SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *PROLEGOMENA*

1. I have voted in favour of the adoption of the present Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, whereby the International Court of Justice (ICJ) has established violations of Articles 6 (2) and 7 (1) of the 1984 United Nations Convention against Torture[1], has asserted the need to take immediately measures to comply with the duty of prosecution under that Convention[2], and has rightly acknowledged that the absolute prohibition of torture is one of *jus cogens*[3]. Although I have agreed with the Court's majority as to most of the findings of the Court in its present Judgment, there are two points of its reasoning which I do not find satisfactory or consistent with its own conclusions, and on which I have a distinct reasoning, namely, the Court's jurisdiction in respect of obligations under customary international law, and the handling of the time factor under the UN Convention against Torture. I feel thus obliged to dwell upon them in the present separate opinion, so as to clarify the matter dealt with by the Court, and to present the foundations of my personal position thereon.

2. My reflections, developed in the present separate opinion, pertain to considerations at factual, conceptual and epistemological levels, on distinct points in relation to which I do not find the reasoning of the Court entirely satisfactory or complete. At the factual level, I shall dwell upon: *(a)* the factual background of the present case: the regime Habré in Chad (1982-1990) in the findings of the Chadian Commission of Inquiry (Report of 1992); *(b)* the significance of the decision of 2006 of the UN Committee against Torture; *(c)* the clarifications on the case before the ICJ, in the responses to questions put to the contending Parties in the course of the legal proceedings; and *(d)* the everlasting quest for the realization of justice in the present case.

3. At the conceptual and epistemological levels, my reflections in the present separate opinion will focus on: *(a)* urgency and the needed provisional measures of protection in the *cas d'espèce*; *(b)* the acknowledgment of the absolute prohibition of torture in the realm of *jus cogens*; *(c)* the obligations *erga omnes partes* under the UN Convention against Torture; *(d)* the gravity of the human rights violations and the compelling struggle against impunity (within the law of the United Nations itself); *(e)* the obligations under customary international law; and *(f)* the *décalage* between the time of human justice and the time of human beings revisited (and the need to make time work *pro victima*).

[1] Judgment, resolutory points 4 and 5 of *dispositif*.
[2] *Ibid.*, point 6 of *dispositif*.
[3] *Ibid.*, para. 99.

4. In sequence, I will proceed to: *(a)* a rebuttal of a regressive interpretation of the UN Convention against Torture (CAT); and *(b)* the identification of the possible emergence of a new chapter in restorative justice. As to the reassuring assertion by the Court that the absolute prohibition of torture is one of *jus cogens* (Judgment, para. 99) — which I strongly support — I go further than the Court, as to what I perceive as the pressing need to extract the legal consequences therefrom, which the Court has failed to do. The way will then be paved, in the epilogue, for the presentation of my concluding reflections on the matter dealt with in the present Judgment of the Court.

II. The Factual Background of the Present Case: The Regime Habré in Chad (1982-1990) in the Findings of the Chadian Commission of Inquiry (Report of 1992)

5. In the written and oral phases of the proceedings before this Court, both Belgium and Senegal referred to the Report of the National Commission of Inquiry of the Chadian Ministry of Justice, concluded and adopted in May 1992. Thus, already in its Application Instituting Proceedings (of 19 February 2009), Belgium referred repeatedly to the findings of the 1992 Report of the Truth Commission of the Chadian Ministry of Justice, giving account of grave violations of human rights and of international humanitarian law during the Habré regime (1982-1990) in Chad[4]. Subsequently, in its Memorial (of 1 July 2010), in dwelling upon Chad under the regime of Mr. H. Habré, Belgium recalled that,

> "[a]ccording to an assessment published in 1993 by the National Commission of Inquiry of the Chadian Ministry of Justice, Mr. Habré's presidency produced tens of thousands of victims. The Commission gives the following figures: 'more than 40,000 victims; more than 80,000 orphans; more than 30,000 widows; more than 200,000 people left with no moral or material support as a result of this repression'." [5] (Para. 1.10.)

6. The aforementioned Report was also referred to in the course of the oral arguments at the provisional measures phase[6]. Subsequently, Belgium referred repeatedly to the Report, from the very start of its oral arguments on the merits of the case[7]. For its part, in its oral argument

[4] Application instituting proceedings, pp. 13, 39, 57, 89 and 93.

[5] Chadian Ministry of Justice, «Les crimes et détournements de l'ex-président Habré et de ses complices — Rapport de la commission d'enquête nationale du ministère tchadien de la justice» [«The Crimes and Misappropriations Committed by ex-President Habré and His Accomplices — Report by the National Commission of Inquiry of the Chadian Ministry of Justice»], Paris, L'Harmattan, 1993, pp. 3-266. For the English translation, see Neil J. Kritz (ed.), *Transitional Justice*, Vol. III, Washington D.C., U.S. Institute of Peace Press, 1995, pp. 51-93.

[6] CR 2009/08, of 6 April 2009, pp. 18-19.

[7] CR 2012/2, of 12 March 2012, pp. 12 and 23.

of 16 March 2012 before the Court, Senegal also referred to those findings of the Chadian Truth Commission, as evoked by Belgium[8]. Those findings were not controverted.

7. In my understanding, those findings ought to be taken into account in addressing the questions lodged with the Court in the present case, under the CAT, one of the "core Conventions" on human rights of the United Nations. (This is of course without prejudice to the determination of facts by the competent criminal tribunal that eventually becomes entrusted with the trial of Mr. H. Habré.) After all, the exercise of jurisdiction — particularly in pursuance to the principle *aut dedere aut judicare* — by any of the States parties to the CAT (Arts. 5-7) is prompted by the *gravity* of the breaches perpetrated to the detriment of human beings, of concern to the members of the international community as a whole.

8. Bearing this in mind, the main findings set forth in the Report of the Chadian Truth Commission may here be briefly recalled, for the purposes of the consideration of the *cas d'espèce*. They pertain to: *(a)* the organs of repression of the regime Habré in Chad (1982-1990); *(b)* arbitrary detentions and torture; *(c)* the systematic nature of the practice of torture of detained persons; *(d)* extra-judicial or summary executions, and massacres. The corresponding passages of the Report, published in 1993, can be summarized as follows.

1. The Organs of Repression of the Regime Habré in Chad (1982-1990)

9. According to the aforementioned Report of the Chadian Truth Commission, the machinery of repression of the Habré regime in Chad (1982-1990) was erected on the creation and function of four organs of his dictatorship, namely: the Directorate of Documentation and Security (*Direction de la documentation et de la sécurité* — DDS) or the "political police", the Service of Presidential Investigation (*Service d'investigation présidentielle* — SIP), the General Information [Unit] (*Renseignements généraux* — RG) and the State party *(parti-Etat)*, called the *Union nationale pour l'indépendance et la révolution* — UNIR). And the Report added:

> "All these organs had the mission of controlling the people, keeping them under surveillance, watching their actions and attitudes even in the smallest matters, in order to flush out so-called enemies of the nation and neutralize them permanently.
>
> The DDS is the principal organ of repression and terror. Among all the oppressive institutions of the Habré regime, the DDS distinguished itself by its cruelty and its contempt for human life. It fully

[8] CR 2012/5, of 16 March 2012, p. 31.

> carried out its mission, which was to terrorize the population to make them better slaves.
>
> Habré laid all the foundations for his future political police in the first days after he seized power. Initially it existed in embryonic form as the 'Documentation and Intelligence Service' (. . .). The DDS as it is known today was created by Decree No. 005/PR of 26 January 1983."[9]

10. The "territorial competence" of the DDS extended over "the whole national territory" and even abroad. No sector, public or private, escaped its supervision:

> "Agents were everywhere in the country, beginning with the prefectures, the subprefectures, the cantons and even the villages. It had a branch in every electoral borough. To oversee its territory, it recruited local agents as spies and informers. Each branch was composed of a chief and a deputy."[10]

Promotions were given in exchange for information[11]. The DDS aimed also at those who opposed the regime and were based in neighbouring countries, whereto it sent its agents to perpetrate murder or kidnappings[12]. The DDS was directly linked and subordinated to the Presidence of the Republic, as set forth by the decree which instituted the DDS; given the "confidential character" of its activities, there was no intermediary between President H. Habré and the DDS[13].

2. The Systematic Practice of Torture of Persons Arbitrarily Detained

11. The same Report adds that, in the period of the Habré regime, most victims were arbitrarily detained by the DDS, without knowing the charges against them. They were systematically tortured, either for "intimidation" or else as "reprisal"[14]. And the Report added that

> "Torture was an institutional practice in the DDS. Arrestees were systematically tortured, then kept in tiny cells under terrible and inhumane conditions. (. . .) [T]he DDS elevated torture virtually to

[9] Chadian Ministry of Justice, "Report by the National Commission of Inquiry of the Chadian Ministry of Justice on 'The Crimes and Misappropriations Committed by ex-President Habré and His Accomplices' ", *op. cit. supra* note 5.

[10] *Ibid.*

[11] *Ibid.*, pp. 61-62.

[12] *Ibid.*

[13] He gave all the orders, and the DDS reported to him daily; *ibid.* This was how, during his eight years in power, he imposed a regime of terror in Chad.

[14] *Ibid.*, p. 69.

the status of a standard procedure, and almost all detainees were subjected to it one way or another, regardless of sex or age."[15]

12. And the Chadian Truth Commission proceeded in its account of the facts it found:

"Everyone arrested by the DDS, in N'Djamena or in the provinces, was systematically subjected to at least one interrogation session, following which an interrogation report was prepared. Torture being the tool of choice during interrogation, DDS agents resorted to it systematically.

A number of former DDS detainees told the Commission of Inquiry about the torture and abuse to which they were subjected during their detention. Scars from these tortures and medical examinations have corroborated their testimony."[16]

3. Extra-Judicial or Summary Executions and Massacres

13. The Report of the Chadian Truth Commission also acknowledged cases of extra-judicial or summary executions, and of massacres:

"During his eight-year reign Hissein Habré created a regime where adherence to any political opinions contrary to his own could mean physical liquidation. Thus, from the time he came to power in June 1982 through November 1990 when he fled, a large number of Chadians were persecuted for their efforts to modify his autocratic policies. That is why entire families were arrested and imprisoned with no trial of any kind, or simply hunted down and wiped out. (. . .)

Individuals arrested by DDS had very little chance of coming out alive. This sad reality was known to all Chadians. Detainees died in one of two ways: either slowly, following days or months of imprisonment, or quickly, in the first few days after arrest, at the hands of Hissein Habré's executioners. (. . .)

Testimony from former political prisoners has provided ample evidence about the ways their comrades died in prison. Some died of physical exhaustion due to inhuman prison conditions (. . .). Others died from asphyxiation. Packed into minuscule cells (. . .), prisoners died one after another.

[15] Neil J. Kritz (ed.), *Transitional Justice, op. cit. supra* note 5, p. 38. Such practice was conducted pursuant to superior orders, in the hierarchy of power; cf. *ibid.*, pp. 69-70.

[16] *Ibid.*, pp. 70-71.

Removals at night and extra-judiciary executions are practiced regularly by DDS agents on detainees. These are generally the most bloodthirsty agents (. . .) who proceed in the selection of prisoners destined for the abattoir located near N'Djamena. These odious and barbarous and acts target a certain category of detainees."[17]

4. The Intentionality of Extermination of Those Who Allegedly Opposed the Regime

14. In its remaining parts, the Report of the Chadian Truth Commission addressed aggravating circumstances of the oppression of the regime Habré, mainly the *intentionality* of the atrocities perpetrated. In its own words,

"The Hissein Habré regime was a veritable hecatomb for the Chadian people; thousands of people died, thousands of others suffered in mind and body and continue to suffer.

Throughout this dark reign, in N'Djamena and everywhere else in the country, systematic repression was the rule for all opponents or suspected opponents of the regime.

The possessions of persons arrested or hunted were pillaged and their relatives persecuted. Entire families were decimated.

In the interior, villages were completely burned down and their populations massacred. Nothing was immune to this murderous madness, and the entire country was in a state of terror. (. . .)

Never in the history of Chad have there been so many deaths, never have there been so many innocent victims. When the Commission of Inquiry began its work, it believed that at worst it would be dealing with massacres, but the further it proceeded in its investigations, the larger loomed the dimensions of the disaster, until finally it was a question of extermination. No ethnic group, no tribe, no family was spared, except the Goranes and their allies. The killing machine made no distinction between men, women and children. The mildest protest was equated with revolt and triggered horrible reprisals. The silenced and submissive population watched powerless its own gradual asphyxiation. Starting in 1982, political prisons sprang up all over Chad, and they were not emptied until the fall of the regime in 1990. In N'Djamena as well as the provinces, arrests were made at a frenetic pace. People were arrested on any pretext, even without any pretext. A slip of the tongue, an old grudge never forgiven by a Gorane or DDS agent, even an incident fabricated of whole cloth was enough for one to find himself in the grim dungeons of the DDS.

[17] Neil J. Kritz (ed.), *Transitional Justice, op. cit. supra* note 5, pp. 54 and 75.

> In these dungeons, a very large number of people died. The number of political prisoners counted by the Commission of Inquiry for the period 1982-1990 and the number who died during the same period boggle the imagination."[18]

15. The Report of the Chadian Truth Commission, published in 1993, was in fact concluded on 7 May 1992, with a series of recommendations[19]. Its over-all assessment was quite sombre. In its own words,

> "The record of Habré's eight-year reign is terrifying. The Commission still wonders how a citizen, a child of the country, could have committed so much evil, so much cruelty, against his own people. The stereotype of the hard-core revolutionary idealist quickly gave way to that of a shabby and sanguinary tyrant.
>
> Recapitulating the evils he has wrought on his fellow citizens, the toll is heavy and the record grim:
>
> — more than 40,000 victims;
> — more than 80,000 orphans;
> — more than 30,000 widows;
> — more than 200,000 people left with no moral or material support as the result of this repression.
>
> Add to that the movable and immovable goods plundered and confiscated from peaceful citizens — an amount estimated at ONE BILLION CFA FRANCS each year.
>
> Eight years of rule, eight years of tyranny (. . .). Why so much evil, so much hatred of his own people? Was it worth the pain of struggling for a whole decade to win power, just to do that? For what ideal and to what end was Habré fighting? (. . .)
>
> The Habré regime and what became of it should serve as a lesson to all Chadians, and in particular to the country's rulers. A wise man once said: 'Power is like a shadow, and shadows are never eternal.' "[20]

III. The Decision of May 2006 of the UN Committee against Torture

16. On 18 April 2001, a group of persons who claimed to be victims of torture during the regime Habré in Chad lodged a complaint with the UN Committee against Torture, supervisory organ of the UN Convention against Torture (CAT). They did so under Article 22 of the CAT, in the exercise of the right of individual complaint or peti-

[18] Neil J. Kritz (ed.), *Transitional Justice, op. cit. supra* note 5, pp. 79-80.

[19] Cf. *ibid.*, pp. 92-93.

[20] *Ibid.*, p. 97.

tion[21]. The Committee then proceeded to the examination of the case of *Souleymane Guengueng and al.* v. *Senegal*. It should not pass unnoticed, at this stage, that the Committee was enabled to pronounce on this matter due to the exercise, by the individuals concerned, of their right of complaint or petition at international level.

17. Half a decade later, on 19 May 2006, the Committee against Torture adopted a decision, under Article 22 of the CAT, on the case *Souleymane Guengueng and al.*, concerning the complaints of Chadian nationals living in Chad, who claimed to be victims of a breach by Senegal of Articles 5 (2) and 7 of the CAT[22]. The Committee did so taking into account the submissions of the complainants and of the respondent State, bearing in mind the factual background of the case as contained in the Report (of May 1992) of the National Commission of Inquiry of the Chadian Ministry of Justice[23]. In their complaint lodged with the UN Committee against Torture, the complainants claimed, as to the facts, that, between 1982 and 1990, they were tortured by agents of Chad who answered directly to Mr. H. Habré, the then President of Chad during the period at issue.

18. The Committee referred to the aforementioned Report by the National Commission of Inquiry established by the Chadian Ministry of Justice (cf. *supra*), giving account of 40,000 "political murders" and "systematic acts of torture" allegedly committed during the H. Habré regime. The Committee recalled that, after being ousted by Mr. Idriss Déby in December 1990, Mr. H. Habré took refuge in Senegal, where he has been living ever since. The Committee further recalled the initiatives of legal action (from 2000 onwards) against Mr. H. Habré, in Senegal and in Belgium. The Committee then found the communication admissible and considered that the principle of universal jurisdiction enunciated in Articles 5 (2) and 7 of the CAT implies that the jurisdiction of States parties "must extend to *potential* complainants in circumstances similar to the complainants"[24].

19. As to the merits of the communication in the case *Souleymane Guen-*

[21] Article 22 of the CAT has been accepted by both Senegal (on 16 October 1996) and Belgium (on 25 July 1999). To date, 64 of the 150 States parties to the CAT have accepted this optional clause of recognition of the competence of the UN Committee against Torture. For an updated digest of the consideration of complaints under Article 22 of the CAT, cf. UN, *Report of the Committee against Torture*, 45th-46th Sessions (2010-2011), UN doc. A/66/44, pp. 150-203.

[22] CAT, paras. 1.1-1.3. The Committee (acting under Article 108 (9) of its Rules of Procedure) requested Senegal, as an interim measure, not to expel Mr. H. Habré and to take all necessary measures to prevent him from leaving the country (other than an extradition) — a request to which Senegal acceded.

[23] *Ibid.*, para. 2.1.

[24] *Ibid.*, para. 6.4, and cf. paras. 6.1-6.5.

gueng and Others, the Committee, after reviewing the arguments of the parties as to the alleged violations of the relevant provisions of the CAT, noted that Senegal had not contested the fact that it had not taken "such measures as may be necessary" under Article 5 (2). The Committee found that Senegal had not fulfilled its obligations under that provision[25]. In reaching this decision, the Committee deemed it fit to warn, in its decision of 19 May 2006, that

> "the reasonable time-frame within which the State party should have complied with this obligation [under Article 5 (2) of the CAT] has been considerably exceeded"[26].

20. As to the alleged breach of Article 7 of the CAT, the Committee noted that "the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition"; it further observed that the objective of Article 7 is "to prevent any act of torture from going unpunished"[27]. The Committee also pondered that Senegal or any other State party "cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with [its] obligations under the Convention"[28]. The Committee found that Senegal was under an obligation to prosecute Mr. H. Habré for alleged acts of torture, unless it could demonstrate that there was not sufficient evidence to prosecute (at the time of the complainants' submission of their original complaint of January 2000).

