SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Jurisdiction of the Court to entertain that part of Belgium's claim relating to obligations arising from customary international law — Existence of a dispute in that connection on the day of delivery of the Judgment — Lack of any rule of customary international law requiring Senegal to prosecute Mr. Hissène Habré before its courts for war crimes, crimes against humanity and the crime of genocide — Belgium's claim in that regard unfounded.

1. In this Judgment, the Court rules on the merits of only one part of Belgium's submissions, namely that relating to Senegal's breach of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter "the Convention"). After upholding its jurisdiction over that part of the Application (point 1 of the operative clause) and declaring the Application admissible in that regard (point 3 of the operative clause), the Court finds that Senegal has breached its conventional obligations (points 4 and 5 of the operative clause) and draws the appropriate conclusions, namely that 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 (point 6 of the operative clause).

2. I have voted in favour of all of those points of the operative clause. I approve not only of the conclusions reached by the Court on those various issues but also of the essence of the reasoning followed to reach them, even though I think that the Judgment's reasoning, in respect of a number of the points considered, would have benefited from being less succinct.

3. However, Belgium did not confine itself to reproaching Senegal with having breached its conventional obligations. The Applicant also contended that Senegal was required to prosecute Mr. Hissène Habré before its courts — unless it extradited him — for acts which could be characterized as war crimes, crimes against humanity and genocide and which do not come within the scope *ratione materiae* of the Convention against Torture. In support of that claim, Belgium invoked customary international law, which, it argued, required Senegal to "prosecute or extradite" any person suspected of having committed acts coming within the categories thus defined.

4. The Court has declared that it lacks jurisdiction to hear that part of Belgium's Application, despite the fact that the Applicant, in order to found the jurisdiction of the Court, invoked not only Article 30 of the Convention — which could clearly only constitute a valid basis for the

Court's jurisdiction in respect of those submissions relating to the alleged breach of conventional obligations — but also the optional declarations made by the two Parties under Article 36, paragraph 2, of the Statute of the Court, which are general in scope. Hence the Judgment makes no substantive ruling on Belgium's claims relating to Senegal's alleged breach of its obligations under customary international law.

5. It is on this point that I have regretfully been obliged to dissociate myself from the majority of my colleagues.

In my view, the Court should have ruled that it has jurisdiction to entertain the Applicant's submissions relating to customary international law (I). However, I do not think that the Court should have upheld those submissions on the merits; in my opinion, it should have dismissed them as unfounded (II).

I. The Court Should Have Ruled that It Has Jurisdiction to Entertain the Applicant's Submissions Based on Customary International Law

6. In point 2 of the operative clause, the Court

> "*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."

I cannot support that finding, for the reasons which I set out below.

7. The reason why the Court thus declined jurisdiction is set forth in paragraph 55 of the Judgment: "[A]t the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law." The conclusion the Court draws is that it has no jurisdiction to decide on the claim set out by Belgium in point 1 *(b)* of its final submissions (cited in paragraph 14 of the Judgment), because that claim refers to Senegal's alleged obligations under customary international law concerning the criminal proceedings which the latter should bring against Mr. Hissène Habré, if it does not extradite him. Since the obligations which Senegal is accused of having breached do not derive from the Convention but from customary international law, the Court can only have jurisdiction over that issue on the basis of the Optional Clause declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court. However, this provision confers jurisdiction upon the Court over "legal disputes" between States that have recognized its jurisdiction as compulsory. Accordingly, the absence of a dispute on a specific issue leaves the Court without jurisdiction over that issue, and, from the Court's point of view, that is the case here.

8. I do not dispute the validity of several of the elements of this reasoning.

Firstly, it is clear that "the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium", as indicated in paragraph 45. Only one of those two bases of jurisdiction is relevant to the question which concerns us here (the other being Article 30 of the Convention against Torture, which is clearly inapplicable — and Belgium has not suggested otherwise — to that part of the Applicant's submissions which relates to Senegal's alleged breach of customary international law).

