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16 March 2012 at 10 a.m.

8 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the continuation of the first round of oral argument of the Republic of Senegal. I now give the floor to Ambassador Cheikh Tidiane Thiam, the Agent of Senegal. You have the floor, Mr. Thiam.

Mr. THIAM:

CLOSE OF SENEGAL'S FIRST ROUND OF ORAL ARGUMENT

Mr. President, Members of the Court, as the first round of Senegal's oral argument draws to a close, I beg leave to announce that counsel for the State of Senegal will each in turn intervene on various aspects of the subject, in order to provide responses to certain questions or to complete the presentations that have been made during this round.

I shall be followed by the following speakers:

— Mr. François Diouf, Co-Agent, who will deal with "the non-existence of a dispute";

— Mr. Ibrahima Bakhoum, counsel, who will deal with "the inadmissibility of Belgium's Application";

— Mr. Oumar Gaye, counsel, who will examine the question of "Senegal's compliance with its obligations as a State Party to the 1984 Convention"; and

— Mr. Abdoulaye Dianko, counsel, who will conclude by taking up the question of "the non-existence of an internationally wrongful act attributable to Senegal".

It will fall to me, with your permission, to close the sitting with a presentation of Senegal's submissions. Thank you.

The PRESIDENT: Thank you, Mr. Thiam. I now give the floor to Mr. François Diouf, Co-Agent. You have the floor, Mr. Diouf.

Mr. DIOUF: Thank you, Mr. President.

THE NON-EXISTENCE OF A DISPUTE

1. Mr. President, Members of the Court, I am very honoured to be addressing your distinguished Court, in my capacity as Co-Agent, and to be speaking in my country's defence on

9 the subject of the non-existence of a dispute between the Kingdom of Belgium and the Republic of Senegal in the case brought before the Court.

2. However, let me begin by casting a different light on the image which has been portrayed of Senegal.

3. Mr. President, Members of the Court, Senegal is not the country that has been described to you.

4. Mr. President, Members of the Court, the image of my country that has been put before you is not the one that you have had, the one that you have been familiar with, for so many years, that is, of a country which has always contributed to the international community by fighting for peace, justice and freedom.

5. From the 1960s onwards, and particularly since 2005, there has been a continuous presence of at least 2,500 Senegalese troops wherever the United Nations is striving to maintain peace, justice and freedom.

6. Our country has always been at the forefront of the struggle for human rights. It is the destination for thousands of refugees from the furthest reaches of Africa. It is the birthplace of great men who have served the cause of international justice, such as Mr. Kéba Mbaye and other world-renowned jurists.

Mr. President, Members of the Court, Senegal has always been a law-abiding country and we take every opportunity to uphold the ideals of the United Nations.

7. The dates of 4 July 2000 and 20 March 2001, which are respectively those of judgment No. 135 of the *Chambre d'accusation* of the Dakar Court of Appeal and judgment No. 14 of the *Chambre criminelle* of the Senegalese Court of Cassation, which upheld the judgment of the Court of Appeal, are of particular importance.

8. The Agent of the Kingdom of Belgium said in this connection, and I quote: "The judgment of the Court of Appeal was confirmed by the Senegalese Court of Cassation on 20 March 2001 . . . [and] ended the victims' hopes . . . of seeing Hissène Habré brought to trial in Senegal."

9. Mr. President, Members of the Court, by that decision the Senegalese courts intended to remind Senegal of the opportunity it had to meet its international obligations better through the

10 implementation of treaty-based provisions, and to remind an entire continent of the pressing need to adapt to international realities so as to be able to participate with dignity in the community of nations.

10. A task of such magnitude is not easy, and our ambition is matched only by our determination to fulfil our international commitments and to combat impunity in every shape and form.

11. Mr. President, Members of the Court, these are the reasons at the root of the mass of legislative work which Senegal has undertaken in order to try Hissène Habré.

12. Africa has been afforded the opportunity, through Senegal, to ensure that the voices of those who consider themselves victims and who are victims are heard.

13. Mr. President, Members of the Court, this is Africa's cry, the voice of those who have no voice.

14. The Kingdom of Belgium is aware of the efforts made by the Republic of Senegal. The aim of those efforts is to fulfil our treaty obligations, despite the various difficulties encountered by our country. Belgium has dreamt up a "dispute" under the jurisdiction of the Court in order to find a pretext to bring us before the Court.

This is what we shall now make every effort to prove by demonstrating the non-existence of an objective dispute which gives the Court jurisdiction.

I. The non-existence of an "objective dispute" which gives the Court jurisdiction

15. In its Application, Belgium speaks of a "dispute" concerning the interpretation and application of the Convention against Torture.

16. It bases the Court's jurisdiction on the provisions of Article 30 of the United Nations Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

17. Article 30 of the Convention provides that "[a]ny dispute between two . . . States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation" or arbitration may be referred "to the International Court of Justice".

11 18. Belgium bases its "dispute" with Senegal on the fact that it has been "negotiating" with Senegal since 2005 with a view to Senegal prosecuting Mr. Habré or, failing that, extraditing him to Belgium. But have Belgium and Senegal actually sat round a table to discuss their differences? Can Senegal be accused of refusing to perform its treaty obligations in any way?

19. Since 2005 Belgium has contrived, by way of Notes Verbales, alleged omissions, silences and unilateral interpretations, to create a "dispute" that might be accepted by the Court as a basis for its jurisdiction.

20. Senegal has always been at the forefront of the fight against impunity, and that is why our country has made every effort to acquire legislation that will enable it to try the most heinous crimes such as genocide, crimes against humanity and other war crimes. Our determination to meet the requirements for a fair trial can be seen in the amendments made to our basic law and the status of the judiciary, and in the intensive legislative activity that ensued.

21. Belgium has employed a strategy consisting in sending one Note Verbale after another and instituting procedures that do not comply with the formal requirements of the Senegalese law on extradition, all with a view to creating a dispute where none exists.

22. While Senegal has already introduced legislation in line with the requirements of the international Convention, at the same time it has had to respond to a number of complaints:

— the complaint filed by the victims of Hissène Habré with the Committee against Torture;

— the complaint filed by Hissène Habré with the ECOWAS Court of Justice.

23. Mr. President, Members of the Court, if you examine the way the Kingdom of Belgium has proceeded, you will realize that Belgium has, unilaterally, set out and determined the different stages which, in its view, should create the conditions for the Court to be seised.

24. The Kingdom of Belgium offers in evidence the Senegalese law on extradition; it is thus perfectly familiar with all the conditions of form and substance prescribed by that law. Therefore

12 we do not understand why all the requests for extradition were objectively refused for failing to comply with the formal conditions.

25. While there was no offer of negotiation, as defined by international case law and doctrine, Belgium considers that it has fulfilled one of the conditions in Article 30 of the Convention against Torture for seising the Court.

Disregarding the definition of negotiation under international law, the Kingdom of Belgium has tried to find evidence of a refusal to "negotiate" in the questions its diplomatic authorities addressed to their Senegalese counterparts, so that it can then move on to the following stage.

26. Having presented the condition to negotiate to *suit its own ends*, as if there were an objective dispute between the two Parties, Belgium uses the breakdown of negotiations as a pretext to seise the Court and move on to the arbitration phase, without Senegal being able to respond to any of these concepts which, under international law, have a clear definition and content.

