SEPARATE OPINION OF JUDGE SEBUTINDE

Two bases of jurisdiction invoked by Belgium — Cumulative preconditions for the Court's jurisdiction based on Article 30, paragraph 1, of the Convention — The existence of a dispute concerning the interpretation or application of the Convention — The precondition that the dispute "cannot be settled through negotiation" has not been met — The preconditions of prior request for arbitration and failure to agree on the organization of such arbitration within six months from the date of the arbitration request have not been met — The Court cannot exercise jurisdiction over the dispute on the basis of Article 30, paragraph 1, of the Convention against Torture — Jurisdiction pursuant to the Parties' declarations under Article 36, paragraph 2, of the Statute of the Court — The dispute concerning Senegal's obligations under the Convention against Torture falls within the scope of Court's jurisdiction on the basis of Article 36, paragraph 2, of the Statute — Court's jurisdiction is not precluded by virtue of the Parties' reservations to their declarations pursuant to Article 36, paragraph 2, of the Statute — Court's jurisdiction pursuant to Article 36, paragraph 2, of the Statute does not extend to the alleged violations by Senegal of its obligations other than those arising under the Convention against Torture.

1. I have voted in favour of the operative part of the Judgment including point (1) where the Court

> "*Finds* that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application 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, which the Kingdom of Belgium submitted to the Court in its Application filed in the Registry on 19 February 2009."

2. That finding is premised upon the reasoning and conclusions of the Court found in Part II of the Judgment, in particular that

> "Given that the conditions set out in Article 30, paragraph 1, of the Convention against Torture have been met, the Court concludes that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.
>
> Having reached this conclusion, the Court does not find it necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute." (Judgment, para. 63.)

3. Whilst I agree that the Court does have jurisdiction to entertain Belgium's Application to the extent indicated in the Judgment, I am respectfully of the view that such jurisdiction can only derive from the Parties' declarations pursuant to Article 36, paragraph 2, of the Statute of the Court, and not from the provisions of Article 30, paragraph 1, of the Convention against Torture (hereinafter referred to as "the Convention"). In this regard, past jurisprudence of the Court shows that in interpreting and applying treaty provisions similar to those of Article 30, paragraph 1, of the Convention, the Court has set a standard of compliance. It is my considered opinion that in the present case the preconditions of negotiations and arbitration have not been fulfilled and that consequently that standard has not been met. What follows is my analysis of the facts and the Parties' submissions upon which I base my opinion and conclusions in that regard.

I. Jurisdiction Based on Article 30, Paragraph 1, of the Convention against Torture

4. To establish the jurisdiction of the Court, Belgium relies, firstly, on the compromissory clause contained in Article 30, paragraph 1, of the Convention and, secondly, on the declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court (Memorial of Belgium, Ann. A.2).

5. Senegal challenges the Court's jurisdiction under Article 30, paragraph 1, of the Convention, as well as the admissibility of Belgium's claims. First, it argues that there is no "dispute" between the Parties in respect of which the Court could exercise jurisdiction. Secondly, it maintains that Belgium's Application must be declared inadmissible because Belgium has not exhausted the avenues of "negotiation" and "arbitration" before referring the matter to the Court (Counter-Memorial of Senegal, para. 121).

6. It should be noted that although Senegal refers to Belgium's alleged non-fulfilment of the procedural requirements laid down in Article 30, paragraph 1, of the Convention as rendering Belgium's claim "inadmissible", this objection clearly pertains to jurisdiction and must thus be examined in that context (see *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*, pp. 39-40, para. 88).

7. In its Order of 28 May 2009, the Court held that it had prima facie jurisdiction under Article 30 of the Convention (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 53). It also concluded that there is consequently "no need to ascertain, at this stage of the proceedings, whether the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute might also, prima facie, afford a basis on which the Court's jurisdiction could be founded"

(*I.C.J. Reports 2009*, p. 151, para. 54). However, in the Order, the Court also indicated that this provisional conclusion is without prejudice to the Court's final decision on the question of whether it has jurisdiction to deal with the merits of the case (*ibid.*, p. 155, para. 74).

8. Article 30, paragraph 1, of the Convention provides as follows:

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

Both Senegal and Belgium are parties to the Convention which is binding upon them as from 26 August 1987 and 25 July 1999, respectively. Neither Party entered any reservation or made any relevant declaration in relation to jurisdiction of the Court under Article 30 thereof.