9. Secondly, if there is no dispute between the parties before the Court (in respect of all or some of the issues which form the subject-matter of the Application), the Court has no jurisdiction to hear the case — or that part of the case over which no dispute exists. In actual fact, it might also be argued that an application concerning a question over which there is no dispute, and over which there was no dispute on the date when the Application was filed, would stand to fail on the ground of inadmissibility rather than lack of jurisdiction. However, in its decisions the Court has, for a very long time, clearly and consistently ruled lack of jurisdiction — though this makes little difference in practice — and it would not have been appropriate for it to depart from its case law.

10. Finally, I can also concur with the finding that, on the date when the Application was filed by Belgium, that is to say, 19 February 2009, there was no dispute between the Parties over Senegal's alleged failure to comply with the rules of customary international law supposedly requiring it to initiate proceedings against Mr. Habré, if it does not extradite him. Paragraph 54 of the Judgment describes at some length the diplomatic exchanges which preceded the filing of the Application. It emerges that at no time during those preliminary exchanges did Belgium reproach Senegal with violating customary international law. Belgium confined itself to emphasizing the obligation under the Convention against Torture, and in particular Article 7, paragraph 1, thereof, to prosecute any person who is suspected of having committed acts of torture, or of complicity in torture, before the courts of the State in whose territory he is present, if he is not extradited to another State having jurisdiction to try him for the same acts.

11. My disagreement with the Judgment centres on the fact that the Court confines itself to the situation that prevailed "at the time of the filing of the Application" and refuses to take account of the present situation, as it emerges from the exchanges between the Parties during the judicial proceedings.

12. However, it is quite certain that, on the date of the present Judgment, a dispute does indeed exist between the Parties regarding the application of customary international law in the present case. Belgium has argued that Senegal has breached its obligation under customary international law to prosecute Mr. Habré before its courts, not only for acts of

torture, but also for "war crimes, crimes against humanity and the crime of genocide alleged against him" (final submissions, 1 *(b)*). Senegal, for its part, without formally denying the existence of such an obligation, has argued that its conduct to date entails no breach by it of that obligation, for essentially the same reasons as those advanced by it to assert that it was not in breach of its conventional obligations: it has already taken several measures with a view to the trial, and has not hitherto had the means at its disposal that it would have needed to do more.

There is therefore no doubt that there does exist today a dispute between the Parties relating to the implementation of customary international law, just as there exists, and for the same reasons, a dispute between them concerning Senegal's compliance with its conventional obligations. The difference between these two aspects of the case is that the dispute relating to conventional law was revealed by the exchanges between the Parties even before the Application was introduced, whereas the dispute relating to customary law only became apparent during their exchanges before the Court.

13. It follows from the above that the crucial question is which date is to be taken in order to determine the existence of a dispute between the Parties.

14. As a general rule, the conditions governing the jurisdiction of the Court must be fulfilled on the date when the Application is filed. However, the Court has, for a very long time, shown reasonable flexibility by accepting that a condition that was initially lacking could be met in the course of the proceedings, and that if not all the conditions for its jurisdiction were fulfilled at the start of the proceedings, the Court should therefore ascertain whether they had been fulfilled on the date of its Judgment. This line of case law, which began with the celebrated *Mavrommatis Palestine Concessions* case, was confirmed and even extended by the obligation to state reasons, which was adopted as a matter of principle in the Judgment on the Preliminary Objections in the *Croatia* v. *Serbia* case, in which the Court stated:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 441, para. 85.)

15. It is true that, more recently, in its Judgment in the *Georgia* v. *Russian Federation* case, the Court referred to the date when the Application

was filed in order to determine whether the condition relating to the existence of a dispute had been met. However, in that case it found that the condition had indeed been met on the date in question (*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. 120, para. 113).

16. The Court therefore had no need, in that case, to settle the question of which solution it should have adopted if the dispute, which had not existed on the date when the Application was filed, had been clearly constituted on the date of the Judgment. In my opinion, the *Georgia* v. *Russian Federation* precedent does not therefore represent a departure from the former jurisprudence of the Court.

Moreover, the Court, very prudently, indicated in its statement of reasons, before moving on to consider specifically the exchanges between Georgia and the Russian Federation, that "[t]he dispute must *in principle* exist at the time the Application is submitted to the Court" (*ibid.*, p. 85, para. 30; emphasis added).