21. The Committee recalled that the decision of March 2001 by the Court of Cassation had put an end to any possibility of prosecuting Mr. H. Habré in Senegal, and added that since Belgium's request of extradition of September 2005, Senegal also had the choice to extradite Mr. H. Habré. As Senegal decided neither to prosecute nor to extradite him, the Committee found that it had failed to perform its obligations under Article 7 of the CAT[29]. The Committee then concluded that Senegal had violated Articles 5 (2) and 7 of the CAT; it added that its decision in no way influenced the possibility of "the complainants' obtaining compensation through the domestic courts for the State party's failure to comply with its obligations under the Convention"[30]. This decision of the Committee against Torture is, in my view, of particular relevance to the present case before this Court[31].

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[25] CAT, paras. 9.1-9.6.
[26] *Ibid.*, para. 9.5.
[27] *Ibid.*, para. 9.7.
[28] *Ibid.*, para. 9.8.
[29] *Ibid.*, paras. 9.7-9.12.
[30] *Ibid.*, paras. 9.12 and 10.
[31] Cf. also Section XV, *infra*.

IV. The Case before the ICJ: Responses to Questions Put to the Contending Parties

1. Questions Put to Both Parties

22. At the end of the public hearings before this Court, I deemed it fit to put to the two contending Parties, on 16 March 2012, the following questions:

"(. . .) First question:

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

Second question:

2. *As to the law*:

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

— *(b)* According to Article 6 (2) of the United Nations Convention against Torture, a State party wherein a person alleged to have committed an offence (pursuant to Article 4) is present 'shall immediately make a preliminary inquiry into the facts'. How is this obligation to be interpreted? In your view, are the steps that Senegal alleges to have taken to date sufficient to fulfil its obligation under this provision of the United Nations Convention against Torture? "[32]

2. Reponses by Belgium

23. Concerning the *first* question I posed[33], Belgium gave its response on the basis of the relevant rules of Belgian law, and invited Senegal to elaborate on the rules applicable under Senegalese law. Belgium contended

[32] CR 2012/5, of 16 March 2012, pp. 42-43.

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

that Belgian law espouses the principle of *"liberté de la preuve"* in criminal contexts, which, according to Belgium, entails, first, the free choice of evidence and, secondly, allows the trial judge to have discretion to assess its probative value. Belgium pointed out that the Belgian Court of Cassation has upheld this principle many times[34]. Belgium further argued that the corollary of the principle of *"liberté de la preuve"* is that of firm conviction, whereby the judge can only uphold the charges in case all the evidence submitted to him by the prosecutor warrants the firm conviction that the individual has committed the offence he is charged with.

24. Belgium contended, in addition, that, essentially, any type of evidence is thus admissible, as long as it is rational and recognized, by reason and experience, as capable of convincing the judge. Belgium also alleged that, in accordance with the general legal principle of respect for the rights of the defence, any evidence taken into account by the judge in a criminal case must be subjected to adversarial argument. Belgium contended that the judge in a criminal case may take into consideration all the evidence which has been gathered abroad and which has been transmitted to the Belgian authorities, such as, a copy of the Report of the National Commission of Inquiry of the Chadian Ministry of Justice (hereinafter: "the Report"), as long as that evidence does not violate the right to a fair trial. Belgium further argued that the judge will determine the legality of the evidence obtained abroad based on the following considerations: whether the foreign law allows the evidence used; whether or not this evidence is consistent with the rules of international law directly applicable in the domestic courts and with Belgian public policy rules; and, whether the evidence was obtained in compliance with the foreign law, in so far as the judge has been seised of a dispute in this connection[35].

25. Belgium further claimed that when the international arrest warrant against Mr. Habré was issued, the Belgian investigating judge took account, in particular, of the evidence contained in the Report. Thus — to conclude — Belgium argued that, while keeping in mind that it is for the trial judge to rule on the probative value of the Report at issue, it could certainly be used as evidence in proceedings against Mr. Habré. Belgium added that the use of the Report could save a considerable amount of time and money in pursuit of the obligation to prosecute, even if — and Belgium referred to Senegal's arguments in this regard — it is not possible to point to "lack of funds or difficulties in establishing a special budget as exonerating factors" concerning the responsibility of the State which is obliged to prosecute or, failing that, to extradite[36].

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[34] CR 2012/6, of 19 March 2012, p. 21. Belgium argues that the Court of Cassation has found that "in respect of criminal law, when the law does not lay down a particular method of proof, the trial judge in fact assesses the probative value of the evidence, submitted in due form, on which he bases his opinion", Belgian Court of Cassation, 27 February 2002, Pas., 2002, p. 598 *[translation by the Registry]*.

[35] CR 2012/6, of 19 March 2012, p. 21.

[36] *Ibid.*, p. 22.

26. As to the *second* question I posed[37], Belgium argued that there are three steps to be taken pursuant to Article 6 of the Convention against Torture (CAT):

> "*first*, to secure the offender's presence; *second*, to conduct, immediately, a preliminary inquiry; and, *third*, to notify, immediately, certain States what is going on, including in particular reporting to them its findings following the preliminary inquiry and indicating whether it intends to exercise jurisdiction".

As to the first requirement of Article 6, Belgium argued that it never contested that Senegal fulfilled this first step, even though, from time to time, Belgium has had serious concerns about Senegal's continuing commitment to this obligation, given certain statements by high-level officials of Senegal.

27. As concerns Article 6 (2), Belgium argued that Senegal's counsel did not make arguments in this regard during the oral hearings. Belgium claimed that Article 6 is a common provision in Conventions containing *aut dedere aut judicare* clauses (as, e.g., in the Hague and Montreal Conventions concerning civil aviation), and referred to the United Nations Study of such clauses, to the effect that the preliminary steps set out in the Conventions, including "measures (. . .) to investigate relevant facts", are indispensable to allow the proper operation of the mechanism for the punishment of offenders in the relevant Conventions. Belgium went on to argue that the nature of the investigation required by Article 6 (2) depended to some extent on the legal system concerned, and the circumstances of the particular case. It contended, however, that from the structure of the *aut dedere aut judicare* provisions of the Convention against Torture, the reference to a preliminary inquiry in Article 6 (2) is of the kind of preliminary investigation which precedes the submission of the matter to the prosecuting authorities.

28. Belgium claimed that Article 6 (4) makes it clear that the preliminary inquiry should lead to findings, and that the main purpose of the inquiry is to enable the State in whose territory the alleged offender is

[37] Namely:

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

present to take a decision on whether it intends to take jurisdiction, and to report its findings to other interested States so that they may take a decision whether or not to seek extradition. In Belgium's submission,

> "[t]he preliminary inquiry referred to in Article 6, paragraph 2, thus requires the gathering of first pieces of evidence and information, sufficient to permit an informed decision by the competent authorities of the territorial State whether a person should be charged with a serious criminal offence and brought to justice"[38].

Belgium concluded by claiming that there is no information before the Court speaking to any preliminary inquiry on the part of Senegal.

29. As to my question concerning the *interpretation of Article 7*[39], Belgium first argued that the obligation under Article 7 (1) is closely related to the obligations under Articles 5 (2), and 6 (2) of the CAT — which in its view Senegal has also violated — and Belgium further claimed in this regard that "the breach of Article 7 flowed from the breach of the other two provisions". Belgium explained that

> "[t]he absence of the necessary legislation, in clear breach of Article 5, paragraph 2, until 2007/2008 meant that Senegal's prosecutorial efforts were doomed to failure. So the prosecutorial efforts undertaken in 2000 and 2001 cannot be seen as fulfilling the obligation laid down in Article 7, paragraph 1, of the Convention."[40]

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[38] CR 2012/6, of 19 March 2012, pp. 42-44. Belgium also cites the *Commentary*, by Nowak and McArthur, in this sense:

> "[s]uch criminal investigation is based on the information made available by the victims and other sources as indicated in Article 6 (1) and includes active measures of gathering evidence, such as interrogation of the alleged torturer, taking witness testimonies, inquiries on the spot, searching for documentary evidence, etc."; M. Nowak, E. McArthur *et al.*, *The United Nations Convention against Torture — A Commentary*, Oxford University Press, 2008, p. 340.

[39] Namely:

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

[40] CR 2012/6, of 19 March 2012, p. 46.

30. Belgium claimed that the obligation in Article 7 of the CAT "to submit the case to the competent authorities for the purpose of prosecution" is carefully worded as it would not seem realistic *"to prosecute whenever allegations are made"*. In this regard, Belgium argued that:

> "What can be required is that the case is submitted to the prosecuting authorities for the purpose of prosecution; and that those authorities 'shall take their decision in the same manner as the case of any ordinary offence of a serious nature' — in paragraph 2 of Article 7, with which paragraph 1 should be read, provides. What is at issue here, in particular, is the need for the prosecuting authorities to decide whether the available evidence is sufficient for a prosecution."[41]

31. Belgium then referred to the negotiating history of Article 7 and argued that the same language is now found in many of the *aut dedere aut judicare* clauses that follow the Hague Convention[42] model, including the CAT. Referring to the *travaux préparatoires* of the latter, Belgium argued that it was decided that the language should follow the "well-established language" of the Hague Convention[43]. Belgium also claimed that "the fact that there is no absolute requirement to prosecute does not mean that the prosecuting authorities have total discretion, and that a State may simply do nothing", and contended that, like any other international obligation, it must be performed in good faith.

32. Belgium referred to the object and purpose of the CAT stated in its concluding preambular paragraph "to make more effective the struggle against torture" which means, in its view, that the prosecuting authorities start "a prosecution if there is sufficient evidence, and that they do so in a timely fashion". After referring to expert writing on the *travaux préparatoires* of the Hague Convention, for guidance in the interpretation of Article 7 of the CAT[44], Belgium concluded that Senegal is in breach of its obligation under Article 7 of the CAT, notwithstanding the fact that the prosecuting authorities acted in the year 2000, without success, which in its view was not sufficient to fulfil its obligations under the CAT.

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[41] CR 2012/6, of 19 March 2012, p. 46.

[42] Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, United Nations, *Treaty Series*, Vol. 860, p. 105 (I-12325).

[43] CR 2012/6, of 19 March 2012, pp. 46-47.

[44] *Ibid.*, pp. 46-48.

33. Belgium further contended that, since 2000-2001, Senegal has taken no action to submit any of the allegations against Mr. H. Habré to the prosecuting authorities, a fact which Belgium submitted to be a

> "matter of particular concern given that the allegations against Mr. H. Habré were renewed in the Belgian extradition request of 2005, and in the further complaint laid in Senegal in 2008, not to speak of the information now publicly available concerning the crimes that have been committed when Hissène Habré was in power in Chad, and for which he allegedly bears responsibility"[45].

3. Responses by Senegal

34. In respect of my *first* question *(supra)*, Senegal pointed out, as far as the pertinent provisions of domestic law in force in Senegal are concerned, that the Report of the Chadian Truth Commission "can only be used for information purposes and is not binding on the investigating judge who, in the course of his investigations conducted by means of an international letter rogatory, may endorse or disregard it". Senegal added that the Report is not binding on the trial judge examining the merits of the case, and thus the value of the Report is "entirely relative"[46].

35. As to my *second* question *(supra)*, Senegal argued that, even before it adhered to the CAT, it had already endeavoured to punish torture, and as such it had established its jurisdiction in relation to Article 5 (3) of the Convention, on the basis of which Mr. Habré was indicted in 2000 by the senior investigating judge when the competent Senegalese authorities had been seised with complaints. Senegal further claims that pursuant to Article 7 (3) of the Convention, Mr. Habré "was able to avail himself of the means of redress made available by Senegalese law to any individual implicated in proceedings before criminal courts, without distinction of nationality, on the same basis as the civil parties"[47].

36. Senegal also added that, further to the judgment of 20 March 2001 of the Court of Cassation, and the mission of the Committee against Torture in 2009, Senegal adapted its legislation to the other provisions of the CAT. Senegal further claimed that the investigating judge, in criminal proceedings, may be seised either by a complaint with civil-party application or by an application from the public prosecutor to open an investigation. Concerning the preliminary inquiry, Senegal claimed that its aim is to establish the basic facts and that it does not necessarily lead to

[45] CR 2012/6, of 19 March 2012, p. 48.
[46] CR 2012/7, of 21 March 2012, p. 32.
[47] *Ibid.*, pp. 32-33.

prosecution, as the prosecutor may, upon review of the results of the inquiry, decide that there are no grounds for further proceedings[48].

37. Senegal further claimed that the CAT does not contain a "general obligation to combat impunity" as a legal obligation with the effect of requiring universal jurisdiction to be established and that an obligation of result is not in question, "since the fight against impunity is a process having prosecution or extradition as possible aims under the said Convention". Senegal questioned the purpose of establishing universal jurisdiction in the case of a State which already has a legal entitlement to exercise territorial jurisdiction, which, in its view, is the most obvious principle in cases of competing jurisdiction. Senegal recalled that, in 2009, it established its jurisdiction concerning offences covered by the CAT.

38. Senegal further recalled the Court's Order on the request for provisional measures of 2009 to the effect that the Parties seemed to differ on the "time frame within which the obligations provided for in Article 7 must be fulfilled or [on the] circumstances (financial, legal or other difficulties)". Senegal argues that the obligation *aut dedere aut judicare* remains an obligation either to extradite or, in the alternative, to prosecute, given that international law does not appear to "give priority to either alternative course of action".[49]

39. Senegal contended, moreover, that "[t]he obligation to try, on account of which Senegal has been brought before the Court, cannot be conceived as an obligation of result" but rather an obligation of means, where "the requirement of wrongfulness is fulfilled only if the State to which the source of the obligation is attributable has not deployed all the means or endeavours that could legitimately be expected of it in order to achieve the results expected by the authors of the rule". Senegal referred to some international jurisprudence and argued that international law does not impose obligations of result on member States.

40. Senegal concluded by arguing that the measures it has taken thus far are largely sufficient and satisfy the obligations laid down in Articles 6 (2) and 7 (1) of the CAT. Senegal thus argued that once it

> "undertook major reforms to allow the trial to be held, including constitutional reforms, it may be considered to have satisfied its obligation of means or of 'best efforts', so as not to give the appearance of a State heedless and not desirous of implementing its conventional obligations. It may not have done this to a sufficient extent, but it has made sufficient progress in terms of acting to achieve such a result."[50]

[48] *Ibid.*, p. 33.
[49] CR 2012/7, of 21 March 2012, p. 34.
[50] *Ibid.*, pp. 35-36.

4. General Assessment

41. In the light of the aforementioned, it is significant that, for the arrest warrant against Mr. Habré, the evidence contained in the Report of the Chadian Truth Commission was taken into account by the Belgian investigating judge. Furthermore — as also pointed out by Belgium — that Report can certainly be taken into account as evidence in legal proceedings against Mr. H. Habré, it being for the trial judge or the tribunal to rule on its probative value. Senegal itself acknowledged that the Report at issue can be taken into account for information purposes, without being "binding" on the investigating judge; it is for the judge (or the tribunal) to rule on it.

42. There thus seems to be a disagreement between Belgium and Senegal as to the consideration of the evidence considered in the Report. In any case, the Report cannot be simply overlooked or ignored, it cannot be examined without care. It is to be examined together with all other pieces of evidence that the investigating judge or the tribunal succeeds in having produced before him/it, for the purpose of ruling on the matter at issue. The present case concerns ultimately a considerable total of victims, those murdered, or arbitrarily detained and tortured, during the Habré regime in Chad (1982-1990).

43. As to the answers provided by the contending Parties to my questions addressed to them, whether in their view the steps that Senegal alleges to have taken to date were sufficient to fulfil its obligations under Articles 6 (2) and 7 (1) of the UN Convention against Torture, an assessment of such answers ensues from the consideration of the doctrinal debate on the dichotomy between alleged obligations of means or conduct, and obligations of result. I am of the view that the obligations under a treaty of the nature of the UN Convention against Torture are not, as the respondent State argues, simple obligations of means or conduct: they are obligations of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*. I feel obliged to expand on the foundations of my personal position on this matter.

V. Peremptory Norms of International Law (*Jus Cogens*): The Corresponding Obligations of Result, and Not of Simple Conduct

44. In my understanding, the State obligations — under Conventions for the protection of the human person — of prevention, investigation and sanction of grave violations of human rights and of international humanitarian law, are not simple obligations of conduct, but rather obli-

gations of result[51]. It cannot be otherwise, when we are in face of peremptory norms of international law, safeguarding the fundamental rights of the human person. Obligations of simple conduct may prove insufficient; they may exhaust themselves, for example, in unsatisfactory legislative measures. In the domain of *jus cogens*, such as the absolute prohibition of torture, the State obligations are of due diligence and of result. The examination of the proposed distinction between obligations of conduct and obligations of result has tended to take place at a purely theoretical level, assuming variations in the conduct of the State, and even a succession of acts on the part of this latter[52], and without taking sufficient and due account of a situation which causes irreparable harm to the fundamental rights of the human person.

45. If the corresponding obligations of the State in such a situation were not of result, but of mere conduct, the doors would then be left open to impunity. The handling of the case of Mr. Hissène Habré to date serves as a warning in this regard. Over three decades ago, when the then *rapporteur* of the UN International Law Commission (ILC) on the International Responsibility of the State, Roberto Ago, proposed the distinction between obligations of conduct and of result, some members of the ILC expressed doubts as to the viability of distinguishing between the two types of obligation; after all, in order to achieve a given result, the State ought to assume a given behaviour[53]. In any case, obligations of result admitted the initial free choice by the State of the means to comply with them, of obtaining the results due.

46. The aforementioned distinction between the two kinds of obligations introduced a certain hermeticism into the classic doctrine on the matter, generating some confusion, and not appearing very helpful in the domain of the international protection of human rights. Despite references to a couple of human rights treaties, the essence of Roberto Ago's reasoning, developed in his dense and substantial Report*s* on the International Responsibility of the State, had in mind above all the framework of essentially inter-State relations. The ILC itself, in the Report of 1977 on its work, at last reckoned that a State party to a human rights treaty has

[51] Cf., to this effect: IACtHR, case of the *Dismissed Employees of the Congress* v. *Peru* (interpretation of judgment of 30 November 2007), dissenting opinion of Judge Cançado Trindade, paras. 13-29; IACtHR, case of the *Indigenous Community Sawhoyamaxa* v. *Paraguay* (judgment of 29 March 2006), separate opinion of Judge Cançado Trindade, para. 23; IACtHR, case *Baldeón García* v. *Peru* (judgment of 6 April 2006), separate opinion of Judge Cançado Trindade, paras. 11-12.

[52] A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato* . . ., *op. cit. infra* note 55, pp. 50-55 and 128-135.

