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15 mars 2012 à 10 heures

15 March 2012 at 10 a.m.

8 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of Senegal. Senegal will conclude this first round of oral argument at the sitting tomorrow, Friday 16 March, from 10 a.m. to 1 p.m.

Before I give the floor to Senegal, I should first like to extend the Court's deepest sympathy to the representatives of the Kingdom of Belgium, following the tragic accident which befell a school coach in Switzerland on 13 March 2012, bereaving a number of Belgian families. I should be grateful if you would send our sincerest condolences to the victims' families, and to the Belgian people and Government. The victims also included Dutch schoolchildren; we would like to extend our sincerest sympathy to their families and to the Dutch people and Government.

I now give the floor to H.E. Mr. Cheikh Tidiane Thiam, Agent of the Republic of Senegal. You have the floor, Mr. Thiam.

Mr. THIAM: Thank you, Mr. President. Mr. President, Members of the Court, I would like to pay tribute to the Belgian citizens who have died so tragically, and extend my sincerest condolences as well as those of the Senegalese delegation and Government at this sad time. We also send our deepest condolences and sympathies for the Dutch citizens who lost their lives at the same time.

SENEGAL'S POSITION BEFORE THE COURT

1. Mr. President, Members of the Court, I have the honour to appear before you once again, having previously been invited to address you in connection with the examination of the Kingdom of Belgium's Application of 19 February 2009 concerning what it presented as a dispute regarding

9 "Senegal's compliance with its obligation to prosecute Mr. H. Habré [former President of Chad] or to extradite him to Belgium for the purposes of criminal proceedings", and the request submitted on the same date for the indication of provisional measures against Senegal on the basis of Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court.

2. I would like to express my country's great respect and esteem for this, the United Nations' highest judicial institution and its Members, and for the irreplaceable contribution it has made to peace between nations by strengthening relations under the governance of law.

3. In deciding to send representatives to the Court for the case with Belgium, in what is a worrying national political context, it was Senegal's intention to show its deep respect for the Court and its high regard for Belgium, as well as its recognition of the importance of the case before you as regards respect for the law.

4. Senegal is grateful to Belgium for referring to the excellent relations between our two countries, which the present proceedings will do nothing to alter. Today those relations are focused more than ever on deepening what is already long-standing, varied and mutually beneficial co-operation.

5. Mr. President, Members of the Court, the regrettable fact that Belgium has brought proceedings against our country before the Court, albeit for probably no other reason than to bring to justice a man allegedly responsible for serious crimes condemned by the whole of the international community, has inevitably added to the many obstacles which have already, for several years now, hindered Senegal's tireless efforts to fulfil its international obligations and thereby to contribute in real terms to the avowed fight against impunity.

6. These proceedings, paradoxically brought against a country which honours the law and respects the human person and which has a deeply held belief — hardly needing to be shown off in its Constitution — that human life is sacred, were only ever likely to harm its ongoing efforts to assume voluntarily and fulfil in practice its international obligations under the United Nations Convention against Torture of 10 December 1984 and under any other relevant source in international law, which it naturally recognizes and accepts. As it described at length in the previous phase of the proceedings, Senegal has never disputed its duty, in the circumstances of the present case, to execute the obligations arising from the 1984 Convention. As the first country in the world to ratify the Rome Statute establishing the International Criminal Court, and whose well-known commitment to human rights has meant that it has proudly been elected and re-elected to the Human Rights Council, where it enjoys an enviable status and respect because of the role it has played there, Senegal cannot be tempted to pick and choose which sources of obligations should guide it in combating serious violations of human rights such as those associated with acts of torture, war crimes, crimes of genocide and crimes against humanity. Having ratified almost all

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human rights legislation, Senegal even welcomes the consequences of the position in which it has voluntarily placed itself in order to help to fight for human rights and against all forms of impunity.

7. Mr. President, Members of the Court, we would like to reassure Belgium. Senegal is not trying to hide from its commitments. What it is trying to do is to adopt an appropriate course which takes account of the need to make reasonable use of time, so that it can overcome any temptation to inaction and work towards fulfilling its obligations.

8. As it recalled at length in the previous phase of the proceedings, concerning the Court's response to Belgium's request for the indication of temporary measures against Senegal, my country has never disputed its duty, in the circumstances of the present case, to execute its international obligations to "prosecute" or "extradite" which flow mainly from the 1984 Convention.

9. At this point, therefore, Senegal would like to make it clear to the Court, with the greatest respect, and to remind Belgium once and for all that, far from seeking to dismiss any relevant source requiring Senegal to prosecute or extradite Mr. Habré in the present circumstances, Senegal

11 has adopted a comprehensive approach based on conventional law and on any other rules or principles which Belgium may have shown to be binding on Senegal. Senegal's determination to comply with its international obligations will be evident from a brief recapitulation of the facts, which will show that, despite the apparent complexity of the case, the responsibilities involved are remarkably simple.

Recapitulation of the facts

10. Mr. Hissène Habré, President of the Republic of Chad from 1982 to 1990, was overthrown on 1 December 1990. After a brief stay in Cameroon, he requested political asylum from the Senegalese Government, a request which was granted. Since then he has made his home in Dakar, where he lives with his family and some of his close relatives.

11. In January 2000, Suleymane Guengueng and others, claiming to be victims of abuses committed against them by President Habré's régime, filed a complaint with civil-party application with the senior investigating judge at the Dakar *Tribunal régional hors classe*, alleging the following offences:

— crimes against humanity;

— torture;

— acts of barbarity and discrimination;

— violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

— torture or murder (Articles 288 and 295-1 of the Senegalese Penal Code);

— enforced disappearance (Article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court).