17. It is also true that in the same case, in order to assess whether the requirement for the Parties to attempt a negotiated settlement of the dispute had been met, the Court referred to the date of its seisin (*ibid.*, p. 128, para. 141). However, this in fact had no bearing on the solution, since in the opinion of the Court's majority — which I did not share — Georgia had never attempted to engage in negotiations with Russia with a view to resolving their dispute concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination, and that assessment would undoubtedly have been the same for the periods before and after the seisin of the Court.

18. In the present Judgment, the Court goes a particularly clear step further in the formalistic approach to the condition relating to the existence of a dispute: this is the first time in the Court's entire jurisprudence that it has declined to hear one part of a case on the basis of the lack of a dispute between the Parties, even though the dispute clearly exists on the date of the Court's Judgment and was apparent in the proceedings before the Court. One may wonder what the extent now is of the position of principle set out by the Court in the Judgment on Preliminary Objections in the *Croatia* v. *Serbia* case. I regret to note that the series of recent Judgments does not convey a great impression of consistency.

19. Let me mention one additional factor which distinguishes the present case from the *Georgia* v. *Russian Federation* precedent and which makes the extremely formalistic solution adopted here by the Court even more surprising. Whereas the Russian Federation had explicitly invoked, as grounds of inadmissibility, the lack of a dispute between the Parties crystallized on the date when the Application was filed, Senegal has done nothing of the kind in the present case. It did indeed assert that there was no justiciable dispute before the Court, but not at all for the reasons adopted by the Court in support of point 2 of the operative clause.

Senegal's argument was, in substance, that there was no dispute between it and Belgium in respect of any aspect of the Applicant's submissions — whether that part relating to conventional obligations or that part based on customary law — for the reason (which applies to the case as a whole) that the Parties did not disagree on the existence and scope of the obligations that were invoked and that the Respondent was making every possible effort to perform those obligations. This argument has no weight, as the Court has found in respect of that part of the submissions relating to conventional law; it should also have been rejected in respect of that part relating to customary law. Thus, the Court has raised ex officio the ground that the dispute relating to compliance with customary obligations did not exist on the date when the Application was filed, since Belgium had failed to address this issue in its previous diplomatic exchanges with Senegal.

20. I do not think that I need address here the procedural question of whether the Court could raise such a ground ex officio — without even notifying Belgium beforehand. For the reasons discussed above, I believe that the Court should simply have noted that a dispute between the Parties as regards compliance with customary international law existed on the date of its Judgment.

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II. The Court Should Have Dismissed as Ill-Founded the Applicant's Submissions relating to the Alleged Breach of Obligations under Customary International Law

21. Although I disagree with the Judgment in respect of the issue of jurisdiction, as I have just described, I do not believe that the Court should have upheld Belgium's claims based on customary law. Indeed, in my opinion, there is no rule of customary international law requiring Senegal to prosecute Mr. Habré before its courts, either for the acts of torture, or complicity in torture, that are alleged against him — in that connection, there is indeed an obligation, but it is purely conventional — or for war crimes, crimes against humanity and the crime of genocide, which do not come within the scope *ratione materiae* of the Convention against Torture — in that regard there is, at present, no obligation under international law.

22. It is true that neither in the written proceedings nor in its oral argument did Senegal dispute the existence of an obligation which, under customary international law, would require it to prosecute Mr. Habré for criminal acts in the above-mentioned categories.

But it is clear that if the Court had also accepted jurisdiction over this part of the case — as I believe it should have done — it would have been obliged to rule ex officio on the existence of the rules of customary law

which Belgium claimed had been breached. As these are rules which, if they existed, would have universal scope, it stands to reason that it is not sufficient for the two parties before the Court to agree on the existence of those rules, and, where appropriate, their scope, for the Court to register that agreement and to apply the alleged rules in question. It is for the Court alone to say what the law is and to do so, if necessary, ex officio — even if it is, in fact, somewhat unusual for it to find itself in such a situation.