[53] Report reproduced in: Appendix I: «Obligations of Result and Obligations of Means», I. Brownlie, *State Responsibility — Part I*, Oxford, Clarendon Press, 2001 [reprint], pp. 241-276, esp. pp. 243 and 245.

obligations of *result*, and, if it does not abide by them, it cannot excuse itself by alleging that it has done all that it could to comply with them, that it has behaved in the best way to comply with them; on the contrary, such State has the duty to attain the *result* required of it by the conventional obligations of protection of the human person.

47. Such binding obligations of *result* (under human rights treaties) are much more common in international law than in domestic law. The confusion generated by the dichotomy of obligations of conduct and of result has been attributed to the undue transposition into international law of a distinction proper to civil law *(droit des obligations)*; rather than "importing" inadequately distinctions from other branches of law or other domains of legal theory, in my view one should rather seek to ensure that the behaviour of States is such that it will abide by the required result, of securing protection to human beings under their respective jurisdictions. Human rights treaties have not had in mind the dichotomy at issue, which is vague, imprecise, and without practical effect.

48. It is thus not surprising to find that the distinction between so-called obligations of conduct and of result was discarded from the approved 2001 draft of the ILC on the International Responsibility of States, and was met with criticism in expert writing[54]. Moreover, it failed to have any significant impact on international case law. The ECHR, for example, held in the case of *Colozza and Rubinat* v. *Italy* (judgment of 12 February 1985), that the obligation under Article 6 (1) of the European Convention of Human Rights was one of result. For its part, the ICJ, in the case of the *"Hostages" (United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980)*, ordered the respondent State to comply promptly with its obligations, which were "not merely contractual", but rather imposed by general international law (para. 62); the ICJ singled out "the imperative character of the legal obligations" incumbent upon the respondent State (para. 88), and added that

> "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the

[54] Cf., e.g., I. Brownlie, *State Responsibility — Part I*, *op. cit. supra* note 53, pp. 241, 250-251, 255-259, 262, 269-270 and 276; J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", *Mélanges offerts à Paul Reuter — Le droit international: unité et diversité*, Paris, Pedone, 1981, pp. 190, 198 and 200-204; P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des Etats", 188 *Recueil des cours de l'Académie de droit international de La Haye* (1984), pp. 47-49; and cf. also P.-M. Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", 10 *European Journal of International Law* (1999), pp. 376-377.

United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." (Para. 91.)

49. One of such principles is that of respect of the dignity of the human person. Thus, in so far as the safeguard of the fundamental rights of the human person is concerned, the obligations of the State — conventional and of general international law — are of *result*, and not of simple conduct, so as to secure the effective protection of those rights. The absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of *result*, endowed with a necessarily objective character, and the whole conceptual universe of the law of the international responsibility of the State has to be reassessed in the framework of the international protection of human rights[55], encompassing the origin as well as the implementation of State responsibility, with the consequent and indispensable duty of reparation.

50. In the framework of the international law of human rights — wherein the UN Convention against Torture is situated — it is not the result that is conditioned by the conduct of the State, but, quite on the contrary, *it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms of protection of the human person*. The conduct of the State ought to be the one which is conducive to compliance with the obligations of result (in the *cas d'espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly "good conduct" of the State concerned.

51. This would be inadmissible; we are herein before obligations of *result*. To argue otherwise would amount to an exercise of legal formalism, devoid of any meaning, that would lead to a juridical absurdity, rendering dead letter the norms of protection of the human person. In sum and conclusion on this point, the absolute prohibition of torture is, as already seen, one of *jus cogens*; in an imperative law, conformed by the *corpus juris* of the international protection of the fundamental rights of the human person, the corresponding obligations of the State are ineluctable, imposing themselves *per se*, as obligations necessarily of *result*.

[55] A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato — Contributo allo Studio degli Obblighi Internazionali*, Milan, Giuffrè Ed., 2003, pp. 166-171; F. Urioste Braga, *Responsabilidad Internacional de los Estados en los Derechos Humanos*, Montevideo, B de F Colección, 2002, pp. 1-115 and 139-203; L. G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht, Nijhoff, 1995, pp. 141-142 and 149, and cf. pp. 145, 150-152 and 156.

VI. The Everlasting Quest for the Realization of Justice in the Present Case

52. With these clarifications in mind, it would be helpful to proceed, at this stage, to a brief view of the long-standing endeavours, throughout several years, to have justice done, in relation to the grave breaches of human rights and international humanitarian law reported to have occurred during the Habré regime (1982-1990). Those endeavours comprise legal actions in domestic courts, requests of extradition (at inter-State level), some other initiatives at international level, and an initiative of entities of the African civil society. The way would then be paved for a brief review of the initiatives and endeavours to the same effect of the African Union in particular, given its influence in the orientation of the conduction of international affairs in the African continent.

1. Legal Actions in Domestic Courts

53. On 25-26 January 2000 the first complaints were lodged by Chadian nationals in Dakar, Senegal, against Mr. Hissène Habré, accusing him of the practice of torture (crimes against humanity). On 3 February 2000 a Senegalese judge, after hearing the victims, indicted Mr. H. Habré, and placed him under house arrest. But on 4 July 2000 the Dakar Appeals Court dismissed the indictment, ruling that Senegalese courts had no jurisdiction to pursue the charges because the crimes were not committed in Senegal.

54. On 30 November 2000, new complaints were filed against Mr. H. Habré, this time in Brussels, by Chadian victims living in Belgium. On 20 March 2001, Senegal's Appeals Court stood by its view, in ruling that Mr. H. Habré could not stand trial because the alleged crimes were not committed in Senegal. In 2002 (26 February to 7 March), a Belgian investigating judge *(juge d'instruction)*, in a visit to Chad, interviewed victims and former accomplices of Mr. H. Habré, visited detention centres and mass graves, and took custody of DDS documents. At the end of a four-year investigation, on 19 September 2005, he issued an international arrest warrant *in absentia* in respect of Mr. H. Habré. Senegal, however, refused to extradite him to Belgium.

55. Parallel to new developments — at international level — from the end of 2005 to date, at domestic level new complaints were filed, on 16 September 2008, against Mr. H. Habré in Senegal, accusing him again of the practice of torture (crimes against humanity). Earlier on, on 31 January 2007, Senegal's National Assembly adopted a law allowing Senegalese courts to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when committed outside of Senegal (thus removing a previous legal obstacle); it later amended its constitution.

2. Requests of Extradition

56. To the above initiatives of legal actions at domestic law level, four requests by Belgium to date, of extradition of Mr. H. Habré, are to be added. As to the first Belgian request of extradition, of 22 May 2005, the Dakar Appeals Court decided, on 25 November 2005, that it lacked jurisdiction to deal with it. On 15 March 2011, Belgium presented a second extradition request, declared inadmissible by the Dakar Appeals Court in its decision of 18 August 2011. Later on, a third extradition request by Belgium, of 5 September 2011, was again declared inadmissible by the Dakar Appeals Courts in its decision of 10 January 2012. Belgium promptly lodged a fourth extradition request (same date). To those requests for extradition, one could add the whole of the diplomatic correspondence exchanged between Belgium and Senegal, reproduced in the dossier of the present case[56] before this Court.

3. Initiatives at International Level

57. On 24 January 2006 the African Union (AU), meeting in Khartoum, set up a "Committee of Eminent African Jurists", to examine the H. Habré case and the options for his trial. In its following session, after hearing the report of that Committee, the AU, on 2 July 2006, asked Senegal to prosecute H. Habré "on behalf of Africa". In the meantime, on 18 May 2006, the UN Committee against Torture found, in the *Souleymane Guengueng and al.* case *(supra)* that Senegal violated the CAT[57] and called on Senegal to prosecute or to extradite Mr. H. Habré. Shortly after the ICJ's Order of 28 May 2009 in the present case opposing Belgium to Senegal, the President and another member of the UN Committee against Torture embarked on an unprecedented visit *in situ* to Senegal, from 4 to 7 August 2009, to seek the application of the Committee's own decision of May 2006 in the *cas d'espèce*.

58. In the meantime, on 11 August 2008, a Chadian national residing in Switzerland (Mr. Michelot Yogogombaye) lodged an application against Senegal before the African Court on Human and Peoples' Rights (AfCHPR) with a view to suspend the "ongoing proceedings" aiming to "charge, try and sentence" Mr. Hissène Habré. On 15 December 2009, the AfCHPR decided that it had no jurisdiction to entertain the application at issue, since Senegal had not made a declaration accepting the jurisdiction of the AfCHPR to hear such applications, pursuant to

[56] Cf. Annexes to Belgium's Memorial, Vol. II, of 1 July 2010, docs. B.1-26.

[57] This was the first time the Committee found a breach of the duty to prosecute (Article 7 of the CAT), in a decision that has been seen as corresponding to "the letter, spirit and purpose of Article 7, namely, to avoid safe havens for torturers"; M. Nowak, E. McArthur *et al.*, *The United Nations Convention against Torture — A Commentary*, *op. cit. supra* note 38, p. 363.

Article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights (on the establishment of the AfCHPR).

59. In the period 2008-2010, moreover, given Senegal's refusal to prepare for the trial of Mr. H. Habré unless it received full funding for it, the European Union and the AU sent successive delegations to negotiate on the issue with Senegal. In the meantime, on 18 November 2010, the ECOWAS Court of Justice ruled that Senegal ought to try Mr. H. Habré by a special jurisdiction or an *ad hoc* tribunal, to be created for that purpose. On 24 November 2010, a donors' international roundtable held in Dakar secured the full funding to cover all the estimated costs of the proceedings of the trial of Mr. H. Habré[58]. Shortly afterwards, on 31 January 2011, the AU called for the "expeditious" start of the trial of Mr. H. Habré, on the basis of the ECOWAS Court decision (cf. *infra*).

60. On 24 November 2011, the rapporteur of the CAT on the follow-up of communications (or petitions) sent a letter to the Permanent Mission of Senegal to the United Nations, reminding it of its obligation *aut dedere aut judicare* under the Convention, and took note of the fact that, until then, no proceedings had been initiated by Senegal against Mr. H. Habré. Earlier on, on 12 January 2011, the same rapporteur had sent another letter to Senegal's Permanent Mission to the UN, recalling the State party's obligation under Article 7 (1) of the CAT, now that the full funding for the trial of Mr. H. Habré had been secured *(supra)*.

61. For its part, the Office of the UN High Commissioner for Human Rights (OHCHR) also expressed its concern with the delays in opening up the trial of Mr. H. Habré; on 18 March 2011, the OHCHR urged Senegal to comply with its duty of prosecution[59]. Later on, the OHCHR requested Senegal not to extradite (as then announced) Mr. H. Habré to Chad (where he had already been sentenced to death *in absentia*), pondering that "[j]ustice and accountability are of paramount importance and must be attained through a fair process and in accordance with human rights law"[60]. Shortly afterwards, the OHCHR warned, on 12 July 2011, that Mr. H. Habré was

> "continuing to live with impunity in Senegal, as he has done for the past 20 years. It is important that rapid and concrete progress is made by Senegal to prosecute or extradite Habré to a country willing to

[58] Cf. UNHCR/Refworld, "African Union Calls for 'Expeditious' Start to Habré Trial", http://www.refworld.org, doc. of 31 January 2011, p. 2.

[59] UN/OHCHR, www.ohchr.org/news, of 18 March 2011, p. 1.

[60] UN/OHCHR, "Senegal Must Review Its Decision to Extradite Hissène Habré to Chad", www.ohchr.org/news, of 10 July 2011, p. 1.

conduct a fair trial. This has been the High Commissioner's position all along. It is also the position of the African Union (AU), as well as of much of the rest of the international community. It is a violation of international law to shelter a person who has committed torture or other crimes against humanity, without prosecuting or extraditing him." [61]

4. Initiative of Entities of African Civil Society

62. In addition to these three exhortations (of the UN Committee against Torture itself, the African Union, and the rapporteur of the CAT), on 21 July 2010, Nobel Peace Prize winners Archbishop Desmond Tutu and Shirin Ebadi, among others, as well as 117 African human rights groups from 25 African countries, likewise called upon Senegal to move forward with the trial of Mr. H. Habré, for political killings and the systematic practice of torture, after more than 20 years of alleged difficulties to the detriment of the victims [62].

63. In their call for the fair trial of Mr. H. Habré, Archbishop D. Tutu and the other signatories stated:

> "We, the undersigned NGOs and individuals urge Senegal rapidly to begin legal proceedings against the exiled former Chadian dictator Hissène Habré, who is accused of thousands of political killings and systematic torture from 1982 to 1990.
>
> The victims of Mr. Habré's regime have been working tirelessly for 20 years to bring him to justice, and many of the survivors have already died. (. . .) Instead of justice, the victims have been treated to an interminable political and legal soap opera (. . .)." [63]

64. After recalling the facts of the victims' quest for justice, they stated that a fair trial for Mr. H. Habré in Senegal "should be a milestone" in the fight to hold "the perpetrators of atrocities (. . .) accountable for their crimes". They added that this would moreover show that "African courts are sovereign and capable of providing justice for African victims for crimes committed in Africa". They thus urged the authorities "to choose justice, not impunity, and to move quickly towards the trial of Hissène Habré" [64].

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[61] UN/OHCHR, www.ohchr.org/news, of 12 July 2011, p. 1.

[62] Cf. Human Rights Watch (HRW), "Senegal/Chad: Nobel Winners, African Activists Seek Progress in Habré Trial", www.hrw.org/news, of 21 July 2010, p. 1; HRW, "UN: Senegal Must Prosecute or Extradite Hissène Habré", www.hrw.org/news, of 18 January 2001, p. 1.

[63] FIDH [Fédération internationale des ligues des droits de l'homme], "Appeal [. . .] for the Fair Trial of Hissène Habré", www.fidh.org/news, of 21 July 2010, p. 1.

[64] *Ibid.*

VII. The Search for Justice: Initiatives and Endeavours of the African Union

65. The above review, to be completed, requires closer attention to be paid to the initiatives and endeavours of the African Union (reflected in the *Decisions* adopted by its Assembly), in the same search for justice in the *Hissène Habré* case. Thus, at its sixth ordinary session, held in Khartoum, Sudan, the Assembly of the African Union adopted its Decision 103 (VI), on 24 January 2006, wherein it decided to establish a Committee of Eminent African Jurists "to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial"[65]. It requested the aforementioned Committee to submit a report at the following Ordinary Session in July 2006.

66. At its seventh ordinary session, held in Banjul, Gambia, the Assembly of the African Union adopted its Decision 127 (VII), on 2 July 2006, whereby it took note of the report presented by the Committee of Eminent African Jurists. It noted that, pursuant to Articles 3 *(h)*, 4 *(h)* and 4 *(o)* of the Constitutive Act of the African Union, "the crimes of which Hissène Habré is accused fall within the competence of the African Union". Furthermore, the Assembly of the African Union mandated 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".

67. At its eighth ordinary session, held in Addis Ababa, Ethiopia, the Assembly of the African Union adopted Decision 157 (VIII), on 30 January 2007, whereby the African Union commended Senegal for its efforts on "the implementation of the Banjul Decision", encouraged it "to pursue its initiatives to accomplish the mandate entrusted to it", and appealed to the international community to mobilize the financial resources required for the trial. Two years later, at its twelfth ordinary session, held again in Addis Ababa, from 1 to 3 February 2009, the Assembly of the African Union adopted Decision 240 (XII), whereby it called on "all Member States of the African Union, the European Union and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to the African Union Commission".

68. At its following thirteenth ordinary session, held in Sirte, Libya, from 1 to 3 July 2009, the Assembly of the African Union adopted Decision 246 (XIII), whereby it reiterated its "appeal to all Member States to

[65] It further took note of the briefing by President Wade of Senegal and President Obasanjo, the outgoing Chairperson of the African Union, on the *Hissène Habré* case.

contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the AU mandate to prosecute and try Hissène Habré"[66]. Next, at its fourteenth ordinary session, held in Addis Ababa, Ethiopia, from 31 January to 2 February 2010, the Assembly of the African Union adopted Decision 272 (XIV), wherein it requested "the Government of Senegal, the Commission and Partners, particularly the European Union to continue with consultations with the view to ensuring the holding of the Donors Round Table as soon as possible". At its fifteenth ordinary session, held in Kampala, Uganda, the Assembly of the African Union adopted Decision 297 (XV), on 27 July 2010, to the same effect.

69. At its sixteenth ordinary session, held in Addis Ababa, Ethiopia, on 30-31 January 2011, the Assembly of the African Union adopted Decision 340 (XVI), whereby it confirmed "the mandate given by the African Union (AU) to Senegal to try Hissène Habré". Furthermore, it welcomed the conclusions of the Donors Round Table concerning the funding of Mr. Habré's trial and called on Member States, all partner countries and relevant institutions to disburse the funds pledged at the Donors Round Table. Moreover, the Assembly requested 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".

70. At its seventeenth ordinary session, held in Malabo, Equatorial Guinea, the Assembly of the African Union adopted Decision 371 (XVII), on 1 July 2011, whereby it reiterated its decision (of January 2011) "confirming the mandate given to Senegal to try Hissène Habré on behalf of Africa". The Assembly of the African Union urged Senegal

> "to carry out its legal responsibility in accordance with the United Nations Convention against Torture, the decision of the United Nations (UN) 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".

Next, at its eighteenth ordinary session, held in Addis Ababa, Ethiopia, on 29-30 January 2012, the Assembly of the African Union adopted Decision 401 (XVIII), whereby it requested the

> "Commission 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 Habre and to consider the practical modalities as well as the legal and financial implications of the trial".

[66] It also invited the partner countries and institutions to take part in the Donors Round Table, scheduled to be held in Dakar, Senegal.

71. As it can be apprehended from the aforementioned decisions, the African Union has been giving attention to the *Hissène Habré* case on a consistent basis, since 2006. Although the African Union does not have adjudicatory powers, it has felt obliged to assist Senegal in the pursuit of its obligation to bring Mr. H. Habré to justice; it thus appears to give its own contribution, as an international organization, to the rule of law (at national and international levels) and to the corresponding struggle against impunity. One can note that, as time progressed, the language of the decisions of the Assembly of the African Union has gradually strengthened.

72. This is evidenced, in particular, by the language utilized in its decision 371 (XVII), adopted on 1 July 2011, wherein the Assembly of the African Union reiterated its previous decision "confirming the mandate given to Senegal to try Hissène Habré on behalf of Africa", and *urged* Senegal "to carry out its legal responsibility" in accordance with the UN Convention against Torture, the decision adopted by the UN 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"[67]. The emphasis shifted from the collection of funds for the projected trial of Mr. H. Habré to the *urgency* of Senegal's compliance with its duty of prosecution, in conformity with the relevant provisions of the UN Convention against Torture.