12. On 3 February 2000, the then senior investigating judge indicted Hissène Habré for these offences before releasing him pending trial, under court supervision.

13. On 18 February 2000, through his counsel, Hissène Habré filed an application to annul the proceedings before the *Chambre d'accusation* of the Dakar Court of Appeal, citing the provisions of Article 27 of the Convention against Torture, Article 6 of the Constitution of the
12 Republic of Senegal, Article 669 of its Code of Criminal Procedure and Article 4 of its Penal Code, on grounds of lack of legal justification and expiry of the time-limit for prosecution.

14. On 4 July 2000, the *Chambre d'accusation* of the Dakar Court of Appeal annulled the record of the indictment and the subsequent proceedings on the ground that the court seised lacked jurisdiction.

15. On 20 March 2001, the Court of Cassation, ruling on an appeal brought by the civil parties on 7 July 2000, dismissed the appeal against the judgment handed down on 4 July 2000 by the *Chambre d'accusation*, thus confirming that the investigating judge to whom the case had been referred lacked jurisdiction.

The Court of Cassation gave the following reasons for its ruling:

> "Whereas Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 requires each State Party to take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him;
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> Whereas, therefore, Article 79 of the Constitution could not be applied, since Senegal needs to enact legislation before the Convention can be implemented;

> Whereas no procedural text provides the Senegalese courts with universal jurisdiction to prosecute and try — if found in the territory of the Republic — the presumed perpetrators (or their accomplices) of acts falling within the provisions of the Law of 28 August 1996 adapting Senegalese legislation to the provisions of Article 4 of the Convention, when those acts have been committed by foreigners outside the territory of Senegal."

16. Being no doubt dissatisfied with this ruling, the victims then brought a case before the Belgian courts based on the same acts. Mr. President, Members of the Court, it is clear that the Senegalese courts reacted promptly, in accordance with the legislation they regarded as relevant, without seeking or finding any grounds for delay which might have benefited the alleged perpetrator of the crimes in question. We shall be coming back to this statement, which we firmly believe to be true.

17. On 19 September 2005, after years of investigation, a Belgian judge issued a warrant for the arrest of Hissène Habré, thus enabling the Kingdom of Belgium to request Senegal to extradite him.

18. On 25 November 2005, the *Chambre d'accusation* of the Dakar Court of Appeal, ruling this time on the request for the extradition of Hissène Habré made by Belgium, held that it lacked

13 jurisdiction on the basis that Mr. Habré should be given jurisdictional immunity, which, far from causing him to be exonerated from criminal responsibility, was of a purely procedural nature within the meaning of the Abdulaye Yerodia Ndombasi judgment of 14 February 2002, which was handed down by the International Court of Justice in the case between the Kingdom of Belgium and the Democratic Republic of the Congo; this privilege was intended to survive the cessation of a person's duties as President of the Republic, whatever their nationality.

19. It was in this context, when extradition appeared to be completely out of the question, if we remember the terms of the judgment of 25 November 2005, that the Republic of Senegal, wishing to find a solution to the *aut dedere aut judicare* requirement contained in Article 7 of the Convention against Torture, one of whose options now seemed impossible and which lay at the heart of what had become "the Hissène Habré case", referred the matter to the African Union in order to obtain the help it needed to benefit from the Union's involvement and from the subsequent appeal for the international community's assistance in making determined progress towards prosecution as the only option left. On 2 July 2006, the African Union followed the

recommendations of eminent African jurists that it had appointed in January 2006 and asked Senegal to put Hissène Habré on trial.

Involvement of the African Union

20. This brings me to the involvement of the African Union. The Union, which considered itself affected by the issue and that Senegal was right to consult it, became involved at its summit in Khartoum (Sudan) in January 2006; this summit was the first time that Senegal had presented a document calling on the African Union for assistance. The Union subsequently adopted a decision[1] at the summit in Banjul (Gambia) in July 2006, calling on Senegal to prosecute and ensure that Hissène Habré was tried by a competent Senegalese court with guarantees for fair trial. The international community was invited to provide support for this trial.

14 21. What is striking at this stage is that, far from acting as mandator, in the legal and technical sense of the term, and despite the use of the word "mandate" in its decision, the African Union urged Senegal to comply with its international commitments, particularly those arising from its ratification of the Convention against Torture. Its decision, adopted in July 2006 in Banjul, was thus an entirely political document reaffirming Senegal's separate, individual commitment. I was invited to examine the text of the decision before it was adopted by the African Union Heads of State and Government at the summit, and I was able to ensure that the reference to the Convention against Torture was retained in the text, thus preventing any gap in the legal justification for Senegal's obligations and responsibilities in preparing for and holding Mr. Habré's trial.

22. The African Union is to support the Senegalese Government's efforts throughout this process, in which it has already provided significant assistance in assessing the budget for the trial, raising the necessary funding and organizing, to that end, a Donors Round Table, and in giving detailed consideration to the conditions for establishing an *ad hoc* international tribunal, as suggested in the decision of 18 November 2010 handed down by the Court of Justice of the Economic Community of West African States (ECOWAS) in response to Mr. Habré's complaint against Senegal. It is still keeping a close eye — the African Union, that is — on the action to be taken in response to the Kingdom of Belgium's extradition requests to Senegal.

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[1] Assembly/AU/3 (VII).

