SEPARATE OPINION OF JUDGE SKOTNIKOV

1. I support the Court's conclusions set forth in the operative clause. However, while I agree with the Court's ruling that Belgium's claims based on Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture are admissible (paragraph 3 of the operative clause), I respectfully submit that the Court has erred as to the grounds on which to base this finding.

2. In order to declare admissible Belgium's claims relating to Senegal's conduct, the Court could have confined itself to observing that Belgium has instituted criminal proceedings against Mr. Habré, in accordance with its legislation in force; that it has requested Mr. Habré's extradition from Senegal to Belgium; and that it has engaged in diplomatic negotiations with Senegal on the subject of Mr. Habré's prosecution in Senegal or his extradition to Belgium.

3. The Court has chosen instead to follow the route which leads it to conclude that any State party to the Convention against Torture has standing before this Court to invoke the responsibility of any other State party "with a view to ascertaining the [latter's] 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" (Judgment, para. 69). Accordingly, in the view of the Court, Belgium is entitled to invoke Senegal's responsibility before this Court without necessarily having a special interest in Senegal's compliance with the Convention.

4. The route thus taken by the Court allows it to avoid dealing at the merits stage with the question as to whether Belgium has established its jurisdiction in respect of Mr. Habré in accordance with Article 5, paragraph 1, of the Convention, despite the fact that none of the alleged victims who have filed complaints against Mr. Habré was of Belgian nationality at the time of the alleged offences. This question, which is directly related to the issue of the validity of Belgium's request for Mr. Habré's extradition, is admittedly not an easy one to answer, especially given the fact that Belgium, subsequent to its request for Mr. Habré's extradition, repealed a part of its legislation which had allowed for the exercise of universal jurisdiction irrespective of the nationality of the alleged victims. The present case is left over from the brief period during which this legislation was in force.

5. During the oral phase, Belgium confirmed that it appeared before this Court as an injured State. Indeed, Belgium instituted the present proceedings precisely because it had exercised its jurisdiction in respect of

Mr. Habré and requested his extradition from Senegal to Belgium. As is clear from the Application, Belgium was concerned that "the referral" of Mr. Habré's case to the African Union could have affected the prospect of Mr. Habré being extradited to Belgium under the terms of the Convention against Torture. Clearly, Belgium did not seise this Court simply as a State party to the Convention.

6. In the alternative, however, Belgium, responding to a question posed by one of the judges, claimed *locus standi* as a party other than an injured State. It seems that this contention was made as a precaution, in case the Court were to find, for example, that Belgium was precluded from claiming jurisdiction to prosecute Mr. Habré on account of the fact that it had abrogated the law which allowed it to exercise its jurisdiction in cases where the alleged victims did not have Belgian nationality at the time when the alleged offences were committed.

7. In any event, in its final submissions, Belgium clearly positions itself as an injured State, that is, as a party having a special interest in Senegal's compliance with the Convention. It has specifically requested the Court to adjudge and declare *inter alia* that Senegal is required to cease the internationally wrongful act:

> "*(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" (emphasis added).

8. In the light of the above, the Court's decision not to pronounce on the question of whether Belgium has a special interest in Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré (see Judgment, para. 70) is surprising. One inevitable implication of this decision is that the issue of the validity of Belgium's request for extradition remains unresolved.

9. The Court has a duty under its Statute to settle disputes — when it has jurisdiction to do so — unless there are circumstances preventing it from proceeding with the adjudication of a claim or a part of it. Senegal has contested Belgium's entitlement to exercise passive personal jurisdiction in Mr. Habré's case. Accordingly, when the Court discards, without explanation, a part of Belgium's claim by reducing its status in the present proceedings to that of any State party to the Convention against Torture, it fails in this duty.

10. Moreover, regrettably, the Court's conclusion that Belgium, simply 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, is not properly explained, nor is it justified.

11. According to the Judgment (see para. 68), since 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 Court observes that all States parties "have a legal interest" in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Judgment, I.C.J. Reports 1970*, p. 32, para. 33). In the same context, the Court recalls that, in its Advisory Opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it pointed out that:

> "[i]n 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).

12. Needless to say, the dicta referred to by the Court are of fundamental importance. Indeed, indivisible obligations which are owed by any State party to all other States parties are contained in numerous instruments, in particular those dealing with the protection of human rights. But does this lead to a conclusion that a common interest is one and the same thing as a right of any State party to invoke the responsibility of any other State party before this Court, under the Convention against Torture, for an alleged breach of obligations *erga omnes partes*?

13. One would have expected the Court to have recourse to the interpretation of the Convention in order to support its conclusion. Instead, it confines itself to quoting from its Preamble and classifying this instrument as being similar to the Genocide Convention. This is hardly sufficient.