VIII. Urgency and the Needed Provisional Measures of Protection

73. In the period which followed the ICJ decision *(Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Order of 28 May 2009, I.C.J. Reports 2009)*, not to order provisional measures, Senegal's pledge before the Court to keep Mr. H. Habré under house surveillance and not to allow him to leave Senegal pending its much-awaited trial seemed at times to have been overlooked, if not forgotten. First, concrete moves towards the trial were not made, amidst allegations of lack of full funding (which was secured on 24 November 2010). Next, in early July 2011, Senegal announced that Mr. H. Habré would be returned to Chad on 11 July 2011 (where he had been sentenced to death *in absentia* by a court for allegedly planning to overthrow the Government).

74. In its Order of 28 May 2009, the ICJ had refrained from indicating the provisional measures of protection, given Senegal's assurance that it would not permit Mr. H. Habré to leave the country before the ICJ had given its final decision on the case (*ibid.*, p. 155, para. 71); the ICJ then

[67] Emphasis added.

found that there was not "any urgency" to order provisional measures in the present case (*I.C.J. Reports 2009*, p. 155, para. 73). Yet, on 8 July 2011, the then President of Senegal (Mr. A. Wade) wrote to the Government of Chad and to the African Union to announce the imminent expulsion of Mr. H. Habré back to Chad, scheduled for 11 July 2011 *(supra)*. On the eve of that date, Senegal officially retracted its decision, on 10 July 2011, given the international outcry that promptly followed, including from the UN High Commissioner for Human Rights[68].

75. Had the return of Mr. H. Habré to Chad been effected by Senegal in such circumstances, it would have been carried out in breach of the principle of good faith *(bona fides)*. The fact that it was seriously considered, and only cancelled in the last minute under public pressure, is sufficient reason for serious concern. There is one lesson to be extracted from all that has happened in the present case since the Court's unfortunate Order of 28 May 2009: I was quite right in casting a solitary and extensive dissenting opinion appended to it, sustaining the need for the ordering or indication of provisional measures of protection, given the *urgency* of the situation, and the possibility of irreparable harm (which were evident to me, already at that time).

76. A promise of a Government (any Government, of any State anywhere in the world) does not suffice to efface the urgency of a situation, particularly when fundamental rights of the human person (such as the right to the realization of justice) are at stake. The ordering of provisional measures of protection has the additional effect of dissuading a State not to incur into a breach of treaty. It thus serves the prevalence of the rule of law at international level. The present case leaves a lesson: the ordering of provisional measures of protection, guaranteeing the rule of law, may well dissuade governmental behaviour to avoid further incongruencies and not to incur what might become additional breaches of international law.

77. In my extensive dissenting opinion appended to the Court's Order of 28 May 2009, I insisted on the issuance of provisional measures of protection, given the manifest urgency of the situation affecting the surviving victims of torture (or their close relatives) during the Habré regime in Chad (*ibid.*, pp. 183-186, paras. 50-59), and the probability of irreparable damage ensuing from the breach of the right to the realization of justice (*ibid.*, pp. 186-188, paras. 60-65). After all, the present case had been lodged with the Court under the UN Convention against Torture. Ever since, I have never seen any persuasive argument in support of the decision not to order provisional measures in the present case. All that has been said so far revolves around an empty *petitio principii*: the Court's decision was the right one, as was

[68] HRW, "*Habré* Case: Questions and Answers on *Belgium* v. *Senegal*", www.hrw.org/news, of 29 March 2012, p. 5.

taken by a large majority (the traditional argument of authority, the *Diktat*).

78. The fact is that majorities, however large they happen to be, at times also incur mistakes, and this is why I am more inclined to abide by the authority of the argument, rather than vice versa. My position is that the Court should have ordered the provisional measures of protection in its decision of 28 May 2009, having thus assumed the role of *guarantee* of the relevant norms of the UN Convention against Torture. It should have gone beyond the short-sighted inter-State outlook, so as to behold the fundamental rights of the human person that were (and are) at stake in the present case, under the UN Convention against Torture.

79. Unilateral acts of States — such as, *inter alia*, promise — were conceptualized in the traditional framework of the inter-State relations, so as to extract their legal effects, given the "decentralization" of the international legal order. Here, in the present case, we are in an entirely distinct context, that of *objective* obligations established under a normative Convention — one of the most important of the United Nations, in the domain of the international protection of human rights, embodying an absolute prohibition of *jus cogens* —, the UN Convention against Torture. In the ambit of these obligations, a pledge or promise made in the course of legal proceedings before the Court does not remove the prerequisites (of urgency and of probability of irreparable damage) for the indication of provisional measures by the Court.

80. This is what I strongly upheld in my aforementioned dissenting opinion of 28 May 2009 (*I.C.J. Reports 2009*, p. 192, para. 78), and what successive facts ever since leave as a lesson. When the prerequisites of provisional measures are present — as they in my view already were in May 2009, as confirmed by the successive facts — such measures are to be ordered by the Court, to the benefit of the subjects of rights to be preserved and protected (such as the right to the realization of justice). Accordingly, in my dissenting opinion I deemed it fit to ponder that:

> "A decision of the ICJ indicating provisional measures in the present case, as I herein sustain, would have set up a remarkable precedent in the long search for justice in the theory and practice of international law. After all, this is the first case lodged with the ICJ on the basis of the 1984 United Nations Convention against Torture.
>
> . . . . . .
>
> [T]he prerequisites of urgency and the probability of irreparable harm were and remain in my view present in this case (. . .), requiring from the Court the indication of provisional measures. Moreover, there subsist, at this stage — and without prejudice to the merits of

the case — uncertainties which surround the matter at issue before the Court, despite the amendment in February 2007 of the Senegalese Penal Code and Code of Criminal Procedure.

Examples are provided by the prolonged delays apparently due to the alleged high costs of holding the trial of Mr. H. Habré, added to pre-trial measures still to be taken, and the lack of definition of the time still to be consumed before that trial takes place (if it does at all). Despite all that, as the Court's majority did not find it necessary to indicate provisional measures, the Court can now only hope for the best.

This is all the more serious in the light of the nature of the aforementioned *obligations* of the States parties to the United Nations Convention against Torture.

. . . . . .

This Court should in my view have remained seised of the matter at stake. It should not have relinquished its jurisdiction in the matter of provisional measures, on the ground of its reliance on what may have appeared the professed intentions of the parties, placing itself in a position more akin to that of a conciliator, if not an exspectator. Had the Court done so, it would have assumed the role of the guarantor of the compliance, in the *cas d'espèce*, of the conventional obligations by the States parties to the UN Convention against Torture in pursuance of the principle *aut dedere aut judicare*." (*I.C.J. Reports 2009*, pp. 193-195, paras. 80, 82-84 and 88.)

81. This point is not to pass unnoticed here. Fortunately — for the sake of the realization of justice in the light of the integrity of the obligations enshrined into the UN Convention against Torture — Mr. H. Habré did not escape from his house surveillance in Dakar, nor was he expelled from Senegal. The acknowledgment of the urgency of the situation was at last made by the ICJ: it underlies its present Judgment on the merits of the case, which it has just adopted today, 20 July 2012, wherein it determined that Senegal has breached Articles 6 (2) and 7 (1) of the UN Convention against Torture, and is under the duty to take "without further delay" the necessary measures to submit the case against Mr. H. Habré to its competent authorities for the purpose of prosecution (Judgment, para. 121, and resolutory point 6 of the *dispositif*).

IX. The Absolute Prohibition of Torture in the Realm of *Jus Cogens*

82. The victims' everlasting ordeal in their quest for the realization of justice in the present case becomes even more regrettable if one bears in mind that the invocation of the relevant provisions of the UN Convention against Torture (Arts. 5-7) in the present case takes place in connec-

tion with the absolute prohibition of torture, a prohibition which brings us into the domain of *jus cogens*. One would have thought that, in face of such an absolute prohibition, the *justiciables* would hardly face so many obstacles in their search for the realization of justice. This would be so in a world where justice prevailed, which is not ours. The time of human justice is not the time of human beings; ours is a world where one has to learn soon how to live with the surrounding irrationality, in order perhaps to live a bit longer.

1. The International Legal Regime against Torture

83. Yet, despite of the difficulties that have arisen in the *cas d'espèce*, the truth is that there is today an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, a prohibition which falls under the domain of *jus cogens*. Such international legal regime has found judicial recognition; thus, in the case of *Cantoral Benavides* v. *Peru* (merits, judgment of 18 August 2000), for example, the Inter-American Court of Human Rights (IACtHR) stated that "a true international legal regime has been established of absolute prohibition of all forms of torture" (para. 103).

84. Such absolute prohibition of torture finds expression at both *normative* and *jurisprudential* levels. The basic principle of humanity, rooted in the human conscience, has arisen and stood against torture. In effect, in our times, the *jus cogens* prohibition of torture emanates ultimately from the universal juridical conscience, and finds expression in the *corpus juris gentium*. Torture is thus clearly prohibited, as a grave violation of the international law of human rights and of international humanitarian law, as well as of international criminal law. There is here a normative convergence to this effect; this is a definitive achievement of civilization, one that admits no regression.

85. In the domain of the international law of human rights, the international legal regime of absolute prohibition of torture encompasses the United Nations Convention (of 1984, and its Protocol of 2002) and the Inter-American (1985) and European (1987) Conventions against Torture, in addition to the Special Rapporteur against Torture (since 1985) of the former UN Human Rights Commission (HRC) and the Working Group on Arbitrary Detention (since 1991) also of the former HRC (which pays special attention to the *prevention* of torture)[69]. The three aforementioned co-existing Conventions to combat torture are basically complementary *ratione materiae*[70]. Moreover, in the domain of international criminal

[69] In addition to these mechanisms, there is the United Nations Voluntary Contributions Fund for Victims of Torture (since 1983).

[70] Cf., in this regard, A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 345-352.

law, Article 7 of the 1998 Rome Statute of the International Criminal Court (ICC) includes the crime of torture within the ICC's jurisdiction. Torture is in fact prohibited in any circumstances.

86. As the IACtHR rightly warned, in its judgments in the case of the *Gómez Paquiyauri Brothers* v. *Peru* (of 8 July 2004, paras. 111-112), as well as of *Tibi* v. *Ecuador* (of 7 September 2004, para. 143), and of *Baldeón García* v. *Peru* (of 6 April 2006, para. 117),

> "The prohibition of torture is complete and non-revocable, even under the most difficult circumstances, such as war, 'the struggle against terrorism' and any other crimes, states of siege or of emergency, of civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies."

The IACtHR was quite clear in asserting, for example, in its judgment in the case of *Maritza Urrutia* v. *Guatemala* (of 27 November 2003, para. 92), and reiterating in its judgments in the cases of *Tibi* v. *Ecuador* (of 7 September 2004, para. 143), of the *Brothers Gómez Paquiyauri* v. *Peru* (of 8 July 2004, para. 112), and of *Baldeón García* v. *Peru* (of 6 April 2006, para. 117), that

> "[t]here exists an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, a regime which belongs today to the domain of *jus cogens*".

87. Likewise, in the case of *Caesar* v. *Trinidad and Tobago* (judgment of 11 March 2005), the IACtHR found that the conditions of detention to which the complainant had been subjected (damaging his health — his physical, psychological and moral integrity) amount to an inhuman and degrading treatment, in breach of Article 5 (1) and (2) of the American Convention on Human Rights, which "enshrines precepts of *jus cogens*" (para. 100). And later on, in the case of *Goiburú et al.* v. *Paraguay* (judgment of 22 September 2006), the IACtHR reasserted the absolute prohibition of torture and enforced disappearance of persons, in the realm of *jus cogens*, and acknowledged the duty to fight impunity with regard to those grave violations (with the due investigation of the occurrences), so as to honour the memory of the victims and to guarantee the non-repetition of those facts (para. 93).

88. The IACtHR and the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) are the two contemporary international tribunals which have most contributed so far to the jurisprudential construction of the absolute prohibition of torture, in the realm of *jus cogens*[71]. For its part, the ICTY, in the same line of reasoning, held, in its

[71] Cf., recently, A. A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law", in *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington D.C., General Secretariat of the OAS, 2009, pp. 3-29.

judgment (Trial Chamber, of 10 December 1998) in the *Furundžija* case, that torture is "prohibited by a peremptory norm of international law", it is a prohibition of *jus cogens* (paras. 153 and 155). Likewise, in its judgment (Trial Chamber, of 16 November 1998) in the *Delalić et al.* case, the ICTY asserted that the prohibition of torture is of conventional and customary international law, and is a norm of *jus cogens* (paras. 453-454).

89. This view was reiterated by the ICTY in its judgment (Trial Chamber, of 22 February 2001) in the *Kunarac* case, wherein it stated that

> "Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus cogens*." (Para. 466.)

Other statements of the kind by the ICTY, as to the *jus cogens* prohibition of torture, are found in its judgment (Appeals Chamber, of 20 February 2001) in the *Delalić et al*. case (para. 172 and 225), as well as in its judgment (Trial Chamber, of 31 March 2003) in the *Naletilić et al*. case, wherein it affirmed that

> "Various judgments of the Tribunal have considered charges of torture as a grave breach of the Geneva Conventions of 1949, a violation of the laws and customs of war and as a crime against humanity. The *Celebici* trial judgment stated that the prohibition of torture is a norm of customary international law and *jus cogens*." (Para. 336.)

90. The *ad hoc* International Criminal Tribunal for Rwanda (ICTR), in turn, contributed to the normative convergence of international human rights law and contemporary international criminal law as to the absolute prohibition of torture, in interpreting, in its decision (Chamber I) of 2 September 1998 in the case of *J.-P. Akayesu*, the term "torture" as set forth in Article 3 *(f)* of its Statute, in accordance with the definition of torture set forth in Article 1 (1) of the UN Convention against Torture, namely,

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act that he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (para. 681).

91. The European Court of Human Rights (ECHR), for its part, has also pronounced on the matter at issue, to the same effect. Thus, in its judgment (Grand Chamber) of 12 November 2008, on the *Demir and Baykara* v. *Turkey* case, it held that the prohibition of torture has "attained the status of a peremptory norm of international law, or *jus cogens*", and added that this finding was "incorporated into its case law in this sphere" (para. 73). In a broader context, of prohibition of inhuman and degrading treatment (encompassing mental suffering), the reasoning developed by the ECHR in its judgment of 2 March 2010, in the *Al-Saadoon and Mufdhi* v. *United Kingdom* case, leaves room to infer an acknowledgment of a normative hierarchy in international law, giving pride of place to the norms that safeguard the dignity of the human person.

92. The aforementioned development conducive to the current absolute *(jus cogens)* prohibition of torture has taken place with the awareness of the horror and the inhumanity of the practice of torture. Testimonies of victims of torture — as in the proceedings of contemporary international human rights tribunals — give account of that. Even before the present era, some historical testimonies did the same. One such testimony — a penetrating one — is that of Jean Améry, himself a victim of torture. In his own words,

> "(. . .) torture is the most horrible event a human being can retain within himself. (. . .) Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected. (. . .) The person who has survived torture and whose pains are starting to subside (. . .) experiences an ephemeral peace that is conducive to thinking. (. . .) If from the experience of torture any knowledge at all remains that goes beyond the plain nightmarish, it is that of a great amazement and a foreignness in the world that cannot be compensated by any sort of subsequent human communication. (. . .) Whoever has succumbed to torture can no longer feel at home in the world. (. . .) The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully will not be regained. (. . .) One who was martyred is a defenseless prisoner of fear. It is fear that henceforth reigns over him. Fear — and also what is called resentment. They remain (. . .)."[72]

93. The present Judgment of the ICJ in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* contributes decisively

[72] Jean Améry, *Par-delà le crime et le châtiment*, Arles, Babel/Actes Sud, 2005 [reed.], pp. 61, 83-84, 92 and 94-96. And cf. Jean Améry, *At the Mind's Limits*, Bloomington, Indiana University Press, 1980 [reed.], pp. 22, 34 and 38-40.

to the consolidation of the international legal regime against torture. To this effect, the Court significantly states that

> "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." (Judgment, para. 99.)

94. One of the features of the present-day international legal regime against torture is the establishment of a mechanism of continuous monitoring of a *preventive* character. This is illustrated by the 2002 Optional Protocol of the 1984 UN Convention against Torture, as well as the preventive inspections under the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Art. 2). In this regard, I deemed it fit to point out, in my concurring opinion in the case of *Maritza Urrutia* v. *Guatemala* (IACtHR, judgment of 27 November 2003), that such development has

> "put an end to one of the remaining strongholds of State sovereignty, in permitting scrutiny of the *sancta sanctorum* of the State — its prisons and detention establishments, police stations, military prisons, detention centers for foreigners, psychiatric institutions, among others, — of its administrative practices and legislative measures, to determine their compatibility or not with the international standards of human rights. This has been achieved in the name of superior common values, consubstantiated in the prevalence of the fundamental rights inherent to the human person." (Para. 11.)

2. Fundamental Human Values Underlying that Prohibition

95. Human conscience has awoken to the pressing need for decisively putting an end to the scourges of arbitrary detention and torture. The general principles of the law, and the fundamental human values underly-

ing them, play a quite significant and crucial role here. Such fundamental values have counted on judicial recognition in our times. Thus, the ECHR, for example, asserted, in the *Soering* v. *United Kingdom* case (judgment of 7 July 1989), that the absolute prohibition of torture (even in times of war and other national emergencies) expresses one of the "fundamental values of [contemporary] democratic societies" (para. 88). Subsequently, in the *Kalashnikov* v. *Russia* case (judgment of 15 July 2002), the ECHR stated that Article 3 of the European Convention on Human Rights

> "enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour." (Para. 95.)

96. In the *Selmouni* v. *France* case (judgment of 28 July 1999), the ECHR categorically reiterated that Article 3 of the European Convention

> "enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 (2) even in the event of a public emergency threatening the life of the nation (. . .)." (Para. 95.)

In that same judgment, the European Court expressed its understanding that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (para. 101)[73].

97. Like the ECHR, the IACtHR also singled out the fundamental human values underlying the absolute prohibition of torture. Thus, in the case of *Cantoral Benavides* v. *Peru* (merits, judgment of 18 August 2000), pondered that certain acts which were formerly classified as inhuman or degrading treatment should from now on be classified distinctly, as torture, given the "growing demands" for the protection of fundamental human rights (para. 99). This, in the understanding of the IACtHR, required a more vigorous response in facing "infractions to the basic values of democratic societies" (para. 99). In the *Cantoral Benavides* case, the IACtHR, with its reasoning, thus purported to address the consequences of the absolute prohibition of torture.

