community as a whole) as well as the vertical (projection into the domestic law regulation of relations mainly between the individuals and the public power of the State).

18. In sequence, Judge Cançado Trindade stresses the gravity of the human rights violations in the practice of torture, and the compelling struggle against impunity (part XI). The collective guarantee of the protected rights under human rights treaties was devised, in order to face and fight the human cruelty at the threshold of gravity. In the same line of thinking, the inadmissibility of impunity of the perpetrators is widely upheld. In this connection, Judge Cançado Trindade then examines the position taken, on distinct occasions, by Chad, against impunity, in the case of Mr. H. Habré. He ponders that "[i]mpunity, 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" (para. 124).

19. He further observes that the Court, in paragraph 68, captures the rationale of the CAT Convention (paras. 122-123), with the latter's denationalization of protection, and assertion of the principle of universal jurisdiction. Yet, in doing so, — he adds — 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). Judge Cançado Trindade then ponders that

> "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" (para. 123).

20. Judge Cançado Trindade concludes this section of his Separate Opinion by examining the struggle against impunity in the Law of the United Nations. He recalls the relevant provisions, in this respect, of the final document of the II World Conference of Human Rights (Vienna, 1993), — the Vienna Declaration and Programme of Action, and the subsequent work, in pursuance of those provisions, undertaken by the [former] U.N. Commission on Human Rights, and its [former] Sub-Commission on the Promotion and Protection of Human Rights, which engaged themselves in producing, e.g., 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), among other initiatives. In addition to several pertinent resolutions of the General Assembly and the Security Council, reference is also made to the general comment n. 31 (of 2004) of the Human Rights Committee (supervisory organ of the U.N. Covenant on Civil and Political Rights).

21. In part XII of his Separate Opinion, Judge Cançado Trindade reminds that the prohibition of torture (enshrining fundamental human values) is one of both conventional as well as customary international law. He refers, in this respect, to the 2005 study on Customary International Humanitarian Law undertaken by the International Committee of the Red Cross (ICRC), and to the general comment n. 2 (of 2008) of the U.N. Committee against Torture. He then draws attention to the point that the Court's determination as to the existence of a dispute rested on purely factual considerations of the case at issue. This is, in his view, distinct from an examination by the Court of whether there is a legal basis of jurisdiction (under Article 30(1) of the CAT Convention) over claims of alleged breaches of customary international law obligations.

22. The Court thus has, in his view, improperly stated that it did not have jurisdiction to dwell upon alleged 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). What the Court really wished to say, in his 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. 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.

23. In the following part (XIII) of his Separate Opinion, Judge Cançado Trindade draws on the décalage to be bridged between the time of human justice and the time of human beings, so as to avoid further undue delays in the realization of justice in the present case. He then warns that

> "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. (...)
>
> (...) 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, — until that violation ceases.
>
> 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" (paras. 147-149).

24. In Judge Cançado Trindade's conception, in the present domain of protection, time is to be made to work pro persona humana, pro victima. As to the principle aut dedere aut judicare set forth in Article 7(1) of the CAT Convention, the segment aut judicare is ineluctably associated with the requirement of absence of undue delays. 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 his understanding, 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.

25. In Judge Cançado Trindade's understanding, "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". He adds that "[t]here 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" (para. 157).

26. He regards 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)", as one of the most significant passages of the present Judgment (part XIV). Accordingly, — he proceeds, — the Court should not have promptly turned around to insert into its reasoning the issue of non-retroactivity; it did 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 then regrettably embarked on a "regressive interpretation" of Article 7(1) of the CAT Convention.

27. The Court did 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 (the B. Ltaief and the S. Guengueng cases, of 2003 and 2006, respectively), wherein the Committee overruled its previous decision relied upon by the Court in its reasoning. Moreover, the two contending parties in the present case, Belgium and Senegal, agreed that the obligation under Article 7(1) of the CAT Convention can apply to offences committed before the CAT Convention entered into force for the States concerned.

