DECLARATION OF JUDGE DONOGHUE

Agrees with Court that Article 7, paragraph 1, sets forth an obligation to prosecute, not an obligation to extradite — Extradition relieves a State party from the obligation to prosecute — No need for Court to decide whether Belgium falls within Article 5, paragraph 1, because duties under Article 6, paragraph 2, and Article 7, paragraph 1, are erga omnes partes *— Not obvious that conclusions regarding substantive obligations of the Convention should be reached in the context of admissibility, rather than on the merits — Temporal scope of obligation to prosecute does not extend to alleged offences from prior to Convention's entry into force — Senegal not precluded from prosecuting earlier offences — Court's analysis not limited by positions advanced by the Parties.*

1. I agree with the Judgment rendered by the Court today and submit this declaration in order to address in additional detail the meaning and effect of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter, the "Convention"), which play such an important role in the Court's reasoning.

2. Taken as a whole, Articles 4 to 7 of the Convention strike a powerful blow against impunity. Articles 4 and 5 provide the necessary conditions for States parties to initiate proceedings against alleged offenders, by requiring States parties to criminalize torture and to establish jurisdiction over torture in certain specified contexts. For purposes of this case, it is especially significant that Article 5, paragraph 2, requires a State party to establish its jurisdiction over an alleged offender found in its territory, even if the alleged acts of torture occurred outside of its territory and neither the alleged offender nor the victims are of its nationality. But States parties are not merely required to create the conditions that would permit them to prosecute alleged torturers. Instead, Articles 6 and 7 require a State party to take a series of related, specific steps if it finds an alleged offender in its territory, including placing the individual in custody, conducting an immediate inquiry and submitting the case to prosecution, if it does not extradite the alleged offender. The question whether Senegal complied with these obligations, in particular, those under Article 6, paragraph 2, and Article 7, paragraph 1, is at the heart of this case.

3. The obligations of the State in which an alleged offender is found — especially the obligation contained in Article 7, paragraph 1 — are often described by the shorthand phrase "extradite or prosecute" or *"aut dedere aut judicare"*. That phrase is misleading because it suggests an obligation to extradite. I agree with the Court, however, that this is not the correct understanding of Article 7, paragraph 1, and that the obligation under Article 7, paragraph 1, is to submit a case for prosecution.

4. Article 7, paragraph 1, provides:

> "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

From the text alone, it is clear that prosecution and extradition are not on equal footing. The provision obligates a State party to "submit the case to its competent authorities for prosecution". Extradition relieves the State party from that obligation. The option of extradition in lieu of submission to prosecution is an important component of the anti-impunity provisions of the Convention; there are many circumstances in which extradition might be the more effective means of bringing an alleged offender to justice. Nonetheless, extradition is not required by this provision nor by any other provision of the Convention.

5. In the present case, the Parties have devoted considerable attention to Belgium's extradition requests and to the fact that, to date, Senegal has not extradited Mr. Habré. It bears emphasis, however, that the Court does not come to any conclusions regarding those extradition requests.

6. Given that the obligation in Article 7, paragraph 1, is to submit the case for prosecution, it is important to consider what triggers that obligation. Article 7, paragraph 1, requires the State in the territory of which the alleged offender is found to submit the case for prosecution "if it does not extradite [the alleged offender]". Does this mean that the obligation to submit a case for prosecution only arises when there has been an extradition request? Again, the attention given by the Parties to Belgium's extradition requests might suggest that Senegal's obligation to submit Mr. Habré's case for prosecution flows from the failure to extradite, but, like the Court, I do not reach this conclusion. Instead, I agree with the conclusion in the Judgment that the obligation to submit a case to prosecution is independent of an extradition request.

7. The closely-related obligations contained in Articles 6 and 7 arise as a result of the presence of the alleged offender in the territory of the State party. Under Article 6, when a State party finds an alleged offender in its territory, it must place the alleged offender in custody, immediately make a preliminary inquiry into the facts and notify other States parties that

would have a basis under the Convention to exercise jurisdiction. Notably, the obligation to hold the alleged offender in custody applies "only for such time as is necessary to enable any criminal or extradition proceedings to be *instituted*" (Art. 6, para. 1; emphasis added). Thus, the obligations in Article 6 plainly arise before any extradition proceedings have commenced. If Article 7 required submission of a case for prosecution only after an extradition request, the placement of the individual in custody and the conduct of a preliminary inquiry in the absence of such a request would be without purpose.