[73] In the *cas d'espèce*, the ECHR found the respondent State responsible for the torture inflicted on Selmouni (paras. 105-106). A similar line of reasoning can be found, e.g., in the judgment (of 7 September 2004) of the IACtHR in the case of *Tibi* v. *Ecuador* (para. 143), wherein it likewise found the respondent State responsible for the torture inflicted on the victim (para. 165).

98. In effect, the practice of torture, in all its perversion, is not limited to the physical injuries inflicted on the victim; it seeks to annihilate the victim's identity and integrity. It causes chronic psychological disturbances that continue indefinitely, making the victim unable to continue living normally as before. Expert opinions rendered before international tribunals consistently indicate that torture aggravates the victim's vulnerability, causing nightmares, loss of trust in others, hypertension, and depression; a person tortured in prison or detention loses the spatial dimension and even that of time itself[74].

99. As to the devastating consequences of the (prohibited) practice of torture, and the irreparable damage caused by it, I pondered, in my separate opinion in the case *Tibi* v. *Ecuador* (IACtHR, judgment of 7 September 2004), that

> "[f]urthermore, the practice of torture (whether to obtain a confession or information or to cause social fear) generates a disintegrating emotional burden that is transmitted to the next of kin of the victim, who in turn project it toward the persons they live with. The widespread practice of torture, even though it takes place within jails, ultimately contaminates all the social fabric. The practice of torture has sequels not only for its victims, but also for broad sectors of the social milieu affected by it. Torture generates psychosocial damage and, under certain circumstances, it can lead to actual social breakdown. (. . .)
>
> The practice of torture is a hellish threat to civilization itself. One of the infallible criteria of civilization is precisely the treatment given by public authorities of any country to detainees or incarcerated persons. F. M. Dostoyevsky warned about this in his aforementioned *Memoirs from the House of the Dead* (1862); for him, the degree of civilization attained by any social milieu can be assessed by entering its jails and detention centers[75]. Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim, undermining his or her physical or mental resistance; thus, it treats the victim as a 'mere means' (in general to obtain a confession), flagrantly violating the basic principle of the dignity of the human person (which expresses the Kantian concept of the human being as an 'end in himself'), degrading him, in a perverse and cruel manner[76], and causing him truly irreparable damage." (Paras. 22 and 24.)

[74] IACtHR, case *Tibi* v. *Ecuador* (judgment of 7 September 2004), separate opinion of Judge Cançado Trindade, para. 21.

[75] Cf. F. M. Dostoyevsky, *Souvenirs de la maison des morts* [1862], Paris, Gallimard, 1977 (reed.), pp. 35-416.

[76] J. L. de la Cuesta Arzamendi, *El Delito de Tortura*, Barcelona, Bosch, 1990, pp. 27-28 and 70.

100. For its part, the ICTY stated, in the aforementioned 1998 judgment in the *Furundžija* case, that

> "Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate." (Para. 154.)

101. Another pertinent decision of the ICTY disclosing the close attention it dispensed to fundamental human values is its judgment (Trial Chamber II, of 17 October 2002) in the *Simić* case, wherein, in singling out the "substantial gravity" of torture, it pondered that

> "[t]he right not to be subjected to torture is recognized in customary and conventional international law and as a norm of *jus cogens*. It cannot be tolerated. It is an absolute assault on the personal human dignity, security and mental being of the victims. As noted in *Krnojelac*, torture 'constitutes one of the most serious attacks upon a person's mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment'." (Para. 34.)

102. One decade ago, within the IACtHR, I upheld the view, which I reiterate herein, that *jus cogens* is not a closed juridical category, but rather one that evolves and expands[77]. An ineluctable consequence of the assertion and the very existence of *peremptory* norms of international law is their not being limited to the conventional norms, to the law of treaties, and their encompassing every and any juridical act, and extending themselves to general international law. *Jus cogens* being, in my understanding, an open category, it expands itself in response to the necessity to protect the rights inherent to each human being in every and any situation. The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the realm of the international *jus cogens*[78]. It is in the domain of international responsibility that *jus cogens* reveals its wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence — even beyond that — on the very *foundations* of a truly universal international law[79].

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[77] IACtHR, advisory opinion No. 18 (of 17 September 2003), on the *Juridical Condition and Rights of Undocumented Migrants*, concurring opinion of Judge Cançado Trindade, paras. 65-73.

[78] *Ibid.*, paras. 68-69.

[79] *Ibid.*, para. 70.

103. Jurisprudence of distinct international tribunals is, thus, perfectly clear in stating the reaction of *ratione materiae* law, regarding absolute prohibition of torture, in all its forms, under any and all circumstances, a prohibition that, in our days, falls under international *jus cogens,* with all its juridical consequences for the States responsible. In rightly doing so, it has remained attentive to the underlying fundamental human values that have inspired and guided it. This is a development which cannot be overlooked, and is to continue, in our days.

X. Obligations *Erga Omnes Partes* under the UN Convention against Torture

104. The CAT sets forth the absolute prohibition of torture, belonging to the domain of *jus cogens (supra)*. Obligations *erga omnes partes* ensue therefrom. Significantly, this has been expressly acknowledged by the two contending Parties, Belgium and Senegal, in the proceedings before the Court. They have done so in response to a question I put to them, in the public sitting of the Court of 8 April 2009, at the earlier stage of provisional measures of protection in the *cas d'espèce*. The question I deemed it fit to put to both of them was as follows:

> "Dans ces audiences publiques il y a eu des références expresses de la part de deux délégations aux droits des Etats ainsi qu'aux droits des individus. J'ai alors une question à poser aux deux Parties. Je la poserai en anglais pour maintenir l'équilibre linguistique de la Cour. La question est la suivante: For the purposes of a proper understanding of the *rights* to be preserved (under Article 41 of the Statute of the Court), are there rights corresponding to the obligations set forth in Article 7, paragraph 1, in combination with Article 5, paragraph 2, of the 1984 United Nations Convention against Torture and, if so, what are their *legal nature, content and effects?* Who are the *subjects* of those rights, States having nationals affected, or all States parties to the aforementioned Convention? Whom are such rights opposable to, only the States concerned in a concrete case, or any State party to the aforementioned Convention?"[80].

105. In response to my question, Belgium began by recalling the obligation to prosecute or extradite, incumbent upon States parties to the CAT, under Articles 5 (2) and 7 (1), and pointing out that "where there is an obligation of one State to other States, those States have a corresponding right to performance of that obligation"[81].

[80] CR 2009/11, of 8 April 2009, p. 25.

[81] Response of Belgium to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009, doc. BS 2009/15, of 15 April 2009, p. 2, paras. 4-5.

The obligation set out in Articles 5 (2) and 7 (1) "gives rise to a correlative right" (of States parties) to secure compliance with it[82]. This right, Belgium proceeded, has a "conventional character", being founded on a treaty, and "[t]he rule *pacta sunt servanda* applies in this respect"[83].

106. Thus, it went on, all States parties to the CAT are entitled to seek ensuring compliance with the conventional obligations, in accordance with the rule *pacta sunt servanda*, undertaken by each State party in relation to all other States parties to the CAT[84]. Belgium then added:

> "In the case *Goiburú et al.* v. *Paraguay* [2006], the Inter-American Court of Human Rights observed that all the States parties to the American Convention on Human Rights should collaborate in good faith in the obligation to extradite or prosecute the perpetrators of crimes relating to human rights; it is interesting to note that, in order to illustrate this obligation, the Court refers to the 1984 Convention (. . .):
>
> > 'The Court therefore deems it pertinent to declare that the States parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based on these principles, a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory.'"[85]

In sum — as Belgium put it — the rights set forth in the 1984 UN Convention against Torture "are therefore opposable to *all* the States parties to that Convention"[86].

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[82] Response of Belgium to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009, doc. BS 2009/15, of 15 April 2009, p. 2, para. 7.

[83] *Ibid.*, p. 3, para. 8.

[84] *Ibid.*, para. 11.

[85] Inter-American Court of Human Rights, judgment of 22 September 2006, para. 132, and in particular note 87, which provides a full list of the relevant universal instruments, including the 1984 Convention; cf. also the separate opinion of Judge Cançado Trindade, paras. 67-68.

[86] Response of Belgium to the Question…, *op. cit. supra* note 81, p. 5, para. 14.

107. For its part, Senegal began its response to my question by likewise recalling the obligation to prosecute or extradite under Articles 5 (2) and 7 (1) of the CAT[87], and added:

> "The *nature* of the international obligation to prohibit torture has undergone a major change. From being a conventional obligation of relative effect, it has had an *erga omnes* effect attributed to it."[88]

Senegal then expressly acknowledged "the existence of indivisible obligations *erga omnes*", as restated by the ICJ on a number of occasions from 1970 onwards[89]. Next, Senegal reckoned that States parties to the CAT have "the right to secure compliance with the obligation" set forth in Articles 5 (2) and 7 (1)[90].

108. From the responses given by Belgium and Senegal to my question, it is clear that they both share a proper understanding of the *nature* of the obligations incumbent upon them under the CAT. Such obligations grow in importance in face of the *gravity* of breaches *(infra)* of the absolute prohibition of torture. They conform the *collective guarantee* of the rights protected thereunder. If those breaches are followed by the perpetrators' impunity, this latter, instead of covering them up, adds further gravity to the wrongful situation: to the original breaches (the acts of torture), the subsequent victims' lack of access to justice (denial of justice) constitutes an additional violation of the protected rights. For years, within the IACtHR, I insisted on the jurisprudential construction of the material expansion of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their two dimensions, the horizontal (vis-à-vis the international community as a whole) as well as the vertical (projection into the domestic law regulation of relations mainly between the individuals and the public power of the State)[91]; I now reiterate my position in the present case concerning *Questions relating to the Obligation to Prosecute or Extradite*, decided today by the ICJ.

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[87] Response of Senegal to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009, doc. BS 2009/16, of 15 April 2009, p. 1, para. 1.

[88] *Ibid.*, p. 1, para. 2.

[89] *Ibid.*, p. 2, paras. 3-4.

[90] *Ibid.*, paras. 5-6.

[91] Cf., in this sense, IACtHR, case *La Cantuta* v. *Peru* (judgment of 29 November 2006), separate opinion of Judge Cançado Trindade, paras. 51 and 60.

XI. The Gravity of the Human Rights Violations and the Compelling Struggle against Impunity

1. Human Cruelty at the Threshold of Gravity

109. In effect, in addition to its horizontal expansion, *jus cogens* also projects itself on a vertical dimension, i.e., that of the interaction between the international and national legal systems in the current domain of protection *(supra)*. The effect of *jus cogens*, on this second (vertical) dimension, is to invalidate any and all legislative, administrative or judicial measures that, under the States' domestic law, attempt to authorize or tolerate torture[92]. The absolute prohibition of torture, as a reaction of *ratione materiae* law as here envisaged, in both the horizontal and the vertical dimensions, has implications regarding the longstanding struggle against impunity and the award of reparations due to the victims.

110. As to the first (horizontal) dimension, in my understanding, the *"intérêt pour agir"* of States parties to the CAT grows in importance, in the light of the gravity of the breaches under that Convention. It would be a mistake to attempt to "bilateralize" contentious matters under the CAT (like in traditional inter-State disputes), which propounds a distinct outlook of initiatives thereunder, to prevent torture and to struggle against it. Even in a wider horizon, this trend was already discernible in the years following the adoption of the CAT in 1984.

111. Thus, in 1988, the Senegalese jurist Kéba Mbaye, in his thematic course at the Hague Academy of International Law, rightly observed that a State's *"intérêt pour agir"* goes beyond a simple interest, in that it is a concept of procedural law. And, in the present stage of evolution of international law, it is widely reckoned that States can exercise their *"intérêt pour agir"* not only in pursuance of their own interests, but also of common and superior values, and, under some UN Conventions, in pursuance of shared fundamental values by means of an "objective control"[93]. This is what I refer to as the *collective guarantee* of human rights treaties, by the States parties themselves. This is notably the case of the UN Convention against Torture; the *"intérêt pour agir"* thereunder is fully justified given the *gravity* of the breaches at issue, acts of torture in all its forms.

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[92] Cf. E. de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law", 15 *European Journal of International Law* (2004), pp. 98-99.

[93] Kéba Mbaye, "L'intérêt pour agir devant la Cour internationale de Justice", 209 *Recueil des cours de l'Académie de droit international de La Haye* (1988), pp. 257 and 271.

112. The cruelty of the systematic practice of torture cannot possibly be forgotten, neither by the victims and their next-of-kin, nor by their social milieu at large. In this connection, I have already reviewed the findings of the 1992 Report of the Chadian Commission of Inquiry[94]. The Truth Commission's Report gives a sinister account of the methods of torture utilized during the Habré regime, with illustrations[95], in addition to pictures of the mass graves[96]. The findings of the Chadian Truth Commission have been corroborated by humanitarian fact-finding by non-governmental organizations (NGOs). Although the *Association des victimes de crimes et répressions politiques au Tchad* (AVCRP) was established in N'djamena on 12 December 1991, the files of the archives of the "political police" (the DDS) of the Habré regime were reported to have been discovered in N'Djamena only one decade later, in May 2001, by Human Rights Watch (HRW)[97].

113. In another report, of the same year 2001, Amnesty International stated that, in addition to the information contained in the Chadian Truth Commission's Report *(supra)*, most of the information in its own possession came from accounts of surviving victims of torture themselves, or from other detainees. According to such sources, the Chadian Government of Hissène Habré

> "applied a deliberate policy of terror in order to discourage opposition of any kind. Actual and suspected opponents and their families were victims of serious violations of their rights. Civilian populations were the victims of extrajudicial executions, committed in retaliation for armed opposition groups' actions on the basis of purely ethnic or geographical criteria. Thousands of people suspected of not supporting the Government were arrested and held in secret by the DDS. Thousands of people died on DDS premises — killed by torture, by the inhuman conditions in which they were detained or by a lack of food or medical care."[98]

114. The 2001 report by Amnesty International proceeded that, during the Hissène Habré regime in Chad,

> "the practice of torture was, by all accounts, an 'institutional practice' used to extract confessions, to punish or to instil fear. (. . .) According to survivors, Hissein Habré personally gave the order for certain

[94] Cf. Section II, *supra*.

[95] Cf. Chadian Ministry of Justice, "Les crimes et détournements de l'ex-président Habré et de ses complices — Rapport de la Commission d'enquête nationale. . .", *op. cit. supra*, note 5, pp. 111-123, 137-146 and 148-149.

[96] Cf. *ibid.*, pp. 150-154.

[97] Cf. UNHCR, "African Union: Press Senegal on Habré Trial", www.unhcr.org/news, of 28 January 2009, p. 1; HRW, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, Vol. 17, July 2005, No. 10 (A), p. 5; and cf. S. Guengueng, *Prisonnier de Hissène Habré. . ., op. cit. infra* note 101, pp. 135 and 153.

[98] Amnesty International, [Report] *The Habré Legacy*, AI Index AFR-20/004/2001, of October 2001, p. 10, and cf. p. 26.

> people to be tortured. Other sources say that he was often present during torture sessions. (. . .) Political prisoners were interrogated as a rule by members of the security service at DDS headquarters in N'Djamena. In some cases, they were interrogated and held at the presidential palace after being tortured. (. . .)
>
> According to survivors, some of the most common forms of torture were electric shocks, near-asphyxia, cigarette burns and having gas squirted into the eyes. Sometimes, the torturers would place the exhaust pipe of a vehicle in their victim's mouth, then start the engine. Some detainees were placed in a room with decomposing bodies, others suspended by their hands or feet, others bound hand and foot. Two other common techniques consisted of gripping the victim's head between two small sticks joined by cords, which were twisted progressively (. . .). Some prisoners were subjected to particularly brutal beatings during their interrogation. (. . .)"[99]

115. In a subsequent report, of 2006, Amnesty International added that many detainees were held at the prison of the *Camp des Martyrs*, not far from the so-called *"Piscine"* (a former swimming pool that had been covered over with concrete and divided into several cells below ground level), wherein they were "subjected to torture". A form of torture that became sadly well known as practised in the Habré regime in Chad was the *"arbatachar"*, which consisted of "choking the prisoner by tying his wrists to his ankles from behind"[100], up to a point of stopping the blood circulation and causing paralysis[101]. Moreover, in the personal account of a surviving victims — complainant before the UN Committee against Torture —, very recently published in 2012,

> "The DDS took pleasure in creating conditions that would provoke epidemics and illnesses among the prisoners — such as malaria and pulmonary oedemas — in order to dispatch large numbers of them very quickly.
>
> From what I saw in the two years and five months which I had to spend in the four different DDS prisons, this political police force had every means of saving the lives of those being held. Since their mission was to terrorize and exterminate the Chadian people, they thus did all they could to dispose of the prisoners.
>
> (. . .) Those in charge, like the DDS officers, showed no humanity towards the detainees."[102]

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[99] *Op. cit. supra* note 98, pp. 26-27.

[100] Amnesty International, [Report] *Chad: Voices of Habré's Victims*, AI Index AFR-20/009/2006, of August 2006, p. 6.

[101] Cf. Chadian Ministry of Justice, "Les crimes et détournements de l'ex-président Habré et de ses complices — Rapport de la Commission d'enquête nationale. . .", *op. cit. supra*, note 5, p. 42; S. Guengueng, *Prisonnier de Hissène Habré — L'expérience d'un survivant des geôles tchadiennes et sa quête de justice*, Paris, L'Harmattan, 2012, p. 121. *[Translation by the Registry.]*

[102] S. Guengueng, *op. cit. supra* note 101, pp. 79-80. *[Translation by the Registry.]*

2. The Inadmissibility of Impunity of the Perpetrators

116. It is in no way surprising that the reparations due to victims in cases of torture have revealed a dimension that is both individual and collective or social. Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or handling with indifference the consequences of criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The practice of torture, aggravated by the impunity of the perpetrators, contaminates the whole social milieu wherein it took place.

117. As I deemed it fit to warn in the IACtHR, in my separate opinion in the case of the *"Street Children"* (*Villagrán Morales and Others* v. *Guatemala*, reparations, judgment of 26 May 2001),

> "Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others." (Para. 22.)

118. The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered. This is still an evolving matter, but the right of those victims to fair and adequate reparation is addressed today on the basis of recognition of the central role of the integrity of said victims, of the human person. Realization of justice, with due reparations, helps to reorganize human relations and restructure the psyche of victims. Realization of justice must take place from the standpoint of the integral nature of the personality of the victims. Reparations at least mitigate or soothe the suffering of the victims, in conveying to them the sense of the realization of justice.

