SEPARATE OPINION OF JUDGE YUSUF

The Court's jurisdiction cannot be founded on Article 30 of the CAT — The conditions contained in Article 30 have not been met — Negotiations between the Parties were never deadlocked — Negotiations continued even after submission of the case to the Court — There was no inability to agree on arbitration — No proposals were made by either Party on modalities for the organization of arbitral proceedings — Only inability to agree on organization of arbitration triggers Court's jurisdiction — This was not the case here — Judgment elevates preliminary inquiry to level of full investigation — No general standard for conduct of such inquiries exists — The nature and scope of preliminary inquiry is determined by domestic law — Senegal conducted such an inquiry in 2000, but failed to do so in 2008 — Distinction should have been made between the two events — Obligation under Article 7, paragraph 1, of the CAT is to submit case for prosecution — Failure to do so engages State's international responsibility — Extradition is an option, but not an obligation under the CAT — State may extradite suspect only to relieve itself of its obligation to prosecute.

I. Introduction

1. I feel bound to append this separate opinion for several reasons. First, contrary to the conclusions of the Court, I am of the view that the jurisdiction of the Court in the present case cannot be founded on Article 30 of the Convention against Torture (CAT) since the conditions set out in that provision have not been met. Secondly, I have voted against subparagraph 4 of the operative part of the Judgment because I believe that the choice of means for the conduct of the preliminary inquiry prescribed by Article 6, paragraph 2, of the CAT, as well as the scope of such inquiry, is determined by the State party on whose territory the suspect is present in accordance with its domestic law. Consequently, there was no valid reason, in my view, for the Court to conclude that the circumstances and procedures related to the questioning of Mr. Habré by the Senegalese investigating judge in February 2000, followed by his indictment by the same judge, did not constitute a preliminary inquiry. Thirdly, it is my view that the nature and meaning of the obligation laid down in Article 7, paragraph 1, of the CAT could have been further elaborated and clarified in the Judgment, particularly in view of the fact that Belgium continued to insist on the extradition of Mr. Habré while Senegal was preparing for his prosecution in its territory, and mobilizing funds for that purpose.

II. JURISDICTION

2. In its Application to the Court, Belgium invoked two separate bases of jurisdiction. It relied equally on the Declarations made by Belgium and Senegal under Article 36, paragraph 2, of the Court's Statute and on Article 30 of the United Nations Convention against Torture (CAT). I believe that the Court has jurisdiction on the basis of the declarations made by Belgium and Senegal under Article 36, paragraph 2, respectively on 17 June 1958 and 2 December 1985. The Court's jurisdiction cannot, however, be founded in the present case on Article 30 of the CAT.

3. Four conditions have to be met, under Article 30 of the CAT, for the Court to have jurisdiction on disputes between parties to the Convention. First, there has to be a dispute between the parties concerning the application or interpretation of the Convention. Secondly, the dispute has to be one which cannot be settled by negotiation. Thirdly, one of the parties to the dispute must have requested that it be submitted to arbitration. Fourthly, if within six months from the date of the request, the parties are unable to agree on the organization of the arbitration, any one of them may refer the dispute to the International Court of Justice. The parties agree that these conditions are cumulative. Thus, all four must be met before the jurisdiction of the Court can be established. As explained below, it is my view that two of these conditions have not been met, namely: *(a)* the condition that the dispute could not be settled through negotiation; and *(b)* that the Parties must have been unable to agree on the organization of the arbitration. I will examine these conditions below.

A. A Dispute Which "Cannot Be Settled through Negotiation"

4. It should be stressed at the outset that Article 30 of the CAT refers to a dispute which "cannot be settled through negotiation", a condition that is vastly different from the formula used in other conventions where the reference is to a dispute which "is not settled by negotiation". The latter expression, viz. "is not settled by negotiation", implies a factual finding, and not an assessment of whether a deadlock or a refusal by one of the parties has occurred.

5. The Court rightly notes in paragraph 57 of the Judgment that

> "[t]he requirement that the dispute 'cannot be settled through negotiation' could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that . . . 'no reasonable probability exists that further negotiations would lead to a settlement' (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345)."