Involvement of the United Nations Committee against Torture

23. It should also be mentioned that, prior to the involvement of the African Union, the civil parties that had seised the senior investigating judge at the Dakar *Tribunal régional hors classe* had also, on 18 April 2001, filed a complaint with the United Nations Committee against Torture. On 17 May 2006, pursuant to Article 22, paragraph 7, of the Convention against Torture, the

15 Committee issued recommendations to the Government of Senegal. Mr. Oumar Gaye, counsel for Senegal in this case, will, with your permission, talk in greater detail about this important aspect: the monitoring of Senegal's application of the Convention against Torture and the use of recommendations to help to prevent impunity for any act of torture.

24. The State of Senegal responded to the recommendations of the Committee against Torture by bringing its legislation into conformity with the relevant rules of international law, in particular the Convention against Torture, which Senegal had ratified on 21 August 1987.

Legislative and constitutional reforms

25. I would briefly like to underline the major effort that has been made here — in a relatively short period, given the pace at which States are known to operate in this respect — by mentioning the legislative and constitutional reforms which Senegal has worked hard to complete. As early as November 2006, a commission was established to examine the question of adapting national legislation and to propose the necessary legislative and institutional reforms.

26. It is apparent today that all the legislative and constitutional reforms, of both form and substance, have already been made in order to give full effect to the provisions of the Convention and to create the ideal conditions for Mr. Habré's trial by the Senegalese courts and judges, on a fair and equitable basis.

Legislative reforms

27. Several reforms amending, supplementing or repealing certain provisions of the Penal Code and the Code of Criminal Procedure have been effected.

28. Law No. 2007-02 of 12 February 2007 introduced a number of articles — Articles 431-1 to 431-5 — defining and formally sanctioning the crime of genocide, crimes against humanity, war crimes and other crimes of international humanitarian law as specified by the 1954 Hague

Convention, the 1976 Convention and the 1980 Convention, which were not previously included in the domestic arsenal of criminal legislation.

29. Article 431-6 of the Penal Code provides that, notwithstanding the provisions of Article 4 of the Code, perpetrators of the offences referred to in Articles 431-1 to 431-5 may be
16 tried and sentenced for any act or omission, which, at the time and place where it was committed, was regarded as a criminal offence according to the general principles of law recognized by the community of nations, whether or not it constituted an infringement of the law in force at that time and in that place. This marks a considerable advance.

30. Article 669 of the Code of Criminal Procedure was also amended as follows:

> "Any foreigner who, outside the territory of the Republic, is accused of being the perpetrator of or accessory to one of the crimes referred to in Articles 431-1 to 431-5 of the Penal Code . . . or of acts referred to in Articles 279-1 to 279-3 and 295 of the Penal Code may be prosecuted and tried according to the provisions of Senegalese laws or laws applicable in Senegal . . . or if the Government obtains his extradition."

31. A new article, Article 664*bis*, has been inserted in Title XII of Book Four of the Code of Criminal Procedure. It reads as follows: "The 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."

32. As regards torture, the central crime in these proceedings before the International Court of Justice, no legislative reforms were necessary, as it was already included in Article 295-1 of Law No. 96-15 of 28 August 1996, which made it a punishable offence.

33. The final phase in this important task of revising the legislative texts was the far-reaching reform of the composition of the *Cour d'assises* and the way in which cases were referred to it. The two-tier court system in force in Senegalese criminal proceedings, which applied to the investigation — an obligatory step in criminal proceedings — was criticized for slowing down proceedings. It is therefore no longer compulsory for the investigating judge to order the file to be submitted to the higher-level *Chambre d'accusation*.

34. Now, after closing his criminal investigation, the investigating judge orders the file to be transmitted directly to the *Cour d'assises*.

35. The *Cour d'assises* has also undergone reform in that jurors, ordinary men and women who were involved in dispensing justice at this high level, no longer sit alongside the professional judges who constitute the court proper.

17 36. Observers had consistently criticized the presence of jurors as members of the *Cour d'assises*, since their lack of training could seriously jeopardize the aim of fairness in criminal proceedings.

37. An appeals system has also been created, whereby appeals can be brought against the first-instance rulings handed down by this court before another *Cour d'assises* appointed by order of the First President of the Supreme Court.

38. As we can see, these measures reflected Senegal's desire to incorporate in its domestic legislation important rules which protect human rights, such as those of the African Charter on Human and Peoples' Rights concerning fair and equitable trials. Next came the greater reform, to the Constitution as our fundamental charter, the effects of which would have a major impact on the handling of the worrying case concerning Mr. Habré.

Constitutional reform

39. Article 9 of the Constitution of Senegal set forth the principle of strict conformity with statute with regard to criminal offences. Before the Rome Statute and the legislative reforms which I have mentioned were ratified, the Senegalese legislature, concerned to ensure that the laws were constitutional, took steps to introduce an exception to that principle, in accordance with the legal régime for serious crimes covered by *jus cogens* and with the relevant provisions of the International Covenant on Civil and Political Rights. This is not the sort of reform that happens every day, not even in countries which support human rights and seek to protect them as much as possible.

40. The former Article 9 of the Constitution has therefore been replaced by the following provisions, which I will read out with your permission, Mr. President:

> "Any infringement of these freedoms and any intentional restriction of the exercise of a freedom shall be punishable by law.
>
> No one may be convicted other than by virtue of a law which became effective before the act was committed.

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

18 This therefore covers war crimes, even where they have been committed before the adoption of a rule sanctioning them.

41. While these legislative reforms constitute a legal basis for the proceedings which Senegal is now in a position to contemplate in order to execute its mandate from the African Union, appropriate organs are needed to implement them, such as investigating judges, prosecuting judges, a pool of registrars, a co-ordinator and a Committee on Follow-up and Communication. This whole range of organs has been introduced, partly, and indeed mainly, in order to ensure the best possible follow-up for the "Hissène Habré" case.