27. It is thus easy to see the entire "strategy" developed by Belgium with a view to seising the Court on the grounds of a "dispute" between Senegal and the Kingdom of Belgium.

28. Let us then adopt the definition of the concept of a "dispute" as given by the Court: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."

29. The Republic of Senegal has always looked in the same direction as Belgium, or at least that is what we thought. Our credo is to ensure the application and observance of the international principles of justice, peace and freedom.

30. Senegal gave itself the de facto mission to try Hissène Habré, on behalf of Africa, before an African Union mandate gave it a legal basis to do so.

31. We admit that it is not an easy mission. It requires efforts from all countries committed to the principle of fighting impunity. Senegal appreciates the enormity of the task that stems from its treaty obligations. That is why it considers international funding to be essential in order to carry

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out this task. Can becoming aware of an obligation and seeking the means to fulfil it be understood as non-compliance with its treaty obligations?

32. As Senegal has no dispute with the Kingdom of Belgium, it follows that the Court must declare that it lacks jurisdiction.

33. In conclusion, we would say that Senegal remains as determined now as it was when it ratified the Convention. The fight against impunity is a credo to which Senegal attaches particular importance. Senegal, the African Union and Africa expect the Court to give it the opportunity to show the world once again that a whole continent has taken control of its destiny.

34. Mr. President, Members of the Court, please excuse some of my passionate language, it is simply the voice of the voiceless, of an Africa that wishes to play its part in the community of nations.

35. In the unlikely event that the Court should uphold its prima facie jurisdiction, you will in due course be persuaded to dismiss the Application on the grounds of inadmissibility due to the breach of Article 30 of the Convention, on which my colleague will address you.

36. Mr. President, Members of the Court, I thank you for your attention.

The PRESIDENT: Thank you, Mr. Diouf. I now give the floor to Mr. Ibrahima Bakhoum, counsel for Senegal.

Mr. BAKHOUM:

THE INADMISSIBILITY OF BELGIUM'S APPLICATION

Mr. President, distinguished Members of the Court, following Mr. François Diouf, Co-Agent of Senegal, it is my task to address the inadmissibility of Belgium's Application.

1. In support of its Application, the Kingdom of Belgium relies on two fundamental grounds: firstly, the two unilateral declarations made by the Parties to the proceedings, in accordance with

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Article 36 of the Statute of the Court, and, secondly, the relevant provisions of Article 30 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

2. Under the terms of Article 30, paragraph 1, of the Convention against Torture:

> "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."

3. Thus, for the Kingdom of Belgium's Application instituting proceedings to be admissible, it must be considered whether it satisfies that provision, which lays down two cumulative preconditions for its Application, namely, first of all, that a dispute must exist between the parties, and, secondly, that the said parties must have exhausted all avenues of negotiation and arbitration.

4. Upon consideration, it is plain to see that, despite the various arguments put forward, Belgium's Application instituting proceedings does not satisfy either of these prerequisites under Article 30 of the Convention against Torture.

5. In fact, there is neither a dispute between the Parties concerning the interpretation or application of the Convention (I), nor, still less, have other remedies or avenues of negotiation (II) between the Parties been exhausted. Mr. President, Members of the Court, these are the two main points of my address.

I. The absence of a dispute between the Parties

6. In Belgium's view there is indeed a dispute, not so much regarding the interpretation of the terms of the Convention but rather its application, in particular in respect of Articles 6 and 7 which require Senegal to institute proceedings against Mr. Habré within a reasonable period of time.

7. Belgium concludes that an internationally wrongful act exists, entailing Senegal's responsibility in consequence of its failure to comply with its obligation to prosecute.

15 8. In this connection, the Court may take the view that, in the light of the arguments put forward by Senegal, there is neither an internationally wrongful act nor an internationally wrongful omission, still less a refusal by Senegal to perform its obligations under the Convention against Torture, in particular under Articles 6 and 7 thereof.

9. Indeed, since judgment No. 14 of 20 March 2001 of the Court of Cassation (the Senegalese Court of Cassation, that is) (item 3 in the judges' folder), which established that the Senegalese courts did not have jurisdiction to try Mr. Habré because there was no legal basis, Senegal has taken a number of measures with a view to creating the conditions to try Hissène Habré, both from a legal and a practical standpoint.

10. Legislative reforms have thus been made in order to put in place a legal framework enabling our courts to prosecute or extradite Mr. Habré.

11. In light of the view — widely shared in the international community — that for the Senegalese courts to hold such a trial in due form, resources would need to be mobilized, Senegal then successfully organized the Donors Round Table for the funding of the trial in November 2010.

12. This Round Table, which brought together the African Union, the European Union and the development partners, including Belgium, gathered funding pledges for the entire budget required to organize the trial.

13. It should be noted, and happily so, that Belgium took part in the November 2010 Round Table and pledged as much as €1 million.

14. This goes to show, Mr. President, Members of the Court, that up to this juncture Senegal and Belgium were of the same mind. This casts some doubt on whether a dispute actually exists between Senegal and its sister country Belgium, in particular given the steps Belgium has taken towards a trial being held.

15. Thus, in the statement issued following the Donors Round Table meeting, Senegal undertook to commence proceedings within three months.

16. However, just as the final steps had been taken actually to begin proceedings, Senegal received notification of the decision by the ECOWAS Court of Justice; that decision, first of all,

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prohibited Senegal from trying Mr. Habré in its courts, and, secondly, enjoined Senegal to consider arrangements for the establishment of an *ad hoc* international court to try Hissène Habré, under the aegis of the African Union.

17. Mr. President, Members of the Court, you will concur with us that Senegal, a State based on the rule of law, which respects international law and is a member of ECOWAS, had no choice but to comply with and make every effort to implement the decision handed down by the judicial organ of its own community.

18. Thus, as part of the steps taken by Senegal to implement the decision of the ECOWAS Court of Justice recommending the establishment of an *ad hoc* international court, Senegal undertook a series of consultations with the African Union with a view to establishing that *ad hoc* international court.

19. At the last meeting held in Dakar during 2011, consideration was given to the founding documents for this *ad hoc* court that would be able to try Mr. Habré. In this connection, the consultations with the African Union are continuing with a view to the establishment of the *ad hoc* international court.

20. Mr. President, distinguished Members of the Court, you will observe from these developments that, far from standing idly by, Senegal has, on the contrary, taken a number of steps to commence proceedings, and that, if it were not for the decision of the ECOWAS Court of Justice, the trial of Mr. Hissène Habré would undoubtedly by now, at this very moment, have already started.

21. In this connection, moreover, the decision of the ECOWAS Court should be considered as a major obstacle in a process that had almost come to an end. It should also be noted that up until the time the court handed down that decision, there was no dispute between Senegal and Belgium concerning the interpretation or application of the Convention against Torture.

22. Further still, Belgium was so convinced by the steps taken by Senegal in respect of the application of the Convention against Torture, and consequently also convinced that there was no dispute, that it, Belgium, offered its active co-operation throughout the process and even, as I have

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just said, in November 2010, namely one year earlier, had gone so far as to pledge €1 million for the holding of the trial.

23. In the light of all that has just been described, you can see that Belgium firmly believes that Senegal will try Hissène Habré and that it will be a fair and equitable trial. Belgium's firm belief is further backed up by action which amply demonstrates that there is no dispute between the Kingdom of Belgium and Senegal.