The Court does not, however, draw the correct conclusions from these statements, particularly on the strength of the evidence before it in this case.

This evidence clearly shows that neither a deadlock nor an impasse was ever reached in the negotiations between the Parties, and that those negotiations continued for a long time even after the filing of Belgium's Application with the Court. Thus, there is nothing in the material placed before the Court by the Parties which indicates that the dispute could not be settled through negotiations and that the Parties fully and definitively gave up any hope of reaching a settlement through negotiations. The fact that the negotiations between the Parties were never permanently interrupted, but were resumed on many occasions, even after the filing of the Application by Belgium, demonstrates that the possibility of a settlement through negotiations never disappeared.

6. Ascertaining whether negotiations have taken place, but have not resulted in the settlement of the dispute, in accordance with the condition stipulated in certain conventions regarding "a dispute which is not settled by negotiations", is a question of factual verification and requires no inquiry into the exhaustion of the possibilities of settling the dispute through negotiations. The formula used in the CAT, i.e., "cannot be settled through negotiations" requires such an inquiry and a determination by the Court that further negotiations became futile and showed no reasonable probability that they could result in a settlement of the dispute. This determination does not appear to have been made in the Judgment. As a matter of fact, in assessing whether the dispute was one which could not be settled by negotiation, the Court limited itself to the consideration of the Notes Verbales by Belgium to Senegal of 11 January 2006, 9 March 2006, 4 May 2006 and 20 June 2006. These diplomatic Notes form the only evidence that the Court relies on to conclude that

> "[t]here was no change in the respective positions of the Parties concerning the prosecution of Mr. Habré's alleged acts of torture during the period covered by the above exchanges. The fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute." (Judgment, para. 59.)

7. It is true that in its Note Verbale of 20 June 2006, which Senegal affirmed not to have received, Belgium noted that "the attempted negotiation with Senegal, which started in November 2005" had not succeeded, and accordingly asked Senegal to submit the dispute to arbitration (Memorial of Belgium, Ann. B.11). But this was not, and cannot be considered, clear evidence of an impossibility to settle the dispute through negotiations. It simply reflects the viewpoint of one of the Parties, which apparently wanted to submit the dispute to arbitration. The material placed before the Court by both Parties contains additional evidence of continued negotiations between the Parties up to, and beyond, the date of submission of Belgium's Application to the Court. This additional evidence shows that the positions of the Parties continued to evolve, particularly with the adoption by Senegal in 2007 of constitutional and legislative reforms aimed at facilitating the prosecution of Mr. Habré in Senegal for

crimes allegedly committed in Chad, and the consequent co-operation between the Parties, both directly as well as through the African Union and the European Union, to mobilize the necessary funds for the organization of Mr. Habré's trial in Senegal.

8. To illustrate the evolution of the positions of the Parties through their diplomatic exchanges from 2007 and until very recently (17 January 2012), reference may be made to, *inter alia*, Senegal's Notes Verbales of 18 July 2007 and 5 October 2007, in which it announced the intention to organize a meeting of potential donors and informed Belgium of its decision to organize the Hissène Habré trial (Memorial of Belgium, Anns. D.14 and B.15). Further diplomatic correspondence was sent by Senegal to Belgium on 5 October 2007 and 7 December 2007 regarding the organization of the donor meeting and the financial aspects of the trial (*ibid.*, Ann. D.16).

On 2 December 2008, in a Note Verbale to Senegal, Belgium refers to the dispute between the Parties regarding the interpretation and application of the provisions of the CAT, and takes note of the constitutional and legislative amendments adopted by Senegal with a view to the submission for prosecution to its competent authorities of the case of Mr. Habré (*ibid.*, Ann. B.16). Belgium reaffirms, in the same Note Verbale, its readiness to establish the necessary modalities for international judicial co-operation with Senegal on the *Habré* case, in particular through the transmission to Senegal of the dossier compiled by the Belgian investigating judge following a letter rogatory from the competent Senegalese authorities. In this context, Belgium also confirms the readiness of the Belgian investigating judges to receive the Senegalese judges responsible for the *Hissène Habré* case, and requests Senegal to provide it with the contact details of the Senegalese judges in charge of the investigation and prosecution of the case. Finally, Belgium expresses in this Note Verbale the hope that this co-operation would result in decisive progress in the coming few weeks.