42. Mr. President, Members of the Court, with the completion of these legislative and constitutional reforms, which were, as I stressed earlier, entirely voluntary, particularly as regards the exception to the principle of non-retroactivity introduced into the Constitution, there appeared to be no further obstacles to progress towards the trial of Mr. Habré. The Donors Round Table for the funding of the trial, held in Dakar on 24 November 2010, generated sufficient funding pledges to cover the budget of around €8.6 million, or some CFA5,176,000,000. However, the decision handed down a few days earlier, on 18 November 2010, by the ECOWAS Court of Justice undermined this progress towards the holding of an early trial, since it ruled out prosecution by the Senegalese courts.

43. Of course, Senegal's commitments under the Convention against Torture remain, but account will now have to be taken of the new factor introduced by the decision of the ECOWAS Court of Justice.

44. It should be noted, however, that Belgium's persistence in repeatedly requesting Mr. Habré's extradition has led to the emergence of a further new and extremely important factor, which is that the Court of Appeal has, unexpectedly, abandoned its judgment of 25 November 2005, which had seemed to rule out altogether the possibility — now open — that any extradition request might be considered which complied with the formal requirements laid

19 down by Senegalese law. This fundamental reversal of its decision has allowed the Senegalese courts considerable breathing space and means that they can now co-operate with other countries

when they are called upon to consider any extradition request arising in such circumstances. This does, at least, re-open the other alternative to trial, and means that extradition can be seriously considered instead of prosecution.

45. Belgium might thus find that Senegal will do as it has asked and that its perseverance has paid off. Unless, that is, Belgium considers it preferable to insist on punishing Senegal instead of welcoming Senegal's granting of a request that appears generally acknowledged.

46. All in all, although there is, as Senegal has maintained throughout, no dispute between Belgium and Senegal on the application of the Convention against Torture, the difference seems to be as follows: that although they share the same aim of achieving prosecution, in which time is an important factor, Belgium seems less concerned than Senegal about using time in a way which acknowledges institutional realities as well as complying with legal requirements.

Mr. President, Members of the Court, thank you for your attention during my presentation. With your permission I would now like to invite Mr. Oumar Gaye, counsel, to speak about the State of Senegal's position of principle in response to the raising of the case by various international bodies. After Mr. Gaye, but probably tomorrow morning at the sitting devoted to our round of oral argument, the speakers will be Mr. François Diouf, Co-Agent, who will discuss the position of the dispute in this case, followed by Mr. Ibrahima Bakhoum, who will consider the question of admissibility, and Mr. Abdoulaye Dianko, also Senegal's counsel and *agent judiciaire de l'Etat*, who will speak about the absence of any internationally wrongful acts attributable to Senegal. Thank you for your attention.

The PRESIDENT: Thank you, Sir. I understand that Mr. Oumar Gaye will be the last speaker for Senegal today and that his address will take about one hour or one hour and ten minutes. In order not to interrupt his statement, the Court will take a break now, for 20 minutes. Please be prepared to continue the hearing from 11.20 a.m.

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The Court adjourned from 11 to 11.25 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and I immediately give the floor to Mr. Oumar Gaye, counsel and advocate for Senegal. You have the floor, Sir.

Mr. GAYE:

THE STATE OF SENEGAL'S POSITION OF PRINCIPLE IN RESPONSE TO THE RAISING OF THE CASE BY VARIOUS INTERNATIONAL BODIES

1. Mr. President, Members of the Court, as a Senegalese citizen and legal counsel, I am honoured to have been appointed by the Government of Senegal once again to defend its interests in this case brought by Belgium before your distinguished Court, following the hearings held here in April 2009.

2. Following on from the exhaustive review of the facts of the case by the Agent of Senegal, I shall reiterate the position of principle of the State of Senegal in response to the raising of the case by the Kingdom of Belgium in the context of various international bodies.

3. Mr. President, Members of the Court, as you know, the Kingdom of Belgium has presented tendentious arguments to your distinguished Court in an effort to demonstrate that the raising of the case of Mr. Hissène Habré before certain regional, continental or international bodies reflects a failure by Senegal to comply with the provisions of Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture.

4. It is necessary to reassert the truth about the approaches made to the United Nations Committee against Torture, the African Union and the Economic Community of West African States (ECOWAS), inasmuch as Senegal's position before these bodies has consistently reflected its desire and commitment to abide fully by the obligations incumbent on it, that is, those of a State Party to the 1984 Convention, by giving full and unreserved effect to the provisions of that Convention.

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5. It is worth recalling that Senegal, a State based on the rule of law, which respects human rights, is also deeply committed to the fight against impunity and the punishment of the most serious violations of international law, in the same way as other States that are members of the international community and share its ideals, since the crimes of international law undermine values deemed universal which have an impact on human dignity.

6. My statement will deal with the proceedings instituted by Senegal against Mr. Hissène Habré and I shall provide clarifications on the raising of the case before certain international bodies, but allow me first to point out before your distinguished Court that no doubts

whatsoever appear to have been expressed with regard to Senegal's good faith in the handling of "the Habré case".

I. Proceedings initiated by Senegal against Mr. Hissène Habré

7. For a proper understanding of the decision of 17 May 2006 by the United Nations Committee against Torture, it is worth recalling that in January 2000, following the filing of a complaint with civil-party application by Mr. Souleymane Guengueng and others, the senior investigating judge at the Dakar *Tribunal regional hors classe* indicted Hissène Habré, on 3 February 2000, for complicity in crimes against humanity, acts of torture and barbarity, and placed him under house arrest.

8. Mr. Hissène Habré then sought to avail himself of the means of redress made available by Senegalese law to any individual implicated in proceedings before criminal courts, without distinction of nationality, on the same basis as the civil parties.

