COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

QUESTIONS CONCERNANT L'OBLIGATION DE POURSUIVRE OU D'EXTRADER

(BELGIQUE c. SÉNÉGAL)

ARRÊT DU 20 JUILLET 2012

2012

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE

(BELGIUM *v.* SENEGAL)

JUDGMENT OF 20 JULY 2012

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ARRÊT

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QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE

(BELGIUM *v.* SENEGAL)

Historical and factual background.

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

*

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

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

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*

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*

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

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

*

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JUDGMENT

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

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

between

the Kingdom of Belgium,

represented by

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

as Agent;

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

as Co-Agent;

Mr. Eric David, Professor of Law at the Université libre de Bruxelles,
Sir Michael Wood, K.C.M.G., member of the English Bar, member of the International Law Commission,
Mr. Daniel Müller, consultant in Public International Law, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel and Advocates;

H.E. Mr. Willy De Buck, Ambassador, Permanent Representative of the Kingdom of Belgium to the International Organizations in The Hague,
Mr. Philippe Meire, Federal Prosecutor, Federal Prosecutor's Office,
Mr. Alexis Goldman, Adviser, Public International Law Directorate, Directorate-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,
Mr. Benjamin Goes, Adviser, Federal Public Service Chancellery of the Prime Minister,
Ms Valérie Delcroix, Attaché, Public International Law Directorate, Directorate-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,

Ms Pauline Warnotte, Attaché, International Humanitarian Law Division, Federal Public Service for Justice,
Ms Liesbet Masschelein, Attaché, Office of the Prime Minister,
Mr. Vaios Koutroulis, Senior Lecturer, Faculty of Law, Université libre de Bruxelles,
Mr. Geoffrey Eekhout, Attaché, Permanent Representation of the Kingdom of Belgium to the International Organizations in The Hague,
Mr. Jonas Perilleux, Attaché, International Humanitarian Law Division, Federal Public Service for Justice,

as Advisers,

and

the Republic of Senegal,

represented by

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

as Agent;

H.E. Mr. Amadou Kebe, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands,
Mr. François Diouf, Magistrate, Director of Criminal Affairs and Pardons, Ministry of Justice,

as Co-Agents;

Professor Serigne Diop, Mediator of the Republic,
Mr. Abdoulaye Dianko, *Agent judiciaire de l'Etat*,
Mr. Ibrahima Bakhoum, Magistrate,
Mr. Oumar Gaye, Magistrate,

as Counsel;

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

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

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

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

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

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

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

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

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

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

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

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

For Belgium: Mr. Paul Rietjens,
Mr. Gérard Dive,
Mr. Eric David,
Sir Michael Wood,
Mr. Daniel Müller.

For Senegal: H.E. Mr. Cheikh Tidiane Thiam,
Mr. Oumar Gaye,
Mr. François Diouf,
Mr. Ibrahima Bakhoum,
Mr. Abdoulaye Dianko.

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

*

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

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

— the Court has jurisdiction to entertain the dispute between the Kingdom of Belgium and the Republic of Senegal regarding Senegal's compliance with its obligation to prosecute Mr. H. Habré or to extradite him to Belgium for the purposes of criminal proceedings;
— Belgium's claim is admissible;
— the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice;
— failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts.

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

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

On behalf of the Government of Belgium,

in the Memorial:

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

1. *(a)* Senegal breached its international obligations by failing to incorporate in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under customary international law by failing to bring criminal proceedings against Mr. Hissène Habré for acts characterized in particular as crimes of torture, genocide, war crimes and crimes against humanity alleged against him as perpetrator, co-perpetrator or accomplice, or to extradite him to Belgium for the purposes of such criminal proceedings;

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

2. Senegal is required to cease these internationally wrongful acts

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

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

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

On behalf of the Government of Senegal,

in the Counter-Memorial:

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

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;
2. In the alternative, Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to 'extradite or try' (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any rule of customary international law;
3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State party to the 1984 Convention against Torture;
4. In taking the appropriate measures and steps to prepare for the trial of Mr. Habré, Senegal is complying with the declaration by which it made a commitment before the Court.