These exchanges clearly constitute, in my view, an evolution of the positions of the Parties and indicate the emergence of new factors (modification of Senegalese legislation, preparations for the organization of trial, co-operation in the mobilization of funds for the trial, offer of judicial co-operation by Belgium and of the transmission of the Habré dossier compiled by its magistrates) indicating a clear evolution of the negotiations and of the positions of the Parties subsequent to the period, and to the Notes Verbales, on the basis of which the Court concluded that the condition set forth in Article 30, paragraph 1, of the CAT has been met.

9. Moreover, after the filing of its Application before the Court, and until recently, Belgium continued its exchanges with Senegal on the financing of the trial of Hissène Habré in Senegal, on its own financial contribution to such a trial, as well as judicial co-operation on the basis of the international letter rogatory requested by Belgium in its Note Verbale of 2 December 2008 (*ibid.*, Ann. B.16). Thus, in a Note Verbale of

the Embassy of Belgium in Dakar to the Senegalese Ministry of Foreign Affairs on 23 June 2009, Belgium extended an invitation to the Senegalese investigating judges responsible for the case to visit Belgium to meet with their Belgian counterparts and offered to bear the costs of the visit (Memorial of Belgium, Ann. B.17). The Senegalese authorities welcomed this offer and designated two of the investigating judges to travel to Belgium (Note Verbale of 14 September 2009, *ibid.*, Ann. B.19).

The negotiations and discussions on the letter rogatory held between the Foreign Ministers of Senegal and Belgium on 26 May 2010 constitute further evidence of the continuation of negotiations between the Parties. Likewise, in November 2010, Belgium attended the donors' round-table in Dakar, in which the participants discussed the budget for organizing the Habré trial in Senegal, and made co-operation arrangements amongst themselves, including between Belgium and Senegal. Indeed, Belgium pledged a maximum of €1 million to the organization of the trial (Counter-Memorial of Senegal, Anns. 5, 10-4, and 11).

10. Negotiations continued as recently as 17 January 2012, when Belgium submitted a fourth extradition request to Senegal. Belgium noted, in its Note Verbale of 17 January 2012, that without prejudice to the case pending before the ICJ, it is in favour of the Habré trial being organized in Africa by the country on whose territory Mr. Habré is present. In addition, Belgium confirmed that it was still ready to co-operate with Senegal by judicial means, and this on 17 January 2012. Is it persuasive, under such circumstances, for the Court to conclude that the dispute could not be settled through negotiation or that negotiations had been exhausted and offered no further prospect for the settlement of the dispute already in 2006 allowing for resort to arbitration under Article 30 of the CAT?

B. The Inability of the Parties to Agree on the Organization of the Arbitration

11. The requirement under Article 30 relating to the inability of the parties "to agree on the organization of the arbitration" implies, in my view, an attempt to initiate the organization of the arbitration, or a suggestion of modalities by one or both parties regarding such organization, on which the parties have, however, failed to agree. The proposal or initiative by one or both parties, showing an effort to organize arbitration, is to be distinguished from the request for arbitration and has to be subsequent to it. In the present case, it does not appear to me that either of the two parties has made a proposal or has attempted to initiate the organization of an arbitration on whose terms the Parties failed to agree. As a matter of fact, Belgium does not even claim that it has done anything regarding the organization of an arbitration, and limits its arguments to the fact that it requested Senegal to submit the dispute to an arbitration, and subsequently reminded Senegal of that request.

12. In its reply to a question posed by a Member of the Court, Belgium stated that: "a State requesting arbitration under Article 30 is not required to make proposals for, or even to raise questions concerning the organization of the arbitration at the outset or at any specific moment" (CR 2012/6, p. 40, para. 14 (Wood)). It is also recognized in the Judgment that "Belgium did not make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings". Nonetheless, the Court concludes that: "this does not mean that the condition that 'the Parties are unable to agree on the organization of the arbitration' has not been fulfilled. A State may defer proposals concerning these aspects to the time when a positive response is given in principle to its request to settle the dispute by arbitration." (Judgment, para. 61.)

