INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE (BELGIUM *v.* SENEGAL)

COUNTER-MEMORIAL OF THE REPUBLIC OF SENEGAL

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INTRODUCTION

Before addressing the merits of the case, mention should be made of the following points:

— the procedure followed;

— the structure of the present Counter-Memorial;

— recapitulation of Senegal's position before the Court.

The procedure followed

1. The case before the Court was initiated by an Application dated 16 February 2009, filed in the Registry of the Court by the Kingdom of Belgium (hereinafter "Belgium") on 19 February, against the Republic of Senegal (hereinafter "Senegal"). The Belgian Application concerned a "dispute" relating to the interpretation and application of the 1984 United Nations Convention against Torture, a convention to which both of the States are parties. It is based on the existence of proceedings instituted against the former Head of State of Chad, currently residing in Senegal, in which Mr. Hissène Habré is accused of acts characterized as crimes of torture or other crimes under international law. These proceedings, which were initiated in 2000, 2001 and 2005 before Senegalese courts, do not appear to have provided satisfaction to the applicants.

2. Belgium, which also made a request for the extradition of the former Head of State in 2005, but was unable to obtain satisfaction, considers that Senegal has failed to fulfil its obligations as a State party to the Convention against Torture, which requires in particular that any person alleged to have committed offences under the Convention and found in the territory of the State party should be "extradited" or "prosecuted".

3. The Court's jurisdiction to hear and determine such a case is founded, according to Belgium, on the one hand on Article 30 of the Convention against Torture — which provides for referral to the Court in case of difficulty in the interpretation or application of the Convention — and, on the other hand, on the declarations recognizing the compulsory jurisdiction of the Court made by the two States in accordance with Article 36, paragraph 2, of the Statute of the Court.

[3.] When filing its Application, Belgium also submitted a request to the Court for the indication of provisional measures having regard to the risk that Senegal might, at any time, end the house arrest to which the former President of Chad is currently subject on its territory. At that time, Belgium requested the Court to indicate, pending a final judgment on the merits, measures to be taken by Senegal to ensure that Mr. Habré could not escape the surveillance of the Senegalese authorities.

In the Order made on 28 May 2009, the Court, "taking note of the assurances given by Senegal" held "that the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order"[21].

[21] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Provisional Measures, Order of 28 May 2009, para. 33.

4. After consulting the Parties, the Court issued an Order on 9 July 2009 fixing 9 July 2010 for the submission of a Memorial by Belgium and 11 July 2011 for the submission of a Counter-Memorial by Senegal. Belgium filed its Memorial on the date indicated. Senegal filed this Counter-Memorial pursuant to the Order of 9 July 2009 and that of 11 July 2011 fixing a new time-limit, 29 August 2011, for the filing of this Counter-Memorial.

5. In the meantime, more precisely by letter dated 15 June 2010, Senegal transmitted to the Court a "Note on the latest developments in Senegal's preparations for the trial of Mr. Hissène Habré since the delivery of the Order of 28 May 2009 on the request for the indication of provisional measures submitted by Belgium". It subsequently transmitted two further notes dated 22 June 2011 and [29] August 2011 respectively.

The structure of the present Counter-Memorial

Senegal's Counter-Memorial is structured as follows:

— Chapter 1 recapitulates the facts, as they occurred at both national and international level;

— Chapter 2 concerns the position of principle adopted by Senegal with regard to the handling of certain aspects of the case by various international bodies:

4 the United Nations Committee against Torture (I),

the African Union (II),

the Court of Justice of the Economic Community of West African States (ECOWAS) (III);

— Chapter 3 relates to the jurisdiction of the Court and the admissibility of Belgium's Application;

— Chapter 4 concerns Senegal's compliance with its obligations as a State party to the Convention against Torture. This provides the opportunity not only to rebut the allegations made by Belgium (I), but also to provide evidence that Senegal has already taken measures that are clearly consistent with fulfilment of its conventional undertakings and compliance with its customary obligations (II). On the first point, the Court will be able to find that no fault can be attached to Senegal, either in terms of adopting domestic measures to implement the Convention (A), or in terms of performing its obligation to "extradite or prosecute" (B). As for the second point — "first steps by Senegal to perform its obligations" —, initiatives can be mentioned (A) that are utterly irreconcilable with any allegation of an internationally wrongful act (B).

Recapitulation of Senegal's position before the Court

6. On the eve of the Court's consideration of the merits of this dispute, the Republic of Senegal wishes solemnly to recall that it has always conducted and continues to conduct its diplomatic affairs and international relations in accordance with the requirements laid down in the Charter of the United Nations, namely promotion of international peace and security, friendly relations among nations and the pacific settlement of any disputes that might arise between them.

7. Concerned that international law should be respected, the Republic of Senegal signed a declaration recognizing the jurisdiction of the Court on 22 October 1985. It has no qualms therefore about its case going before the principal judicial organ of the United Nations.

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8. Wishing to see the pacific settlement of disputes between States, Senegal is also deeply concerned that the international criminal justice system should be developed. It believes that combating impunity and punishing flagrant violations of human rights are major requirements of modern times, from which no State may be exempted. Any member of the international community that fails to comply with this essential duty is guilty of a particularly serious act. It was with this overriding obligation in mind that Senegal wished, in particular, to mark clearly and conspicuously the occasion of its accession to the Rome Statute of the International Criminal Court of 17 July 1998, which it was the first State to ratify, and that it expressed its intention to fulfil all of its obligations as a State party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the observance of which is today at issue before the Court.

9. As it made clear in the previous phase of the proceedings *(Request for the indication of provisional measures)*, the Republic of Senegal believes that the fact that its disagreement with Belgium has become a legal dispute must not be allowed to damage relations between the two countries. It hopes that note will be taken of its genuine intention to assume its duties as a party to the 1984 Convention and that, when the proceedings pending before the Court are concluded, the two Parties will have succeeded in demonstrating their shared desire not to let crimes of torture and other cruel, inhuman or degrading treatment or punishment go unpunished.

10. The Kingdom of Belgium is requesting the Court to find Senegal guilty of breaching its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture, and under customary international law,

> "by failing to bring criminal proceedings against Mr. Hissène Habré for acts characterized in particular as crimes of torture, genocide, war crimes and crimes against humanity alleged against him as perpetrator, co-perpetrator or accomplice, or to extradite him to Belgium for the purposes of such criminal proceedings".