14. In order to confirm its view that the common interest shared by States parties to the Convention against Torture — and other instruments containing *erga omnes partes* obligations, such as the Genocide Convention — equates to a procedural right of one State party to invoke the responsibility of another for any alleged breaches of such obligations, the Court would need to explain, for example, how such treaties could simultaneously envisage the right of a State party to make reservations to its jurisdiction. No such explanation is provided.

15. Furthermore, under the Convention against Torture, any State party has the right to shield itself not only from accountability before the Court but also from the scrutiny of the Committee against Torture. This scrutiny is based on the *erga omnes partes* principle but, tellingly, remains optional:

> "A State Party to this Convention may at any time declare . . . that it recognizes the competence of the Committee to receive and consider

> communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention . . . No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration." (Convention against Torture, Art. 21, para. 1.)

The Judgment does not address this issue.

16. If the logic adopted by the Court were correct, no such opt-out or opt-in clauses would have been allowed in the Convention. The simple truth is that the Convention does not go as far as the Court suggests.

17. Admittedly, there are treaties which allow invocation of responsibility by any State party, for example, the European Convention on Human Rights. However, this entitlement is expressly granted. Article 33 of the European Convention states that: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party." Interestingly, and most logically, no reservations to the jurisdiction of the European Court of Human Rights are allowed under the European Convention.

18. By contrast, in the view of the Court, an entitlement of each State party to the Convention against Torture to make a claim concerning the existence of an alleged breach by another State party is *implied* in the common interest of the States parties' compliance with the relevant obligations under the Convention against Torture (see Judgment, para. 69). No explanation is offered in support of this statement.

19. The Court does not mention the European Convention on Human Rights, or any other similar treaty. Accordingly, it does not offer its view as to how that which is expressly provided for in one treaty could simply be implied in another, in respect of the same — and rather important — entitlement. If one accepts the logic of the Judgment, it would make no difference whether such an express provision were included in or excluded from a treaty by its drafters. This cannot be right.

20. The Judgment cites no precedent in which a State has instituted proceedings before this Court or any other international judicial body in respect of alleged violations of an *erga omnes partes* obligation simply on the basis of it being a party to an instrument similar to the Convention against Torture. Nor does it mention the fact, which might be worth noting as a reflection of State practice — or rather the absence of it — that the inter-State human rights complaints mechanisms (including the one provided for in Article 21 of the Convention against Torture) have never been used.

21. The Judgment does not refer to the draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001, which do not support the Court's position. In its commentary to Article 48, which deals with invocation of responsi-

bility by a State other than the injured State, the ILC notes that "certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party", without in any way implying that such an entitlement is allowed in treaties which do not contain a specific provision to that effect (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 127). Moreover, the commentary to the draft Articles states in no ambiguous terms that:

> "[i]n order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. *a right of action specifically conferred by a treaty*, *or it must be considered an injured State*." (*Ibid.*, p. 117; emphasis added.)

No such right of action is conferred on States parties by the Convention against Torture.

22. I have to conclude with regret that the grounds which are intended to support the Court's correct ruling as to the admissibility of Belgium's claims do not seem to be founded in law, be it conventional or customary.

23. As a final remark pertaining to the Judgment as a whole, I would like to recall that in 2009, at the provisional measures stage of the current proceedings, Belgium summarized the dispute between itself and Senegal in the following way: first, "Senegal considers that its decision to transmit the case to the African Union . . . somehow fulfils Article 7 [of the Convention against Torture]" (CR 2009/10, p. 20, para. 13); secondly, "Senegal's present commitment to move, albeit slowly, towards a criminal trial derives in its view from the African Union 'mandate', not directly from its obligations under the Torture Convention" *(ibid.)*.

For its part, Senegal responded that:

> "as a State it is bound by the 1984 Convention [against Torture]. The fact that an organization like the African Union may be involved in organizing the Habré trial in no way lessens Senegal's duties and rights as a party to the Convention. Indeed, it is as a party to the Convention, not pursuant to a mandate from the African Union, that the Republic of Senegal is fulfilling its obligations." (CR 2009/11, p. 18, para. 11.)

Accordingly, it seemed to me in 2009 that the Parties were in agreement on the points raised by Belgium and, therefore, that the dispute, as framed by the latter, had ceased to exist. In the light of this, I was expecting that Senegal would have taken swift action to comply with its obligations under the Convention against Torture. Unfortunately, this has not happened. Senegal concedes that there is a continuing dispute about the application of the Convention:

> "At issue before the Court is a difference between two States as to how the execution of an obligation arising from an international instrument to which both States are parties should be understood. That is the reality of the contentious proceedings that have been brought before the Court." (CR 2012/4, p. 28, para. 39.)

The above statement reflects the true nature of the dispute, which had persisted through twists and turns since the time that Belgium requested Mr. Habré's extradition from Senegal. This dispute has now been settled by the Court with a unanimous ruling to the effect 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.

(Signed) Leonid SKOTNIKOV.