8. The Court's conclusion that the obligations under Articles 6 and 7 are independent of an extradition request is important to its analysis of Belgium's standing in this Court. Belgium's extradition requests did not give rise to Senegal's duties under Articles 6 and 7; those duties were a consequence of the presence in Senegal of an individual alleged to be responsible for torture. The Court therefore has no need to decide whether Belgium falls within Article 5, paragraph 1, of the Convention (which refers to the exercise of jurisdiction by a State "[w]hen the victim is a national of that State"). This is why, in considering standing, the Court need not concern itself with the fact that none of the complainants in the proceedings underlying the Belgian extradition requests had Belgian nationality when the alleged offences occurred.

9. The Court makes a number of important observations in the course of its conclusion that Belgium has standing to pursue this case against Senegal. Having established that the duty to prosecute is triggered by the presence of the alleged offender (and thus is not conditioned on an extradition request), the Court considers to whom that duty is owed. I agree with the Court that Senegal's duties to conduct a preliminary inquiry and to submit Mr. Habré's case for prosecution is owed to all States parties. Here, it is again important to bear in mind the combined package of obligations comprising Articles 4 to 7 of the Convention.

10. Articles 4 and 5 unquestionably impose a duty on States parties to put in place legislation. This duty must correspond to a right on the part of some or all of the other State parties; this is inherent in the nature of treaty relations. A State party's adherence to this duty to legislate is of consequence to all other States parties, so it is difficult to see why the duty would be owed to some States parties but not to others. In addition, under Article 6, a State party incurs the duty to place the individual in custody and immediately to make a preliminary inquiry, whenever an individual allegedly responsible for torture is present in its territory, without limitation as to the location of the alleged offence or the nationality of the victim or alleged offender. Once again, a breach of these obligations is of consequence to all States parties. For each of these provisions, therefore, it can be said that the State in the territory of which

the offender is found has duties that correspond to rights on the part of all other States parties.

11. If the text of Article 7, paragraph 1, is considered in isolation from the related obligations in Articles 4, 5 and 6, it might be argued that the obligation set forth in Article 7, paragraph 1, is owed not to all States parties, but only to certain States. In particular, Article 7, paragraph 1, requires submission for prosecution "in cases contemplated in Article 5". This might be seen to suggest that the duty to submit a case for prosecution is owed only to States that fit within Article 5: the State in the territory of which the offence allegedly occurred; the State of the offender's nationality; and the State of the victim's nationality (if that State exercises jurisdiction based on a victim's nationality). This more parsimonious approach would greatly reduce the potency of the related obligations in Articles 4 to 7 of the Convention. It would mean, for example, that the State where the alleged offender is located owes no duty to any other State in a situation in which the alleged torture occurs in its territory and the victim and alleged offender are nationals of that State. The territorial State would be free to accord impunity to the alleged offender. The problem would persist if the alleged offender fled to the territory of another State. The State in the territory of which the alleged offence occurred (which, in this example, is also the State of nationality of the alleged offender and of the victim) might decide not to invoke the responsibility of the State in the territory of which the alleged offender is located. If the latter State owes no duty to any other State party, the alleged offender will enjoy precisely the sort of safe haven that the Convention was intended to eliminate. These situations are hypothetical, but they are not far-fetched. They serve to illustrate that the obligations at issue could be entirely hollow unless they are obligations *erga omnes partes*.

12. For these reasons, I conclude that the duties imposed by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention are duties *erga omnes partes*. This characterization may not fit every provision of the Convention. Moreover, an "extradite or prosecute" provision in another treaty would give rise to a duty to a particular State if, in fact, it required extradition.

13. As a consequence of its conclusion that the duties under Article 6, paragraph 2, and Article 7, paragraph 1, are owed to all States parties, the Court concludes that Belgium has standing in this Court to invoke Senegal's responsibility in respect of the alleged breach of these duties. The Court integrates into a single step its understanding of the primary rules specified in the Convention; their *erga omnes* character; and the secondary rules of State responsibility (i.e., that Belgium may invoke Senegal's responsibility). In all respects, the Court's analysis turns on substantive law.

14. These issues of substantive law might well have been examined as part of the Court's analysis of the merits. In the Judgment, however, the

Court frames the issue as a question of standing, which, in turn, it treats as an aspect of admissibility. As the Court has stated before, objections to admissibility

> "normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29).

Such reasons could include "a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120).