24. Mr. President, distinguished Members of the Court, it is even clearer that there is no dispute in respect of extradition. All three extradition requests have been dealt with by the Senegalese courts.

25. Mr. President, Members of the Court, does your august Court need reminding that Senegal is a State based on the rule of law, with an independent judiciary which renders sovereign and independent judgments, without any interference from the other branches of power?

26. Thus, after finding that it did not have jurisdiction on the grounds of the jurisdictional immunity due to Mr. Habré[1], it has altered its position in the light of the more recent decisions handed down by the *Chambre d'acccusation* of the Dakar Court of Appeal.

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[1]See Senegal's Counter-Memorial (CMS), annex.

27. The Court of Appeal has so far rendered two procedural decisions declaring Belgium's second (judgment No. 133 of 18 August 2011; item 11 in the judges' folder) and third (judgment No. 7 of 10 January 2012; item 8 in the judges' folder) extradition requests inadmissible on the grounds that the said requests did not comply with the formal conditions prescribed by our legislation.

28. Thus, on the strength of those decisions rejecting the requests as inadmissible, Belgium decided to file a fourth request for extradition on 17 January 2012 (items 8 and 9 in the judges' folder); that fourth request is being considered by the competent authorities as this very hearing is taking place before your august Court.

18 29. Should this fourth extradition request be admissible, the *Chambre d'accusation* will render a decision on the merits which will bring an end to the judicial proceedings on extradition.

30. Mr. President, Members of the Court, we request you to find that there is no dispute concerning extradition, in light of the fact that Belgium has instituted proceedings in the Senegalese justice system which is at this very moment considering the validity of its request, with a view to making an independent ruling.

31. It is hardly possible to accuse the State of Senegal of refusing to extradite when the proceedings are pending before the court currently seised.

32. It might just be possible to conclude that the Convention had been breached, thus causing a dispute, if — and only if — in the wake of a decision by the *Chambre d'accusation* in favour of extraditing Mr. Habré, the State of Senegal refused to comply with the extradition request and did not try him either. However, that is clearly not the case here.

The absence of negotiations prior to the seisin of the Court

33. Mr. President, Members of the Court, concerning the absence of negotiations prior to the seisin of the Court, which is the second focus of my statement, Belgium considers, in the light of the exchange of three Notes concerning requests for information addressed to Senegal, that it complied with the precondition of negotiation laid down by Article 30 of the Convention against Torture.

34. Looking at the matter in this way, it should be noted that Belgium goes so far as to disregard the primary significance of negotiation and the way in which it should be understood in international law.

35. All of this, Mr. President, Members of the Court, calls for an attempt to define the concept, in order to provide appropriate material content for a finding by the Court that no negotiation ever took place, since Belgium in fact never had the intention to negotiate, being more concerned with artificially and surreptitiously meeting the preconditions for seising the Court in accordance with Article 30 of the Convention against Torture.

36. Negotiation is to be understood as a set of steps and processes of communication, for the purpose of comparing positions, points of view, interests and expectations regarding a particular subject, so that an agreement can be reached between the parties concerned.

37. In its oral argument before your distinguished Court, the Kingdom of Belgium, with reference to these "negotiations", mentions the following initiatives that it claims to have taken:

— 30 November 2005: it "asks" the Government of Senegal to explain "the implications" of a judgment by the *Chambre d'accusation* of the Dakar Court of Appeal in which it held that it lacked jurisdiction. It should be noted that Senegal responded to this request through its ambassador in Brussels. In particular, this response shows that, notwithstanding the judicial decision, the Republic of Senegal intended to raise the "[Habré] matter" during the African Union summit, scheduled to take place a few months later in Banjul;

— subsequently, on 11 January 2006: according to Belgium, it "notes" the decision of the Senegalese authorities to raise the matter with the African Union and, it writes, "refers" to the negotiation procedure contemplated in Article 30 of the 1984 Convention against Torture;

— finally, on 9 March 2006, Belgium "points out" the negotiation process and "asks" Senegal whether the raising of the "Habré matter" means that Senegal will neither extradite Mr. Habré to Belgium nor try him. Senegal responded to this question as well. Its response was that, in raising the matter with the African Union, the Republic of Senegal did not seek to shirk its obligation under the 1984 Convention (namely, to try or to extradite), but, on the contrary, intended to assume its duty to prosecute.

38. Mr. President, Members of the Court, by Belgium's own admission, and as discerned from its description of the process leading up to the proceedings before the Court, those were the main stages said to have marked the negotiations which Article 30 of the 1984 Convention makes a precondition for any action before the International Court of Justice.

39. The Court will thus have the opportunity to observe the liberty taken by the applicant State in interpreting the obligation to negotiate. International negotiation presupposes a minimum

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number of contacts and a minimum amount of follow-up and definition of the terms of the discussion; the Kingdom of Belgium has clearly paid no heed to these minima in the present case. There has never been any offer to negotiate, never any of the exchanges characteristic of diplomatic negotiations in this case. The only approaches cited by Belgium in this regard consisted of addressing questions to the Senegalese authorities, questions simply calling for answers, and the Republic of Senegal always gave these. Moreover, why should negotiations have taken place, given that Senegal is fulfilling all of its obligations? Negotiations would in fact be conceivable and welcomed by Senegal only if it were in breach, which is not the case, as Senegal has shown.

40. Thus, everything points to the applicant State — the Kingdom of Belgium — wishing to move "by surprise" and to bring proceedings against the Republic of Senegal before the Court by retrospectively interpreting some of its approaches as connected with a precondition imposed by Article 30 of the Convention against Torture.

41. Everything points to Belgium having had a preconceived intention to bring proceedings, the rest — that is to say, its earlier démarches — having unfortunately been mere formalities or pretexts for meticulously planned legal proceedings.

42. Mr. President, Members of the Court, the obligation to negotiate is not a rather "vague" instruction to States to perform duties that are not perfectly clear. It has a positive content that international case law has long underlined. In the arbitral award delivered on 9 December 1978 in the case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France*, the Arbitral Tribunal recalled that

> "the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance. There is the very general obligation to negotiate which is set forth by Article 33 of the Charter of the United Nations and the content of which can be stated in some quite basic terms. But there are other, more precise obligations. The Tribunal recalls the terms of Article VIII of the 1946 Agreement, which reads as

> follows: 'In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of
21 the principles . . . outlined in the present Agreement . . .'. This Article provides for an obligation of continuing consultation between the Parties."

43. International negotiation is understood to require "transparency" and good faith on the part of States. It bars "surprises" or dissembling; and it must, so to speak, present itself as such. It is on this condition that it may be invoked against a State.

44. The Kingdom of Belgium has never — I repeat, never — expressed its intention to engage in negotiations with any real conviction to the Republic of Senegal. Moreover, how could it have done so, since Senegal was fulfilling its obligation? As Belgium itself writes, it merely "pointed out" the precondition laid down by Article 30 of the Convention against Torture. Such conduct is not in strict accordance with the requirements of good faith in inter-State relations. The Court itself has repeatedly established a link between the obligation to negotiate and good faith.

45. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons,* it indicated, in connection with the obligation to negotiate expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, that this obligation

> "includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'."

46. In the *Nuclear Tests* case, the Judgment of 20 December 1974 delivered by the Court also recalls that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 268, para. 46.)