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

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

On behalf of the Government of Belgium,

at the hearing of 19 March 2012:

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

1. *(a)* Senegal breached its international obligations by failing to incorporate in due time in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
   (b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under other rules of international law by failing to bring criminal proceedings against Hissène Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings;
   (c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

   (a) by submitting without delay the *Hissène Habré* case to its competent authorities for prosecution; or
   (b) failing that, by extraditing Hissène Habré to Belgium without further ado."

On behalf of the Government of Senegal,

at the hearing of 21 March 2012:

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

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;
2. In the alternative, should it find that it has jurisdiction and that Belgium's Application is admissible, that Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to 'try or extradite' (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any other rule of conventional law, general international law or customary international law in this area;
3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State party to the 1984 Convention against Torture;
4. In taking the appropriate measures and steps to prepare for the trial of Mr. H. Habré, Senegal is complying with the declaration by which it made a commitment before the Court;

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

* * *

I. Historical and Factual Background

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

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

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

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

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

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

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

4 September 1961, respectively — circulated a "red notice" concerning Mr. Habré, which serves as a request for provisional arrest with a view to extradition.

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

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

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

and

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

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

25. By Note Verbale of 11 January 2006, Belgium, referring to the ongoing negotiation procedure provided for in Article 30 of the Conven-

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

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

26. By Note Verbale dated 4 May 2006, having noted the absence of an official response from the Senegalese authorities to its earlier Notes and communications, Belgium again made it clear that it interpreted Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him if it does not prosecute him, and stated that the "decision to refer the Hissène Habré case to the African Union" could not relieve Senegal of its obligation to either judge or extradite the person accused of these offences in accordance with the relevant articles of the Convention. It added that an unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention. By Note Verbale of 9 May 2006, Senegal explained that its Notes Verbales of 7 and 23 December 2005 constituted a response to Belgium's request for extradition. It stated that, by referring the case to the African Union, Senegal, in order not to create a legal impasse, was acting in accordance with the spirit of the *aut dedere aut punire* principle. Finally, it took note of "the possibility [of] recourse to the arbitration procedure provided for in Article 30 of the Convention". In a Note Verbale of 20 June 2006, which Senegal claims not to have received, Belgium "not[ed] that the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded" and accordingly asked Senegal to submit the dispute to arbitration "under conditions to be agreed mutually", in accordance with Article 30 of the Convention. Furthermore,

according to a report of the Belgian Embassy in Dakar following a meeting held on 21 June 2006 between the Secretary-General of the Senegalese Ministry of Foreign Affairs and the Belgian Ambassador, the latter expressly invited Senegal to adopt a clear position on the request to submit the matter to arbitration. According to the same report, the Senegalese authorities took note of the Belgian request for arbitration and the Belgian Ambassador drew their attention to the fact that the six-month time-limit under Article 30 (see paragraph 42 below) began to run from that point.

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

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

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

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

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

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

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

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

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

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

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

30. By Note Verbale dated 8 May 2007, Belgium recalled that it had informed Senegal, in a Note Verbale of 20 June 2006, "of its wish to constitute an arbitral tribunal to resolve th[e] difference of opinion in the absence of finding a solution by means of negotiation as stipulated by Article 30 of the Convention [against Torture]". It noted that "it ha[d] received no response from the Republic of Senegal [to its] proposal of arbitration" and reserved its rights on the basis of the above-mentioned Article 30. It took note of Senegal's new legislative provisions and enquired whether those provisions would allow Mr. Habré to be tried in Senegal and, if so, within what time frame. Finally, Belgium made Senegal an offer of judicial co-operation, which envisaged that, in response to a letter rogatory from the competent Senegalese authorities, Belgium would transmit to Senegal a copy of the Belgian investigation file against Mr. Habré. By Note Verbale of 5 October 2007, Senegal informed Belgium of its decision to organize the trial of Mr. Habré and invited Belgium to a meeting of potential donors, with a view to financing that trial.