9. It is apparent from the language of Article 30, paragraph 1, that in order for the Court to have jurisdiction on this basis, the following four conditions must be fulfilled. Firstly, a dispute must have existed between the Parties concerning the interpretation or application of the Convention (see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 148-149, para. 46). Secondly, the Parties must have failed to settle the dispute through negotiations (see also *ibid.*, pp. 149-150, para. 49). Thirdly, failing settlement through negotiation, either Party must have requested that the dispute be submitted to arbitration. Lastly, the Parties must have failed to agree on the organization of the arbitration within six months from the date when such arbitration was requested (see also *ibid.*, p. 150, para. 51). As the Court has confirmed in respect of a compromissory clause of a similar type, these conditions are cumulative (*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*, pp. 38-39, para. 87). An examination of the facts in this case clearly shows that not all the above conditions were fulfilled at the time of the filing of the Application as required by Article 30, paragraph 1, of the Convention.

A. Was There a Dispute between the Parties concerning the Interpretation or Application of the Convention at the Time Belgium's Application Was Filed on 19 February 2009?

10. Regarding the first condition, I am in complete agreement with the Court's analysis of the facts, as well as its findings and conclusion that "any dispute that may have existed between the Parties with regard to the

interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed" and that the Court therefore "lacks jurisdiction to decide on Belgium's claim relating to the obligation under Article 5, paragraph 2" (Judgment, para. 48). Furthermore, I am in agreement with the Court's analysis of the facts, findings and conclusion with regard to Belgium's claim under Article 6, paragraph 2, and Article 7, paragraph 1, that

> "Given that Belgium's claims based on the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention were positively opposed by Senegal, the Court considers that a dispute in this regard existed by the time of the filing of the Application. The Court notes that this dispute still exists." (*Ibid.*, para. 52.)

B. Was the Dispute between Belgium and Senegal One that Could Not Be Settled through Negotiations?

11. Regarding the second condition, Belgium contends that notwithstanding several diplomatic exchanges with Senegal requesting the latter to prosecute Mr. Habré for alleged acts of torture, or alternatively to extradite him to Belgium, Senegal has not "initiated or sought to prolong the negotiations" rendering the dispute "not capable of being settled through negotiation" (Memorial of Belgium, para. 3.22). In Belgium's view, the negotiations which started in November 2005, had proven futile by June 2006 (*ibid.*, paras. 3.18-3.21), a fact expressly communicated to Senegal in Belgium's Note Verbale of 20 June 2006 (*ibid.*, Ann. B.11).

12. Senegal argues that no negotiations within the meaning of Article 30, paragraph 1, of the Convention have ever taken place between the Parties as there "[h]as never been any offer [by Belgium], to negotiate; never any of the exchanges characteristic of diplomatic negotiations" (Counter-Memorial of Senegal, paras. 121 and 190). Senegal contends that Belgium failed in its duty to negotiate in as far as its diplomatic exchanges consisted of general questions aimed at eliciting factual information concerning the status of the proceedings or about the Senegalese Government's plans in respect of the *Habré* case, to which questions Senegal had always provided answers (*ibid.*, paras. 190, 195, 200 and 204).

13. In line with the well-established jurisprudence of this Court and its predecessor, the requirement that "a dispute cannot be settled through negotiation", is met only where genuine attempts at negotiations, aimed at resolving the dispute, have actually taken place between the parties and have failed or become futile or deadlocked (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J.*

Reports 2011 (I), p. 133, para. 159, citing earlier cases). The Court explained that negotiation differs from "mere protests or disputations" and "requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" (*ibid.*, p. 132, para. 157).

14. Concerning the substance of negotiations envisaged under this condition, the Court has stated that whilst "the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction" (*ibid.*, p. 133, para. 161), these negotiations must, at the very least, "relate to the subject-matter of the treaty containing the compromissory clause" *(ibid.)*.

15. Finally, the obligation to negotiate entails not only an obligation to enter into negotiations, "but also to pursue them as far as possible, with a view to concluding agreements [even if] an obligation to negotiate does not imply an obligation to reach agreement" (*ibid.*, pp. 132-133, para. 158, citing earlier cases).