9. In this connection, it should be emphasized that Senegal has never hindered the Senegalese courts in their consideration of the civil-party complaint or the rights of recourse exercised by Mr. Habré.

10. It was in this context that the C*hambre d'accusation* of the Court of Appeal, which had been seised by counsel for Mr. Hissène Habré, annulled, by judgment No. 135 of 4 July 2000, the record of the indictment and the subsequent proceedings on the ground that the court seised lacked jurisdiction.

11. The Court of Cassation, ruling on an appeal lodged by the civil parties against the judgment rendered by the *Chambre d'accusation* on 4 July 2000, dismissed the appeal, thus confirming, by its judgment of 20 March 2001, that the investigating judge to whom the case had been referred lacked jurisdiction.

22 12. The Court of Cassation's ruling was based on the following reasons:

> "Whereas Article 5, paragraph 2, of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 requires each State party to take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him;

> Whereas, therefore, Article 79 of the Constitution of Senegal could not be applied, since Senegal needs to enact legislation before the Convention can be implemented."

The court added:

> "Whereas no procedural text provides the Senegalese courts with universal jurisdiction to prosecute and try — if found in the territory of the Republic — the presumed perpetrators (or their accomplices) of acts falling with the provisions of the Law of 28 August 1996 adapting Senegalese legislation to the provisions of Article 4 of the Convention, when those acts have been committed by foreigners outside the territory of Senegal."

The raising of the Hissène Habré case before the United Nations Committee against Torture

13. It was in this specific context that certain individuals of Chadian nationality filed a complaint with the Committee against Torture, the body established under the Convention, adopted in New York, of 10 December 1984.

14. The Committee, relying on both the above-mentioned judgment of the Court of Cassation and the judgment handed down on 25 November 2005 by the *Chambre d'accusation* of the Dakar Court of Appeal, which later found that it lacked jurisdiction to rule on the first request from Belgium for the extradition of Mr. Hissène Habré, noted that Senegal had failed to take "such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him".

Positive assessment by the Committee against Torture of Senegal's compliance with the provisions of the Convention against Torture

15. In this connection, it should be emphasized that the Republic of Senegal, which never contested the findings of the Committee against Torture at the time when they were made, has provided guarantees of non-repetition of the violation thus noted, by undertaking, since 2009, all

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the necessary constitutional and legislative reforms, of both form and substance, to give full effect to the provisions of Article 5, paragraph 2, of the Convention against Torture and thus to meet fully all the necessary conditions for having Mr. Hissène Habré put on trial by the Senegalese courts, in the context of fair and equitable proceedings, or to extradite him.

16. For this reason, a delegation from the Committee against Torture visited Senegal from 4 to 7 August 2009 on a mission to ascertain the state of preparations for Mr. Hissène Habré's trial and the arrangements made by the State of Senegal for that purpose.

17. After meeting all the senior administrative and judicial authorities involved in the Habré case, the Committee expressed its appreciation for Senegal's desire to comply with its obligations under the Convention against Torture, and in particular the *aut dedere*, *aut judicare* obligation, with which Senegal must comply in the case of Mr. Habré.

18. The Committee stressed, however, that quite obviously Senegal would not be able to meet the inevitable costs of such a trial on its own. Hence the need for the démarches that it had made to the African Union, the European Union and its other partners, with a view to establishing a budget and raising the appropriate funds.

Mr. Grossman — a member of the confidential mission — explained to the Senegalese authorities during this visit

> "that the Committee had in fact intended to adopt a decision regarding Senegal but that, given the widespread belief that it is showing good will in managing the case and its commitment to fighting impunity, the members of the Committee had opted for an approach that involved, above all, hearing the views of the State concerned on this issue, an approach which was in fact quite exceptional, according to Mr. Grossman".

19. However, the reality of the situation is quite different. The positive assessments by the Committee against Torture have been deliberately played down by the Kingdom of Belgium, which does not seem to wish to give them the prominence they deserve before your distinguished Court, a fact which Senegal obviously deplores.

24 The non-conformity of the extradition requests with the provisions of Law No. 71-77 of 28 December 1971 on extradition

20. It was on the basis of Senegal's adaptation of its legislation to the provisions of the Convention against Torture that the Kingdom of Belgium, by Notes Verbales of 15 March 2011 and 5 September 2011, submitted the second and third extradition requests, which were both found inadmissible, on the grounds that they were not accompanied by the original or certified copies of the necessary documents, in accordance with the requirements of the law on extradition.

21. The third extradition request was rejected on 10 January 2012 on account of a formal defect. An extradition request cannot simply be made by a Note Verbale, as the Kingdom of Belgium rightly noted when it pointed out that:

> "the Belgian authorities wish to stress that the documents required by the Senegalese law relating to extradition, i.e., the arrest warrant for Mr. Habré and the Belgian and

international legislation applicable to the offences of which he is accused, were in fact transmitted to the Senegalese authorities by Belgium.

Those documents were transmitted [according to Belgium]:

— in original form *by Note Verbale of 22 September 2005, serving as the first request for extradition*;

— as certified and duly authenticated copies, equivalent to office copies, *by Note Verbale of 15 March 2011, serving as the second request for extradition*".

22. Belgium cannot be unaware of the fact that, in procedural matters, when the *Chambre d'accusation* renders its decision and it is again seised of a fresh extradition request, it cannot legally search the archives for any particular document in order to fulfil a required formality, as Belgium seems to suggest in its Note Verbale of 17 January 2012, when it points out, in relation to another Note Verbale of 22 September 2005, that the original documents are still in the possession of the Senegalese authorities.