28. The Court, however, — he continues, — "has proceeded to impose a temporal limitation contra legem to the obligation to prosecute under Article 7(1) of the CAT Convention". It overlooked another point, that "occurrences of systematic practice of torture conform continuing situations in breach of the CAT Convention, to be considered as a whole, without temporal

limitations decharacterizing it, until they cease" (para. 165). Nor has the Court taken into account that: a) the approaches of domestic criminal law and contemporary international criminal law are distinct, with regard to pleas of non-retroactivity; and b) 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.

29. Ultimately, and summing up, Judge Cançado Trindade concludes on this point that

> "the Court has pursued, on this particular issue, a characteristic 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. (...)
>
> Accordingly, it would seem inconsistent with the object and purpose of the Convention CAT 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" (paras. 166 and 168).

30. Judge Cançado Trindade then turns to his remaining line of considerations on restorative justice (part XV). To him, the growing awareness nowadays of, and the growing attention shifted to, the sufferings of victims of grave breaches of the rights inherent to them, as well as the corresponding duty to provide reparation to them, demonstrate that this whole matter has become, in our days, a legitimate concern of the international community, envisaging the individual victims as members of humankind as a whole. Developments in the International Law of Human Rights and contemporary International Criminal Law have much contributed to this.

31. It appears — he proceeds — that restorative justice (present from ancient to modern legal and cultural traditions), is reflourishing in our times, shifting attention from the punishment of offender (central to retributive justice) also to the provision of redress to individual victims. It so appears that "restorative justice may have faded" (until the mid-XXth century), but "did not vanish". In Judge Cançado Trindade's perception,

> "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.
>
> (...) The realization of justice appears, after all, as a form of reparation itself, rehabilitating — to the extent possible — victims (of torture). (...) 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" (paras. 171-172).

32. To him, 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 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, — he adds, — "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" (para. 174).

33. Last but not least, Judge Cançado Trindade turns to his concluding reflections (part XVI). He nourishes 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 make time work pro persona humana, pro victima. 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, — he adds, — 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. To him, what stands above all is the imperative of universal justice, in line with jusnaturalist thinking.

34. He ponders that, in this new and wider horizon, of the universalist international law, the new universal jus gentium of our times, — 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, rendering it 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" (para. 178).

35. The advent of the International Law of Human Rights, in his perception, "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. (...) This development has a direct bearing on reparations due to victims of torture" (para. 179). Rehabilitation of victims, in his understanding, 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 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)" (para. 180).

36. In Judge Cançado Trindade's conception, with the acknowledgment that the realization of justice, with the judicial recognition of the sufferings of the victims, is a form of the reparation due to them, we have moved from jus dispositivum to jus cogens, beyond the traditional inter-State outlook. Here, the central position is that of the individual victims, rather than of their States; "had the inter-State dimension not been surmounted, not much development would have taken place in the present domain" (para. 181). And he adds that

> "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" (para. 182).

37. To Judge Cançado Trindade, the jus cogens prohibition of torture contains no limitations in time or space; it has discarded all such limitations, with 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'" (para. 183). State duties (of protection, investigation, prosecution, sanction and reparation) emanate directly from international law. To Judge Cançado Trindade, 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 (recalled by the U.N. Convention against Torture itself); "[a]n ethical content is thus rescued and at last ascribed to the jus gentium of our times" (para. 184).

Separate opinion of Judge Yusuf

1. In his separate opinion, Judge Yusuf expresses his views on three key aspects of the Judgment namely: the Court's reliance on Article 30 of the Convention against Torture (CAT) to found its jurisdiction; Senegal's obligation under Article 6 (2) of the Convention and the inquiry it carried out in 2000; and the Court's interpretation of the obligation aut dedere aut judicare contained in Article 7 (1).