16. In light of the above standard, it is necessary to examine whether the facts before the Court demonstrate: *(a)* that Belgium made genuine attempts to enter into negotiations with Senegal and, if so, whether the former pursued those negotiations as far as possible with a view to resolving the dispute between the Parties; and *(b)* that these negotiations had proven unsuccessful before Belgium submitted its Application to the Court on 19 February 2009 (see also *ibid.*, p. 134, para. 162). The diplomatic exchanges on record show that the dispute between the Parties arose at the earliest in late 2005 when Belgium submitted to Senegal its first extradition request in respect of Mr. Habré.

17. In the Note Verbale of 11 January 2006 (Memorial of Belgium, Ann. B.7), Belgium stated that it is providing clarifications to Senegal concerning its extradition request of 22 September 2005, "in the framework of the negotiation procedure covered by Article 30 of the [Convention]". In its Note Verbale of 9 March 2006 (*ibid.*, Ann. B.8), Belgium stated:

> "As the procedure for negotiation with regard to the extradition application in the case of Mr. Hissène Habré, in application of Article 30 of the [Convention] is under way, Belgium wishes to point out that it interprets the provisions of Articles 4, 5.1c, 5.2, 7.1, 8.1, 8.2, 8.4 and 9.1 of the [Convention] as requiring the State on whose territory the alleged author of an offence under Article 4 of the [Convention] is located to extradite this offender, unless it has judged him on the basis of the charges covered by said article.
>
> Belgium would therefore be grateful if the Government of Senegal would be so kind as to inform it as to whether its decision to transfer the *Hissène Habré* case to the African Union is to be interpreted as meaning that the Senegalese authorities no longer intend to extradite him to Belgium or to have him judged by their own Courts."

18. Two months later, in its Note Verbale of 4 May 2006 (Memorial of Belgium, Ann. B.9), Belgium expressed concerns about the absence of an official reaction by Senegal to its previous diplomatic Notes. It reiterated its interpretation of Article 7 of the Convention as "requiring the State on whose territory the alleged offender is located to extradite him unless it has judged him" and emphasized that "[a]n unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the [Convention]". In a Note Verbale of 9 May 2006 (*ibid.*, Ann. B.10), Senegal considered that it had provided its response to Belgium in respect of the extradition request in its earlier Notes, and stated that by referring the *Habré* case to the African Union it was "acting in accordance with the spirit of the principle *'aut dedere aut punire'*". Senegal also "[took] note of the possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the Convention". In its response in a Note Verbale of 20 June 2006 (*ibid.*, Ann. B.11), Belgium, considering that Senegal had acknowledged that these diplomatic exchanges were taking place within the framework of negotiation under Article 30 of the Convention and recalling that Belgium had wished to open negotiation with Senegal in respect of its interpretation of the Convention, pointed out that "the attempted negotiation with Senegal . . . ha[d] not succeeded".

19. In my view, these diplomatic exchanges demonstrate a genuine attempt by Belgium at negotiating with Senegal the issue of Senegal's compliance with its substantive obligations under the Convention. It is, however, doubtful whether by June 2006 Belgium had in fact pursued these negotiations as far as possible with a view to settling the dispute. This question is especially justified in light of the short period of time that had lapsed by that point since Belgium's first reference to negotiations in January 2006, and given that only a few Notes had been exchanged between the Parties during this period. In this regard, it is recalled that the short period of time in which the diplomatic exchanges were made between the Parties in the framework of negotiations does not *per se* preclude the failure or a deadlock of negotiation as the Permanent Court of International Justice noted in the *Mavrommatis Palestine Concessions* case, where it stated:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13; emphasis in the original.)

20. Such was the situation in the case concerning *United States Diplomatic and Consular Staff in Tehran*, where the attempts by the United States to negotiate with Iran were met with complete refusal of the

Iranian Government to enter into any discussion of the matter or to have contact with representatives of the United States, leading the Court to conclude, despite the very short period of time between the occurrence of the dispute and the date of the application to the Court, that this dispute was one "not satisfactorily adjusted by diplomacy" within the meaning of the relevant jurisdictional clause (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 15, para. 26, and p. 27, para. 51).