22 47. Mr. President, Members of the Court, the link that the Court establishes between the obligation to negotiate, the principle of good faith and mutual trust is particularly apposite in the present case.

48. The Republic of Senegal considers not only that the applicant State did not properly observe its duty to negotiate, but also that the action that it brought before the Court, and the sort of excessive haste accompanying it, reflect a clear defiance and abuse of the right to take proceedings for which there is neither any basis nor any justification, in the light of the measures that Senegal has taken thus far to organize the trial of the former Chadian Head of State.

49. In the present context, it must be recognized that, when a party intends to enter into a process of discussion, prior to negotiations, it should at least clearly say so. More or less "general" questions aimed at eliciting factual information cannot suffice.

50. The Kingdom of Belgium will therefore be hard put to demonstrate the failure of an initiative that never really took place. In order for judicial proceedings to be initiated against a State Party to the Convention, negotiations entered into must have failed; all the avenues explored to reconcile the points of view must have reached an impasse. However, the Kingdom of Belgium fails to demonstrate the existence of an impasse; it cannot say that any efforts it supposedly made ended in failure. That is not the case. If we go by its own presentation of the facts, we cannot help but observe the strangeness of the circumstances in which it claimed to have exhausted its obligation to negotiate. In fact, it was subsequent to a reply from the Government of the Republic of Senegal, providing assurances that it intended to prosecute or extradite Mr. Habré, in accordance with the Convention (statement of 9 May 2006), that Belgium sought to point out that the negotiations based on Article 30 of the Convention had "not succeeded" (20 June 2006). As strange as this may seem, the Kingdom of Belgium thus considered that it had to "point out" a failure after receiving a reply which should actually have satisfied it. This conduct lends credence to the idea that the judicial proceedings that have now started had been planned well in advance and that the claimed failure of the negotiations is in fact merely an "alibi".

23 51. The second question that arises in this case is whether there has been a failure of negotiations. Members of the Court, the Court takes a very strict view of what constitutes the "failure of negotiations". Indeed, in the *Mavrommatis Palestine Concessions* case (Judgment of 30 August 1934), the Permanent Court of International Justice defined what was meant by the failure of negotiations, justifying recourse to judicial settlement. The State relying on the failure of negotiations in order to take court proceedings can justify its position only if, in the negotiations,

> "a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13; emphasis in the original).

52. Can it be said in the present case, Mr. President, Members of the Court, that the Government of the Republic of Senegal adopted any such attitude or gave the slightest evidence of any such refusal? Were negotiations ever begun and, *a fortiori*, did they ever reach a deadlock of the kind which the Court defines as the test for the failure of negotiations? Obviously not.

53. The fact is that the Kingdom of Belgium has never entered into any real negotiations with the Government of the Republic of Senegal. Its only approach to the Senegalese authorities was through Notes Verbales consisting of questions about the status of the proceedings or about the Senegalese Government's plans in respect of the Habré case. Senegal provided answers to all these questions from Belgium. The truth is, unfortunately, that Belgium has never wanted Mr. Hissène Habré to be tried in Senegal.

54. Mr. President, Members of the Court, it might even be added that Belgium has also failed to comply properly with another precondition laid down by Article 30 of the 1984 Convention: the recourse to arbitration.

55. It will be recalled that, according to the relevant provision,

> "[a]ny 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."

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56. Not only did the Kingdom of Belgium not enter into any negotiations in the strict sense of the term with the Government of the Republic of Senegal — and consequently could not legitimately argue that negotiations in any sense failed — but also, by its conduct, it skirted round the other precondition laid down by Article 30 of the 1984 Convention. The *only reference to arbitration* is in a statement by the Belgian Government dated 20 June 2006, which Belgium claims to have sent to the State of Senegal, and unfortunately it is evasive. According to its own presentation of the facts, Belgium "[observed] that the negotiations based on Article 30 of the Convention have failed; it [noted] that there [was] a dispute between the two States concerning the

interpretation of Article 7 of the Convention and [asked] Senegal to submit to the arbitration process contemplated by Article 30 of the Convention".

57. Mr. President, Members of the Court, the three assertions lurking in this seemingly innocuous sentence are all questionable:

— Belgium speaks of the failure of negotiations that never actually took place;

— Belgium refers to the existence of a "dispute concerning the interpretation of Article 7" of the Convention, when nowhere in the Notes exchanged with the Republic of Senegal was there ever any discussion of or dispute over this provision of the Convention; on the contrary, Senegal's response of 9 May 2006, the only document in which it refers to this provision, clearly states that Senegal "is complying with the spirit of the rule *aut dedere aut punire* laid down in Article 7";

— the invitation that Belgium claims to have addressed to Senegal to submit to the arbitration procedure was formally extended only once, Mr. President, Members of the Court, in a very surreptitious manner, in a statement whose main subject was not the invitation in question (statement of 20 June 2006).

58. As an essential prerequisite for action before the International Court of Justice was involved, Senegal was legitimately entitled to expect a clearer, less evasive proposal. Here, too, the circumstances reflect Belgium's desire to "expedite" the formalities required by Article 30 of the Convention, so as to satisfy as quickly as possible the conditions required for the Court to be seised.

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59. The Court will easily appreciate the striking contrast between the attitude of the Kingdom of Belgium, unquestionably in a hurry to try the case in its courts and skipping the steps required for that purpose, and the conduct of the State of Senegal, legitimately cautious to begin with but then sedulous once it became clear that it had the possibility to put Mr. Habré on trial.

60. Mr. President, Members of the Court, in the light of the foregoing, the Court is entitled to find that Belgium has never conformed to the precondition of negotiation provided for in Article 30 of the Convention. Rather, the action it took was to request information on the case file through two letters, to which Senegal replied.

61. Mr. President, Members of the Court, by thus using those letters as a pretext in an attempt to demonstrate its compliance with the precondition laid down by Article 30 of the Convention, Belgium was only concerned to bring Senegal before your distinguished Court.

62. Accordingly, on the basis of these observations, Mr. President, Members of the Court, may it please your distinguished Court to adjudge and declare that the Belgian claim is not admissible, inasmuch as it does not satisfy the conditions laid down by Article 30 of the 1984 Convention against Torture, those conditions being the existence of a dispute, on the one hand, and the exhaustion of negotiation procedures, on the other.

Mr. President, Members of the Court, I thank you for your kind attention and respectfully request that you permit me to step down from the podium and invite my colleague, Oumar Gaye, to take the floor to deal with Senegal's compliance with its obligations as a State Party to the 1984 Convention against Torture. Thank you.

The PRESIDENT: Thank you for your statement, Mr. Bakhoum, and I give the floor to Mr. Oumar Gaye. You have the floor, Mr. Gaye.

26 Mr. GAYE:

SENEGAL'S COMPLIANCE WITH ITS OBLIGATIONS AS A PARTY TO THE 1984 CONVENTION

Mr. President, Members of the Court, I am appearing before you once again to reply to the arguments developed by the Kingdom of Belgium, which persists in arguing, wrongly, that Senegal has not fulfilled its obligations under the 1984 Convention (item 1 in the judges' folder).

1. That assertion is irrelevant since it has no basis in reality, and it is totally rejected by Senegal. My presentation will be divided into two sections, the first focusing on the application of the provisions of Articles 2, 3, 4, 5, paragraph 3, and 7, paragraph 3, of the Convention against Torture, while the second will concentrate on the implementing measures required by the Convention.