119. Such reparations cannot be disrupted by undue invocations of State sovereignty or State immunity, as I have pointed out in two recent cases adjudicated by this Court[103]. Likewise, the struggle against impunity for grave violations of human rights and of international humanitarian law cannot be dismantled by undue invocations of State

[103] Case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, dissenting opinion of Judge Cançado Trindade, pp. 179-290, paras. 1-316; case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2012 (I)*, separate opinion of Judge Cançado Trindade, pp. 347-384, paras. 1-101.

sovereignty or State immunity. The hope has been expressed of advances in this respect:

> "(. . .) The idea of exemption from responsibility, under the cover of sovereignty or immunity, is gradually on the decline, at least in respect of a series of atrocities now classified as 'international crimes'. That is a source of great hope for every citizens' and human rights movement, for all those who have been forgotten."[104]

120. In the case *Bulacio* v. *Argentina* (judgment of 18 September 2003), the IACtHR held as "inadmissible" any measure of domestic law intended to hinder the investigation and sanction of those responsible for violations of human rights (para. 116), thus leading to impunity. In my separate opinion in the case *Bulacio*, I pondered *inter alia* that

> "*Reparatio* does not put an end to what occurred, to the violation of human rights. The wrong was already committed[105]; *reparatio* avoids the aggravation of its consequences (by the indifference of the social milieu, by the impunity, by the oblivion). (. . .) *Reparatio* disposes again, reestablishes order in the life of the surviving victims, but it cannot eliminate the pain that is already ineluctably incorporated into their daily existence. The loss is, from this angle, rigorously irreparable. (. . .) *Reparatio* is a reaction, in the realm of law, to human cruelty, manifested in the most diverse forms: violence in dealing with fellow human beings, the impunity of those responsible on the part of the public power, the indifference and the oblivion of the social milieu.
>
> This reaction of the breached legal order (the *substratum* of which is precisely the observance of human rights) is ultimately moved by the spirit of human solidarity. This latter, in turn, teaches that the oblivion is inadmissible, by the absence it implies of any solidarity whatsoever of the living with their deceased. (. . .) Death has over centuries been linked to what is supposed to be the revelation of destiny, and it is especially in facing death that each person becomes aware of his or her individuality[106]. (. . .) The rejection of the indifference and the oblivion, and the guarantee of non-repetition of the violations, are manifestations of the links of solidarity between those victimized and potential victims, in the violent world, empty of values,

[104] L. Joinet (ed.), *Lutter contre l'impunité*, Paris, Eds. La Découverte, 2002, p. 125. *[Translation by the Registry.]*

[105] Human capacity to promote good and to commit evil has not ceased to attract the attention of human thinking throughout the centuries; cf. F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Gedisa Edit., 1988, pp. 9-196; A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier, 1949, pp. 5-412.

[106] Ph. Ariès, *Morir en Occidente — Desde la Edad Media hasta Nuestros Días*, Buenos Aires, A. Hidalgo Ed., 2000, pp. 87, 165, 199, 213, 217, 239 and 251.

wherein we live. It is, ultimately, an eloquent expression of the links of solidarity that unite the living to their deceased[107]. Or, more precisely, of the links of solidarity that unite the deceased to those who survive them (. . .)" (*Bulacio*, paras. 37-40.)

121. As to the present case before this Court concerning *Questions relating to the Obligation to Prosecute or Extradite*, the facts speak for themselves. As I deemed it fit to warn in my earlier dissenting opinion in the Court's Order of 28 May 2009 (not indicating provisional measures of protection) in the *cas d'espèce*,

> "The several years of impunity following the pattern of systematic State-planified crimes, perpetrated — according to the Chadian Truth Commission — by State agents in Chad in 1982-1990, render the situation, in my view, endowed with the elements of gravity and urgency (. . .). The passing of time with impunity renders the gravity of the situation even greater, and stresses more forcefully the urgency to make justice prevail." (*I.C.J. Reports 2009*, p. 187, para. 60.)

122. In the present Judgment on the merits in the case opposing Belgium to Senegal, the Court recalls the *ratio legis* of the CAT. After recalling the sixth preambular paragraph of the CAT[108], the Court states that

> "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." (Judgment, para. 68.)

123. The Court here captures the rationale of the CAT, with the latter's denationalization of protection, and assertion of the principle of universal jurisdiction. Yet, in doing so, the Court does not resist the

[107] On these links of solidarity, cf. my separate opinions in the case *Bámaca Velásquez* v. *Guatemala* (IACtHR, judgments on the merits, of 25 November 2000, and on reparations, of 22 February 2002).

[108] Which expresses the desire "to make more effective the struggle against torture (. . .) throughout the world". Article 2 (1) of the CAT adds that "[e]ach State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

temptation to quote itself, rescuing its own language of years or decades ago, such as the invocation of "legal interest" (in the *célèbre obiter dictum* in the *Barcelona Traction* case of 1970), or "common interest" (expressions used in the past in different contexts). In order to reflect in an entirely faithful way the rationale of the CAT, the Court, in my understanding, should have gone a bit further: more than a "common interest", States parties to the CAT have a *common engagement* to give *effet utile* to the relevant provisions of the Convention; they have agreed to exercise its *collective guarantee*, in order to put an end to the impunity of the perpetrators of torture, so as to rid the world of this heinous crime. *We are here in the domain of obligations, rather than interests*. These obligations emanate from the *jus cogens* prohibition of torture.

124. In sum, as to this particular point, the development, in recent years — acknowledged also in expert writing — leading to the formation and consolidation of a true international legal regime against torture (cf. *supra*), has contributed to the growing awareness as to the pressing need and the compelling duty to put an end to impunity. In effect, the response to the diversification of sources of human rights violations, and the struggle against the impunity of its perpetrators[109], are challenges which call for the enhancement of the existing mechanisms of protection and the devising of new forms of protection. Impunity, besides being an evil which corrodes the trust in public institutions, remains an obstacle which international supervisory organs have not yet succeeded to overcome fully.

125. However, some of the Truth Commissions, established in recent years in certain countries, with distinct mandates and varying results of investigations, have constituted a positive initiative in the struggle against that evil[110]. Another positive initiative is represented by the recent endeav-

[109] Cf. J. A. Carrillo Salcedo, *Dignidad frente a Barbarie — La Declaración Universal de Derechos Humanos Cincuenta Años Después*, Madrid, Ed. Trotta, 1999, pp. 105-145; N. Rodley, *The Treatment of Prisoners under International Law*, Paris/Oxford, Unesco/Clarendon Press, 1987, pp. 17-143. Cf. also N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, 1995, pp. 3-381; S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1997, pp. 3-303; Kai Ambos, *Impunidad y Derecho Penal Internacional*, Medellín, Found. K. Adenauer *et al.*, 1997, pp. 25-451; Y. Beigbeder, *International Justice against Impunity — Progress and New Challenges*, Leiden, Nijhoff, 2005, pp. 45-235; [Various Authors,] *Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 1-330; N. S. Rodley, "Impunity and Human Rights", in *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* (Proceedings of the Siracusa Conference, September 1998, ed. C. C. Joyner), Ramonville St.-Agne, Erès, 1998, pp. 71-78.

[110] Cf., *inter alia*, [Various Authors,] "Humanitarian Debate: Truth and Reconciliation Commissions", 88 *International Review of the Red Cross* (2006), No. 862, pp. 225-373; P. B. Hayner, *Unspeakable Truths — Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., N.Y./London, Routledge, 2011, pp. 1-337; A. Bisset, *Truth Commis-*

ours, within the United Nations, towards the establishment of an international penal jurisdiction of permanent character; they have resulted in the creation (by the UN Security Council), in 1993 and 1994, of the two *ad hoc* international criminal tribunals, for ex-Yugoslavia and Rwanda, respectively — followed by the adoption (by the UN Conference of Rome) of the 1998 Statute of the International Criminal Court (ICC), and thereafter by the adoption of the first permanent international criminal jurisdiction. Attention turns now to the evolving position of the individual victims before the ICC, opening up what appears to be a new chapter in the longstanding history of restorative justice[111].

3. The Position of Chad against Impunity

126. There is another element to be here taken into account: the records of the present case concerning *Questions relating to the Obligation to Prosecute or Extradite* give account of Chad's position against impunity. References in this regard include: *(a)* official pronouncements by Chad concerning the trial of Mr. H. Habré, in connection with the right of victims to the realization of justice and the need to fight against impunity[112]; *(b)* Chad's decision to lift Mr. H. Habré's immunity in 1993, as confirmed in 2002[113]; *(c)* claims that Chad joined in efforts to gather the financial resources for the trial of Mr. H. Habré in Senegal[114]; and *(d)* Chad's recent statements in support of the extradition of Mr. H. Habré to Belgium[115].

127. In this respect, Belgium refers, in its Memorial, to the fact that, in 1993, Chad had, in so far as it was necessary, "lifted the immunities which Mr. Habré may have sought to claim"[116]. In the same vein, Belgium submitted a letter addressed by the Minister of Justice of Chad to the Belgian *juge d'instruction*, dated 7 October 2002, confirming the lifting of any

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sions and Criminal Courts, Cambridge University Press, 2012, pp. 1-199; P. B. Hayner, "Fifteen Truth Commissions — 1974 to 1994: A Comparative Study", 16 *Human Rights Quarterly* (1994), pp. 598-634; [Various Authors,] *Truth Commissions: A Comparative Assessment* (Seminar of the Harvard Law School, of May 1996), Cambridge/Mass., Harvard Law School, 1997, pp. 16-81.

[111] Cf. Section XV, *infra*.

[112] Cf. CR 2012/6, of 19 March 2012, p. 25, para. 43 (citing "Communiqué de presse du ministère des affaires étrangères du Tchad", of 22 July 2011).

[113] Cf. Memorial of Belgium, of 1 July 2010, p. 10, para. 1.29, and p. 57, para. 4.44, and Annex C.5; CR 2012/2, of 12 March 2012, p. 23, para. 21; and CR 2012/3, of 13 March 2012, p. 21, para. 41.

[114] CR 2012/2, of 12 March 2012, pp. 47-48.

[115] Given its view that a trial of Mr. H. Habré in Africa would seem difficult to realize; cf. CR 2012/6, of 19 March 2012, p. 25, para. 43 (citing "Communiqué de presse du ministère des affaires étrangères du Tchad", of 22 July 2011).

[116] Memorial of Belgium, of 1 July 2010, p. 10, para. 1.29.

immunity of Mr. H. Habré[117]. Furthermore, it stems from the records of the present case that Chad, among other States, reportedly agreed to assist financially Senegal in the trial of Mr. H. Habré[118]. Belgium claims, in this regard, that,

> "despite the gestures of support of the European Union, the African Union and other States — including Belgium and Chad — in particular for the funding of the Hissène Habré trial in Senegal, the latter has not yet performed the obligations incumbent on it under international law in respect of the fight against impunity for the crimes concerned"[119].

128. Moreover, as to Belgium's request for extradition, and in light of Senegal's failure to prosecute Mr. H. Habré so far, it also appears from the records of the present case that Chad does not oppose the extradition of Mr. H. Habré to Belgium[120]. In fact, on 22 July 2011, the Ministry of Foreign Affairs, African Integration and International Co-operation of Chad stated that:

> "Despite the many national, continental and international initiatives, it appears increasingly unlikely that the former dictator will be tried under the circumstances preferred by the AU [the African Union]. Recent developments confirm this impression.
>
> It seems more difficult than ever to fulfil the conditions, in particular the legal conditions, for the trial of Mr. Hissène Habré to be held on African soil.
>
> In light of this situation, and given the victims' legitimate right to justice and the principle of rejection of impunity enshrined in the Constitutive Act of the African Union, the Government of Chad requests that preference should be given to the option of extraditing Mr. Habré to Belgium for trial. This option, which was explicitly considered among others by the African Union, is the most suitable under the circumstances."[121]

129. In sum and conclusion, as it can be perceived from the aforementioned, the records of the present case demonstrate that Chad has been consistently supporting the imperative of the fight against impunity, in so far as the case of Mr. H. Habré is concerned. The records of the case make Chad's position clear, to the effect that Mr. H. Habré must be brought to justice, in Senegal or elsewhere[122]. Last but not least, the posi-

[117] Cf. Memorial of Belgium, Annex C.5.
[118] CR 2012/2, of 12 March 2012, p. 47, para. 20.
[119] Cf. *ibid.*, p. 48, para. 21 (3).
[120] CR 2012/6, of 19 March 2012, pp. 24-25.
[121] *Ibid.*, p. 25, para. 43.
[122] *Ibid.*

tion of Chad is further confirmed by its statement before the UN Human Rights Committee, the supervisory organ of the UN Covenant on Civil and Political Rights, on the occasion of the consideration of Chad's initial report on measures undertaken to implement the provisions of the Covenant. In responding to questions put to it, the delegation of Chad, stressing its commitment to the struggle against impunity, declared, on 17 July 2009, that

> "under Hissène Habré's regime nothing had been done to restore the rule of law, since that regime had been a dictatorship . . . The present Government, however, wished to move forward, and in particular to combat impunity at all levels . . . Efforts to overcome political impunity would take a long time, but the Government was working actively to that end.
>
> Although Chad's request for Hissène Habré's trial had been loud and clear, Senegal, which was responsible for conducting the trial, claimed to have financial difficulties."[123]

4. The Struggle against Impunity in the Law of the United Nations

130. The final document of the II World Conference of Human Rights (Vienna, 1993), of which I keep vivid memories[124], the Vienna Declaration and Programme of Action, cared to include in its Part II two paragraphs (60 and 91) on the compelling struggle against impunity (of perpetrators of torture), which read as follows:

> "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture, and prosecute such violations, thereby providing a firm basis for the rule of law. (. . .)
>
> The [II] World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue."

131. In pursuance to the call of the 1993 World Conference of the United Nations, the (former) UN Commission on Human Rights, and its (former) Sub-Commission on the Promotion and Protection of Human

[123] UN/Comité des droits de l'homme, 96th Session — 2636th meeting (of 17 July 2009), document CCPR/C/SR.2636, of 25 September 2009, p. 5, paras. 15-16. And cf. also: UN Human Rights Committee, "Human Rights Committee Considers Report of Chad", www.unog.ch/news, of 17 July 2009, p. 9.

[124] A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2nd ed., Vol. I, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 1-640; A. A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994), pp. 9-57.

Rights, engaged themselves in producing, in 1997, a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (restated by the Commission in 2005)[125]. Later on, also in pursuance of the aforementioned call of the II World Conference on Human Rights, the (former) UN Commission on Human Rights adopted its resolution 2003/72, of 25 April 2003, wherein it deemed it fit to emphasize "the importance of combating impunity to the prevention of violations of international human rights and humanitarian law" as well as "the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law" (paras. 1-2). The resolution urged States to "give necessary attention" to the matter (para. 1), and recognized that

> "crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law, and (. . .) perpetrators of such crimes should be prosecuted or extradited by States (. . .)" (para. 10).

The resolution further urged "all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes" (para. 10).

132. Moreover, the *dossier* of the present case before the Court contains other pertinent elements which cannot pass unnoticed herein. Belgium's Memorial, for example, refers to numerous resolutions of the UN General Assembly and Security Council urging States to combat impunity in connection with grave violations of human rights[126] — a point reiterated in its oral arguments[127]. The UN Human Rights Committee (supervisory organ of the UN Covenant on Civil and Political Rights), in its General Comment No. 31 (of 2004), asserted, in connection with violations of the Covenant rights, that

> "States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetra-

[125] Cf. UN document E/CN.4/Sub.2/1997/20/Rev.1, Annex II, of 2 October 1997, pp. 13-25; and cf. UN/CHR, resolution 1998/53, of 17 April 1998. Cf., more recently, UN/CHR, document E/CN.4/2005/102/Add.1, Annex, of 8 February 2005, pp. 5-19. And cf. also L. Joinet (rapporteur), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Civiles y Políticos) — Informe Final*, UN/Commission on Human Rights, doc. E/CN.4/Sub.2/1997/20, of 26 June 1997, pp. 1-34; and, for the economic, social and cultural rights, cf. El Hadji Guissé (special rapporteur), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Económicos, Sociales y Culturales) — Informe Final*, UN/Commission on Human Rights, doc. E/CN.4/Sub.2/1997/8, of 23 June 1997, pp. 1-43.

[126] Memorial of Belgium, of 1 July 2010, Vol. I, pp. 63-66, paras. 4.69-4.70.

[127] CR 2012/3, of 13 March 2012, pp. 24-26.

tors of such violations could in and of itself give rise to a separate breach of the Covenant" (Human Rights Committee, General Comment No. 31, para. 18).

133. After singling out, as particularly grave violations, the crimes of torture, of summary and arbitrary executions, and enforced disappearances of persons, the Human Rights Committee warned that "the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations" (*ibid.*, para. 18). The Committee further warned as to the need "to avoid continuing violations" (*ibid.*, para. 19), and drew attention to the "special vulnerability of certain categories" of victims (*ibid.*, para. 15).

XII. Obligations under Customary International Law: A Precision as to the Court's Jurisdiction

134. I turn now to another issue, dealt with in the present Judgment, in relation to which my reasoning is distinct from that of the Court. May I begin by recalling the fundamental human values underlying the absolute prohibition of torture, which I have already referred to (cf. *supra*). May I add, at this stage, that such prohibition is one of both *conventional* as well as *customary* international law. And it could not be otherwise, being a prohibition of *jus cogens*. In this sense, the 2005 study on *Customary International Humanitarian Law* undertaken by the International Committee of the Red Cross (ICRC) sustains that: "Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited" (Rule 90)[128]. And it goes on to summarize, on the basis of an extensive research, that "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts"[129].

135. Likewise, in its General Comment No. 2 (of 2008), focused on the implementation by States parties of Article 2 of the CAT[130], the UN Committee against Torture acknowledged the Convention's absolute *(jus cogens)* prohibition of torture as being also one of customary international law. It ensues from the *jus cogens* character of this prohibition that States parties are under the duty to remove any obstacles that impede the eradication of torture; they are bound to take "positive effective mea-

[128] ICRC, *Customary International Humanitarian Law* — Vol. I: *Rules*, Cambridge University Press, 2005 [reprint 2009], p. 315.

[129] *Ibid.*, Vol. I: *Rules*, p. 315, and cf. pp. 316-319; and cf. also ICRC, *Customary International Humanitarian Law* — Vol. II: *Practice* — Part 1, Cambridge University Press, 2005, pp. 2106-2160.