21. However, the situation in the present case is not comparable to that cited above. Senegal's reply, albeit not immediate, to Belgium's Notes of 11 June, 9 March and 4 May 2006, can hardly be seen as expressing a refusal to discuss the issue of its compliance with the Convention or as adopting any such position in this regard which could be viewed as irreconcilable with Belgium's claims. To the contrary, in the Note Verbale of 9 June 2006, Senegal merely clarified, in reply to Belgium's inquiry, that its courts have declined to rule on Belgium's extradition request due to lack of jurisdiction, and that it considers itself as already "acting in accordance with the spirit of the principle *'aut dedere aut judicare'*" by having referred the *Habré* case to the African Union for recommendation as to the further course of action in this regard. Whilst this statement attests to the existence of a dispute between the Parties as to Senegal's compliance with its obligations under the Convention, it does not in my view, demonstrate a failure or collapse of negotiation on the matter.

22. Furthermore, after Belgium's Note Verbale of 20 June 2006 whereby Belgium declared negotiation as "unsuccessful", there were further diplomatic exchanges between the Parties indicating that Belgium nonetheless continued *de facto* to negotiate with Senegal with a view to resolving the dispute, including expressing its willingness to support Senegal's efforts to prosecute Mr. Habré by its own Court as long as that is done within a reasonable period (Belgium's Note Verbale of 8 May 2007 (Memorial of Belgium, Ann. B.14) and 2 December 2008 (*ibid.*, Ann. B.16)). Notably, in its last Note Verbale before its Application to the Court, dated 2 December 2008 (*ibid.*, Ann. B.16), Belgium merely noted the legislative changes by Senegal enabling the prosecution of Mr. Habré in Senegal, and reiterated its offer of judicial co-operation on the matter.

23. In my view, the diplomatic exchanges between the Parties indicate that negotiations on the matters in dispute between the Parties continued right up to December 2008 and cannot be considered to have failed by June 2006, nor, for that matter, at any other time prior to the date of Belgium's Application on 19 February 2009. In this regard, I respectfully disagree with the findings and conclusions of the Court to the effect that "the condition set forth in Article 30, paragraph 1, of the Convention that the dispute cannot be settled by negotiation has been met" (Judgment,

para. 59). This brings me to the third requirement, namely, whether either of the Parties requested for arbitration as a means of settling the dispute.

C. Did Belgium Request that the Dispute Be Submitted to Arbitration?

24. Belgium submits that it announced the possibility of having recourse to arbitration in its Note Verbale of 4 May 2006 and that Senegal took note of this possibility in the latter's Note Verbale of 9 May 2006 (Memorial of Belgium, para. 3.23; CR 2012/2, p. 27, para. 34, and p. 61, para. 49). Belgium further argues that it formally requested recourse to arbitration under mutually agreed conditions in its Note Verbale of 20 June 2006, and that it repeated the request in its Note Verbale of 8 May 2007, but that its request had "met with no answer" from Senegal, either in the ensuing six months or thereafter (Memorial of Belgium, paras. 3.23-3.28). In response to a question by a Member of the Court concerning the interpretation of the arbitration requirement in Article 30, paragraph 1, of the Convention, Belgium opined that the condition that the Parties are unable to agree on the organization of the arbitration within six months from the arbitration request "is met if, for any reason, the period expires without agreement on the arbitration" (CR 2012/6, p. 39, para. 11). In Belgium's view, Article 30, paragraph 1, does not require that a State requesting to submit the dispute to arbitration must also propose any aspect of the organization or the time-frame of the arbitration (*ibid.*, p. 40, para. 14).

25. In response, Senegal argues that the criteria requiring the request by one of the Parties for arbitration, as well as the lapse of a six-month period without the Parties being able to agree on the organization of the arbitration, have not been met (Counter-Memorial of Senegal, paras. 121 and 214). It maintains that Belgium made only one "evasive" reference to arbitration in its Note Verbale of 20 June 2006, which cannot be considered as constituting a clear and formal proposal for arbitration to which Senegal could possibly have replied in order to fulfil the requirement under Article 30, paragraph 1, of the Convention (*ibid.*, paras. 207-210).

26. In the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, the Court, in interpreting a similar compromissory clause contained in Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women, held that

> "[T]he lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant,

to which the respondent has made no answer or which it has expressed its intention not to accept." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 41, para. 92.)