Senegal's punishment of acts of torture under national legislation

2. In accordance with the provisions of Articles 2, 3, 4 and 5, paragraph 3, of the Convention, it must be pointed out that Senegal has always punished acts of torture under its national legislation. Article 5 (3) of the Convention provides that "This Convention does not exclude any . . . jurisdiction exercised in accordance with internal law." As soon as it gained international sovereignty, Senegal adopted a Penal Code which punished acts of torture.

3. In other words, even before it acceded to the Convention against Torture, Senegal endeavoured to punish acts of torture which seriously harm the dignity of the human person, since it had already adopted a law introducing a Penal Code, Article 228 of which punished torture and complicity in torture.

4. That law complied with the provisions of Article 2 of the Convention against Torture, which provides that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

27 5. Persons alleged to be guilty of acts of torture could be prosecuted in Senegal even before it acceded to the 1984 Convention. It was partly on that basis that Mr. Hissène Habré was indicted by the senior investigating judge in 2000.

Compliance with the provisions of Article 7, paragraph 3, of the Convention

6. Article 7, paragraph 3, of the Convention against Torture states that "Any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings."

7. It was in accordance with that very provision that Mr. Habré decided at that point to use the legal remedies provided for in Senegalese legislation for any individual indicted before the Senegalese criminal courts, regardless of nationality, on the same basis as the civil parties.

8. It should be pointed out here that Senegal has never tried to prevent its courts from examining the complaint filed by the civil parties, Belgium's various extradition requests or the proceedings brought by Mr. Habré.

9. On 4 July 2000, Mr. Habré's application led the *Chambre d'accusation* of the Court of Appeal to annul the record of the indictment and the subsequent proceedings on the ground that the court seised lacked jurisdiction (item 10 in the judges' folder).

10. Subsequently, the Court of Cassation confirmed in its judgment of 20 March 2001 that the investigating judge to whom the case had been referred lacked jurisdiction (item 3 in the judges' folder).

11. Furthermore, it should be pointed out that it was Mr. Habré himself who initiated proceedings before the ECOWAS Court of Justice against the State of Senegal, following the adoption of the legislative measures necessary for Senegal to fulfil its obligations as a State Party to the 1984 Convention.

12. He brought those proceedings on 1 October 2008, in accordance with the principles and rules governing the organization of a fair and equitable trial set out in the Convention against Torture. The ECOWAS Court delivered its judgment on 18 November 2010 (item 7 in the judges' folder).

28 **Belgium's silence on the application of the provisions of the Convention against Torture**

13. The Court will note that Belgium has failed to state a clear position on Senegal's application of the provisions of Article 5, paragraph 3, of the Convention against Torture. In Senegal's opinion, Belgium cannot reasonably allege that there has been any infringement of those provisions.

14. Belgium has also said nothing about Senegal's adaptation of its legislation to bring it into line with the other provisions of the Convention against Torture.

The measures prescribed by various provisions of the 1984 Convention

15. Belgium claims in its Memorial: "Through its actions and omissions, Senegal has violated the obligations deriving from Article 5, paragraph 1, Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture."

16. That assertion is anything but accurate. It is worth pointing out that it was after the Court of Cassation delivered its judgment that the Committee against Torture, to which the case had been referred by individuals of Chadian nationality, found in its decision of 2006 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".

17. Senegal, which carefully noted these comments by the Committee against Torture, complied with the obligation to adapt its national legislation in order to fulfil its commitment as a State Party to the Convention against Torture. The situation which Belgium describes in its Application concerns a period fairly far back in the past — from 1990 to 2001 — and an outdated legal situation, which it is worth recalling only from a historical point of view; it has no legal value on which Belgium may base its current claims before the Court (item 12 in the judges' folder).

18. This is why the Committee against Torture, following an official mission to Senegal from 4 to 7 August 2009, gave a positive assessment of Senegal's special efforts to fulfil its commitments in respect of the Convention against Torture, particularly as regards Senegal's *aut dedere aut judicare* obligation in respect of Mr. Habré.

29 19. Since 2009, Senegal has established its jurisdiction over the offences referred to in the Convention against Torture. Belgium does not dispute that. Senegal has duly complied with this requirement.

20. In its Memorial produced before the Court, Belgium writes that "Senegal failed in its obligation to prosecute or extradite Mr. Habré to Belgium" and that

> "The obligation to try or extradite provided for in the Convention derives from the mere presence of the person alleged to have committed acts of torture in the territory of the State Party concerned. In fact, it is a responsibility incumbent on Senegal as the forum State."[2]

21. Senegal intends vigorously to contest that statement or, at the very least, the implications which Belgium attaches to it. Article 7, paragraph 1, of the Convention against Torture provides for an alternative to Senegal's choice, extradition, failing prosecution.

22. It was on the basis of Senegal's adaptation of its legislation to the provisions of the Convention against Torture that Belgium submitted, in Notes Verbales dated 15 March 2011 and 5 September 2011, its second and third requests for extradition, which were rejected for formal defects. They were declared inadmissible on the grounds that they were not accompanied by the originals of the documents required, in accordance with the requirements of the law on extradition (item 2 in the judges' folder).

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[2]Memorial of Belgium (MB), pp. 85 and 88.

23. The Court will note that all of Belgium's requests have come before the courts, even though they have not yet been as successful as it hoped. The latest extradition request, filed on 17 January 2012, is currently being examined, in accordance with Senegal's *aut dedere aut judicare* obligations resulting from the Convention against Torture (item 2 in the judges' folder).

24. In any event, Mr. Habré is still in Senegal, and his presence confirms Senegal's fulfilment of the commitment it gave here to the Court at the hearing on Belgium's request for the indication of provisional measures.

30 25. In that respect, Senegal is scrupulously complying with the provisions of Article 3, paragraph 1, of the Convention, since it has not taken any measures to expel Mr. Habré, despite the statements to which Belgium alluded and which have no legal character.

26. If Senegal had intended, as Belgium claims, to shirk its obligations, it would certainly not have taken the trouble to amend its Constitution, adopt these laws and organize regular diplomatic exchanges with a number of States, nor would it have hosted international meetings to decide the conditions for conducting the trial of the former Chadian Head of State, including the Donors Round Table to raise funds for the trial (item 5 in the judges' folder).

The alleged breach of the *aut dedere aut judicare* rule

27. Belgium also contends that the current lack of funds to organize the trial does not constitute a "justification". In its Memorial, Belgium notes that

> "The seisin of the African Union does not constitute an alternative to compliance with Senegal's conventional obligations . . . The 'mandate' conferred on Senegal by the African Union to try Mr. Habré does not in any way exempt Senegal from its obligation, as the forum State, to submit the case to its competent authorities or to extradite him to a State which so requests. This obligation continues to exist despite the intervention of the African Union. The obligation to try or extradite provided for in the Convention derives from the mere presence of the person alleged to have committed acts of torture in the territory of the State Party concerned. In fact, it is a responsibility incumbent on Senegal as the forum State."[3]

28. Senegal regrets to note, on this point as on others, the rather artificial nature of the disagreement which Belgium is attempting to highlight. In actual fact, the question of the interpretation of the African Union's "mandate" has already been discussed at the hearings on the

[3]MB, p. 88.

request for the indication of provisional measures and in Senegal's first round of presentations[4]. Senegal has more than once explained to the Court the meaning and scope which it attached to the African Union's intervention.