23. The judgment of the *Chambre d'accusation* of 10 January 2012 gave Belgium a clear explanation of the substantive formalities to be fulfilled and enabled it to submit a new request on 17 January 2012, which Belgium considers to be in conformity with the requirements of the Senegalese law on extradition. That request was transmitted as it stood to the competent

25 authorities. This is adequate evidence of Senegal's desire to implement in full its *aut dedere, aut judicare* obligation under the provisions of the Convention against Torture.

24. Furthermore, the statement made to the press on 5 January 2012 by President Abdoulaye Wade of Senegal, to which the Kingdom of Belgium refers in a letter sent to the Registrar of your Court on 23 January 2012, is an integral part of this process, as the President of the Republic stated that, if the *Chambre d'accusation* were to give a favourable opinion, he would immediately extradite Mr. Hissène Habré to Belgium.

25. It should, however, be recalled, and rightly so, that because of the independence of the judiciary vis-à-vis the executive, which is enshrined in the Constitution of Senegal, the President of the Republic cannot interfere in the functioning of the judiciary. Senegalese judicial officials, and the courts in general, are subject only to the authority of the law in the exercise of their judicial duties.

26. The fourth extradition request from the Kingdom of Belgium, transmitted on 17 January 2012, is under consideration and will undoubtedly be the subject of appropriate action, thus confirming Senegal's desire to comply with the provisions of the Convention against Torture.

27. In the opinion of Senegal, this commitment has been largely implemented, and the tendentious reference by the Kingdom of Belgium to the findings made before 2009 by the Committee against Torture can certainly no longer be of any more than "historical" interest and cannot legally be relied upon by that country to support any contention of a violation of the Convention against Torture, since hitherto the judicial action taken on all of its extradition requests has been dictated by processing requirements.

28. This démarche is legally inappropriate and Senegal respectfully requests the Court to leave out of consideration in this case tendentious elements of the proceedings before the Committee against Torture.

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II. The raising of the Hissène Habré case before the African Union

29. Mr. President, Members of the Court, after the raising of this case before the Committee against Torture, Belgium did not miss the opportunity to go back over the consideration of the same case by the African Union, more precisely by the supreme organ of the pan-African organization, the Assembly of Heads of State and Government, in an attempt to create the impression that Senegal had not complied with its international obligations under the Convention against Torture.

30. On this point, Senegal respectfully invites the Court to note that the involvement of the African Union was intended simply to bring to the attention of the highest political authorities of the African continent the requirements of a new world order based on the fight against impunity in all its forms with regard to the massive violations of international law, and not to exempt Mr. Hissène Habré from prosecution for alleged offences committed by him or at his instigation.

31. Furthermore, this approach was welcomed with great enthusiasm, relief and hope by the Assembly of Heads of State and Government. The Agent of Senegal has explained at length the significance to be attached to the decision of the African Union of 2 July 2006[2].

[2] Assembly/AU/3/VII.

32. The raising of the case of the former President of Chad by the African Union had no legal implications, and this African body could not substitute itself for Senegal, which remains the only party subject to the obligations contained in the Convention against Torture, on its territory, as a State Party to the Convention, which is bound, in that capacity, *inter alia*, by the obligation to "extradite" or "try".

Decision of the African Union

33. Mr. President, Members of the Court, as I pointed out to you here, in this same hall, on 6 April 2009, at the hearing on the request for the indication of provisional measures, a decision on the Hissène Habré case was taken at the most recent session of the African Union, held on
27 4 February 2009 in Addis Ababa, Ethiopia, by the Assembly of Heads of State of that organization[3].

34. That decision very pertinently recalled that Mr. Hissène Habré was to be tried by a competent Senegalese court with guarantees for a fair trial, in accordance with the provisions of the relevant articles of the Convention against Torture.

35. That point was also made forcefully by Professor Alioune Sall, at the same hearing. And it bears repeating: "[A]t no point has Senegal established any link between the decision of the African Union and the obligations incumbent upon it under the 1984 Convention."[4] It was reaffirmed that:

> "The backdrop of the trial for which preparations are now being made is indeed one of co-operation across Africa — and even beyond. In this connection Senegal wishes to make clear once and for all, so as to dispel for good all ambiguity and misunderstanding, that as a State it is bound by the 1984 Convention. The fact that an organization like the African Union may be involved in organizing the Habré trial in no way lessens Senegal's duties and rights as a party to the Convention. Indeed, it is

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[3]Decision of the Conference of Heads of State of the African Union taken on 4 Feb. 2009:

"*Recalls* its Decision Assembly/AU/Dec.127 (VII) taken in Banjul, the Gambia, in July 2006 mandating 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';

Reiterates its commendation of the Government of the Republic of Senegal for having taken constitutional, legal and regulatory measures to carry out the mandate;

Takes note that despite the establishment of the budget for the case by the European Union, which offered to be partner, together with the Government of the Republic of Senegal, the resources needed for the prosecution are not yet available."

[4]CR 2009/11, p. 13, para. 10 (Diouf).

> as a party to the Convention, not pursuant to a mandate from the African Union, that the Republic of Senegal is fulfilling its obligations."[5]

36. The idea that, in agreeing that the African Union should discuss the "Habré case", Senegal was seeking to evade its obligation to punish the acts specified in the Convention against Torture is doubly disputable.

37. First, the act of establishing a continent-wide discussion of the subject is, if anything, indicative of a bias towards punitive action, a predisposition to prosecute — and not to tolerate — the acts specified in the Convention against Torture.

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38. Secondly, from a more strictly legal point of view, Senegal has never repudiated its duty. On the contrary, it has acknowledged its obligation to deal with the complaints lodged against Mr. Habré, beginning with his indictment in early January 2000.