27. In the present case, Belgium first mentions the prospect of arbitration in its Note Verbale of 4 May 2006 in the following terms:

> "As indicated in its last approach of 10 March 2006, Belgium interprets Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him unless it has judged him.
>
> *An unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure* provided for in Article 30 of the [Convention].
>
> In view of the willingness already expressed by Senegal to combat impunity for the most serious crimes such as those of which Mr. Hissène Habré is accused, Belgium once more insists on Senegal respecting the obligations arising from the [Convention] and responding to the request by the Belgian authorities accordingly." (Emphasis added.)

Five days later, Senegal in its Note Verbale of 9 May 2006 responded, *inter alia*, as follows:

> "(2) With regard to the interpretation of Article 7 of the [Convention], the Embassy considers that by transferring the *Hissène Habré* case to the African Union, Senegal, in order not to create a legal impasse, is acting in accordance with the spirit of the principle *'aut dedere aut punire'* the essential aim of which is to ensure that no torturer can escape from justice by going to another country.
>
> (3) By taking this case to the highest level on the continent, Senegal, while respecting the separation of powers and the independence of its judicial authorities, has thus opened up, throughout Africa, new prospects for upholding human rights and combating impunity.
>
> (4) *As to the possibility of Belgium having recourse to the arbitration procedure* provided for in Article 30 of the [Convention], the Embassy *can only take note of this*, restating the commitment of Senegal to the excellent relationship between the two countries in terms of co-operation and the combating of impunity." (Emphasis added.)

28. Taken at face value, Belgium's Note Verbale of 4 May 2006 cannot be regarded as "a request to submit the dispute to arbitration" within the meaning of Article 30, paragraph 1, of the Convention. In my opinion, what the diplomatic exchange did was to alert Senegal to the prospect that Belgium reserved its right, at some future date, to refer the dispute, if unresolved, to arbitration within the framework of Article 30, para-

graph 1, of the Convention. Indeed, Senegal appears to have interpreted that Note Verbale in this way, merely noting that prospect. Senegal's response in this regard cannot be described as "non-responsive" or "a rejection of an arbitration request" within the meaning of established case law.

29. In my view, the closest that Belgium came to putting a direct request for arbitration to Senegal was in its Note Verbale of 20 June 2006, wherein it stated, *inter alia*:

> "While confirming to Senegal its attachment to the excellent relationship between the two countries, and while following with interest the action carried out by the African Union in the context of combating impunity, Belgium cannot fail to point out that the attempted negotiation with Senegal, which started in November 2005, has not succeeded and, in accordance with Article 30.1 of the Torture Convention consequently asks Senegal to submit the dispute to arbitration under conditions to be agreed mutually."

The above statement raises questions as to whether under Article 30, paragraph 1, of the Convention, Belgium, by shifting the burden to Senegal to submit the dispute to arbitration, rather than Belgium itself taking that initiative, the latter can be said to have "requested for arbitration". I doubt that that is the case. Nonetheless, Senegal did not respond to Belgium's request within six months or at all and perhaps the Court is justified in interpreting Senegal's silence as "the absence of any response on the part of the State to which the request for arbitration was addressed" (Judgment, para. 61).

30. Be that as it may, I am of the considered opinion that, in light of my earlier conclusion that neither Belgium nor Senegal had pursued negotiations regarding the dispute as far as they possibly could before concluding that they had failed, and given that the procedural requirements of negotiation and arbitration under Article 30, paragraph 1, of the Convention, are cumulative, I am not convinced that the preconditions for the Court's jurisdiction under that provision have fully been met.

31. Accordingly, I am of the view that given that the procedural requirements laid down in Article 30, paragraph 1, of the Convention against Torture had not been met at the date of the Application on 19 February 2009, the Court cannot exercise jurisdiction over the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention on the basis of Article 30, paragraph 1, thereof. This brings me to the issue of whether in the absence of jurisdiction pursuant to Article 30, paragraph 1, of the Convention, the Court can exercise jurisdiction based on the Parties' declarations pursuant to Article 36, paragraph 2, of the Court's Statute. This is an issue the Court did not address, having concluded in light of its findings that it was not necessary to do so (*ibid.*, para. 63).