11. As it recalled at length during the previous phase of the dispute, Senegal has never denied either its status as a party to the 1984 Convention or its duty, in the present circumstances, to implement the procedures necessary to shed light on whether Mr. Hissène Habré bears any
6 responsibility for the acts of which he is accused. However, what it has denied is the assertion that it is "failing" to perform its obligations as a party to the Convention against Torture.

12. Such an accusation is at odds with declarations made several times by the Senegalese authorities, and — beyond "declarations" — is not borne out by Senegal's actions. Senegal wishes to contest the very substance of Belgium's accusation: that it has "failed" to fulfil its obligations as a party to the Convention. What is more, the Republic of Senegal believes that, by acting as it has since publicly declaring its intention to assume its duties, it is in full compliance with the requirements of the Convention's cardinal rule whereby States are obliged to "extradite or prosecute".

13. It is appropriate to recall the remarks made during the hearings on the request for the indication of provisional measures by the Agent of Senegal:

> "Senegal is meeting its obligations to prosecute Hissène Habré stemming from the Convention against Torture, on which the African Union's decision is based. Consequently, there is no request for extradition which has to be met in this case. *Aut dedere aut judicare*: either one thing or the other. And above all, it is extradition if there can be no trial. When the extradition avenue is *blocked*, and the country pledges to conduct a trial, it is hard to see — in relation to the Convention against Torture — where any dispute could lie on the application and interpretation of that Convention . . . Under cover of an invitation to ensure compliance with international law, the purpose of the proceedings instituted by Belgium is to get the Court to order Senegal to extradite Hissène Habré as soon as possible so that he can be tried in Belgium in disregard of Senegal's rights and obligations under the Convention against Torture and which task Senegal is tackling with unflagging determination."[22]

This position is clear: the Republic of Senegal has rights under the 1984 Convention against Torture, rights that it intends to exercise in full. It has resolved not to extradite Mr. Habré but to organize his trial, to prosecute him.

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CHAPTER 1

THE FACTS

14. Mr. Hissène Habré, President of the Republic of Chad from 1982 to 1990, was overthrown on 1 December 1990. After a brief stay in Cameroon, he requested political asylum from the Senegalese Government, a request which was granted. Since then he has made his home in Dakar, where he lives with his family and some of his close relatives.

15. In January 2000, Suleymane Guengueng and others, claiming to be victims of abuses committed against them by President Habré's régime, filed a complaint with civil-party application with the senior investigating judge at the Dakar *Tribunal régional hors classe*, alleging the following offences:

— crimes against humanity;

— torture;

— acts of barbarity and discrimination;

— violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

— torture or murder (Articles 288 and 295-1 of the Senegalese Penal Code);

— enforced disappearance (Article 7, paragraph 2 *(i)* of the Rome Statute of the International Criminal Court).

16. On 3 February 2000, the then senior investigating judge indicted Hissène Habré for these offences before releasing him pending trial, under court supervision.

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[22] CR 2009/9, 6 April 2009, p. 20, para. 56 (Thiam).

17. On 18 February 2000, through his counsel, Hissène Habré filed an application to annul the proceedings before the *Chambre d'accusation* of the Dakar Court of Appeal, citing the provisions of Article 27 of the Convention against Torture, Article 6 of the Constitution of the Republic of Senegal, Article 669 of the Code of Criminal Procedure and Article 4 of the Penal Code, on grounds of lack of legal justification and expiry of the time-limit for prosecution.

18. On 4 July 2000, the *Chambre d'accusation* of the Dakar Court of Appeal annulled the record of the indictment and the subsequent proceedings on the ground that the court seised lacked jurisdiction.

19. On 20 March 2001, the Court of Cassation, ruling on an appeal brought by the civil parties on 7 July 2000, dismissed the appeal against the judgment handed down on 4 July 2000 by
8 the *Chambre d'accusation*, thus confirming that the investigating judge to whom the case had been referred lacked jurisdiction.

The Court of Cassation gave the following reasons for its ruling:

> "Whereas Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 requires each State Party to take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him;
>
> Whereas, therefore, Article 79 of the Constitution could not be applied, since Senegal needs to enact legislation before the Convention can be implemented;
>
> Whereas no procedural text provides the Senegalese courts with universal jurisdiction to prosecute and try — if found in the territory of the Republic — the presumed perpetrators (or their accomplices) of acts falling within the provisions of the Law of 28 August 1996 adapting Senegalese legislation to the provisions of Article 4 of the Convention, when those acts have been committed by foreigners outside the territory of Senegal."

20. Being no doubt dissatisfied with this ruling, the victims then brought a case before the Belgian courts based on the same acts.

21. On 19 September 2005, after years of investigation, a Belgian judge issued a warrant for the arrest of Hissène Habré, thus enabling the Kingdom of Belgium to request Senegal to extradite him.

22. On 25 November 2005, the *Chambre d'accusation* of the Dakar Court of Appeal, ruling this time on the request for the extradition of Hissène Habré made by Belgium, held that it lacked jurisdiction for the following reasons:

> "Article 101 of the Constitution of Senegal and the Organic Law of 14 February 2002 on the High Court of Justice instituted a special procedure falling outside the scope of the ordinary law for any proceedings brought against the President of the Republic;

9 That . . . the *Chambre d'accusation*, a court of ordinary law, cannot extend its jurisdiction to matters relating to the investigation or prosecution of a Head of State for acts . . . committed in the exercise of his functions;

That therefore this exception must necessarily apply to the extradition request since the implementation of the procedure depends on fundamental investigative steps being carried out beforehand, in particular the appearance and examination of the accused;

That, in addition, given that the extradition itself arises from steps in criminal proceedings or measures of execution delegated by the applicant State to the requested State, it must comply, at least in its judicial phase, with the mandatory rules of law concerning jurisdiction and the organization of criminal courts, which are a bastion of national sovereignty;

That Hissène Habré should be given jurisdictional immunity, which, far from causing him to be exonerated from criminal responsibility, is of a purely procedural nature within the meaning of the Abdulaye Yerodia Ndombasi judgment of 14 February 2002, which was handed down by the International Court of Justice in the case between the Kingdom of Belgium and the Democratic Republic of the Congo;

That it is worth recalling that this privilege is intended to survive the cessation of his duties as President of the Republic, whatever his nationality and regardless of any convention on mutual assistance.