Belgium reiterated its offer of judicial co-operation by Notes Verbales of 2 December 2008, 23 June 2009, 14 October 2009, 23 February 2010, 28 June 2010, 5 September 2011 and 17 January 2012. By Notes Verbales of 29 July 2009, 14 September 2009, 30 April 2010 and 15 June 2010, Senegal welcomed the proposal of judicial co-operation, stated that it had appointed investigating judges and expressed its willingness to accept the offer as soon as the forthcoming Donors' Round Table had taken place. The Belgian authorities received no letter rogatory to that end from the Senegalese judicial authorities.

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

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

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

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

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

35. In a judgment of 18 November 2010, the Court of Justice of the Economic Community of West African States (hereinafter the "ECOWAS Court of Justice") ruled on an application filed on 6 October 2008, in which Mr. Habré requested the court to find that his human rights would be violated by Senegal if proceedings were instituted against him. Having observed *inter alia* that evidence existed pointing to potential violations of Mr. Habré's human rights as a result of Senegal's constitutional and legislative reforms, that Court held that Senegal should respect the rulings handed down by its national courts and, in particular, abide by the principle of *res judicata*, and ordered it accordingly to comply with the absolute principle of non-retroactivity. It further found that the mandate which Senegal received from the African Union was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Mr. Habré to take place, within the strict framework of special *ad hoc* international proceedings (ECOWAS Court of Justice, *Hissein Habré* v. *Republic of Senegal*, judgment No. ECW/CCJ/JUD/06/10 of 18 November 2010).

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

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

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

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

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

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

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

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

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

41. At its eighteenth session, held in January 2012, the Assembly of the Heads of State and Government of the African Union observed that the Dakar Court of Appeal had not yet taken a decision on Belgium's fourth

request for extradition. It noted that Rwanda was prepared to organize Mr. Habré's trial and

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

II. Jurisdiction of the Court

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

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

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

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

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

> "[Senegal] accepts on condition of reciprocity as compulsory *ipso facto* and without special convention, in relation to any other State accepting the same obligation, the jurisdiction of the Court over all legal disputes arising after the present declaration, concerning:
>
> — the interpretation of a treaty;
> — any question of international law;

— the existence of any fact which, if established, would constitute a breach of an international obligation;
— the nature or extent of the reparation to be made for the breach of international obligation.

This declaration is made on condition of reciprocity on the part of all States. However, Senegal may reject the Court's competence in respect of:

— disputes in regard to which the parties have agreed to have recourse to some other method of settlement;
— disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal."

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

A. The Existence of a Dispute

44. In the claims included in its Application, Belgium requested the Court to adjudge and declare that

"— the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice;
— failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts".

According to Belgium's final submissions, the Court is requested to find that Senegal breached its obligations under Article 5, paragraph 2, of the Convention against Torture, and that, by failing to take action in relation to Mr. Habré's alleged crimes, Senegal has breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that instrument and under certain other rules of international law.

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

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

46. The Court recalls that, in order to establish whether a dispute exists, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The Court has previously stated that "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74) and that "[t]he Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.) The Court has also noted that the "dispute must in principle exist at the time the Application is submitted to the Court" (*ibid.*, p. 85, para. 30).

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

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

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

48. The Court finds that any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, para-

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

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

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

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

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

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

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

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

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

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

54. While it is the case that the Belgian international arrest warrant transmitted to Senegal with a request for extradition on 22 September 2005 (see paragraph 21 above) referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties reviewed above (see paragraphs 21-30), the Court considers that such a dispute did not exist on that date. The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture. It is noteworthy that even in a Note Verbale handed over to

Senegal on 16 December 2008, barely two months before the date of the Application, Belgium only stated that its proposals concerning judicial co-operation were without prejudice to "the difference of opinion existing between Belgium and Senegal regarding the application and interpretation of the obligations resulting from the relevant provisions of the [Convention against Torture]", without mentioning the prosecution or extradition in respect of other crimes. In the same Note Verbale, Belgium referred only to the crime of torture when acknowledging the amendments to the legislation and Constitution of Senegal, although those amendments were not limited to that crime. Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law. The facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture. However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems.