31 29. It has stated on a number of occasions that it did not see that intervention as the source of its obligation to try, but that it was, of course, legally bound only by its status as a State Party to the 1984 Convention. That being so, Senegal finds it difficult to understand Belgium's insistence on an interpretation which has never been that of the State liable to perform the obligation in question — which is, precisely, to "try".

30. Senegal therefore reiterates, in the hope of finally closing this discussion, that it regards the 1984 Convention against Torture as the main legal basis for all the measures it has taken with a view to putting Mr. Habré on trial. In other words, the interpretations which the two Parties give to that "mandate" do not differ, but fully coincide. Moreover, the African Union decision conferring that "mandate" on Senegal mentions the Convention against Torture and refers to its content as the principal source of Senegal's commitments.

31. Senegal would also like to clarify its position on another point in Belgium's argument, having to do with the "financial difficulties" to which it (that is to say, Belgium) refers. The interpretation given to this aspect of Senegal's submission should certainly be corrected.

32. Belgium appears to view this factor as a sort of excuse relied on by Senegal in order to evade its commitment.

33. Yet it was Belgium itself which cited, on page 15 of its Memorial, the assessment published in 1993 by the National Commission of Inquiry of the Chadian Ministry of Justice, which gives the following figures:

— "more than 40,000 victims;

— more than 80,000 orphans;

— more than 30,000 widows;

— more than 200,000 people left with no moral or material support as a result of this repression".

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[4]CR 2012/4, pp. 13 and 14 (Thiam).

32 34. Senegal has never presented the problem of financial support for Mr. Habré's trial as justification for failing to fulfil an obligation. Senegal has never at any point in the judicial proceedings sought to free itself from its commitment. The Court cannot therefore point to lack of funds or difficulties in establishing a special budget as exonerating factors, for the simple reason that that has never been Senegal's position.

35. For the Senegalese authorities, it has simply been a question of ensuring that basic preparations were made for a trial which really is unique, given the large number of alleged victims of the former Head of State, and the need for them to be heard in fair and equitable judicial proceedings where the rights of the persons indicted are also protected.

36. Raising all the funds needed to organize the trial will ensure that it is conducted efficiently, without any disruption which might infringe the rights of the parties involved. In our judicial system, once a person has been charged, the investigation must continue uninterrupted.

37. In those circumstances, it is understandable that the trial of the former Chadian Head of State is a case like no other. The scale of the challenge has not, however, prevented Senegal from taking the first steps along the lines required by the Convention against Torture.

38. In Senegal's opinion, in the light of the arguments I have just presented, Belgium's arguments do not establish any violation of the provisions of the Convention against Torture.

Thank you for your kind attention. With your permission, Mr. President, I would now ask you to call my colleague Mr. Abdoulaye Dianko, who will demonstrate the non-existence of any internationally wrongful act attributable to Senegal.

The PRESIDENT: Thank you, Mr. Gaye. The Court will now take a break of 15 minutes. Mr. Dianko will have the floor after the break. The sitting is adjourned for 15 minutes.

The Court adjourned from 11.40 a.m. to 12 noon.

33 The PRESIDENT: Please be seated. The sitting is resumed, and I now give the floor to Mr. Abdoulaye Dianko. You have the floor, Mr. Dianko.

Mr. DIANKO:

THE NON-EXISTENCE OF AN INTERNATIONALLY WRONGFUL ACT ATTRIBUTABLE TO SENEGAL

1. Mr. President, Members of the Court, it is a great honour and a privilege for me to come before the Court today in order to defend the interests of my country once again in these proceedings brought by Belgium.

2. The Agent of the Republic of Senegal has asked me to explain before the Court that the claims made by Belgium must be rejected. To do that, I shall examine the following points:

— firstly, I shall endeavour to demonstrate the actions which prove that no internationally wrongful act can seriously be attributed to Senegal by Belgium;

— secondly, I shall indicate that Belgium does not specify any internationally wrongful act that can be attributed to Senegal.

The actions which prove that no internationally wrongful act can seriously be attributed to Senegal by Belgium

3. Senegal intends to refute strongly the attribution to it by Belgium of internationally wrongful acts.

4. It cannot reasonably be held to have breached its obligations under the Convention against Torture. We shall demonstrate this once again, even if it means going back over what has been argued at some length by previous speakers.

5. In the case which has been brought before the Court, the question posed is as follows: is the Republic of Senegal refusing to perform its obligations?

Senegal has always taken positive action

6. According to Belgium in its Memorial, but above all in its oral argument, especially the presentation by Mr. Müller, Senegal has confined itself to a statement of intent in this case:

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> "despite its commitment to prosecute Hissène Habré, nothing has happened. No act of investigation or inquiry has been performed and the case of Hissène Habré has still not been submitted to the competent Senegalese prosecution authorities. The only things that did happen were several statements of the highest authorities of Senegal to 'get rid' of the case and even an attempt to expel Hissène Habré to Chad in July 2011."

> "In any event, Senegal seems to overlook the basic fact that State responsibility is not conditioned by the will or the intent of a State."[5]

7. But no, Senegal has not merely expressed its willingness to comply with its treaty obligation.

8. For more than ten years it has been taking action, and it did not wait to be approached by Belgium before attempting to prosecute Mr. Habré.

9. Need one recall that Mr. Habré was indicted on 3 February 2000, following a civil-party application, although it is true that this procedure resulted in a decision by the Court of Cassation of 20 March 2001 confirming that there were no texts on which criminal proceedings against Mr. Habré could be based.

10. Some will say that, in any event, if Senegal had taken the necessary steps to adapt its criminal legislation, as the Convention against Torture obliges it to do, those proceedings might have resulted in a judgment.

11. But some considered, as Professor David did his utmost to show in his presentation on Tuesday, though certainly with a different end in view, that it was possible for the prosecution to be based on the principles of combating impunity, given the nature of the offences of which Mr. Habré is accused. The arguments developed at great length by counsel for the victims in their complaint with civil-party application, arguments which were partially endorsed by the senior judge at the time, relate to this contention.

12. However that may be, and even though the proceedings originated in a complaint with civil-party application, it can be said that this is nevertheless evidence that the State — the State of Senegal —, by allowing them to move forward, wished to demonstrate its commitment not to hinder any prosecution of Mr. Habré. Because if the State did not wish such a prosecution to take place, it had the legal means to request the investigating judge, at the very least, to refuse to open an investigation.

35 13. But what is important to bear in mind, above all, following this first unsuccessful attempt, is the determination of the State of Senegal to do everything to make it possible for Mr. Habré to be tried on its soil.

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[5] CR 2012/3, p. 41, paras. 15 and 16.

14. Moreover, Senegal has long been mindful of the need for this to happen. The Senegalese authorities have taken measures designed to prevent Mr. Habré from escaping justice. Mr. Habré cannot leave the territory of Senegal, since he has no travel document, the Senegalese authorities having refused to issue him with one. In addition, his residence is under round-the-clock surveillance by members of the national police force.

15. Senegal is thus complying with an obligation under the Convention, set forth in Article 6 thereof:

> "Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in Article 4 is present, shall take him into custody or take other legal measures to ensure his presence."