On these grounds, the *Chambre d'accusation* concludes that it has no jurisdiction to adjudicate the lawfulness of proceedings and the validity of the arrest warrant against a Head of State." *[Translation by the Registry]*

23. It was in this context that the Republic of Senegal, wishing to find a solution to what had become known as "the Hissène Habré case", referred the matter to the African Union, which on 2 July 2006 followed the recommendations of eminent African jurists that it had appointed in January 2006 and asked Senegal to put Hissène Habré on trial.

The request of the African Union

24. The request made by the African Union took the form of a decision (doc. Assembly/AU/3 [VII]) and contained the following recommendations:

10 — to consider the "Hissène Habré case" as falling within the competence of the African Union;

— to mandate the Republic of Senegal to prosecute and ensure that Hissène Habré is tried by a competent Senegalese court with guarantees for fair trial;

— to mandate the Chairperson of the Union, in consultation with the Chairperson of the Commission, to provide Senegal with the necessary assistance for the effective conduct of the trial;

— to request all the Member States to cooperate with the Government of Senegal on this matter;

— to call upon the international community to avail its support to the Government of Senegal.

25. The wording of the mandate left no doubt that the African Union as a whole was determined to support Senegal in its efforts to prepare for and conduct the proposed trial of Mr. Hissène Habré.

26. It should also be mentioned that, prior to this position being adopted by the African organization, the civil parties that had seised the senior investigating judge at the Dakar *Tribunal régional hors classe*, had on 18 April 2001 filed a complaint with the United Nations Committee against Torture. On 17 May 2006, pursuant to Article 22, paragraph 7, of the Convention against Torture, the Committee issued recommendations to the Government of Senegal.

[26.] The Committee, noting all of the court decisions described above, recalled that, in accordance with Article 5, paragraph 2, of the Convention, "each State Party shall . . . take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him".

27. In its observations on the merits, the Committee noted that Senegal, a party to the Convention, had not contested the fact that it had not taken such measures as might be necessary in keeping with Article 5, paragraph 2, of the Convention, and observed that the Court of Cassation itself considered that Senegal had not taken such measures.

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28. The Committee also considered that the reasonable time frame within which the State party should have complied with this obligation had been considerably exceeded.

29. The Committee recalled that, under Article 7 of the Convention, "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".

30. It noted in this regard that the obligation to prosecute the alleged perpetrator of acts of torture did not depend on the prior existence of a request for his extradition. The alternative available to the State party under Article 7 of the Convention existed only when a request for extradition had been made and put the State party in the position of having to choose between proceeding with extradition and submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished.

31. The Committee concluded that the State party could not invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with these obligations under the Convention.

32. The Committee, acting under Article 22, paragraph 7, of the Convention, therefore considered that Senegal had "violated Article 5, paragraph 2, and Article 7 of the Convention".

33. And that, in accordance with Article 5, paragraph 2, of the Convention, the State party was obliged to adopt the necessary measures to make all forms of torture punishable offences.

34. Moreover, under Article 7 of the Convention, the State party was obliged to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since another State had made an extradition request, to comply with that request in accordance with the Convention.

12 35. This decision in no way influenced the possibility of the complainants' obtaining compensation through the domestic courts for the State party's failure to comply with its obligations under the Convention.

36. Finally, the Committee against Torture stated:

> "Bearing in mind that, in making the declaration under article 22 of the Convention, the State party recognized the competence of the Committee to decide whether or not there has been a violation of the Convention, the Committee wishes to receive information from the State party within 90 days on the measures it has taken to give effect to its recommendations."

37. Senegal, being anxious to comply with its obligations, was bound on the one hand to act on the recommendations of the Committee against Torture and, on the other, to execute the mandate that it had received from the African Union.

Implementation of the recommendations of the Committee against Torture

38. The State of Senegal responded to the recommendations of the Committee against Torture by bringing its legislation into conformity with the relevant rules of international law with a view to putting Mr. Hissène Habré on trial. The President of the Republic made a solemn undertaking to his counterparts to hold the trial, while pointing out that the first step would be to mobilize the financial resources required, resources that Senegal could not secure on its own.

39. This unequivocal political undertaking confirms the legal obligation arising from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by Senegal on 21 August 1986 and which forms the legal basis for all the proceedings initiated against Hissène Habré.

40. On 23 November 2006 the Minister of State, Keeper of the Seals and Minister of Justice therefore issued an order establishing a commission charged with examining the matter and proposing the necessary legislative and institutional reforms.

41. All the legislative and constitutional reforms, of both form and substance, have already been made in order to give full effect to the provisions of the Convention and to create the ideal
13 conditions for Mr. Hissène Habré's trial by the Senegalese courts and judges, on a fair and equitable basis.

The legislative reforms initiated

42. Several reforms amending, supplementing or repealing certain provisions of the Penal Code and the Code of Criminal Procedure have been effected.

Law No. 2007-02 of 12 February 2007 introduced Articles 431-1, 431-2, 431-3, 431-4 and 431-5 into our Penal Code. These articles define and formally sanction the **crime of genocide, crimes against humanity, war crimes and other crimes of international humanitarian law** as specified by the 1954 Hague Convention, the 1976 Convention and the 1980 Convention, which were not previously included in the domestic arsenal of criminal legislation.

Article 431-6 of the Penal Code provides that, notwithstanding the provisions of Article 4 of the Code, perpetrators of the offences referred to in Articles 431-1 to 431-5 may be tried and sentenced for any act or omission, which, at the time and place where it was committed, was regarded as a criminal offence according to the general principles of law recognized by the community of nations, whether or not it constituted an infringement of the law in force at that time and in that place.

Article 669 of the Code of Criminal Procedure has been amended as follows:

> "Any foreigner who, outside the territory of the Republic, is accused of being the perpetrator of or accessory to one of the crimes referred to in Articles 431-1 to 431-5 of the Penal Code . . . or of acts referred to in Articles 279-1 to 279-3 and 295 of the Penal Code may be prosecuted and tried according to the provisions of Senegalese laws or laws applicable in Senegal . . . or if the Government obtains his extradition."