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

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

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B. Other Conditions for Jurisdiction

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

57. With regard to the first of these conditions, the Court must begin by ascertaining whether there was, "at the very least[,] a genuine attempt

by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157). According to the Court's jurisprudence, "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked" (*ibid.*, p. 133, para. 159). The requirement that the dispute "cannot be settled through negotiation" could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, "no reasonable probability exists that further negotiations would lead to a settlement" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345).

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

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

60. With regard to the submission to arbitration of the dispute on the interpretation of Article 7 of the Convention against Torture, a Note Verbale of the Belgian Ministry of Foreign Affairs of 4 May 2006 (see para-

graph 26 above) observed that "[a]n unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture". In a Note Verbale of 9 May 2006 (see paragraph 26 above) the Ambassador of Senegal in Brussels responded that

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

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

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

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

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

> "the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the

> applicant, to which the respondent has made no answer or which it has expressed its intention not to accept." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 41, para. 92.)

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

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

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

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

III. Admissibility of Belgium's Claims

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

65. Belgium does not dispute the contention that none of the alleged victims was of Belgian nationality at the time of the alleged offences. However, it noted in its Application that "[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction". In its Application Belgium requested the Court to adjudge and declare that its claim was admissible. In the oral proceedings, Belgium also claimed to be in a "particular position" since "it has availed itself of

its right under Article 5 to exercise its jurisdiction and to request extradition". Moreover, Belgium argued that "[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform".

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

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

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

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

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

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

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

IV. The Alleged Violations of the Convention against Torture

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

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

73. Senegal contests Belgium's allegations and considers that it has not breached any provision of the Convention against Torture. In its view, the Convention breaks down the *aut dedere aut judicare* obligation into a

series of actions which a State should take. Senegal maintains that the measures it has taken hitherto show that it has complied with its international commitments. First, Senegal asserts that it has resolved not to extradite Mr. Habré but to organize his trial and to try him. It maintains that it adopted constitutional and legislative reforms in 2007-2008, in accordance with Article 5 of the Convention, to enable it to hold a fair and equitable trial of the alleged perpetrator of the crimes in question reasonably quickly. It further states that it has taken measures to restrict the liberty of Mr. Habré, pursuant to Article 6 of the Convention, as well as measures in preparation for Mr. Habré's trial, contemplated under the aegis of the African Union, which must be regarded as constituting the first steps towards fulfilling the obligation to prosecute laid down in Article 7 of the Convention. Senegal adds that Belgium cannot dictate precisely how it should fulfil its commitments under the Convention, given that how a State fulfils an international obligation, particularly in a case where the State must take internal measures, is to a very large extent left to the discretion of that State.

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

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

76. The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. Indeed, the Dakar Court of Appeal was led to conclude that the Senegalese courts lacked jurisdiction

to entertain proceedings against Mr. Habré, who had been indicted for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing such proceedings within the domestic legal order (see paragraph 18 above). The Dakar Court of Appeal held that

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

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

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

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

A. The Alleged Breach of the Obligation Laid Down in Article 6, Paragraph 2, of the Convention

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

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

81. In answer to the question put by a Member of the Court concerning the interpretation of the obligation laid down by Article 6, para-

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

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

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

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

> "In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1."

85. The Court observes that Senegal has not included in the case file any material demonstrating that the latter has carried out such an inquiry in respect of Mr. Habré, in accordance with Article 6, paragraph 2, of the Convention. It is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts. The question-

ing at first appearance which the investigating judge at the *Tribunal régional hors classe* in Dakar conducted in order to establish Mr. Habré's identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.