[130] UN doc. CAT/C/GC/2, of 24 January 2008, pp. 1-8, paras. 1-27.

sures" to ensure that (Committee against Torture, General Comment No. 2, para. 4), and "*no exceptional circumstances whatsoever* may be invoked" by them to attempt to justify acts of torture (*ibid.*, para. 5). Stressing the CAT's "overarching aim of preventing torture and ill-treatment" (*ibid.*, para. 11), General Comment No. 2 of the Committee against Torture further stated that each State party "should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control" (*ibid.*, para. 15), and then drew attention to the needed protection for individuals and groups made vulnerable by discrimination or marginalization (*ibid.*, paras. 20-24).

136. Having voted in favour of the conclusions reached by the Court in the present Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I feel, however, obliged to lay down in the present separate opinion my understanding, distinct from the Court's reasoning, corresponding to operative paragraph (2) of the *dispositif* of the present Judgment. May I, at first, recall that, in the *cas d'espèce*, Belgium requested the Court to declare that Senegal has breached an obligation under customary international law for its failure to bring criminal proceedings against Mr. H. Habré concerning core international crimes[131]. In this respect, the Court concludes, in paragraph 55, 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".

137. The Court then goes on to consider whether it has jurisdiction on the basis of Article 30 (1) of the Convention against Torture (CAT). In operative paragraph (2) of the *dispositif*, the Court finds that "it has no jurisdiction" to entertain Belgium's claims relating to Senegal's "alleged breaches" of "obligations under customary international law". It is important to be clear as to why the Court has not entertained, in the present case, Belgium's claim that Senegal breached certain obligations under customary international law.

138. The Court first proceeded to determine, on the basis of the facts of the *cas d'espèce*, whether there was a dispute between the contending Parties concerning Senegal's alleged violations of customary international law obligations. The question as to whether there is a dispute between the Parties concerning the corresponding obligations under customary international law turns on factual considerations. The question pertains to

[131] Cf. Memorial of Belgium, of 1 July 2010, p. 83, Submission 1 *(b)*; Final Submissions of Belgium, of 19 March 2012, Submission 1 *(b)*.

whether, on the basis of the factual framework of the present case, a dispute existed between the Parties, at the time of the filing of the Application, concerning Senegal's obligation under customary international law to take action with regard to core international crimes[132].

139. As the Court notes in paragraph 45 of the present Judgment, "the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium". It has long been established that "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[133]. In this context, the Court's *jurisprudence constante*, as recalled in the present Judgment, is to the effect that the Court's determination of the existence of a dispute "must turn on an examination of the facts" (Judgment, para. 46)[134].

140. In the present case, the Court considered the facts, as they were presented to it, in order to decide whether there was a dispute between the contending Parties concerning the claims that Senegal had breached obligations under customary international law. The Court found that the diplomatic exchanges between the Parties, prior to Belgium's institution of the present proceedings, disclosed that Belgium did not refer to Senegal's alleged obligations under customary international law to take action against Mr. H. Habré for core international crimes. It followed that there could not have existed a disagreement (or a difference of opinion) between the Parties, as to Senegal's alleged obligations under customary international law in relation to the prosecution of Mr. H. Habré for the commission of core international crimes, at the time when Belgium filed the Application.

141. It is clear that, in the present case, the Court's determination of whether there was a dispute on this question rested on purely factual considerations of the case at issue. This is, in my view, *distinct from an examination by the Court of whether there is a legal basis of jurisdiction* over claims of alleged breaches of customary international law obligations. The Court's consideration of Belgium's claim that Senegal allegedly breached obligations under customary international law, as well as its conclusion thereon, stand in stark contrast to its examination of whether it has jurisdiction under the terms of Article 30 (1) of the CAT. As to the latter, the Court considers the *legal* conditions pursuant to Article 30 (1) of the Convention in order to assess whether there is a *legal basis of jurisdiction* according to the terms of that provision.

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[132] Its determination is based upon the consideration of the circumstances of the present case (and particularly on the fact that, in the diplomatic correspondence between the Parties, Belgium did not refer to its claim that Senegal has an obligation under customary international law to prosecute those accused of the perpetration of core international crimes).

[133] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[134] The Court considers whether there is a dispute by examining the position of the contending Parties (including their exchanges), as disclosed in the records of the case.

142. Contrastingly, with regard to the claim of alleged breaches of customary international law obligations, the Court's analysis hinges on *factual* considerations of the present case (Judgment, para. 55). In my perception, paragraph 55 and operative paragraph (2) of the *dispositif* of the present Judgment are not to be understood as meaning that the Court lacks jurisdiction to entertain claims of breaches of a State's alleged obligations under customary international law (e.g., to prosecute perpetrators of core international crimes, such as raised in this case). As in the circumstances of the *cas d'espèce* the dispute between the Parties at the time of the filing of the Application did not include claims of alleged breaches by Senegal of obligations under customary international law, the Court improperly stated that it did not have jurisdiction to dwell upon those alleged breaches.

143. The Court, in my view, did not express itself well. The proper understanding of paragraph 55, in combination with operative paragraph (2) of the *dispositif* of the present Judgment, is, in my understanding, that the determination that the facts of the present case do not disclose a dispute between the Parties as to Senegal's alleged breach of obligations under customary international law is not the same as the finding that the Court presumably does not have jurisdiction to entertain the claims of alleged breaches of obligations under customary international law.

144. What the Court really wished to say, in my perception, is that *there was no material object for the exercise of its jurisdiction* in respect of obligations under customary international law, rather than a lack of its own jurisdiction *per se*[135]. The finding that, in the circumstances of the present case, a dispute did not exist between the contending Parties as to the matter at issue, *does not necessarily mean that, as a matter of law, the Court would automatically lack jurisdiction*, to be exercised in relation to the determination of the existence of a dispute concerning breaches of alleged obligations under customary international law.

XIII. A Recurring Issue: The Time of Human Justice and the Time of Human Beings

1. An Unfortunate Décalage *to Be Bridged*

145. Already in my earlier dissenting opinion in the Court's Order of 28 May 2009 (not indicating provisional measures of protection) in

[135] As already pointed out, the Court's finding concerning Belgium's claim that Senegal breached certain obligations under customary international law is based on the specific factual background of the present case, and particularly on the fact that Belgium did not refer, in its diplomatic correspondence or otherwise, to such obligations.

the present case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I deemed it fit to address the *décalage* to be bridged between the brief time of human beings *(vita brevis)* and the often prolonged time of human justice (*I.C.J. Reports 2009*, pp. 182-188, paras. 46-64). I stressed the crucial importance of the incidence of the time element — to the effect of avoiding undue delays — for the realization of justice in the present case (*ibid.*, pp. 191-194, paras. 74-84). In this respect, in that dissenting opinion I deemed it fit to warn that

> "(. . .) As to the obligations corresponding to that right to be preserved, the segment *aut judicare* of the enunciation of the principle of universal jurisdiction, *aut dedere aut judicare*, forbids undue delays in the realization of justice. Such undue delays bring about an irreparable damage to those who seek justice in vain; furthermore, they frustrate and obstruct the fulfilment of the object and purpose of the United Nations Convention against Torture, to the point of conforming a breach of this latter.[136]
>
> . . . . . .
>
> It is the gravity of human rights violations, of the crimes perpetrated, that admits no prolonged extension in time of the impunity of the perpetrators, so as to honour the memory of the fatal victims and to bring relief to the surviving ones and their relatives. In my understanding, even more significant than retribution is the judicial recognition of human suffering[137], and only the realization of justice can *alleviate* the suffering of the victims caused by the irreparable damage of torture.
>
> . . . . . .
>
> With the persistence of impunity in the present case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the *passing* of time will continue hurting people, much more than it normally does, in particular those victimized by the absence of human justice. The time of this latter is not the time of human beings.
>
> . . . . . .
>
> This is all the more serious in the light of the nature of the aforementioned *obligations* of the States parties to the United Nations Convention against Torture." (*Ibid.*, pp. 187, 191, 192 and 194, paras. 63, 75, 77 and 84).

146. The often prolonged delays in the operation of human justice seem to disclose an indifference to the brevity of human existence, to the time of human beings. But this is not the only means whereby the administration of human justice, in its handling of the time factor, seems to

[136] Cf., to this effect, A. Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement*, The Hague, Nijhoff, 1999, p. 227.

[137] The right to be herein preserved, the right to justice, is inextricably linked to (non-pecuniary) reparation.

operate against the expectation of justice on the part of human beings. One example is found in the undue invocation of non-retroactivity in relation to *continuing* wrongful situations of obstruction of access to justice extending themselves in time (cf. *infra*). Another example is afforded by the undue invocation of prescription in situations of the kind. Whether we look forth, or else back in time, we are faced with injustice in the handling of the time factor, making abstraction of the *gravity* of the breaches of law, to the detriment of victimized human beings.

147. In the present case concerning Mr. H. Habré, prescription has already been duly discarded by the 2006 Report of the AU Committee of Eminent African Jurists (para. 14). And, in my view, the invocation is likewise to be discarded in the present case, for the reasons that I lay down in Section XIV, *infra*, of the present separate opinion. One cannot lose sight of the fact that those who claim to have been victimized by the reported atrocities of the Habré regime in Chad (1982-1990) have been waiting for justice for over two decades, and it would add further injustice to them to prolong further their ordeal by raising new obstacles to be surmounted[138]. One has to bridge the unfortunate *décalage* between the time of human justice and the time of human beings.

148. The time factor cannot be handled in a way that leads to injustice. Certain conceptions, which took shape a long time ago in a historical context entirely distinct from the one with which we are confronted in the present case, cannot be mechanically applied herein. It should, moreover, be kept in mind that the passing of time does not heal the profound scars in human dignity inflicted by torture. Such scars can even be transmitted from one generation to another. Victims of such a grave breach of their inherent rights (as torture), who furthermore have no access to justice (*lato sensu*, i.e., no realization of justice), are victims also of a *continuing* violation (denial of justice), to be taken into account as a whole, without the imposition of time-limits decharacterizing the continuing breach[139], until that violation ceases.

149. The passing of time cannot lead to subsequent impunity either; oblivion cannot be imposed, even less so in face of such a grave breach of human rights and of international humanitarian law as torture. The imperative of the preservation of the integrity of human dignity stands well above pleas of non-retroactivity and/or prescription. It is high time

[138] HRW, *The Trial of Hissène Habré: Time is Running Out for the Victims*, Vol. 19, January 2007, No. 2, pp. 1, 14 and 19.

[139] On the notion of "continuing situation" in international legal thinking, cf. case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, dissenting opinion of Judge Cançado Trindade, pp. 352-366, paras. 55-94.

to bridge the unfortunate *décalage* between the time of human justice and the time of human beings. Articles 5 (2), 6 (2) and 7 (1) — interrelated as they are — of the CAT forbid undue delays; if, despite the requirements contained therein, undue delays occur, there are breaches of those provisions of the CAT. This is clearly what has happened in the present case, in so far as Articles 6 (2) and 7 (1) of the CAT are concerned, as rightly upheld by this Court[140].

150. It has already been pointed out that, in its decision of 19 May 2006 in the *Souleymane Guengueng and al.* v. *Senegal* case, the UN Committee against Torture found that the "reasonable time-frame" for the State concerned to take the necessary measures, in pursuance of the principle of universal jurisdiction, under Article 5 (2) of the CAT, had been, already by then, "considerably exceeded". With such a prolonged delay, the same applied in respect of Article 6 (2) of the CAT, which expressly determines that the State party concerned "shall *immediately*[141] make a preliminary inquiry into the facts". This has not been done to date. And the same also applies to the measure — submission of the case to the competent authorities for the purpose of prosecution — also in pursuance of the principle of universal jurisdiction, under Article 7 (1) of the CAT. This has not been done to date either.

151. Although the breach of Article 5 (2) ceased in 2007, with the adoption by Senegal of legislative reforms to bring its domestic law into conformity with Article 5 (2) of the CAT, the other continuing breaches of Articles 6 (2) and 7 (1) of the CAT persist to date. These provisions of the CAT are meant, as I perceive them, *to bridge the unfortunate gap between the time of human justice and the time of human beings*, by purporting to avoid, and not to allow, undue delays. Non-compliance with such provisions, as in the present case so far, perpetuates the unfortunate gap between the time of human justice and the time of human beings.

152. This is even more regrettable, bearing in mind that everyone lives within time — the existential time of each one. The irreversible passing of time not only leaves its marks in the aging body, but also marks its flow in one's conscience. Each person is ineluctably linked more to her own existential time (which cannot be changed) than to the space where she lives (which can be changed). Each person lives inevitably within her own time, *conscious* that it will come to an end. If one's life-time is marked by injustice and impunity, one is left with the impression, after the occurrence of all the atrocities, that nothing seems to have happened at all[142].

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[140] Operative paragraphs (4) and (5) of the *dispositif* of the present Judgment.

[141] Emphasis added.

[142] Cf. Jean Améry, *Levantar la Mano sobre Uno Mismo — Discurso sobre la Muerte Voluntaria* [*Hand an sich legen — Diskurs über den Freitod*, 1976], Valencia, Pre-Textos, 2005 (repub.), pp. 67, 91-92 and 143.

153. To live within time can thus at times be particularly painful, the more one is conscious of the brevity of one's lifetime. Even if nothing wrongful had happened, to live within one's time, and to accept the effect of its implacable passing upon oneself, up to the end of one's existence, is already difficult. To feel the existential time pass with injustice prevailing, and surrounded by indifference, is all the more painful; the passing of time in such circumstances is on the verge of becoming truly unbearable. Prolonged and definitive injustice may lead — and not seldom has led — victims of grave violations of human rights into despair. The graver the violation, the greater the likelihood of this to happen. Impunity is an additional violation of human rights.

2. *Making Time Work* Pro Victima

154. In the domain of the international law of human rights, which is essentially victim-oriented, the time factor is to be made to operate *pro victima*. As to the principle *aut dedere aut judicare* set forth in Article 7 (1), it has already been indicated that *aut judicare* is ineluctably associated with the requirement of absence of undue delays. For its part, extradition, largely dependent upon the existence of treaties and the interpretation given to them in the circumstances of each case, is bound to remain largely discretionary. What comes promptly into the fore in the *cas d'espèce* is the requirement of expeditious inquiry into the facts for the purpose of prosecution, a duty incumbent upon States parties to the CAT. The duty of prosecution is further singled out by the requirement, under Article 4 of the CAT, of criminalization of all acts of torture under domestic law, taking into account "their grave nature". Extradition comes into the picture only in case of the absence of prosecution.

155. In this connection, the recent judgment (of 2010) of the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice) cannot be seen as an obstacle to Senegal's compliance with its obligations under Article 7 of the CAT. In fact, it can at first be argued, as Belgium does[143], that Senegal has been in non-compliance with its obligations under the CAT (such as those under Article 7) for years, well before the judgment of the ECOWAS Court was delivered in 2010[144]. In this connection, I find Senegal's reiterated contentions

[143] CR 2012/3, of 13 March 2012, p. 17.

[144] Thus, from the start it does not seem reasonable to rely on this recent ECOWAS judgment to attempt to justify that continuing non-compliance, largely predating the latter judgment. Moreover, Senegal's continuing non-compliance with the obligation *aut dedere aut judicare*, enshrined in Article 7 of the CAT, has created a situation whereby Mr. H. Habré has been under house surveillance for an extended period of time — according to the pleadings of the Parties since 2000; cf. CR 2012/4, of 15 March 2012, p. 21,

(in its Counter-Memorial[145] and oral arguments[146]) of alleged difficulties ensuing from the judgment of the ECOWAS Court of Justice of 2010 unpersuasive. They do not — cannot — bear an impact on compliance with its obligations under the CAT.

156. Likewise, they cannot be invoked in a way that generates further delays in the realization of justice. A supervening decision of an international tribunal (the ECOWAS Court of Justice) cannot encroach upon the current exercise of the judicial function of another international tribunal (the ICJ), performing its duty to pronounce on the interpretation and application of the CAT — one of the "core Conventions" of the United Nations in the domain of human rights —, in order to make sure that justice is done. As the ICJ rightly stated in the present Judgment, "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" (para. 111).

157. It is my view that co-existing international tribunals perform a *common mission* of imparting justice, of contributing to the common goal of the *realization of justice.* The decision of any international tribunal is to be properly regarded as contributing to that goal, and not as disseminating discord[147]. There is here a convergence, rather than a divergence,

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para. 7. Cf. also Counter-Memorial of Senegal, p. 3. It may thus be argued that the delay in prosecuting (or extraditing) him, while still keeping him under house surveillance (amounting to a preventive detention), is contrary to his right to be tried without undue delay; furthermore, at present this calls into question whether Senegal has truly intended so far to prosecute Mr. H. Habré. In addition, arguments as to the question of non-retroactivity seem hardly convincing; for criticisms, cf., e.g., V. Spiga, "Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga", 9 *Journal of International Criminal Justice* (2011), pp. 5-23; A. D. Olinga, "Les droits de l'homme peuvent-ils soustraire un ex-dictateur à la justice? L'affaire *Hissène Habré* devant la Cour de Justice de la CEDEAO", 22 *Revue trimestrielle des droits de l'homme* (2011), No. 87, pp. 735-746; K. Neldjingaye, "The Trial of Hissène Habré in Senegal and Its Contribution to International Criminal Law", in *Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 185-196.

[145] Counter-Memorial of Senegal, Vol. I, paras. 67-70, 77, 85, 115-119, 176 and 241.

[146] CR 2012/4, of 15 March 2012, paras. 22, 42-43, 47, 51-53, 55-56, 58-59, 65, 69 and 71; CR 2012/5, of 16 March 2012, paras. 12.22, 16.16-18 and 20-21, and 27.11-12; CR 2012/7, of 21 March 2012, paras. 14.26, 17.8 and 24.25-26.

[147] Accordingly, it should not pass unnoticed, in this connection, that Mr. H. Habré has been in custody (under house surveillance) for some years (CR 2012/5, of 16 March 2012, p. 21). The submission of the case for purpose of prosecution without undue delay would thus avoid what amounts to a preventive detention for an excessively prolonged period of time, without trial; A. Boulesbaa, *The UN Convention on Torture. . ., op. cit. supra* note 136, p. 225, and cf. pp. 226-227, on the question of pre-trial detention and its impact on the rights of the accused. In the present case, the undue delay in submitting the case to prosecution has thus also caused unreasonable delay in Mr. H. Habré's preventive

of the *corpus juris* of the international law of human rights and international criminal law, for the correct interpretation and application by international tribunals.

XIV. The Time Factor: A Rebuttal of a Regressive Interpretation of the Convention against Torture

158. Paragraph 99 of the present Judgment, wherein the ICJ expressly acknowledges that "the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*", is in my view one of the most significant passages of the present Judgment. My satisfaction would have been greater if the Court dwelt further upon it, and developed its reasoning on this particular issue, as it could and should, thus fostering the progressive development of international law. The Court, however, promptly turned around in the following paragraph, and started treading on troubled waters, embarking — to my regret — on a regressive interpretation of the relevant provision (Article 7 (1)) of the CAT.