This is in my view an erroneous interpretation of the provision on arbitration in Article 30 of the CAT. In the first instance, it is very clear from a simple reading of the text that it is not enough to request the submission of the dispute to arbitration. Such a request must be followed by an effort or a proposal to organize arbitration proceedings, which is either opposed by the other party, or does not result in an agreement between the parties. Thus, it is only a failure to agree on the organization of arbitration, in the sense that an attempt had been made to organize or to propose modalities for the organization of arbitration without, however, reaching an agreement, which triggers the possibility to refer the dispute to the Court. Secondly, it should be recalled that, in the present case, following Belgium's initial reference to the arbitration procedure on 4 May 2006, Senegal responded by acknowledging and taking note of the "possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the [Convention]" (Memorial of Belgium, Ann. B9). In light of such acknowledgment, the onus lay on Belgium, as the requesting State, to take steps to suggest the procedure for organizing the said arbitration.

The present case is thus different from *DRC* v. *Rwanda (Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda))* and from *Libya* v. *USA* (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, where the Conventions concerned included similar treaty provisions. Unlike, for example, the Respondent in the *Libya* v. *USA* case, Senegal did not express an intention to reject the proposal for arbitration. On the contrary, Senegal took note of Belgium's request to submit the matter to arbitration in its Note Verbale of 9 May 2006 (*ibid.*, Ann. B10). Belgium should have followed this up with a proposal on the modalities for the organization of the arbitration, rather than reiterate a request to submit the dispute to arbitration. The condition that the parties were unable "to agree on the organization of the arbitration" contained in Article 30 must be met before the matter can be referred to the Court for adjudication. Absent such clear disagreement on the organiza-

tion of arbitral proceedings, the dispute cannot be submitted to the Court, and if any one of the Parties does so, the Court has to declare that it lacks jurisdiction. This is the case here, and the Court should have concluded, in my view, that it had no jurisdiction under Article 30 of the CAT.

III. Senegal's Obligation to Make Immediately a Preliminary Inquiry into the Facts

13. I find the reasoning of the Court, according to which the interrogation by the investigating judge in 2000 does not amount to a preliminary inquiry under Article 6, paragraph 2, of CAT, very unpersuasive, and disagree with its conclusion that the events of 2000 may be lumped together with those of 2008 where Senegal clearly failed to conduct a preliminary inquiry following a further complaint against Mr. Habré, after the legislative and constitutional amendments made by Senegal in 2007. The Court should have made a clear distinction between the steps taken by Senegal in 2000 and the absence of an inquiry following the complaints submitted to the Senegalese authorities in 2008.

14. The CAT provides little guidance on the specifics of the preliminary inquiry required by Article 6, paragraph 2. The Judgment also fails to shed light on what is meant by a preliminary inquiry under Article 6, paragraph 2, of the CAT and consequently provides no reliable basis for the assessment of whether or not Senegal, through the actions undertaken by its investigating judge, was able to satisfy the requirements of this provision of the Convention. Instead, in paragraph 83 of the Judgment, the concept of a preliminary inquiry under the Convention appears to have been elevated to the level of a full investigation. In that paragraph, the Court notes that the preliminary inquiry provided for in Article 6, paragraph 2, is

> "intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned."

15. The preliminary inquiry provided for under Article 6, paragraph 2, of the CAT can only be based, at that stage of the investigations, on the information made available by the victims or by those who have filed the complaint against the suspect and brought his presence in the country, and the crimes allegedly committed by him, to the attention of the authorities. Moreover, the nature of the inquiry to be carried out under this provision will depend to a large extent on the legal system concerned,

and on the particular circumstances of the case. It would therefore be erroneous to suggest, as paragraph 83 of the Judgment appears to do, that a general standard for the conduct of such inquiries exists.

The Court rightly observes in paragraph 86 that the choice of means for conducting the preliminary inquiry remains in the hands of the States parties, taking account of the case in question. This observation however stands in contradiction with the Court's findings that the indictment of Mr. Habré by the Senegalese investigating judge in 2000 is insufficient to fulfil the obligation in Article 6, paragraph 2. Without a proper assessment of Senegal's legal system and practice, the Court cannot conclusively state that

> "[t]he questioning at first appearance which the investigating judge at the *Tribunal régional hors classe* in Dakar conducted in order to establish Mr. Habré's identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré" (Judgment, para. 85).