2. First, Judge Yusuf disagrees that the jurisdiction of the Court in the present case can be founded on Article 30 of the Convention against Torture (CAT) since two of the four conditions, prescribed by the provision have not been met. These conditions are: (a) that the dispute could not be settled by negotiation; and (b) that the Parties were unable to agree on the organization of arbitration. With respect to the condition that the dispute could not be settled by negotiation, he agrees with the Court's finding that the formula "cannot be settled" implies that "no reasonable probability exists that further negotiations would lead to a settlement". However, he holds the view that the Court drew incorrect conclusions from these statements in light of the evidence available. A review of the evidence demonstrates that neither a deadlock nor an impasse was ever reached in the negotiations between the Parties, and that those negotiations continued even after the filing of Belgium's Application with the Court. Thus, he finds it unpersuasive for the Court to conclude that, by 2006, the dispute could not be settled through negotiation and negotiations offered no further prospect for settlement.

3. Regarding the requirement that the parties are unable to agree on the organization of arbitration, Judge Yusuf notes that this implies an attempt to initiate the organization of the arbitration, or a suggestion of modalities by one or both parties regarding such organization. The proposal by one or both parties, showing an effort to organize arbitration, is thus to be distinguished from the request for arbitration and has to be subsequent to it. He states that in light of the fact that Senegal acknowledged Belgium's initial request for arbitration, the onus lay on Belgium, as the requesting State, to take steps to suggest the procedure for organizing the said arbitration. In his view, the present case is different from DRC v. Rwanda and from Libya v. USA, where the Conventions concerned included similar treaty provisions. Absent such inability to agree, the dispute cannot be referred to the Court, and if it is referred to the Court, the latter has no jurisdiction on such a dispute, since a basic condition of Article 30 has not been satisfied. The Court should have therefore concluded that it had no jurisdiction under Article 30 of the CAT, and should have instead based its jurisdiction on the declarations made by Belgium and Senegal under Article 36, paragraph 2, of its Statute.

4. Secondly, Judge Yusuf disagrees with the Court's finding that Senegal breached its obligation under Article 6 (2) in 2000, and states that a clear distinction should have been made between the steps taken by the Senegalese authorities in 2000, and the absence of similar acts following the submission of new claims against Mr. Habré in 2008. He holds the view that the nature and scope of such a preliminary inquiry is determined to a large extent by domestic law and the circumstances of the case. As such, the Court should not be dismissive of a State's choice of means for conducting such a preliminary inquiry. In his opinion, 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 in 2000. Judge Yusuf also observes in his separate opinion that the Judgment elevates a preliminary inquiry to the level of a full investigation and appears to suggest the existence of a general standard for the conduct of such inquiries.

5. Finally, while Judge Yusuf agrees with the Court's interpretation of the obligation aut dedere aut judicare contained in Article 7 (1) of the CAT, he believes that the Court could have further clarified the meaning and nature of this obligation within the context of this Convention. He notes that the prevalence of the formula aut dedere aut judicare has led to some confusion within legal scholarship over the relationship between extradition and prosecution in conventional clauses containing this formula. He briefly reviews the variety of provisions with a similar construction and notes that in light of the Court's interpretation of Article 7 (1), Belgium had no right to insist upon the extradition of Mr. Habré. Judge Yusuf emphasizes that in the context of the Convention, 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. Extradition is an option which a State may adopt to relieve itself of the obligation to submit the case for prosecution; but extradition itself is not an obligation under the CAT.

Dissenting opinion of Judge Xue

In principle, Judge Xue agrees with the Judgment that Senegal as a party to the Convention against Torture 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, she disagrees with the majority of the Members of the Court on a number of issues in the Judgment.

On the issue of admissibility, Judge Xue considers that the nationality of the victims 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 should be inadmissible. In her view, Belgium's law and practice have relevance to the issue in this case.