43. A new article, Article 664*bis*, has been inserted in Title XII of Book Four of the Code of Criminal Procedure. It reads as follows:

> "The national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic by a national or a foreigner, if the victim is of Senegalese nationality at the time the acts are committed." *[Translation by the Registry]*

14 44. No legislative reforms were necessary in respect of torture, as it was already included in Article 295-1 of Law No. 96-15 of 28 August 1996, which made it a punishable offence.

45. The final phase in this important task of revising the legislative texts was the far-reaching reform of the composition of the *Cour d'assises* and the way in which cases were referred to it. The two-tier court system in force in Senegalese criminal proceedings, which applied to the investigation — an obligatory step in criminal proceedings — was criticized for slowing down proceedings. It is therefore no longer compulsory for the investigating judge to order the file to be submitted to the higher-level *Chambre d'accusation*.

46. Now, after closing his criminal investigation, the investigating judge orders the file to be transmitted directly to the *Cour d'assises*.

47. The *Cour d'assises* has also undergone reform in that jurors, ordinary men and women who were involved in dispensing justice at this high level, no longer sit alongside the professional judges who constitute the court proper.

48. Observers had consistently criticized the presence of jurors as members of the *Cour d'assises*, since their lack of training could seriously jeopardize the aim of fairness in criminal proceedings.

49. Now that jurors have been removed from the *Cour d'assises* and proceedings are conducted solely by professional judges, the court will be able to dispense justice more quickly. However, this initiative had to be accompanied by guarantees for the accused and the civil parties. An appeals system has therefore been created, whereby appeals can be brought against the first-instance rulings handed down by this court before another *Cour d'assises* appointed by order of the First President of the Supreme Court.

50. These measures reflect Senegal's desire to incorporate in its domestic legislation the rules of the African Charter on Human and Peoples' Rights concerning fair and equitable trials.

15 The constitutional reform

51. Article 9 of the Constitution of Senegal sets out the principle of strict conformity with statute with regard to criminal offences. Before the Rome Statute and the above-mentioned legislative reforms were ratified, the Senegalese legislature, concerned to ensure that the laws were constitutional, took steps to introduce an exception to that principle in accordance with the legal system for serious crimes covered by *jus cogens* and with the relevant provisions of the International Covenant on Civil and Political Rights.

52. The former Article 9 of the Constitution has therefore been replaced by the following provisions:

> "Any infringement of these freedoms and any intentional restriction of the exercise of a freedom shall be punishable by law.
>
> No one may be convicted other than by virtue of a law which became effective before the act was committed.
>
> However, the provisions of the preceding subparagraph shall not prejudice the prosecution, trial and punishment of any person for any act or omission which, at the time when it was committed, was defined as criminal under the rules of international law concerning acts of genocide, crimes against humanity and war crimes."

53. While the legislative reforms constitute a legal basis for the proposed proceedings to execute Senegal's mandate from the African Union, appropriate organs are needed to implement them.

The organs established with the aim of executing the request of the African Union

54. The organs that have already been established with a view to holding the proposed trial under the aegis of the African Union and in co-operation with the European Union are: four investigating judges, three prosecuting judges, a pool of registrars, a co-ordinator and a Committee on Follow-up and Communication.

16 The judges and registrars appointed

55. The number of investigating judges' offices at the Dakar *Tribunal régional hors classe,* which are responsible for investigating criminal cases, has been increased from six to ten. The same measures have been taken at the Public Prosecutor's Office, where the number of Deputy Public Prosecutors has been significantly increased.

56. This increase is justified by the opening of Mr. Hissène Habré's trial, which must not be allowed to have an adverse impact on the day-to-day administration of justice.

The Co-ordinator

57. By Order No. 04310 dated 21 May 2008, the Minister of State, Keeper of the Seals and Minister of Justice appointed a trial co-ordinator, namely Mr. Ibrahima Gueye, Judge Emeritus, President of the *Chambre civile et commerciale* of the Supreme Court. This senior judge is charged with preparing and organizing the trial of Mr. Hissène Habré.

58. In this capacity he will establish contact with the authorities, structures and entities involved in the trial, at both national and international level. He will deal with the logistics of the trial, including the administrative and financial aspects. However, he will not have any judicial role.

The Committee on Follow-up and Communication

59. Order No. 04310 of 21 May 2008 also established a Committee on Follow-up and Communication. This committee is charged with communication and the smooth running of the Habré trial.

60. All of these organs have been operational since they were established and they have already produced a training plan for the judges and other staff involved in the trial.

61. A provisional budget of 18 billion CFA francs was drawn up, assuming that 500 witnesses would be called and that the trial would have a duration of 38 months. This estimate
17 does not include the sum of 2 billion CFA francs required to meet the operating costs of the organs responsible for co-ordinating and following up the trial.

62. This provisional budget has been reduced to 14 billion CFA francs by Senegal's partners, which have limited the number of witnesses to be summoned to 100 and the duration of the trial to 28 months. This new period of 28 months is divided into segments of 20 months for the investigation and gathering of evidence, five months for the proceedings in the court of first instance and three months for the appeal.

The decision handed down by the ECOWAS Court of Justice

63. On Thursday 18 November 2010, the ECOWAS Court of Justice handed down a judgment that called into question the process that was to lead to the trial of Mr. Hissène Habré.

64. For the record, Senegal was summoned to appear before the Court of Justice of the Economic Community of West African States (ECOWAS) and the African Court on Human and Peoples' Rights by, respectively, Mr. Habré himself and Mr. Michelot Yogogombaye in two cases directly related to the trial that the State of Senegal intends to open on its own territory, in accordance with its international obligations and national legislation, against Mr. Hissène Habré.

65. In the case before the ECOWAS Court of Justice, Mr. Habré asked the Court to find that Senegal had violated his human rights in the course of preparing his trial, and to order a halt to all proceedings against him. Senegal took part in all the hearings before the Court in this case, the first of which was devoted to examining the request to intervene submitted by the "Victims' Collective", which was seeking to join the proceedings as a party. Since the Court rejected the victims' application by preliminary judgment No. ECW/CCJ/ADD/11/09 of 27 November 2009, the case involved the original parties only.