In coming to this conclusion, the Court disregards Senegal's explanation that under its legal system

> "in criminal proceedings, the investigating judge may be seised either by a complaint with civil-party application or by an application from the public prosecutor to open an investigation. The preliminary inquiry is aimed simply at enabling the basic facts to be established; it does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for further proceedings." (CR 2012/7, p. 34, paras. 39-40 (Thiam); see also CR 2012/7, p. 17, para. 7.)

16. It does not also appear logical to assume that an indictment would have been issued by a Senegalese magistrate without a preliminary inquiry. While Senegal did not provide adequate material to show the exact nature of the inquiry carried out by the competent authorities following the allegations against Mr. Habré, the conduct of an inquiry, particularly one of a preliminary nature, is implicit in the fact that Mr. Habré was indicted by the investigating magistrate, and placed under house arrest. The Court should not have been so dismissive of the peculiarities of the Senegalese legal system, and the manner in which the indictment of Mr. Habré was arrived at, particularly in view of the fact that the exact nature and scope of the preliminary inquiry is determined on the basis of domestic law.

17. Thus, it is my view that the only instance in which Senegal failed to comply with its obligation to carry out a preliminary inquiry was the one relating to the lack of action by the competent Senegalese authorities following the filing of new allegations of torture against Mr. Habré in 2008. The Court should have, therefore, noted that notwithstanding the possi-

bility that Senegal may have met its obligations under Article 6, paragraph 2, in 2000, Senegal was under an obligation to conduct such an inquiry in 2008 when, following the legislative and constitutional reforms in 2007, new allegations of torture were brought against Mr. Habré. Despite the fact that four investigating judges were assigned to the case, there is no evidence that a preliminary inquiry, even of the same nature and scope as the one conducted in 2000, was ever carried out. It is on the basis of this failure to conduct a preliminary inquiry in 2008 that the Court should have found that Senegal breached its obligations under Article 6, paragraph 2, and not by setting aside the inquiry and the indictment of 2000.

IV. The Nature and Meaning of the Obligation in Article 7, Paragraph 1

18. I believe that the Court could have brought further clarification to the meaning and nature of the obligation *aut dedere aut judicare* contained in Article 7, paragraph 1, of the CAT, which is at the heart of the present case. The prevalence of the formula *aut dedere aut judicare*, which can be found in over 60 multilateral instruments, has led to some confusion within legal scholarship over the relationship between extradition and prosecution in conventional clauses containing this formula. Used loosely, the expression can be misleading as it is generally understood to mean an obligation to extradite or prosecute. However, depending on the legal instrument under consideration, the obligation may be placed on prosecution, rather than extradition, or vice versa. It is for this reason that the statement contained in paragraph 95 of the Judgment is useful, but could have benefited from further elaboration and elucidation. In that paragraph the Court notes that, within the context of the CAT, the choice between extradition or submission for prosecution does not mean that the two alternatives are to be given the same weight. Rather, "[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State" (Judgment, para. 95).

19. Despite the importance of this clarification, the Court stops short of elaborating further on the meaning of the obligation, and differentiating the formula in Article 7, paragraph 1, of the CAT from that of the conventions which impose an obligation to extradite. Such elaboration is necessary to avoid ambiguity, especially with respect to the interpretation of treaties containing the formula *aut dedere aut judicare*. The conventions containing the formula *aut dedere aut judicare* may be divided generally into two broad categories: *(a)* clauses that impose an obligation to extradite, and in which prosecution becomes an obligation only after the refusal of extradition; and *(b)* clauses that impose an obligation to prosecute, with extradition being an option available to the State. The latter

category also includes clauses that impose an obligation to prosecute, but extradition becomes an obligation if the State fails to submit the case for prosecution.