Judge Xue recalls that Belgium amended its criminal law in 2003, which 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. She further adds that Belgian judicial decisions indicate that the legislative intention of such amendment was to avoid "an obviously abusive political use of this law" by those who settled in Belgium "for the sole purpose of obtaining the possibility . . . of securing the jurisdiction of the Belgian courts".

Judge Xue holds that, by its own legislative and judicial acts, particularly the jurisdictional limits its 2003 law imposes on passive nationality, Belgium is precluded from denying the applicability of the nationality rule in case it wishes to exercise passive personal jurisdiction. She does not think Belgium has provided any evidence to show that the national link of the victims is not solely meant to secure the jurisdiction of the Belgian courts.

Judge Xue regrets that the Court fails to address this crucial issue presented by Senegal in the Judgment, and instead bases its reasoning on the notion of obligations erga omnes partes.

By virtue of the nature of such 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 the Convention. She is of the opinion that this conclusion is abrupt and unpersuasive. Judge Xue expresses the concern that the Court's reference to the Barcelona Traction case misuses the obiter dictum with regard to obligations erga omnes. She observes that in that case, in terms of standing, 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.

Secondly, Judge Xue considers that the Court's view on obligations erga omnes partes in this case is not in conformity with the rules of State responsibility. She observes that even though prohibition of torture has become part of jus cogens in international law, such obligations as to make immediately an inquiry and the obligation to prosecute or extradite under the Convention are treaty rules, subject to the terms of the Convention. In her view, 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. She adds that a State party must show what obligations that another State party owes to it under the Convention have been breached, and such 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.

Judge Xue adds that thirdly, the Court's reasoning on admissibility is contrary to the terms of the Convention. She observes that conditions for the operation of the monitoring and communication mechanisms demonstrate that the State parties in no way intended to create obligations erga omnes partes under the Convention. 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.

Regarding the relationship between the obligations concerned, Judge Xue is of the view that 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.

In her consideration, 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. 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. She takes the view that 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. In her opinion, 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.

On Article 6, paragraph 2, Judge Xue considers that in 2000, when the first complaint was filed in the Senegalese courts, the Senegal competent authorities did take legal action and actually indicted Mr. Habré. 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. Under such circumstances, the Court's pronouncement on the obligation to make a preliminary inquiry under Article 6, paragraph 2, seems unnecessarily formalistic.

On the obligation aut dedere aut judicare under Article 7, paragraph 1, Judge Xue disagrees with the majority on the interpretation of this clause. In her view, 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. She considers that while the decision on extradition is still pending, it is questionable for Belgium to claim that Senegal has breached its obligation under Article 7, paragraph 1, for failing to prosecute. She expresses the concern that 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. While acknowledging that Belgium's request for extradition has actually pushed the process to bring Mr. Habré to prosecution, she questions whether it goes beyond the legal framework of the Convention by giving a State party an entitlement to monitor the implementation of any State party on the basis of erga omnes partes. When the decision on prosecution is taken or extradition request is being considered under due process, she finds it questionable for the Court to pronounce that Senegal has breached its obligation under Article 7, paragraph 1.

On the issue of referral of the Habré case to the African Union (AU), Judge Xue considers that none of the decisions taken by the Organization can be considered as contrary to the object and purpose of the Convention, and 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. She is further of the view that 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.

Judge Xue recognizes that as a State party to the Convention, Senegal cannot justify its failure to implement its obligations by claiming financial difficulties. However, in her opinion, the Court should not downplay the practical difficulties that Senegal faces in the preparation of the trial, given the scale of the trial with tens of thousands of victims and hundreds of witnesses. 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. After giving examples of the Special Court

for Sierra Leone, the Special Tribunal for Lebanon, and the International Criminal Tribunal for the former Yugoslavia, Judge Xue concludes that, the Hissène Habré trial being the first case of its kind, it is only prudent for Senegal to get things ready before the prosecution commences.