66. In its judgment No. ECW/CCJ/JUD/06/10 of 18 November 2010, the Court found that "the mandate which Senegal received from the African Union was in fact a remit to devise and
18 propose all the necessary arrangements for the prosecution and trial [of Hissène Habré] to take place, within the strict framework of special *ad hoc* international proceedings as practised in international law by all civilized nations".

67. As a full member of ECOWAS, Senegal has signed and ratified the ECOWAS Treaty. It has also ratified Protocol A/P.1/7/91 on the Community Court of Justice, which handed down the above-mentioned decision.

68. Senegal is a State that is based on the rule of law, that respects international law and is concerned to promote and defend human rights. Yet it has no choice but to comply with this decision at the risk of violating its international commitments.

69. Moreover, pursuant to the provisions of Article 22, paragraph 3 of Protocol A/P.1/7/91 on the Community Court of Justice, "Member States and Institutions of the Community shall take immediately all necessary measures to ensure execution of the decisions of the Court".

70. Despite this decision being handed down by the above-mentioned Court, Senegal's efforts to prepare for the proposed trial of Mr. Hissène Habré have continued unabated, in accordance with the principle of universal jurisdiction enshrined in Articles 5 and 7 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. Senegal's firm desire to respect its commitments and to attempt to reconcile two obligations which, in appearance at least, are contradictory, motivated its decision to go ahead with the Donors Round Table following the ECOWAS Court's ruling.

The decision adopted by the African Union at its sixteenth ordinary session, held in Addis Ababa on 30 and 31 January 2011

71. At its sixteenth ordinary session, held in Addis Ababa (Ethiopia) on 30 and 31 January 2011, at which the presence of the Senegalese delegation was recorded, the Assembly of the African Union adopted a decision stating, amongst other things, that the Assembly:

— confirms the mandate given by the African Union to Senegal to try Hissène Habré considering the continued readiness of Senegal to try him;

— also reiterates its commitment to fight impunity in conformity with the provisions of Article 4 (*h*) of the Constitutive Act of the African Union;

19 — **welcomes the conclusions of the Donors Round Table for the funding of the Hissène Habré trial, held in Dakar (Senegal) on 24 November 2010;**

— requests the Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré through a **special tribunal with an international character** consistent with the Economic Community of West African States (ECOWAS) Court of Justice Decision;

— further requests the Commission to follow up and to report on the implementation of (this) Decision in June 2011.

72. In order to give substance to the African Union's Banjul Decision and the above-mentioned ruling of the Court of Justice, an *ad hoc* court with an international character was therefore to be created, the founding act of which would be an African Union decision.

73. The legal basis for creating such a body would be Articles 3 *(h)*, 4 *(h)*, 4 *(o)*, 5 (2), 6 (2) and 9 (1) of the Constitutive Act of the African Union.

74. This decision gave a mandate to the AU Commission to determine, in particular, the headquarters, composition, jurisdiction, applicable rules and organs of the court.

75. Pursuant to the above-mentioned Decision Assembly/AU/Dec.340 (XVI) on the Hissène Habré case, which was adopted on 31 January 2011 by the sixteenth ordinary session of the Assembly of Heads of State and Government of the African Union (AU), representatives of the African Union Commission and a delegation from the Government of the Republic of Senegal led by Mr. Cheikh Tidiane Sy, Minister of State, Keeper of the Seals and Minister of Justice, held consultations on these matters on 23 and 24 March 2011 in Addis Ababa (Ethiopia), at AU headquarters.

76. The consultations were co-chaired, at the political level, by Mr. Cheikh Tidiane Sy, Minister of State, Keeper of the Seals and Minister of Justice of the Republic of Senegal, and Ambassador Ramtane Lamamra, AU Commissioner for Peace and Security, and, at the technical level, by Ambassador Bassirou Sene, Permanent Representative of the Republic of Senegal to the AU, and Mr. Ben Kioko, Legal Counsel of the AU Commission.

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77. On concluding their work, the Parties agreed on the need to create an *ad hoc* international court to try Mr. Hissène Habré for crimes committed in Chad between 7 June 1982 and 1 December 1990, in accordance with the above-mentioned Decision Assembly/AU/Dec.340 (XVI), the judgment of the ECOWAS Court of Justice of 18 November 2010 and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

78. The draft Agreement establishing this international court would be drawn up by the African Union Commission and then submitted to the Government of the Republic of Senegal for its opinion and observations before being signed.

79. The proceedings before the *ad hoc* international court would be conducted using the resources mobilized at the Donors Round Table for the funding of the trial of Mr. Hissène Habré, held on 24 November 2010, and on the basis of the budget and documents relating thereto. Additional resources could be mobilized as and when required.

80. It should be noted that, according to experts, the estimated budget for the trial was in the amount of eight million five hundred and seventy thousand dollars (US$8,570,000) (report of European Union experts drafted in collaboration with the African Union and Senegal).

81. The Donors Round Table for the funding of the trial of Mr. Hissène Habré, held in Dakar on 24 November 2010 under the aegis of the African Union Commission, generated sufficient funding pledges from donors to cover the budget in full.

82. These funds have not yet been actually mobilized and made available to the authorities — independent of Senegal — that are charged with managing them.

83. Nevertheless, the participants in the Donors Round Table stressed the need for the funds to be disbursed within a reasonable time.

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84. To this end they had asked the United Nations Office for Project Services (UNOPS) quickly to take the appropriate measures to enable the funds pledged to be disbursed, in collaboration with the countries and institutions that had made funding pledges or any other partner interested in funding the organization of the trial.

85. It is therefore clear that, had the ECOWAS Court not handed down its ruling of 18 November 2010, the budgetary procedure managed by UNOPS could have delivered the necessary funding and therefore enabled the trial to start.

86. Regarding the establishment of the future *ad hoc* international court, a draft Statute drawn up by AU Commission experts was adopted as amended by the meeting. It was then agreed that the draft Rules of Procedure and Evidence of the *ad hoc* international court should be drawn up. To this end it was agreed that the AU Commission would prepare the draft Rules of Procedure, which would be submitted to the Senegalese Party for its opinion and observations.