159. In any case, up to now, the Court has not shown much familiarity with, nor strong disposition to, elaborate on *jus cogens*; it has taken more than six decades for it to acknowledge its existence *tout court*, in spite of its being one of the central features of contemporary international law. In effect, immediately after identifying the manifestation of *jus cogens* in the customary international law prohibition of torture (Judgment, para. 99), the Court has indulged into a consideration, *sponte sua*, of non-retroactivity of treaty provisions. The Court has done so (*ibid.*, paras. 100 to 104) adding an unnecessary — if not contradictory — element of confusion to its own reasoning.

160. It has done so, *sponte sua*, without having been asked to pronounce itself on this point — alien to the CAT — neither by Belgium nor by Senegal. It has done so despite the fact that the CAT, unlike other treaties, does not provide for, nor contain, any temporal limitation or express indication on non-retroactivity. It did so by picking out one older

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detention, and that is contrary to basic postulates proper to the international law of human rights; cf., e.g., Article 14 (3) of the UN Covenant on Civil and Political Rights, providing for the right "to be tried without undue delay". Moreover, the principle *aut dedere aut judicare* (in particular the obligation *aut judicare*), set forth in Article 7 (1) of the CAT, forbids undue delays, which would militate against the object and purpose of the Convention; cf., to this effect, J. H. Burgers and H. Danelius, *The United Nations Convention against Torture*, Dordrecht, Nijhoff, 1988, p. 137, and cf. also note 136, *supra*.

decision (of 1989) of the UN Committee against Torture that suited its argument, and at the same time overlooking or not properly valuing more recent decisions of the Committee *a contrario sensu*, wherein the Committee overruled its previous decision relied upon by the Court in its reasoning.

161. The Court has referred approvingly to (Judgment, para. 101) an earlier decision of the Committee against Torture (of 23 November 1989) in the case *O. R. and al.* v. *Argentina*, whereby the Committee found that the CAT did not apply to acts of torture allegedly committed before the entry into force of the Convention in Argentina[148]. Yet, the Committee has, ever since, adopted a different approach, as illustrated in two subsequent cases. Thus, in 2003, in the case of *Bouabdallah Ltaief* v. *Tunisia*, the Committee considered allegations of acts of torture allegedly committed in 1987, notwithstanding the fact that the Convention entered into force for Tunisia in 1988[149]. In other words, the Committee did not distinguish between acts allegedly committed before the entry into force of the CAT for Tunisia and those allegedly perpetrated thereafter.

162. Similarly, more recently, in 2006, in the case of *Souleymane Guengueng and al.* v. *Senegal*[150], which pertains to a similar factual background as the present case before this Court, the Committee again did not make any distinction between the facts that are reported to have taken place *before* the entry into force of the Convention for Senegal and those alleged to have occurred *afterwards*. Thus, it can be considered that the more recent approach of the Committee, as illustrated by these two decisions of 2003 and 2006, has been to apply the CAT without distinguishing between acts alleged to have occurred *before* the Convention entered into force for the respondent State, and those alleged to have occurred *thereafter*.

163. The fact is that the more recent decisions of the Committee against Torture provide no support to the reasoning of the Court on this particular point. Moreover, the Court has overlooked, or not valued properly, the responses given by the contending Parties to a question put to them from the bench, in a public sitting of the Court. In its response, Belgium recalled the object and purpose of the CAT and the two more

[148] CAT, case *O. R. et al.* v. *Argentina*, communications Nos. 1/1988, 2/1988 and 3/1988, decision of 23 November 1989, para. 7.3, *Official Records of the General Assembly*, 45th Session, Supplement No. 44 (doc. A/45/44), Annex V, p. 108, paras. 7.2-7.4 and 8.

[149] CAT, case *Bouabdallah Ltaief* v. *Tunisia*, communication No. 189/2001, decision of 14 November 2003, *Official Records of the General Assembly*, 59th Session, Supplement No. 44 (doc. A/59/44), Annex VII, p. 207, paras. 1.2, 2.1 and 10.1-10.9.

[150] CAT, case *Souleymane Guengueng and al.* v. *Senegal*, communication No. 181/2001, UN Convention against Torture (doc. C/36/D/181/2001), decision of 19 May 2006. And cf. Section III, *supra*.

recent cases decided by the Committee against Torture (in the *Bouabdallah Ltaief* and the *Souleymane Guengueng and al.* cases, *supra*), and contended, as to the procedural obligations under Article 7 of the CAT, that

> "[t]here is nothing unusual in applying such procedural obligations to crimes that occurred before the procedural provisions came into effect. There is nothing in the text of the Convention, or in the rules of treaty interpretation, that would require that Article 7 not apply to alleged offenders who are present in the territory of a State party after the entry into force of the Convention for that State, simply because the offences took place before that date. Such an interpretation would run counter to the object and purpose of the Convention. (. . .) [T]he procedural obligations owed by Senegal are not conditioned *ratione temporis* by the date of the alleged acts of torture. (. . .) That does not involve a retroactive application of the Convention to the omissions of Senegal. All these omissions took place after both States, Belgium and Senegal, became parties to the Convention and became mutually bound by the procedural obligations contained therein."[151]

164. Likewise, in its response, Senegal, much to its credit, acknowledged the importance of the obligations, "binding on all States", pertaining to the "punishment of serious crimes under international humanitarian law", such as those in breach of the prohibition of torture. Turning to the procedural obligations under Article 7 (1) of the CAT, Senegal added that

> "it does not deny that the obligation provided for in the Convention can be applied to the offences allegedly committed before 26 June 1987, when the Convention entered into force for Senegal"[152].

165. The Court, notwithstanding, has proceeded to impose a temporal limitation *contra legem* to the obligation to prosecute under Article 7 (1) of the CAT (Judgment, para. 100, *in fine*). There were other points overlooked by the Court in this respect. For example, it has not taken into account that occurrences of systematic practice of torture conform *continuing situations* in breach of the CAT[153], to be considered as a whole,

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[151] Questions Put to the Parties by Members of the Court at the Close of the Public Hearing Held on 16 March 2012: Compilation of the Oral and Written Replies and the Written Comments on those Replies, doc. BS-2012/39, of 17 April 2012, pp. 50-52paras. 49 and 52.

[152] *Ibid.*, p. 52.

[153] On the notion of *continuing situation* in international legal thinking, cf. case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, dissenting opinion of Judge Cançado Trindade, pp. 354-366, paras. 60-94.

without temporal limitations decharacterizing it, until they cease. Nor has it taken into account the distinct approaches of domestic criminal law and contemporary international criminal law, with regard to pleas of non-retroactivity.

166. And nor has the Court taken into account that such pleas of non-retroactivity become a moot question wherever the crimes of torture had already been prohibited by customary international law (as in the present case) at the time of their repeated or systematic commission. Ultimately — and summing up — the Court has pursued, on this particular issue, a characteristic voluntarist reasoning, focused on the will of States within the confines of the strict and static inter-State dimension. But it so happens that the CAT (the applicable law in the *cas d'espèce*) is rather focused on the victimized human beings, who stand in need of protection. It is further concerned to guarantee the non-repetition of crimes of torture, and to that end it enhances the struggle against impunity. Human conscience stands above the will of States.

167. The Court has pursued a negative or self-restricted approach to its jurisdiction. In respect of Article 5 (2) of the CAT, what does not exist here is the *object* of a dispute over which to exercise its jurisdiction; the Court, in my understanding, remains endowed with jurisdiction, with its authority or aptitude to say what the law is (to do justice), to pronounce on the CAT, and to determine, *inter alia*, that the dispute concerning Article 5 (2) has ceased, but it will nevertheless take into account — as it has done (Judgment, para. 48) — its *effects* in relation to its determination of the breaches by the respondent State of Articles 6 (2) and 7 (1) of the CAT. The three aforementioned provisions of the CAT are ineluctably interrelated. By the same token, the Court retains its jurisdiction to pronounce upon the corresponding customary international law prohibition of torture. This is a point which requires clarification.

168. Accordingly, it would seem inconsistent with the object and purpose of the CAT if alleged perpetrators of torture could escape its application when found in a State in respect of which the Convention entered into force only *after* the alleged criminal acts occurred (as a result of the temporal limitation which the Court regrettably beheld in Article 7 (1)). Worse still, although the present Judgment rightly recognizes that the prohibition of torture has attained the status of *jus cogens* norm (*ibid.*, para. 99), it promptly afterwards fails to draw the necessary consequences of its own finding, in unduly limiting the temporal scope of application of the CAT. The Court has insisted on overlooking or ignoring the persistence of a *continuing situation* in breach of *jus cogens*.

XV. A New Chapter in Restorative Justice?

169. This brings me to my remaining line of considerations in the present separate opinion. In our days, there is a growing awareness of, and a growing attention shifted to, the sufferings of victims of grave breaches of the rights inherent to them, as well as to the corresponding duty to provide reparation to them. This has become, in our days, a legitimate concern of the international community, envisaging the individual victims as members of humankind as a whole. The international law of human rights has much contributed to this growing consciousness. And contemporary international criminal law also draws further attention to the duty to provide reparation for those sufferings in the quest for the realization of justice.

170. Much has been written on restorative justice, and it is not my intention to review the distinct trends of opinion on the matter within the confines of the present separate opinion. Yet, the issue cannot pass unnoticed here, and there is in my view one point to be made. In historical perspective, there are traces of restorative justice in the presence, from ancient to modern legal and cultural traditions, of the provision of compensation due to victims of wrongful acts, attentive to their rehabilitation but also to avoid reprisals or private revenge. As administration of justice was gradually brought under centralized State control (during the Middle Ages), there was a gradual shift from the provision of compensation into retributive justice, a tendency which came to prevail in the eighteenth century, with the multiplication of criminal law codes, turning attention to the punishment of offenders rather than the redress to individual victims[154].

171. By then, restorative justice may have faded, but did not vanish. By the mid-twentieth century (from the sixties onwards), with the emergence of victimology[155], restorative justice began again to attract greater attention and to gain in importance. Throughout the second half of the twentieth century, the considerable evolution of the *corpus juris* of the international law of human rights, being essentially *victim-oriented*, fostered the new stream of restorative justice, attentive to the needed rehabilitation of the victims (of torture). Its unprecedented projection nowadays into the domain of international criminal justice — in cases of core international crimes — makes us wonder whether we would be in face of the conformation of a new chapter in restorative justice.

[154] I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 13-24, and cf. pp. 25, 27 and 35-38.

[155] Cf. IACtHR, case *Tibi* v. *Ecuador* (judgment of 7 September 2004), separate opinion of Judge A. A. Cançado Trindade, paras. 16-17.

172. If so, given the gravity of those core international crimes such as the one of torture, one would likely be facing, nowadays, a co-existence of elements proper to both restorative and retributive justice, in reaction to particularly grave and systematic violations of their rights suffered by the victims. The realization of justice appears, after all, as a form of reparation itself, rehabilitating — to the extent possible — victims (of torture). May I just point out that I do not conceive restorative justice as necessarily linked to reconciliation; this latter can hardly be imposed upon victims of torture, it can only come spontaneously from them[156], and each of them has a unique psyche, reacting differently from others. There is no room here for generalizations. I consider restorative justice as necessarily centred on the rehabilitation of the victims of torture, so as to render it possible to them to find bearable to keep on relating with fellow human beings, and, ultimately, to keep on living in this world.

173. Restorative justice grows in importance in cases of grave and systematic violations of human rights, of the integrity of human beings, such as the abominable practice of torture. Reparation to the victims naturally envisages their rehabilitation. The (former) UN Commission on Human Rights itself recognized, in its resolution 2003/72 (of 25 April 2003), that, for the victims of grave violations of human rights, "public knowledge of their suffering and the truth about the perpetrators" (including their accomplices) of those violations, are "essential steps" towards their rehabilitation (para. 8).

174. It should be kept in mind that the restorative nature of redress to victims is nowadays acknowledged in the domain not only of the international law of human rights, but also of contemporary international criminal law (the Rome Statute of the ICC). Yet, the matter at issue is susceptible of further development, bearing in mind the vulnerability of the victims and the gravity of the harm they suffered. In so far as the present case before this Court is concerned, the central position is that of the human person, the victimized one, rather than of the State.

XVI. Epilogue: Concluding Reflections

175. The factual background of the present case discloses a considerable total of victims, according to the fact-finding already undertaken, among those murdered, or arbitrarily detained and tortured, during the

[156] A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Ed. Del Rey, 2011, Annex II: "Responsabilidad, Perdón y Justicia como Manifestaciones de la Conciencia Jurídica Universal", pp. 267-288.

Habré regime in Chad (1982-1990). The absolute prohibition of torture being one of *jus cogens* — as reckoned by the ICJ itself in the present Judgment — the obligations under a "core human rights Convention" of the United Nations such as the Convention against Torture are not simple obligations of means or conduct: they are, in my understanding, obligations necessarily of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*, generating obligations *erga omnes partes* under the Convention against Torture.

176. To the original *grave* violations of human rights, there follows an additional violation: the *continuing situation* of the alleged victims' lack of access to justice and the impunity of the perpetrators of torture (and their accomplices). This wrongful continuing situation is in breach of the UN Convention against Torture as well as of the customary international law prohibition of torture. I dare to nourish the hope that the present Judgment of the ICJ, establishing violations of Articles 6 (2) and 7 (1) of the Convention against Torture, and asserting the duty of prosecution thereunder, will contribute to bridge the unfortunate gap between the time of human justice and the time of human beings. It is about time that this should happen. Time is to be made to work *pro persona humana*, *pro victima*.

177. In this second decade of the twenty-first century — after far too long a history —, the principle of universal jurisdiction, as set forth in the CAT (Arts. 5 (2) and 7 (1)), appears nourished by the ideal of a universal justice, without limits in time (past or future) or in space (being transfrontier). Furthermore, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole. There is nothing extraordinary in this, if we keep in mind that, in historical perspective, international law itself precedes the inter-State dimension, and even the States themselves. What stands above all is the imperative of universal justice. This is in line with jusnaturalist thinking[157]. The contemporary understanding of the principle of universal jurisdiction discloses a new, wider horizon.

178. In it, we can behold the universalist international law, the new universal *jus gentium* of our times[158] — remindful of the *totus orbis* of Francisco de Vitoria and the *societas generis humani* of Hugo Grotius.

[157] On the influence of natural law doctrines, cf., *inter alia*, e.g., M. Henzelin, *Le principe de l'universalité en droit pénal international — Droit et obligation pour les Etats de poursuivre et juger selon de principe de l'universalité*, Basle/Geneva/Munich/Brussels, Helbing & Lichtenhahn/Faculté de droit de Genève/Bruylant, 2000, pp. 81-119, 349-350 and 450.

[158] Cf. A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law — Part I", 316 *Recueil des cours de l'Académie de droit international de La Haye* (2005), pp. 432-439.

Jus cogens marks its presence therein, in the absolute prohibition of torture. It is imperative to prosecute and judge cases of international crimes — like torture — that shock the conscience of mankind. Torture is, after all, reckoned in our times as a grave breach of international human rights law and international humanitarian law, prohibited by conventional and customary international law; when systematically practised, it is a crime against humanity. This transcends the old paradigm of State sovereignty: individual victims are kept in mind as belonging to humankind; this latter reacts, shocked by the perversity and inhumanity of torture.

179. The advent of the international law of human rights has fostered the expansion of international legal personality and responsibility, and the evolution of the domain of reparations (in their distinct forms) due to the victims of human rights violations. I have addressed this significant development — which I refer to herein — in my recent separate opinion appended to the Court's Advisory Opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (*I.C.J. Reports 2012 (I)*, pp. 51-93, paras. 1-118). This development has a direct bearing on reparations due to victims of torture.

180. Here, the suffering and the needs of those victims are to be kept in mind. Rehabilitation of victims plays an important role here, bringing to the fore a renewed vision of restorative justice. In effect, restorative justice, with its ancient roots (going back in time for some millennia, and having manifested itself in earlier legal and cultural traditions around the world), seems to have flourished again in our times. This is due, in my perception, to the recognition that: *(a)* a crime such as torture, systematically practised, has profound effects not only on the victims and their next-of-kin, but also on the social milieu concerned; *(b)* punishment of the perpetrators cannot be dissociated from rehabilitation of the victims; *(c)* it becomes of the utmost importance to seek to heal the damage done to the victims; *(d)* in the hierarchy of values, making good the harm done stands above punishment alone; and *(e)* the central place in the juridical process is occupied by the victim, the human person, rather than by the State (with its monopoly of sanction).

181. We look here beyond the traditional inter-State outlook, ascribing a central position to the individual victims, rather than to their States. Had the inter-State dimension not been surmounted, not much development would have taken place in the present domain. The struggle against impunity is accompanied by the endeavours towards the rehabilitation of the victims. The realization of justice, with the judicial recognition of the sufferings of the victims, is a form of the reparation due to them. This is imperative, we have here moved from *jus dispositivum* to *jus cogens*.

182. Identified with general principles of law enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the interna-

tional law for humankind. In prohibiting torture in any circumstances whatsoever, *jus cogens* exists indeed to the benefit of human beings, and ultimately of humankind. Torture is absolutely prohibited in all its forms, whichever misleading and deleterious neologisms are invented and resorted to, to attempt to circumvent this prohibition.

183. In the aforementioned move from *jus dispositivum* to *jus cogens*, this absolute prohibition knows no limits in time or space: it contains no temporal limitations (being a prohibition also of customary international law), and it ensues from a peremptory norm of a *universalist* international law. *Jus cogens* flourished and asserted itself, and has had its material content expanded, due to the awakening of the universal juridical conscience, and the firm support it has received from a lucid trend of international legal thinking. This latter has promptly discarded the limitations and shortsightedness (in space and time) of legal positivism, and has further dismissed the myopia and fallacy of so-called "realism".

184. Last but not least, the emancipation of the individual from his own State is, in my understanding, the greatest legacy of the consolidation of the international law of human rights — and indeed of international legal thinking — in the second half of the twentieth century, amounting to a true and reassuring juridical revolution. Contemporary international criminal law takes that emancipation into account, focusing attention on the individuals (victimizers and their victims). Not only individual rights, but also the corresponding State duties (of protection, investigation, prosecution, sanction and reparation) emanate directly from international law. Of capital importance here are the *prima principia* (the general principles of law), amongst which the principles of humanity, and of respect for the inherent dignity of the human person. This latter is recalled by the UN Convention against Torture[159]. An ethical content is thus rescued and at last ascribed to the *jus gentium* of our times.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[159] Second preambular paragraph.