The intervention of the African Union in the case

16. There was a major new development in the case with the intervention of the African Union (which, it must be pointed out, now seems to be viewed favourably once again by Belgium, something that has not always been the situation recently), which in July 2006 took a decision in this case which is binding upon Senegal just as much as the Convention against Torture.

17. That decision contains a very important element which may help in understanding the subsequent attitude of Senegal. The African Union takes the view that:

— the Hissène Habré case falls within its competence; and then

— mandates Senegal to prosecute and try *Hissène Habré, on behalf of Africa, in a competent Senegalese court*.

18. The decision therefore signifies that Senegal has to try Mr. Habré, but must do so for Africa and on African soil. Senegal will apply that decision while at the same time proceeding to perform its treaty obligation.

36 19. However, it has already been sufficiently explained that the 1984 Convention offers the choice of two alternatives, as was recalled by the Agent of Senegal at the opening of the hearings on the request for the indication of provisional measures.

20. Immediately after this decision, therefore, Senegal took a series of relevant preliminary steps in order to try Mr. Habré.

Developments in the case since the intervention of the African Union

21. In 2007, the legislation was modified in order to extend the jurisdiction of Senegal's courts to cover the offences of which Mr. Habré is accused.

22. In May 2008, all the judicial and administrative organs needed to conduct the trial proceedings had been put in place. However, there then followed the intervention of the ECOWAS Court of Justice.

The judgment of the ECOWAS Court of Justice

23. Within that same time period, 2007-2008, a number of victims filed a complaint with the Senegalese authorities, on 16 September 2008.

24. But 15 days later, on 1 October 2008, Hissène Habré filed an application with the ECOWAS Court of Justice, requesting it to find that Senegal could not try him for acts connected with the period when he was President of the Republic of Chad and to order it to cease any proceedings or actions against him.

25. On 18 November 2010, the Court decided 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".

26. This decision, whatever one may think of it, enjoins Senegal to alter fundamentally the process which began in 2006 and which was to result in a judgment ultimately being delivered.

27. The Court's judgment now points to the establishment of a new mechanism that will be more cumbersome, more complicated and more expensive for Senegal, which was already struggling to find the resources to organize a trial at national level.

37 28. This new obstacle is not a constraint of a domestic nature, as Belgium seems to think. Senegal, while bearing in mind its duty to comply with its treaty obligation, is nonetheless subject to the authority of the decision of the ECOWAS Court.

29. However, it has not given up the task and immediately began the necessary consultations with its partners in order to perform its obligation to try Mr. Habré, through the arrangement laid down by the ECOWAS Court.

The steps taken by Senegal are entirely consistent with compliance with the Convention

30. As can be observed, all the steps undertaken by Senegal since 2006, I mean to say since 2000, are entirely consistent with the *aut dedere aut judicare* obligation. Indeed, the 1984 Convention in a sense breaks down the obligation to "extradite or try" into a series of actions which a State required to comply with it should take. Thus all the measures taken by Senegal up to now have been in performance of its obligations under the Convention, and are not preliminaries to the fulfilment of those obligations.

31. The act of trying Mr. Habré is merely the culmination of a process, though it remains a commitment like other commitments; it cannot conceivably be claimed that, until that culminating action is complete, the State is not performing its obligations.

32. Accordingly, never at any point in the course of the "Habré case", either nationally or in an international context, has it been claimed that Senegal *refuses* to perform its obligations. An internationally wrongful act involves an attitude of repudiation, at least an implied denial, of a duty. In the case concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* the International Court of Justice expressly concluded that "it is clear that *refusal* to fulfil a treaty obligation involves international responsibility" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 228).

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Belgium does not specify any internationally wrongful act that can be attributed to Senegal

33. Belgium is thus finding it hard to prove, both in its written and oral pleadings, that any specific action or omission that can be attributed to Senegal constitutes an internationally wrongful act.

There is neither an action nor an omission constituting an internationally wrongful act

34. We would recall, as we wrote in our Memorial, that under Article 1 of the Articles drawn up by the International Law Commission in its work on State responsibility: "Every internationally wrongful act of a State entails the international responsibility of that State." And Article 2 identifies the elements of an internationally wrongful act and provides that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: *(a)* is

attributable to the State under international law; and *(b)* constitutes a breach of an international obligation of the State".

35. Thus, in a number of judgments, your august Court has indicated what is covered by the notion of breach of an international obligation by a State. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court referred to acts' "compatibility or incompatibility with the obligations of [a State]".

36. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court spoke of acts "contrary . . ., inconsistent" with a State's given obligation.

37. In the *Gabčíkovo-Nagymaros Project* case between Hungary and Slovakia, the Court used the expression "failure to comply with . . . treaty obligations".

38. Lastly, in the *Elettronica Sicula S.p.A. (ELSI)* case, the Court asked "whether the requisition was in conformity with the requirements of [the Treaty of Friendship, Commerce and Navigation between the United States and Italy]". All these judgments, together with their supporting arguments, are included in our Counter-Memorial, from page 70 onwards.

No positive act exists

39. As we have repeatedly said: Belgium does not spell out which specific action or omission can be attributed to Senegal.

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40. Belgium's persistent requests to the Court call for clarification on this point too. In international law, a State can be judged only on its actual deeds. Even if there is any doubt about the sincerity of what a State says, it is still absolutely impossible to infer any wrongful act from that doubt. Even where an internationally wrongful act consists of a precise action — which is not the case here — the mere preparatory measures for that action do not themselves constitute an internationally wrongful act. The Court made this clear in the *Gabčíkovo-Nagymaros Project* case. In that Judgment, the question asked of the Court concerned when the system for diversion of the waters had been put in place. It replied that the breach of the law constituted by that act occurred only from the time when the waters of the Danube were *actually* diverted. According to the Court,

> "between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final

> decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act [whether instantaneous or continuous] and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'."

41. In conclusion, the "possibility of an internationally wrongful act" therefore does not exist. Belgium's claim is essentially based on a factual and legal situation which no longer obtains, and it will not be able to rely on criticizing Senegal's conduct in the past. Senegal has broadly begun the process which should culminate in the trial of Mr. Habré, and is thus already performing its obligations.

42. Members of the Court, in the light of the above arguments, showing that Senegal is fulfilling its conventional commitments and has not, to date, committed an internationally wrongful act, Senegal asks the Court to find that no internationally wrongful act can be attributed to it.

I thank you for your attention.

40 The PRESIDENT: Thank you, Mr. Dianko. I now invite Professor Thiam, Agent of the Republic of Senegal, to the podium. You have the floor, Mr. Thiam.

Mr. THIAM:

SUBMISSIONS

1. Mr. President, Members of the Court, in the light of the arguments and reasons set out in its Counter-Memorial and its pleadings, whereby Senegal has stated and demonstrated that, in the instant case, it has duly assumed its international commitments and has not committed any internationally wrongful act, I should like, on behalf of my country, to request the Court to find in its favour on the submissions which follow and to adjudge and declare that:

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

(2) In the alternative, Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to "extradite or try" (Article 6,

paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any rule of conventional law, general international law or customary international law which has been proved to be incumbent on the State of Senegal;

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

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

(5) May it please the Court, in consequence, to dismiss all the claims attaching to the Application of the Kingdom of Belgium.

2. These submissions, Mr. President, Members of the Court, conclude the first round of Senegal's oral argument. I thank you for your kind attention.