87. With a view to accelerating the establishment of the *ad hoc* international court, the meeting decided to hold a second Consultative Meeting in Dakar in the last week of April 2011, in order to consider and finalize the draft Agreement between the African Union and the Government of the Republic of Senegal on the creation of the *ad hoc* international court, the draft Rules of Procedure and Evidence, and also the road map for the establishment of the said court.

88. Furthermore, the participants agreed that the inaugural meeting of the Follow-up Committee on the implementation of the conclusions of the Donors Round Table of 24 November 2010 should be held in Dakar, as soon as the documents required for the establishment of the *ad hoc* international court had been finalized.

The second Consultative Meeting between experts from the African Union and Senegal

89. Following the first Consultative Meeting between experts from the African Union and Senegal, which was held in Addis Ababa on 23 and 24 March 2011, a second meeting was scheduled to take place in Dakar from 30 May to 3 June 2011, for the purpose of studying both the

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draft Agreement between Senegal and the African Union on the creation of the *ad hoc* international court and the draft Rules of Procedure and Evidence of the future court.

90. The documents that were to be studied at the meeting were sent to the Senegalese Party two days before the meeting. Given the volume of the documents and, in particular, of the Rules of Procedure and Evidence, which comprised 80 pages, there was insufficient opportunity to study them before the meeting, which made fruitful discussions all but impossible.

91. Furthermore, the Rules of Procedure and Evidence included, in particular, numerous provisions on the judges' status and code of conduct, and this at a time when Senegal was in the process of implementing far-reaching reforms of its judicial system, including the regulations governing the judiciary. At this stage, Senegal once again reiterated its firm desire to continue the process begun in 2006, which has, moreover, resulted in its being brought before two African courts, including the ECOWAS Court of Justice of which it is a member.

92. The above-mentioned decision of the said Court and the need to have more time to study the documents relating to the future *ad hoc* international criminal court properly are the only considerations that motivated Senegal's request for a reasonable amount of time to finalize the arrangements with the African Union for creating the judicial body empowered to manage the proposed trial.

93. As a careful reading of the documents tabled by the AU will show, it will be extremely difficult for Senegal to perform its obligation to try Mr. Hissène Habré on its own, through its own courts, if the trial is to take place in the proposed *ad hoc* international criminal tribunal, as the latter, after all, would be characterized by its specificity, its independence and the fact of being separate from the Senegalese legal system.

The decision of the *Chambre d'accusation* of the Court of Appeal on Belgium's request for extradition

94. This decision was handed down very recently, on 18 August 2011, following a re-submission, by Belgium, of its extradition request. While demonstrating a readiness to examine
23 the said request in the light of the requirements of Senegalese law on extradition, the Court rejected it, finding it to be inadmissible because it did not comply with the conditions laid down by law.

CHAPTER 2

THE STATE OF SENEGAL'S PRINCIPLED POSITION IN RESPONSE TO THE RAISING OF THE CASE BY VARIOUS INTERNATIONAL BODIES

95. A large portion of the argument that the Kingdom of Belgium has submitted to the Court is based on an erroneous interpretation of Senegal's comportment before various international bodies: the United Nations Committee against Torture, the African Union and the Economic Community of West African States (ECOWAS). The position that Senegal has adopted before each of these bodies is in full conformity with its statement that it intends to perform its obligations as a State party to the 1984 Convention.

I. BEFORE THE UNITED NATIONS COMMITTEE AGAINST TORTURE

96. Upon the case being referred to it by **a number of individuals of Chadian origin**, the Committee against Torture, a body established by the Convention itself to ensure that it is properly implemented, stated in its decision of [19] May 2006 that:

> "the Court of Cassation of Senegal ruled that 'no procedural text confers on Senegalese courts a universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] . . . when these acts have been committed outside Senegal by foreigners; the presence in Senegal of Hissène Habré cannot in itself justify the proceedings brought against him'".

Further on, the Committee

> "also notes that, on 25 November 2005, the Indictment Division of the Dakar Court of Appeal stated that it lacked jurisdiction to rule on Belgium's request for the extradition of Hissène Habré".

24 97. The Committee then recalled that each State party is obliged to take "such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him".

98. The Republic of Senegal never contested the findings of the Committee against Torture **at the time that they were made.** At that time, the Senegalese authorities themselves acknowledged that their failure to adopt domestic measures implementing the Convention against Torture constituted an omission. They have never sought to evade this obligation and the Committee against Torture itself noted that:

> "in its observations on the merits, the State party has not contested the fact that it had not taken 'such measures as may be necessary' in keeping with article 5, paragraph 2, of the Convention, and observes that the Court of Cassation itself considered that the State party had not taken such measures".

99. Nevertheless, the Court will have the opportunity to note that, although Senegal did not hesitate to acknowledge before the Committee against Torture that it had not fully complied with its obligation to ensure that it could meet its international commitments, as soon as it had examined the Committee's observations it took appropriate action to perform that obligation and adopt the "necessary measures" to give full effect to the Convention, in other words to establish the jurisdiction of the Senegalese courts. Indeed, as early as the beginning of August 2009, Senegal invited the Committee to come and see for itself the efforts that the State of Senegal had made to establish the jurisdiction of its national courts. The Committee's confidential fact-finding mission took note of the statements of the national authorities and resolved to "monitor" implementation of the commitment made.

100. Today, this commitment has largely been implemented. As matters stand at present, and at a time when the trial of the former President of Chad has not yet opened, it is impossible to maintain, as was possible previously, that Senegal has failed to perform its duty as a State party to the Convention. **The terms of the debate have certainly changed and, now that the Court is being requested to rule "on the merits" of the case, it is difficult to see how it could be**
25 **considered relevant to mention circumstances that have now been completely "overtaken by events", except for purely "historical" reasons.**

101. It should be added that the change in Senegal's attitude naturally invalidates the idea that it would be unlawful for it to refuse an extradition request *now*. Although it was legitimate to question the lawfulness of such a refusal at a time when the conditions were not in place to enable

the national courts to deal with the "Habré case", such a refusal could even be necessary in the present circumstances, where Senegal is claiming jurisdiction.