23. In the present case, the Court found itself in a situation where it could have performed that function, as a result of one of the very many questions put by judges to the Parties at the end of the first round of oral argument.

24. The question was put by my esteemed colleague Judge Greenwood, who, in essence, asked Belgium to demonstrate: (i) that there is State practice in respect of the jurisdiction of domestic courts over war crimes and crimes against humanity when the alleged offence occurred outside the territory of the State in question and when neither the alleged offender nor the victims were nationals of that State; and (ii) that States consider that they are required, in such cases, to prosecute the alleged perpetrator of the offence before their own courts, or to extradite him.

25. The responses given by Belgium, initially during the second round of oral argument and later in a written document, do not come close to establishing the existence of a general practice and an *opinio juris* which might give rise to a customary obligation upon a country such as Senegal to prosecute a former foreign leader before its courts for crimes such as those of which Mr. Hissène Habré stands accused, unless it extradites him.

26. Let me begin by clarifying the subject-matter of the question that was before the Court in the present case, by distinguishing it from those which the Court, in any event, was not called upon to decide.

27. The Court was not called upon to determine whether the prohibition on acts of torture and other "international crimes" (a phrase I use for convenience, although I doubt its legal relevance), as laid down in the Convention against Torture and in various other multilateral treaties, is of a customary nature and accordingly applies even outside any conventional obligations. The answer is certainly in the affirmative, but that is not the question directly posed by Belgium's claim in the present case: Senegal has never been reproached with having committed, encouraged or facilitated such crimes. With regard to the prohibition on torture, the Judgment states (para. 99) that it is part of customary law and that it has even become a peremptory norm *(jus cogens)*, but that is clearly a mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element.

28. Nor did the Court have to decide whether customary law requires a State to prosecute individuals suspected of having committed crimes of the kind that are alleged here when those persons have the nationality of the

State concerned, or when those crimes have been committed in that State's territory. Mr. Hissène Habré is not Senegalese, and the crimes of which he is suspected were not committed in Senegal. Thus the question of whether there exists in customary law an obligation upon States to exercise "territorial" jurisdiction or "active personal" jurisdiction for the purposes of punishing "international crimes" did not arise in the present case.

29. Nor did the Court have to determine whether there exists a customary obligation for a State to give its courts "passive personal jurisdiction", that is to say, a title of jurisdiction enabling them to try the alleged perpetrators of "international crimes" when the victim has the nationality of the State concerned. The reply is very probably negative: even the Convention against Torture does not require States parties to give themselves such "passive personal jurisdiction", since Article 5 (1) *(c)* only provides for such jurisdiction where the State party "considers it appropriate". But in any event, the question did not arise in the present case.

30. Finally, and this point deserves particular mention, the present case did not require the Court to determine — in any event not directly — whether customary international law enables States to provide their courts with universal jurisdiction over war crimes, crimes against humanity and the crime of genocide. In that regard, it may be contrasted with the *DRC* v. *Belgium* precedent, in which that issue was raised by the Applicant before subsequently being dropped (case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3). In fact, Belgium does not reproach Senegal with exercising universal criminal jurisdiction, but on the contrary with failing to exercise it, whereas, according to the Applicant, international law requires it do so. Consequently, the controversial issue of the legality of universal jurisdiction in international law (see on this point, in particular, the separate opinion of President Guillaume appended to the Judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 35) did not arise directly in the present case. Only if the Court had found that international law required States to establish universal criminal jurisdiction over the categories of offences in question would it have ruled, *a fortiori*, in respect of the legality of such jurisdiction. If, however, while examining the merits of the case, the Court had found that there is no rule of customary law requiring States to give themselves universal criminal jurisdiction, such a finding would have left entirely open the (separate) question of the legality of universal jurisdiction.

31. The question which the Court could not have avoided answering directly, had it accepted jurisdiction as I believe it should have done, is therefore the following: is there sufficient evidence, based on State practice and *opinio juris*, of a customary obligation for States to prosecute before their domestic courts individuals suspected of war crimes or crimes against humanity (which presupposes that they have provided their courts with the necessary jurisdiction), when there is no connecting link between the alleged offence and the forum State, that is to say, when the offence

was committed outside the territory of that State and neither the offender nor the victim were nationals of that State?