II. Jurisdiction Based on the Parties' Declarations of Acceptance of Compulsory Jurisdiction of the Court under Article 36, Paragraph 2, of the Statute of the Court

32. Belgium sought to found the jurisdiction of the Court on the declarations of acceptance of compulsory jurisdiction of the Court made by the Parties under Article 36, paragraph 2, of the Statute of the Court, the text of which is reproduced in the Judgment (para. 42).

33. Belgium's declaration, in effect since 17 June 1958, applies to "legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement" (Judgment, para. 42). Senegal's declaration, in effect since 2 December 1985, extends to "all legal disputes arising after the present declaration", save for: *(a)* disputes in regard to which the parties have agreed to have recourse to some other method of settlement; and *(b)* disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal *(ibid.)*. Thus, by virtue of reciprocity applied to the two declarations of acceptance, the competence of the Court extends to all legal disputes arising between the Parties after 2 December 1985 with the exception of disputes in regard to which the Parties have agreed to have recourse to some other method of settlement and disputes concerning questions which fall exclusively within the domestic jurisdiction of one of the Parties.

34. Only Belgium submitted arguments on this issue, maintaining that the Court has jurisdiction under Article 36, paragraph 2, of its Statute, over the entire dispute between the Parties, both with regard to the Convention and with regard to other rules of conventional and customary international law (Memorial of Belgium, para. 3.44; CR 2012/2, p. 65, para. 5). First, as regards the existence of a dispute, Belgium argues that the Parties disagree as to the application and interpretation of conventional and customary international obligations regarding the punishment of torture, crimes against humanity, war crimes and genocide (Memorial of Belgium, para. 3.34). In Belgium's view Senegal had not only failed to prosecute or extradite Mr. Habré for the international crimes alleged against him, but had also shown, "through its actions and inaction", that "it did not interpret conventional and customary rules in the same way as Belgium" (*ibid.*, para. 3.35). Secondly, in respect of the temporal limits of the Court's jurisdiction under Article 36 declarations, Belgium contends that the dispute between the Parties crystallized when it became apparent that Senegal would neither extradite Mr. Habré to Belgium nor prosecute him, and thus relates to the facts occurring entirely after the two dates of application of the Parties' respective declarations of acceptance, falling clearly within the temporal scope of the Court's jurisdiction (*ibid.*, paras. 3.37-3.40; CR 2012/2, p. 68, para. 14). Finally, Belgium contends that the Court's jurisdiction under the Article 36, paragraph 2, declara-

tions is not excluded by virtue of the exceptions contained therein, since the Parties have neither agreed on another method of settling this dispute nor does the dispute, relating to violations of conventional or customary rules of international law, fall within the exclusive jurisdiction of either Party (Memorial of Belgium, paras. 3.41-3.43; see also CR 2012/2, pp. 68-69, paras. 15-16).

35. In response to a question by a Member of the Court concerning the relationship between the exceptions contained in Belgium's and Senegal's respective declarations of acceptance in respect of other modes of dispute settlement, Belgium maintains that these exceptions do not affect the Court's jurisdiction on the basis of Article 30 of the Convention, since that provision refers to negotiations and arbitration as procedural preconditions to be fulfilled prior to the seisin of the Court, rather than as "alternative" modes of dispute settlement. Furthermore, in Belgium's view, the Court's jurisprudence confirms that different sources of the Court's jurisprudence, in the present case the declarations under Article 36, paragraph 2, of the Statute of the Court and Article 30 of the Convention, are independent from each other and are not mutually exclusive (CR 2012/6, pp. 29-32, paras. 10-17). Belgium emphasizes that the Court's jurisdiction pursuant to Article 30 of the Convention in respect of the dispute under the Convention is additional to the Court's jurisdiction under Article 36, paragraph 2, of the Court's Statute, which also applies to that dispute as well as to the other issues in dispute between Belgium and Senegal in the present proceedings (CR 2012/6, p. 36, para. 3).

A. Article 36 Declarations as the Basis for Jurisdiction of the Court in Respect of the Alleged Violations of the Convention

36. The Court has previously dealt with the question of multiple bases of jurisdiction. In the *Electricity Company of Sofia and Bulgaria* case, the Permanent Court of International Justice held that multiple bases of jurisdiction were not mutually exclusive: a treaty recognizing the jurisdiction of the Court did not prevent declarations of acceptance of the Court's jurisdiction having the same effect (*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 76). Similarly, in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, the Court found that when seised on the basis of Article 36, paragraph 2, which did not contain a precondition of negotiations, it did not matter that the basis of jurisdiction under the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") was more restrictive (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 322, para. 109).