102. It is therefore unreasonable to suggest that Senegal had somehow persisted in a premeditated refusal to discharge its obligation to prosecute Mr. Habré. Senegal's conduct is governed by precise circumstances and reflects a specific context: previously, it was the context of failing to discharge an unquestionable obligation — the duty to bring domestic law into conformity with the 1984 Convention; today it is the context of declaring and asserting a claim to jurisdiction. This being the case, the factors that informed the discussions in the Committee against Torture should be immediately set aside from these proceedings.

II. BEFORE THE AFRICAN UNION

103. In the Memorial that it submitted to the Court, Belgium also returns to the raising of the "Hissène Habré case" by the African Union (AU), or more precisely the supreme body of the pan-African organization, the Assembly of Heads of State and Government. In its Memorial Belgium writes:

> "The involvement of the African Union in the proceedings against H. Habré dates back to December 2005 and continues to this day. During the period of four and a half years that has thus elapsed, the Senegalese public prosecutor's office has taken no judicial steps to institute proceedings against Mr. Habré. Moreover, before the Court of Justice of the Economic Community of West African States (ECOWAS), Senegal itself affirmed that, to date, 'no proceedings against [Mr. Habré] were pending . . . in the Senegalese courts'."[23]

26 104. The Belgian Memorial goes on to recall the circumstances in which the Senegalese authorities referred the case to the pan-African political organization, after the Senegalese courts had declared that they lacked jurisdiction.

105. On this point too, Senegal wishes to ensure that its position is clearly understood and to clarify the precise significance of the twists and turns in the handling of the dossier by the African Union.

106. In the first place, as the Court will see, the State of Senegal's decision to refer the case of the former President of Chad to the AU at least reflects an intention that is the reverse of any willingness to tolerate impunity. Its only motive in raising the matter at the level of the pan-African organization was precisely to highlight the importance of the issues at stake and to provide an unprecedented and formal opportunity for Africa, a continent that has witnessed massive violations of international law from time to time, to make clear to the world its firm and collective commitment to punish such offences. Incidentally, this purpose was achieved, as the Assembly of Heads of State and Government:

> "DECIDES to consider the Hissène Habré case as falling within the competence of the African Union;

[23] Memorial of Belgium, p. 36.

> MANDATES the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial."[24]

107. The raising of the case of the former President of Chad by the African Union therefore needs to be seen in context: rather than being motivated purely by legal considerations, this was a symbolic act, providing an opportunity to speak with one voice on a serious subject that not so very long ago might have been considered "taboo". Since becoming involved in the case, the AU has been advocating that a trial should be held and has taken various initiatives to ensure that such judicial action is taken.

108. This was the intent — the sole intent — that can be attributed to Senegal. Senegal has never sought to imply that the pan-African organization should be subject to the obligations set out
27 in the Convention against Torture. Senegal, a sovereign State and party to the Convention, believes that it is incumbent upon it alone to perform, in particular, the obligation under the Convention to "extradite" or "prosecute". This point, which has been made several times in the past, was expressed in the clearest possible terms during the hearings on the request for the indication of provisional measures. It is worth recalling the statement made: "at no point has Senegal established any link between the decision of the African Union and the obligations incumbent on it under the 1984 Convention"[25]. It was further stated that:

> "The backdrop of the trial for which preparations are now being made is indeed one of co-operation across Africa — and even beyond. In this connection Senegal wishes to make clear once and for all, so as to dispel for good all ambiguity and misunderstanding, that as a State it is bound by the 1984 Convention. The fact that an organization like the African Union may be involved in organizing the Habré trial in no way lessens Senegal's duties and rights as a party to the Convention. Indeed, it is as a party to the Convention, not pursuant to a mandate from the African Union, that the Republic of Senegal is fulfilling its obligations."[26]

109. The idea that, in agreeing that the AU should discuss the "Habré case", Senegal was seeking to evade its obligation to punish the acts specified in the Convention against Torture is therefore doubly disputable.

110. First, the act of establishing a continent-wide discussion of the subject is, if anything, indicative of a bias towards punitive action, a predisposition to prosecute — and not to tolerate — the acts specified in the Convention against Torture.

111. Secondly, from a more strictly legal point of view, Senegal has never repudiated its duty. On the contrary, it has acknowledged its obligation to deal with the complaints lodged against Mr. Habré.

28 112. In other words, the "involvement" or "intervention" of the AU has no fundamental impact on the terms of the debate before the Court. At issue before the Court is a dispute between two States about how the execution of an obligation arising from an international instrument to

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[24] Assembly/AU/Dec.127 (VII).

[25] CR 2009/11, 8 April 2009, p. 13, para. 10 (Diouf).

[26] CR 2009/11, 8 April 2009, p. 18, para. 11 (Sall).

which both States are parties should be understood. That is the reality of the dispute that has been brought before the Court. Senegal therefore believes that anything that falls outside the scope of this clear and simple presentation of the facts should be set aside from the debate on the ground that it is irrelevant.

113. The State of Senegal has consistently declared its intention to respect its commitments as a State party. In fact it wishes to organize a trial to deal with the acts of which the former Head of State of Chad, who is now present in its territory, stands accused. However, it does not intend to act under pressure, even though such pressure is understandable, particularly when it is being exerted by alleged victims. A trial on this scale and of this complexity deserves to be conducted calmly and in compliance with international standards of due process. In Senegal's view, what is at stake here is the very credibility of its judicial institutions and even of the judicial institutions of Africa as a whole, which are being confronted with such a situation for the first time.

114. In this regard it is worth recalling the words addressed to the Court by the Co-Agent of Senegal during the hearings on the request for the indication of provisional measures:

> "The fight against impunity must not overshadow the no-less-important duty on us all to afford the accused, no matter how serious the acts with which he is charged, a presumption of innocence until such time as he is convicted after a fair trial; and it is for that fair trial that Senegal is making the preparations.
>
> It is for all of these reasons that Senegal has not yet begun the trial, fearing that it would be interrupted for long periods in which funds, hypothetical funds, would have to be sought. Accordingly, advance financing adequate to ensure uninterrupted proceedings all the way to the end in accordance with our domestic law is what is needed."[27]

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III. BEFORE THE ECOWAS COURT OF JUSTICE

115. In its Memorial, Belgium also refers to the proceedings instituted before the Court of Justice of the Economic Community of West African States (ECOWAS), which culminated in a judgment being delivered on 18 November 2010.