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

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

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

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

B. The Alleged Breach of the Obligation Laid Down in Article 7, Paragraph 1, of the Convention

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

> "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the

Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the "obligation to prosecute") was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

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

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

92. According to Belgium, the State is required to prosecute the suspect as soon as the latter is present in its territory, whether or not he has been the subject of a request for extradition to one of the countries referred to in Article 5, paragraph 1 — that is, if the offence was committed within the territory of the latter State, or if one of its nationals is either the alleged perpetrator or the victim — or in Article 5, paragraph 3, that is, another State with criminal jurisdiction exercised in accordance with its internal law. In the cases provided for in Article 5, the State can consent to extradition. This is a possibility afforded by the Convention, and, according to Belgium, that is the meaning of the maxim *aut dedere aut judicare* under the Convention. Thus, if the State does not opt for extradition, its obligation to prosecute remains unaffected. In Belgium's view, it is only if for one reason or another the State concerned does not prosecute, and a request for extradition is received, that that State has to extradite if it is to avoid being in breach of this central obligation under the Convention.

93. For its part, Senegal takes the view that the Convention certainly requires it to prosecute Mr. Habré, which it claims it has endeavoured to

do by following the legal procedure provided for in that instrument, but that it has no obligation to Belgium under the Convention to extradite him.

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

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

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

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

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

98. As regards the first aspect of the question put by the Member of the Court, namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation *aut dedere aut judicare* occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obliga-

tions, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987.

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

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

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

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

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

101. The Committee against Torture emphasized, in particular, in its decision of 23 November 1989 in the case of *O. R., M. M. and M. S.* v. *Argentina* (communications Nos. 1/1988, 2/1988 and 3/1988, decision of 23 November 1989, para. 7.5, *Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44*, UN doc. A/45/44, Ann. V, p. 112) that "'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention". However, when the Committee considered Mr. Habré's situation, the

question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that question (*Guengueng et al.* v. *Senegal* (communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).

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

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

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

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

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

106. Belgium, while recognizing that the time frame for implementation of the obligation to prosecute depends on the circumstances of each

case, and in particular on the evidence gathered, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for the purpose of prosecution. Procrastination on the latter's part could, according to Belgium, violate both the rights of the victims and those of the accused. Nor can the financial difficulties invoked by Senegal (see paragraphs 28-29 and 33 above) justify the fact that the latter has done nothing to conduct an inquiry and initiate proceedings.

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

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

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

110. Moreover, Senegal observes that the judgment of the ECOWAS Court of Justice is not a constraint of a domestic nature. While bearing in mind its duty to comply with its conventional obligation, it contends that it is nonetheless subject to the authority of that court. Thus, Senegal points out that that decision required it to make fundamental changes to the process begun in 2006, designed to result in a trial at the national

level, and to mobilize effort in order to create an *ad hoc* tribunal of an international character, the establishment of which would be more cumbersome.

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

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

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

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

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

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

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

breached and remains in breach of its obligations under Article 7, paragraph 1, of the Convention.

V. Remedies

118. The Court notes that, in its final submissions, Belgium requests the Court to adjudge and declare, first, that Senegal breached its international obligations by failing to incorporate in due time into its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture, and that it has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré for the crimes he is alleged to have committed, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings. Secondly, Belgium requests the Court to adjudge and declare that Senegal is required to cease these internationally wrongful acts by submitting without delay the "Hissène Habré case" to its competent authorities for the purpose of prosecution, or, failing that, by extraditing Mr. Habré to Belgium without further ado (see paragraph 14 above).

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

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

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

* * *

122. For these reasons,

THE COURT,

(1) Unanimously,

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

(2) By fourteen votes to two,

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

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

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

(3) By fourteen votes to two,

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

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

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

(4) By fourteen votes to two,

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

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

AGAINST: *Judges* Yusuf, Xue;

(5) By fourteen votes to two,

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

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

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

(6) Unanimously,

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

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

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

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

(Initialled) P.T.
(Initialled) Ph.C.