20. Multilateral instruments belonging to the first category include the 1929 International Convention for the Suppression of Counterfeiting Currency where the obligation to initiate proceedings against the suspect is "subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence" (Art. 9 (2)). Further illustration of this type of provision can be found in Article 15 of the African Union Convention on Preventing and Combating Corruption which provides that

> "where a State party in whose territory any person charged with or convicted of offences is present and has refused to extradite that person on the basis that it has jurisdiction over offences, the requested State party shall be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution . . .".

Additionally, Article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography provides that

> "if an extradition request is made with respect to an offence described in Article 3, paragraph 1, and the requested State party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution".

21. It is clear that category *(a)* conventions are structured in a manner that extradition to the State in whose territory the crime is committed is given priority. In the majority of these treaties, there is no general obligation on States parties to prosecute the alleged offender. On the contrary, prosecution by the State on whose territory the alleged offender is found only becomes an obligation if a request for extradition has been refused, or certain factors such as nationality of the suspect exist.

22. In category *(b)* conventions, it is evident that extradition is not given the same predominance. For example, a State party under the 1949 Geneva Conventions is obligated to prosecute persons alleged to have committed grave breaches of these conventions. However, "if it prefers, and in accordance with the provisions of its own legislation", it may "hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case". In these conventions the State on whose territory the alleged offender is found is not obliged to extradite him. Other modifications to the formula include Article 7 of the 1970 Hague Convention for the Sup-

pression of Unlawful Seizure of Aircraft, on which Article 7, paragraph 1, of CAT is modelled. Prosecution is clearly given priority, and a State party is obligated to prosecute, or submit a case for prosecution, regardless of the existence of an extradition request. Even where an extradition request has been made, some conventions, such as the 1949 Geneva Conventions, do not require extradition, while others can be interpreted, in accordance with the object and purpose of the particular treaty, as establishing an obligation to extradite if the State refuses to prosecute.

23. This clarification is important in the present case, since, as noted in paragraph 50 of the Judgment, it has repeatedly appeared in the correspondence between the Parties as well as in their pleadings before the Court that the two obligations were often placed on the same footing as alternatives within the context of the CAT. For instance in its Note Verbale of 11 January 2006, Belgium stated its interpretation of the Convention, specifically the obligation *"aut dedere aut judicare"* as "only laying obligations on a State, in this case, in the context of the extradition application of Mr. Hissène Habré, the Republic of Senegal" (Memorial of Belgium, Ann. B.7). Similarly, Belgium made clear to Senegal in its Note Verbale of 9 March 2006, that negotiations which it claimed were under way were with regard to "the extradition application in the case of Mr. Hissene Habré, in application of [Article 30 of the Convention against Torture]" (*ibid.*, Ann. B.8). Furthermore, in its Application, Belgium requested the Court to adjudge and declare that "failing the prosecution of Mr. H[issène] Habré, the Republic of Senegal is obliged to extradite him to *the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts*" (emphasis added). Belgium also insisted during the oral proceedings that Article 7, paragraph 1, of the Convention is to be interpreted as requiring the forum State "to submit the case to its competent authorities for the purpose of prosecution, unless it extradites that person to the State which so requests" (CR 2012/2, p. 15, para. 13 (Rietjens)). Additionally, counsel for Belgium argued that the preliminary inquiry required in Article 6, paragraph 2, was necessary to "implement the obligation to prosecute or, in default of prosecution, *to extradite if an extradition request has been made*" (CR 2012/3, p. 11 para. 11 (Wood); emphasis added).

24. Belgium had no right to insist upon the extradition of Mr. Habré, and Senegal was under no obligation to extradite him to Belgium, as long as Senegal complied with its obligation to submit Mr. Habré's case to its competent authorities for prosecution. It is only the violation of the obligation to submit the case for prosecution which engages the responsibility of the State on whose territory the suspect is present. Should such a State, however, prefer to extradite the suspect, instead of prosecuting him or her in its tribunals, it has the choice of doing so. Additionally, with respect to extradition within the context of the Convention against Torture, it

should be stressed that the State to which a request for extradition has been made is not under an obligation to extradite the suspect to the requesting State. Thus, Senegal had no obligation to extradite Mr. Habré to Belgium, unless it decided to do so simply because it wanted to relieve itself of the obligation to submit his case for prosecution by its own authorities and on its territory.

(Signed) Abdulqawi A. YUSUF.