In conclusion, Judge Xue disagrees 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, nevertheless, she wishes to reiterate her 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.

Declaration of Judge Donoghue

Judge Donoghue agrees with the Judgment of the Court and submits a declaration in order to address in additional detail the meaning 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"). She agrees with the Court that Article 7, paragraph 1, sets forth an obligation to prosecute, not an obligation to extradite. This obligation arises as a result of the presence of the alleged offender in the territory of a State party, regardless of whether there has been an extradition request for that individual.

With respect to the question of Belgium's standing to bring this case to the Court, Judge Donoghue notes her agreement with the conclusion that Senegal's duties to conduct a preliminary inquiry and to submit Mr. Habré's case for prosecution, if it does not extradite him, are duties erga omnes partes. She also observes that the Court has treated the question whether the duties imposed by Article 6, paragraph 2, and Article 7, paragraph 1 are erga omnes partes as an aspect of the admissibility of Belgium's claims. It is not obvious, however, that substantive obligations created by the Convention should be considered as a question of admissibility, rather than on the merits. In future cases premised on alleged non-compliance with obligations erga omnes partes, a different approach may be necessary.

On the question of the temporal scope of Article 7, paragraph 1, Judge Donoghue agrees with the Court's conclusion that Senegal's obligation to submit Mr. Habré's case to prosecution does not extend to offences alleged to have taken place prior to the date of the Convention's entry into force. The conclusion that Senegal is not required to submit these earlier offences for prosecution does not mean that it is precluded from doing so. Moreover, there are serious allegations of Mr. Habré's responsibility for torture during the period after entry into force of the Convention.

Separate opinion of Judge Sebutinde

Judge Sebutinde expresses her disagreement with the Court's reasoning behind the operative paragraph 122 (1) of the Judgment. While agreeing with the Court's finding that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of the Convention against Torture, Judge Sebutinde nonetheless considers 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 Article 30, paragraph 1, of the Convention against Torture.

In Judge Sebutinde's view, the cumulative preconditions for the Court's jurisdiction under Article 30, paragraph 1, of the Convention against Torture, have not been fulfilled in the present case. In particular, she is of the view that, measured against the rather strict standard concerning the "failure of negotiations" as established in the Court's jurisprudence, the diplomatic exchanges between the Parties do not support the conclusion that negotiations between the Parties concerning

Senegal's obligations under the Convention had failed by June 2006, as Belgium claims, nor at any other time prior to the date of Belgium's Application on 19 February 2009. In addition, Judge Sebutinde is of the view that 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 also not been met.

In the absence of the Court's jurisdiction pursuant to Article 30, paragraph 1, of the Convention, Judge Sebutinde nonetheless considers that the Court has jurisdiction over the dispute between the Parties concerning the alleged violations by Senegal of the Convention against Torture, pursuant to the Parties' declarations under Article 36, paragraph 2, of the Statute of the Court. She recalls that by virtue of reciprocity applied to the two declarations of acceptance, the jurisdiction of the Court on that basis extends to all legal disputes arising between the Parties after 2 December 1985, provided that they concern situations or facts subsequent to 13 July 1948, 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. In her view, the present dispute between the Parties concerning Senegal's obligations under the Convention against Torture clearly falls within the material and temporal scope of the Parties' declarations and the Court's jurisdiction over that dispute is not precluded by virtue of the Parties' reservation regarding agreements on an alternative method of settlement.

Finally, Judge Sebutinde points out that the Court's jurisdiction pursuant to Article 36, paragraph 2, of the Statute of the Court, does not extend to 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 against Torture, since no dispute between the Parties existed in this regard at the date of Belgium's Application.

Dissenting opinion of Judge ad hoc Sur

In his dissenting opinion, Judge ad hoc Sur regrets the hasty nature of the reasoning of the Judgment and the excessive number of unproven statements underlying the solution adopted by the Court. The solution would seem to be more in keeping with an advisory opinion on the Convention against Torture than the settlement of a dispute between two States. Lastly, he sets out the reasons why he voted against subparagraphs (2), (3) and (5) of the operative part.