37. This was affirmed in principle in the case concerning *Territorial and Maritime Dispute*, where the Court held that the "provisions of the Pact of Bogotá and the declarations made under the optional clause represent two distinct bases of the Court's jurisdiction which are not mutually exclusive" and noted that "the scope of its jurisdiction could be wider under the optional clause than under the Pact" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 873, paras. 136-137). Importantly, however, Article 36 declarations in that case were not subject to the reservation excluding disputes "in regard to which the parties have agreed . . . to have recourse to another method of pacific settlement".

38. Belgium also relies on the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 85, para. 36) in support of its proposition that titles of jurisdiction are separate and independent. According to Belgium,

> "the declaration of acceptance of Honduras contained a reservation equivalent to those in question in the present case. Despite the existence of that reservation, the Court confirmed that the two titles of jurisdiction were independent, rejecting the Honduran argument to the contrary." (CR 2012/6, pp. 30-31, para. 13.)

Specifically, in the *Border and Transborder Armed Actions* case, the Court held that the compromissory clause in the Pact of Bogotá, providing for the Court's jurisdiction, could be limited only by reservations made under the Pact, and not by incorporating reservations made by a State party in its declaration under Article 36, paragraph 2, of the Statute of the Court (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 88, para. 41).

39. Further, while Belgium is correct in suggesting that Article 30 should be interpreted as establishing preconditions for the seisin of the Court rather than as an "agreement" of the Parties to settle their Convention-related disputes through negotiation or arbitration rather than by recourse to the Court, this still leaves open the question of whether the Court may entertain a Convention-related dispute on the basis of the Article 36 declarations where these preconditions have not been met. On this point, Belgium's argument that there is no presumption of primacy of a restrictive rule over an extensive rule, on the basis that the Court had implied this in the *Cameroon* v. *Nigeria* case in 1998, is not without merit and must be considered carefully.

40. Indeed in the *Cameroon* v. *Nigeria* case, the Court noted that both States had referred to the UNCLOS, which provided for settlement of disputes, *inter alia*, by contentious proceedings before the Court, if no

agreement could be reached within a reasonable period of time. The UNCLOS was one of the treaties which governed the dispute between the Parties, and which the Court had to interpret, in that case. However, the Court held that as it had been seised under Article 36, paragraph 2, of its Statute, which did not provide for any precondition of negotiation, it did not matter whether negotiations had taken place prior to the submission of the dispute (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 321-322, para. 109). In the present case, Belgium is invoking both Article 30, paragraph 1, of the Convention and Article 36, paragraph 2, of the Statute of the Court, as additional but independent bases for the Court's jurisdiction. Given that the Parties have accepted the Court's jurisdiction under Article 36, paragraph 2, of its Statute, and that Article 30, paragraph 1, of the Convention does not fall within the scope of their reservation excluding other agreements for the pacific settlement of disputes, I am of the tentative view that the failure to fulfil the conditions required under Article 30, paragraph 1, of the Convention has no bearing on the Court's jurisdiction under Article 36, paragraph 2, of the Statute of the Court, even in relation to a dispute concerning Senegal's obligations under the Convention.

B. Article 36 Declarations as the Basis for Jurisdiction of the Court in Respect of the Claims relating to International Crimes Other than Those Subject to the Convention

41. With regard to the question of whether the Court has jurisdiction in respect of the alleged breaches by Senegal of its obligations other than those arising under the Convention, there is no evidence before the Court that there was, as Belgium claims, a dispute between the Parties as to the application and interpretation of conventional and customary international obligations regarding the punishment of torture, crimes against humanity, war crimes and genocide at the date of Belgium's Application on 19 February 2009. The record before the Court shows that in the diplomatic exchanges between the Parties in the period prior to 19 February 2009, no claim was ever made by Belgium relating to Senegal's breach of any international obligations other than those under the Convention.

42. Accordingly, I am of the view that the Court does not have jurisdiction to examine Belgium's claims concerning the alleged violation by Senegal of its obligation *aut dedere aut judicare* on the basis of rules of international law other than the Convention.

(*Signed*) Julia SEBUTINDE.