32. In my opinion, the answer to that question is very clearly and indisputably no, regardless of whether or not the suspect is present in the territory of the State in question.

33. Belgium, in response to the question put by the Court, did indeed endeavour to demonstrate that such an obligation exists. However, it fell far short of doing so.

34. In a written document produced in reply to the above-mentioned question, Belgium supplied a list of States having incorporated into their domestic law provisions giving their courts "universal jurisdiction" to try war crimes committed in the course of a non-international conflict, which is the case of the crimes of which Mr. Habré is accused, and crimes against humanity (or certain of those crimes). It found a total of 51. Among those States, some of them make the exercise of such jurisdiction subject to the presence of the suspect in their territory, while others do not, but the list draws no distinction between the two cases.

35. Nevertheless, the information thus provided is quite insufficient to establish the existence of a customary obligation to prosecute the perpetrators of such crimes on the basis of universal jurisdiction, even when limited to the case where the suspect is present in the territory of the State concerned.

And this is for three reasons.

36. In the first place, the States in question represent only a minority within the international community, which is in any event insufficient to establish the existence of a universal customary rule.

37. Secondly, some of those States may have adopted such legislation on the basis of a particular interpretation of their conventional obligations, for example those under conventions of international humanitarian law regarding war crimes. Apart from the fact that such an interpretation is not universally shared, since other States parties to the same conventions have not taken similar action, such an approach does not demonstrate the existence of an *opinio juris*, that is to say, a belief that there exists an obligation to establish "universal jurisdiction" outside of any conventional obligations.

38. Thirdly and finally, certain States among the 51 — and probably many of them — may have decided to extend the jurisdiction of their courts over the crimes in question on the basis of a purely unilateral choice and sovereign decision, without in any sense believing that they were required to do so by some international obligation, whether conventional or customary — but solely in the belief that international law entitled them to do so. Here again, the *"opinio juris"* is lacking.

39. Let me take France, for example, which is included in the "List of 51", and with which I am well acquainted. In the area which interests us here, France has only given its courts "universal" jurisdiction, that is to say, without any link to where the crime was committed or to the nation-

ality of the perpetrator or the victim, in three instances: (1) for acts of torture; (2) for crimes covered by the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and (3) for crimes within the jurisdiction of the International Criminal Court (ICC) if the alleged offender usually resides in France. In the first case, France acted in accordance with its conventional obligations deriving from its status as party to the Convention against Torture. In the other two cases it adopted those provisions of its own free and sovereign choice, without considering as far as it was itself concerned — or asserting in relation to others — that States were required to do so.

The presence of France on the list prepared by Belgium, while not erroneous, is thus not an argument for the recognition of a customary international obligation, and doubtless the same could be said for many of the other States on the list.

40. Belgium itself at present no longer claims that it exercises universal jurisdiction, as a general rule, over "international crimes". Since the provisions of its Code of Criminal Procedure relating to the jurisdiction of its courts were radically modified by the Law of 5 August 2003, Belgium no longer provides those courts with jurisdiction over war crimes and crimes against humanity, except in those cases where it is required to do so under an international legal obligation; in principle, it requires a territorial or personal connection between the alleged crime and itself, a link which must normally exist on the date of the crime or, at the very least, that the suspect should have his principal residence in the territory of the Kingdom. The reason why the Belgian courts continue to investigate the complaints against Mr. Hissène Habré regarding acts other than those which could be characterized as acts of torture is that those complaints were made at a time when Belgian legislation did provide for universal jurisdiction, and because of the transitional provisions of the Law of 5 August 2003; while withdrawing universal jurisdiction almost completely for the future, the latter provided that certain pending proceedings which had been instituted on the basis of the previous legislation would not be affected by that withdrawal.

* * *

41. In conclusion, I am sure that the claims submitted to the Court by Belgium on the basis of customary international law were, in any event, bound to fail.

The Court's refusal to find that it has jurisdiction in that regard has therefore not deprived Belgium of a success which, in any case, it could not have obtained.

(Signed) Ronny Abraham.