41 The PRESIDENT: Thank you, Mr. Thiam. Certain Members of the Court have questions to put to both Parties, or to one of the Parties. They are Judges Abraham, Keith, Bennouna, Cançado Trindade, Greenwood, Xue and Donoghue. Judge Abraham, you have the floor.

Judge ABRAHAM: Thank you, Mr. President. My question is addressed to both Parties, and is as follows:

> "Is Belgium entitled to invoke the responsibility of Senegal for the alleged breach by the latter of its obligation to submit the H. Habré case to its competent authorities for the purpose of prosecution, unless it extradites him, in respect of the alleged crimes the victims of which did not have Belgian nationality at the time the facts occurred? In the case of an affirmative answer, what is the legal basis conferring such entitlement on Belgium? In this respect, should one differentiate between the alleged crimes falling within the scope of the 1984 convention against torture and the others?"
>
> Thank you.

The PRESIDENT: Thank you, Judge Abraham. Je donne maintenant la parole à M. le juge Keith. Vous avez la parole, Monsieur.

M. le juge KEITH : Merci, Monsieur le président. Je souhaiterais poser deux questions, lesquelles s'adressent aux deux Parties. Ma première question est la suivante :

«1. Les déclarations d'acceptation de la juridiction obligatoire de la Cour que les deux Parties ont faites en application du paragraphe 2 de l'article 36 du Statut sont assorties de réserves qui excluent de leur champ d'application «les différends d'ordre juridique … [pour lesquels] les Parties auraient convenu ou conviendraient d'avoir recours à un autre mode de règlement pacifique» (pour la Belgique) et les «différends pour lesquels les Parties seraient convenues d'avoir recours à un autre mode de règlement» (pour le Sénégal).

Les Parties estiment-elles que l'article 30 de la convention contre la torture, en particulier dans ses dispositions relatives aux négociations et à l'arbitrage, prévoit un tel «mode de règlement» en ce qui concerne les violations de cet instrument alléguées par la Belgique, avec pour conséquence que la compétence de la Cour pour connaître de ces violations ne peut être déterminée que par référence à l'article 30 ?

42 Ma seconde question est la suivante :

2. Quel sens convient-il de donner à la référence faite au paragraphe 1 de l'article 30 de la convention à l'incapacité des parties à un différend à se mettre d'accord sur l'organisation de l'arbitrage pour régler ce différend ? Cela impose-t-il, par exemple, à la partie qui propose d'avoir recours à l'arbitrage, de formuler la question qu'elle estime devoir être soumise à cette procédure ou de faire des propositions sur d'autres aspects de l'organisation de l'arbitrage ? En l'espèce, quelles sont les preuves de cette incapacité ?»

Je vous remercie, Monsieur le président.

Le PRESIDENT : Merci. I now give the floor to Judge Bennouna.

Judge BENNOUNA: Thank you, Mr. President. My question is addressed to the Kingdom of Belgium, and is as follows:

"What would be the critical date on which the violation took place, as alleged by Belgium, of Senegal's obligation to prosecute or extradite Mr. Hissène Habré, under the Convention against Torture?"

Thank you.

The PRESIDENT: Thank you, Judge Bennouna. I now give the floor to Judge Cançado Trindade.

Judge CANÇADO TRINDADE: Thank you, Mr. President. My questions are addressed to both Parties. The first question is:

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

And the second question:

"2. *As to the law*:

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

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

Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Cançado Trindade. Je donne maintenant la parole à M. le juge Greenwood. Monsieur, vous avez la parole.

Judge GREENWOOD: Thank you, Mr. President. My question is addressed to the Kingdom of Belgium., but I shall be glad to receive also the comments of Senegal.

"With regard to the argument that Senegal is in breach of a customary international law obligation to prosecute or extradite, please indicate:

(1) which States have provided for their courts to possess jurisdiction over

(i) war crimes committed in an armed conflict not of an international character; and

(ii) crimes against humanity;

in cases where the alleged offence occurred outside their territory and neither the alleged offender nor the victims were their nationals;

(2) what instances there are of States exercising jurisdiction or granting extradition in such cases; and

(3) what evidence exists that States consider that international law requires them to prosecute or extradite in such cases.

The question relates solely to customary international law and not to action taken pursuant to treaty obligations such as those arising under the Convention against Torture."

Thank you, Mr. President.

44 Le PRESIDENT : Je vous remercie, Monsieur le juge. Je donne maintenant la parole à Mme la juge Xue. Vous avez la parole, Madame.

Mme la juge XUE : Merci, Monsieur le président. Ma question s'adresse aux deux Parties.

> «L'un des principaux objectifs de la convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (dite «convention contre la torture») est de faire en sorte que l'auteur de tels actes n'échappe pas à la justice ; en d'autres termes, il s'agit d'éradiquer l'impunité. J'aimerais connaître les vues des Parties sur le point de savoir si l'obligation *aut dedere aut judicare* prévue au paragraphe 1 de l'article 7 de la convention contre la torture devrait selon elles être considérée comme revêtant un caractère absolu en ce sens qu'elle exclurait toutes juridictions autres que celles de l'Etat sur le territoire duquel se trouve l'auteur présumé ou des Etats demandant l'extradition au titre du paragraphe 1 de l'article 5 de la convention contre la torture.»

Je vous remercie, Monsieur le président.

Le PRESIDENT : Merci, Madame la juge. Je donne la parole à Mme la juge Donoghue. Vous avez la parole, Madame.

Mme la juge DONOGHUE : Je vous remercie, Monsieur le président. Mes deux questions s'adressent aux deux Parties.

> «Premièrement, les obligations incombant au Sénégal en vertu du paragraphe 1 de l'article 7 de la convention contre la torture s'appliquent-elles aux infractions prétendument commises avant le 26 juin 1987, date à laquelle la convention est entrée en vigueur pour le Sénégal ?
>
> Deuxièmement, dans les circonstances de la présente affaire, lesdites obligations du Sénégal s'étendent-elles aux infractions prétendument commises avant le 25 juillet 1999, date à laquelle la convention est entrée en vigueur pour la Belgique ?»

Merci, Monsieur le président.

Le PRESIDENT : Je vous remercie, Mme la juge. The texts of the questions will be sent to the Parties in writing as soon as possible. The Parties are invited to reply orally to the questions during the second round of oral argument. They may, however, if necessary, supplement in writing any oral answer which they have provided. Any such supplementary reply must be submitted no later than Wednesday 28 March 2012 at 6 p.m. Written comments on the replies of the other Party may be presented no later than Wednesday 4 April 2012 at 6 p.m.

45 That brings today's sitting to an end and concludes the first round of oral argument. The hearings will resume on Monday 19 March at 10 a.m. with the second round of oral argument of the Kingdom of Belgium. Belgium will present its final submissions at the end of the sitting.

The Republic of Senegal will take the floor on Wednesday 21 March at 10 a.m. for its second round of oral argument. At the end of that sitting, Senegal will present its final submissions.

I would point out that, in accordance with Article 60, paragraph 1, of the Rules of Court, the oral statements are to be as succinct as possible. I would add that the purpose of the second round of oral argument is to enable each of the Parties to reply to the arguments put forward orally by the opposing Party or to the questions put by Members of the Court. The second round must therefore not be a repetition of the arguments already set forth by the Parties, which are not obliged to use all the time allotted to them. Thank you. The sitting is closed.

The Court rose at 12.55 p.m.