39. In other words, the "involvement" or "intervention" of the African Union has no fundamental impact on the terms of the debate before the Court. At issue before the Court is a difference between two States as to how the execution of an obligation arising from an international instrument to which both States are parties should be understood. That is the reality of the contentious proceedings that have been brought before the Court. Senegal therefore believes that anything that falls outside the scope of this clear and simple presentation of the facts should be set aside from the debate on the ground that it is irrelevant.

40. The State of Senegal has consistently declared its intention to respect its commitments as a State Party. In fact, it wishes to organize a trial to deal with the acts of which the former Head of State of Chad, who is now present in its territory, stands accused. However, it does not intend to act under pressure, even though such pressure is understandable, particularly when it is being exerted by alleged victims. A trial on this scale and of this complexity deserves to be conducted calmly and in compliance with international standards of due process.

41. In Senegal's view, what is at stake here is the very credibility of its judicial institutions and even of the judicial institutions of Africa as a whole, which are being confronted with such a situation for the first time.

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[5] CR 2009/11, p. 18, para. 11 (Sall).

42. Indeed, given the number of victims and civil parties to the case, even though Senegal again thanks the Kingdom of Belgium for its offer of co-operation, the Senegalese courts are entitled to treat the civil parties, the victims and the witnesses on an equal basis, while respecting the rights of Mr. Hissène Habré and his possible accomplices. Such a trial deserves to be prepared carefully, and the Kingdom of Belgium should abstain from the pressure it is exerting on the range of judicial bodies seised with contentious cases.

43. Moreover, the Committee against Torture, in the context of its mission to Senegal from 4 to 7 August 2009 to assess preparations for the trial of Mr. Hissène Habré and the arrangements made by the State of Senegal for that purpose, after warmly welcoming Senegal's desire to comply with its obligations under the Convention against Torture, and in particular the *aut dedere, aut*

29 *judicare* obligation, with which Senegal must comply in the case of Mr. Hissène Habré, expressed the view that "Senegal would not be able to meet the inevitable costs of such a trial on its own". This explains the need for the démarches it had made to the African Union, the European Union and its other partners, and the negotiations it had held with them, with a view to establishing a budget and raising the appropriate funds.

44. In this connection, it is appropriate to recall the words used by the Co-Agent of Senegal in his statement to the Court during the hearings on the request for the indication of provisional measures:

> "The fight against impunity must not overshadow the no less important duty on us all to afford the accused, no matter how serious the acts with which he is charged, a presumption of innocence until such time as he is convicted after a fair trial; and it is for that fair trial that Senegal is making the preparations.
>
> It is for all of these reasons that Senegal has not yet begun the trial, fearing that it would be interrupted for long periods in which funds, hypothetical funds, would have to be sought. Accordingly, advance financing adequate to ensure uninterrupted proceedings all the way to the end in accordance with our domestic law is what is needed."[6]

45. How can the Kingdom of Belgium reasonably accuse Senegal of basing itself on recommendations, suggestions, opinions and decisions by the Committee against Torture in order to fulfil its obligations under the Convention against Torture?

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[6]CR 2009/9, p. 30, paras. 53 and 54 (Kandji).

46. Mr. President, Members of the Court, Senegal asks you to note that, despite the pledges made, in particular by Chad and other countries, no contribution has to this day actually been made and Senegal stood alone in its own defence before the African Court on Human and Peoples' Rights in its case with Mr. Yogogombaye, who sought to obtain from that court "suspension of the ongoing proceedings instituted by the Republic and State of Senegal with the objective to charge, try and sentence" Mr. Habré. The court dismissed that application in its decision of 15 December 2009.

47. Similarly, Senegal took steps to defend itself with no support from the States of the African Union in proceedings before the Court of Justice of ECOWAS, after the latter was seised by Mr. Hissène Habré. I shall return to that decision in due course.

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48. In any event, Belgium provides no evidence that the Senegalese courts, in their various decisions, referred to the mandate of the African Union. Senegal intends to fulfil its *aut dedere, aut judicare* obligations under the Convention against Torture, and the *Chambre d'accusation* seised with the latest request for extradition from Belgium will consider the merits of the request on the basis of the Convention against Torture.

49. In the light of these considerations, Senegal respectfully requests the Court to set aside from the debate the arguments made by the Kingdom of Belgium on the raising of this case before the African Union, which could not legally reflect a failure to comply with the provisions of the Convention against Torture.

The raising of the case before the ECOWAS Court of Justice

50. Belgium filed its Memorial before the ECOWAS Court of Justice delivered its ruling by a judgment of 18 November 2010.

51. It is appropriate to recall that it was Mr. Hissène Habré himself who took the initiative in bringing the State of Senegal before the ECOWAS Court, following the adoption of the necessary legislative measures enabling Senegal to fulfil its obligations as a State Party to the 1984 Convention.

52. Mr. Habré then seised the ECOWAS Court, which delivered a judgment on 18 November 2010, the operative part of which reads as follows:

"— finds that evidence exists to demonstrate that Mr. Hissein Habré's . . . rights are likely to be violated as a result of the constitutional and statutory reforms undertaken by the State of Senegal;

— finds that in this regard, the State of Senegal must respect the rulings handed down by its national courts and, in particular, abide by the principle of *res judicata*;

— consequently, the Court orders Senegal to comply with the absolute principle of non-retroactivity;

— finds that the mandate which Senegal received from the African Union was in fact a remit to devise and propose all the necessary arrangements for the prosecution and trial to take place, within the strict framework of special *ad hoc* international proceedings as practised in international law by all civilized nations;

— dismisses all of Mr. Hissein Habré's other claims as inoperative."