15. It is not obvious that the content of certain duties imposed by the Convention against Torture, or the question as to which States parties those duties are owed, should fall within this category of obstacles to the exercise of the Court's jurisdiction. The Court's decision to address these questions under the rubric of admissibility is without practical effect in the present case, in which jurisdiction, admissibility and the merits were all considered in the same phase of the proceedings. The matter may require further analysis and elaboration in future cases in which an Application is premised on obligations *erga omnes partes*.

16. In respect of the question of standing, I have also considered that the compromissory clause of the Convention permits States to opt out of the jurisdiction of this Court (see Art. 30, para. 2). The suggestion has been made that this flexibility as to dispute resolution undermines the conclusion that a State's duties to conduct an immediate inquiry and to submit a case for prosecution are duties *erga omnes partes*. That reasoning would apply to many human rights treaties that permit flexibility as to dispute resolution mechanisms. I am not convinced that such institutional provisions detract from the *erga omnes partes* character of particular obligations.

17. When the Court concluded that the *erga omnes* character of a norm could not itself be the basis for the Court's jurisdiction, it observed that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64). The *erga omnes partes* character of provisions of the Convention against Torture defines the duties of all

States parties, as a matter of substantive law. All States parties have an obligation to implement those duties in good faith, regardless of the dispute resolution mechanisms associated with the particular treaty. Thus, I do not see how flexibility as to dispute resolution mechanisms could erode the substance of a State's duties under a treaty. They are, once again, "two different things". The fact that the Court chose to analyse Belgium's substantive rights as a question of admissibility does not change this conclusion.

18. I have one final point regarding the interpretation of Article 7, paragraph 1, relating to the temporal scope of the obligation to submit a case for prosecution. I agree with the Court that Senegal's obligation to submit Mr. Habré's case to prosecution does not extend to offences that allegedly occurred prior to entry into force of the Convention. As the Court observes, treaties are not interpreted to bind parties in relation to facts that took place prior to their entry into force unless a different intention is established. This presumption is of particular relevance when considering treaty provisions that impose obligations in the field of criminal law. The obligation to submit a case for prosecution can be interpreted to apply to acts allegedly committed before entry into force only if the Convention also requires a State party to criminalize torture retroactively (under Article 4) and to establish its jurisdiction retroactively (under Article 5). There is nothing in the treaty, nor, to my knowledge, in the *travaux préparatoires,* indicating such an intention.

19. There is an important distinction, however, between the conclusion that Senegal is not required by the treaty to prosecute for offences that allegedly occurred before the entry into force of the Convention and the question whether it has discretion to do so. As the Court notes, nothing in the Convention precludes Senegal from submitting for prosecution offences that occurred before entry into force of the Convention. Looking beyond the Convention, Article 15 of the 1966 International Covenant on Civil and Political Rights reflects a general prohibition on retroactive criminal laws, which also is a part of many national legal systems. Nonetheless, the Covenant admits of exceptions for offences that previously had been recognized as crimes. A State might therefore decide to prosecute an alleged offender in respect of acts of torture committed prior to enactment of a particular statute because it concludes that the conduct in question was criminal even before enactment of that particular statute. But the prospect that such retroactive application of a statute would be lawful does not mean that the Convention *requires* a State party to enact retroactive criminal statutes. I agree with the Court that the Convention cannot be interpreted to have imposed *sub silentio* an obligation to enact retroactive criminal laws.

20. I also note that the Court's conclusion on the temporal scope of Article 7, paragraph 1, does not free Senegal from the obligation to

prosecute Mr. Habré, because the claims made against Mr. Habré include many serious offences allegedly committed after 26 June 1987, as is clear from the complaints filed in Senegalese and Belgian courts.

21. The dispositive paragraphs of today's Judgment bind only the Parties. Nonetheless, the Court's interpretation of a multilateral treaty (or of customary international law) can have implications for other States. The far-reaching nature of the legal issues presented by this case is revealed by the number of questions posed by Members of the Court during oral proceedings. The Court would be ill-advised in such circumstances to confine itself to the legal conclusions advanced by the two States that happen to appear before it. In *Jurisdictional Immunities of the State* (*(Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 99), for example, two States from a single region, with a common legal tradition, agreed on many aspects of the law governing foreign State immunity. Because its conclusions had implications for other States, however, the Court conducted its own analysis of customary international law. In interpreting the Convention against Torture, the Court once again wisely has not limited itself to positions advanced by the Parties.

(Signed) Joan E. DONOGHUE.