With respect to the jurisdiction of the Court, Judge ad hoc Sur considers that three issues have not been properly considered or settled in the Judgment. Firstly, he considers that the subject-matter and the critical date of the dispute are not adequately stated in the Judgment. In his view, the dispute does not concern the interpretation of the Convention against Torture, but rather an alleged delay in its implementation and enforcement by Senegal. Secondly, he has doubts whether the precondition concerning the inability to agree on the organization of arbitration, provided for in Article 30 of the Convention against Torture, has been met. Thirdly, he considers that the refusal of the Court to hear the dispute regarding customary rules is unfounded and that the Court should have ruled on the merits of Belgium's claim in that regard.

Judge ad hoc Sur disagrees with the Court's position on the admissibility of Belgium's Application. The Court bases itself on the existence of an obligation erga omnes partes on the Parties in the Convention against Torture: to submit to their competent authorities for the purpose of prosecution suspicions concerning individuals present in their territory. Any State party would then be allowed, on that basis alone, to request any other State party that might have failed to comply with that obligation to cease its breach thereof. First, he recalls that Belgium initially based its claim on its passive criminal jurisdiction, but the Court excluded an examination of this basis. Furthermore, while emphasizing that the prohibition of torture is both an intransgressible and an erga omnes partes obligation, Judge ad hoc Sur considers that the erga omnes partes character of

the obligation does not extend to all the other obligations under the Convention, in particular the obligation to institute proceedings. Only certain categories of interested parties can claim a right in that regard, and that is not the case for Belgium. Recalling the general rules of interpretation of treaties, he emphasizes the textual difficulties of such a conception of the obligation, which is asserted rather than proven, and the lack of relevant practice of the parties supporting the Court's position on this point, even though the Convention has been in force for 25 years. He concludes that Senegal is required to submit the case to its competent authorities for the purpose of prosecuting Mr. Hissène Habré, but that Belgium does not thereby derive a right it can claim from Senegal.

As regards the merits of the case, Judge ad hoc Sur agrees with the position of the Court in finding that Senegal has breached the obligation under Article 6, paragraph 2, of the Convention against Torture to immediately make "a preliminary inquiry into the facts" when a person suspected of acts of torture is found in its territory. He also agrees with the position of the Court when it considers that the dispute regarding the establishment of Senegal's jurisdiction under Article 5 of the Convention against Torture is extinguished. However, he disagrees with subparagraph (5) of the operative part which finds that Senegal has breached its obligation under Article 7, paragraph 1, of the Convention to submit the case to its competent authorities for the purpose of prosecution. In his opinion, the subject-matter of the dispute is Senegal's delay in submitting the case to its competent authorities for the purpose of instituting proceedings and this delay is not unjustified to the extent that it constitutes a breach of its obligation. Following Belgium's requests in 2005, Senegal initiated the necessary reforms of its domestic law, which were carried out in 2007, kept Hissène Habré under house arrest, prohibited him from leaving the territory and set about organizing a trial. The period that has elapsed since Belgium's request is no longer than the time Belgium itself took to investigate the case. Furthermore, Senegal's public authorities, at the governmental level, are taking practical steps to open a trial shortly and have sought and obtained international co-operation to that effect. Accordingly, Judge ad hoc Sur regrets the finding of a failure by Senegal to fulfil its obligation in that regard, a finding which ignores the existence of an ongoing process instead of encouraging it.

In this spirit, he shares the unanimous decision of the Court, stated in subparagraph (6) of the operative part, that Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution.

Lastly, Judge ad hoc Sur considers that, on the basis of the Convention, Belgium is not entitled to obtain Hissène Habré's extradition, and he regrets that no element of the operative part concerns this request presented by Belgium in its submissions.

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