31 That is the purport of the decision taken by the Court of Justice of ECOWAS.

53. Although Senegal took note of that judgment by the ECOWAS Court of Justice, it has to be stated that the said judgment was not of a nature to change its position before your distinguished Court, since Senegal remains attached to the principles of international law, according to which a State which enters into an international commitment must accept all of the implications of that commitment at the national level.

54. In fact, the measures that Senegal has undertaken were definitively adopted and form part of the ongoing adjustment of its legislation to conform to the provisions of the Convention against Torture in order to satisfy the United Nations Committee against Torture.

55. Nevertheless, Senegal considers that the decision rendered by the ECOWAS Court of Justice constitutes an event that it cannot ignore, which could well give rise to a conflict between two obligations with different, indeed opposing, objectives: to prosecute if it has not extradited him, on the one hand, and not to prosecute (in the national courts), on the other hand.

56. It is desirable that Senegal's obligation to apply the provisions of the Convention against Torture should not be delayed to any extent by the mechanism suggested by the ECOWAS Court of Justice which specifies, in its decision of 18 November 2010, that Senegal must establish "all the necessary arrangements for the prosecution and trial to take place, within the strict framework of special *ad hoc* international proceedings as practised in international law by all civilized nations".

57. What approach has been taken by your Court, as the principal judicial organ of the United Nations, with regard to other judgments rendered by international courts?

58. This question is particularly important, since the Hissène Habré case dealt with by the ECOWAS Court of Justice has some links with the present case placed before your Court, which has its own jurisdiction.

59. One need only consider the position taken by the International Court of Justice and the ECOWAS Court of Justice with regard to legal rules or situations governed by a sub-category of international law with its own specific secondary rules, including its own method of dispute settlement.

32 60. This hypothesis is illustrated by the observation that, for some years, the jurisprudence of the International Court of Justice has included many cases in which the Court has found the existence of *leges specialia* in the context of which settlement procedures were under way (cases where a connection existed), or situations where positions had previously been taken on legal matters of which the Court itself had been seised.

61. Mention may be made of a judgment rendered in 1992, which falls under this category. In the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, the Chamber of the Court was confronted with a judgment of the Central American Court of Justice rendered many years earlier in 1917; that regional court, the first of its kind, had been called upon to adjudicate on a question relating to the status of the waters of the Gulf of Fonseca, divided between three riparian States (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*).

62. Moreover, in the *LaGrand* and *Avena* cases, which gave rise to judgments in 2001 and 2004, respectively, Germany, followed by Mexico, had invoked against the United States the authority of an advisory opinion rendered by the Inter-American Court of Human Rights concerning Article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations.

63. In the case concerning *Certain Property* between Liechtenstein and Germany, which gave rise to a judgment in 2005, the Court was aware that, in large part, the same facts had been the subject of a judgment by the European Court of Human Rights on a complaint by Prince Adam of Liechtenstein.

64. Finally, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court was confronted with the position taken by the

International Criminal Tribunal for the former Yugoslavia concerning that same Tribunal's prior legal characterization of the facts which the Court itself had to hear.

65. The possibility that could at best be envisaged is that the Court, persuaded by the arguments of Senegal regarding the adoption of the judgment of the ECOWAS Court, which had previously ruled on a question relating to the *Habré* case, could on its own account adopt the same solution.

33 66. This hypothesis appears to be borne out by the Judgment of 11 September 1992 in the case between El Salvador and Honduras, in connection with the legal status of the waters of the Gulf of Fonseca, and in the Judgment of 26 February 2007, at least in so far as, in the latter case, the International Court of Justice accepted the reasoning and even the legal characterization of the facts it had to deal with in the form in which they had previously been presented by the International Criminal Tribunal for the former Yugoslavia.

67. This balance sheet does in any case show that, at least up until the recent judgment of the Court in the "genocide case" between Bosnia and Serbia and Montenegro, albeit only in connection with a point of general international law, it has never felt the need openly to take a position against a judgment by another judicial body.

68. On the contrary, the International Court of Justice has either accepted in substance the conclusions of the Central American Court, or avoided adjudicating on the points of law that had been the subject of another court's jurisprudence.

69. In any event, the judgment of the ECOWAS Court does not call into question Senegal's desire to implement fully its *aut dedere, aut judicare* obligations deriving from the Convention against Torture.

70. The Court will note that, despite the declarations by the President of the Republic of Senegal, the Kingdom of Belgium has not provided evidence of the existence of any decision aimed at expelling Mr. Hissène Habré to another country. No such administrative decision has been taken, and Senegal remains in compliance with the commitments it undertook here before your Court.

71. In Senegal's opinion, the raising of the Hissène Habré case by the Kingdom of Belgium before the African Union, the Court of Justice of ECOWAS, the Committee against Torture and

other bodies has nothing to do with facts constituting a violation of its international obligations under the Convention against Torture.

72. In view of the foregoing, and other arguments which will be made by the Agent, the Co-Agent and counsel, Senegal respectfully requests the Court to dismiss out of hand these points raised by Belgium, which lack legal relevance to the debate in these proceedings.

34 73. Mr. President, my statement is the last in Senegal's first round of oral argument. Mr. President, Members of the Court, I thank you for your kind attention to my presentation. Thank you.

The PRESIDENT: Thank you, Mr. Gaye. The Court will meet tomorrow at 10 a.m. It would be greatly appreciated if counsel for Senegal could indicate in the texts of their pleadings the references they make to citations, in terms of either references to documents placed in the case file or documents and publications easily accessible to the public. The sitting is closed.

The Court rose at 12.20 p.m.