DECLARATION OF JUDGE OWADA

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

A. Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

8. In its oral pleadings, Senegal adds little on the issue of jurisdiction. Senegal maintains its general position on the non-existence of a dispute which covers the entirety of the relevant obligations under the Convention by summarily stating that there is "no dispute between Belgium and Senegal on the application of the Convention against Torture" (CR 2012/4, p. 19, para. 46). Senegal specifically states that it "has never repudiated its duty" to try Mr. Habré (*ibid.*, p. 28, para. 38). It also notes in a general manner that "Senegal has taken a number of measures with a view to creating the conditions to try Hissène Habré, both from a legal and a practical standpoint" (CR 2012/5, p. 15, para. 9).

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

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

11. This methodology employed in the Judgment, when seen in light of the history of the present dispute as a whole, as well as the position taken by the Parties in arguing the case as described above, is in my view too formalistic and somewhat artificial. The Judgment has adopted a methodology that is too formalistic in the sense that it is engaging in an exercise of dis-

membering the organic whole of this legal framework which consists of an amalgamated whole of procedural steps starting with Article 4 and leading to Article 8 of the Convention, and of assessing each of these component elements separately to determine whether there was a dispute relating to each of these provisions of the Convention at the critical date, that is, the time of the filing of the Application.

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

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

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

Outside of this context, and as far as the question whether there was a case for breach of the obligation under Article 5 of the Convention by Senegal is concerned, it may of course be said that the matter has become a moot point. Be that as it may, what is important is that the consideration of this particular point should not jurisdictionally be excluded from the scope of the competence of the Court under Article 30 of the Convention in proceeding to the examination of alleged breaches of Articles 6 and 7. This point constitutes a *legal* premise for such examination. In order to achieve this, it would be sufficient for the Court to make a declaratory finding that there had been a breach of the obligation under Article 5 of the Convention. This declaratory finding should then form the legal basis for its subsequent ruling on the breach of obligations under

Articles 6 and 7 of the Convention. It is important to underline that this breach of the obligation under Article 5 is not just *a factual background* in light of which the issue of the violation of the obligation under Articles 6 and 7 could be examined. The latter is *a legal consequence* that flows directly from the Court's judicial determination that there had been a breach of the obligation under Article 5, paragraph 2, of the Convention.

B. Admissibility

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

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

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

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

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

> "Belgium is not only a 'State other than an injured State', but has also the right to invoke the responsibility of Senegal as an 'injured State'

under Article 42 *(b)* (i) of the Articles on State Responsibility. Indeed, Belgium, to quote the commentary of the International Law Commission is 'affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed'. Indeed, Belgium is in a particular position as compared to all other States parties to the Torture Convention because, in this particular case, it has availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition. This is equally true with regard to general international law. And once again, the nationality of the victims is irrelevant in this regard as a matter of international law . . ." (CR 2012/6, p. 54, para. 60.)

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

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

On that basis the Judgment concludes that:

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

20. The Judgment dismisses Belgium's main argument, as quoted above, stating that

> "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." *(Ibid.)*

21. Setting aside the issue of plausibility of this arguably controversial basis for entitlement of a State party to the Convention involving

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

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

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

(Signed) Hisashi OWADA.