116. Belgium filed its Memorial before the above-mentioned ruling was delivered. It did not therefore record any developments in the case. However, here too it is appropriate to recall the points at issue to show that they have no bearing on the case referred to the International Court of Justice in The Hague, or on the positions adopted by the Republic of Senegal.

117. It was Mr. Hissène Habré himself who initiated proceedings before the ECOWAS Court of Justice against the State of Senegal after it adopted general legislative and regulatory measures that were designed to bring Senegal's domestic law into conformity with its obligations as a State party to the 1984 Convention. The applicant, Mr. Habré, seised the ECOWAS Court and requested it to:

> "— adjudge and declare that any proceedings instituted on the grounds indicated in [the] application would be liable to perpetuate the . . . violations [of his human rights];

[27] CR 2009/9, 6 April 2009, p. 30, paras. 53 and 54 (Kandji).

— adjudge and declare that the violation of these principles and rights constitutes an obstacle to the implementation of any proceedings against Mr. Hissein Habré;

— order the Republic of Senegal in consequence to uphold the rights and principles referred to above and cease any proceedings and/or actions against Mr. Hissein Habré"[8].

In its judgment of 18 November 2010 on the merits, the Court

"— *finds that evidence exists to demonstrate that Mr. Hissein Habré's . . . rights are likely to be violated as a result of the constitutional and statutory reforms undertaken by the State of Senegal*;

— finds that in this regard, the State of Senegal must respect the rulings handed down by its national courts and, in particular, abide by the principle of *res judicata*;

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— consequently, the Court orders Senegal to comply with the absolute principle of non-retroactivity;

— finds that the mandate which Senegal received from the African Union was in fact a remit to devise and propose all the necessary arrangements for the prosecution and trial to take place, within the strict framework of special *ad hoc* international proceedings as practised in international law by all civilized nations;

— dismisses all of Mr. Hissein Habré's other claims as inoperative".

118. This is the verdict that was rendered. The Government of the Republic of Senegal has taken note of it. The line of defence adopted by the Republic of Senegal before the Community Court was never directly called into question, either by the Court itself or, incidentally, by the opposing party. It consists of remaining faithful to the principles of international law, according to which a State that enters into an international commitment must accept all of the implications of that commitment at national level. The measures that Senegal has undertaken to implement — most of which were definitively adopted some time ago — are designed first and foremost to bring it into conformity with those provisions with which it had previously failed to comply, earning it a reprimand from the United Nations Committee against Torture, as we have seen.

119. Senegal believes that the judgment handed down by the ECOWAS Court of Justice constitutes a significant event, creating a conflict between two obligations with different, indeed opposing, objectives: to prosecute if it has not extradited him, on the one hand, and not to prosecute (in the national courts) on the other hand. The State of Senegal has always had the option of prosecuting, an option that is again recalled before the Court today, and now it suddenly finds this route barred by an external event, placing it in an extremely difficult dilemma. This must be resolved so as to avoid a situation of paralysis in terms of its obligation to fulfil commitments that are, all the same, essentially valid. It is necessary, therefore, to ensure that the prosecution option is not cut off by the position of inertia advocated by the ECOWAS Court of Justice.

[8]ECOWAS Court of Justice, *Hissène Habré* v. *Republic of Senegal, Judgment on Preliminary Objections*, 14 May 2010, para. 2.

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CHAPTER 3

THE OBSTACLES TO EXAMINING THE APPLICATION ON ITS MERITS

120. Senegal believes that the grounds invoked by the Kingdom of Belgium in support of its request to the Court to adjudge and declare that Senegal has breached its international obligations and more particularly the obligations under the Convention against Torture by failing to amend its domestic legislation and bring criminal proceedings against Hissène Habré are not well-founded and that this will be clearly demonstrated by the alternative submissions on the merits.

121. Here and now, however, Senegal solemnly requests the Court to find not only that no dispute exists between the Parties, which should lead the Court to declare that it does not have jurisdiction, but also and above all that the applicant State failed to fulfil its obligation to initiate the negotiation and arbitration procedure before referring the case to the Court, which should render the Belgian Application inadmissible.

I. THE CLEAR ABSENCE OF ANY DISPUTE CONCERNING THE INTERPRETATION AND APPLICATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE OF 10 DECEMBER 1984

122. The Court, in its wisdom, has always verified that it has jurisdiction before ruling on the merits of any claim laid before it. This is closely bound up with the existence of a dispute.

123. The primary condition for the exercise of contentious jurisdiction by the International Court of Justice is the existence of a contentious issue. This requirement is reflected in the concept of "dispute", which first appears in Article 38 of the Statute of the Court: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . ."

124. The requirement of a dispute then appears in all of the instruments capable of founding the Court's capacity to hear the present case.

125. This is true, firstly, of Article 30, paragraph 1, of the Convention whose application is at issue, the 1984 Convention against Torture:

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> "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."

126. The concept of "dispute" also appears in the Declarations Recognizing as Compulsory the Jurisdiction of the Court submitted by the two States. Belgium's Declaration, which is dated 3 April 1958, states that it recognizes the jurisdiction of the Court in "legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date".

127. Senegal's Declaration Recognizing as Compulsory the Jurisdiction of the Court, which is dated 22 October 1985, states that it applies to "all legal disputes arising after the present declaration".

128. When seised of a case, the Court has, moreover, always endeavoured to verify that an underlying dispute does indeed exist. In the case concerning the *Mavrommatis Palestine Concessions*, which gave rise to the Judgment of 30 August 1924, the international court to which the case was referred stated:

> "Before considering whether the case of the Mavrommatis concessions relates to the *interpretation* [or] *application* of the Mandate and whether consequently its nature and subject are such as to bring it within the jurisdiction of the Court as defined . . . Does the matter before the Court constitute a dispute between the Mandatory and another Member of the League of Nations? Is it a dispute which cannot be settled by negotiation?"

129. The Court went on to provide a definition of the concept of "dispute", a definition that has now become the classic definition in international law: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."

33 130. Furthermore, given that the 1984 Convention makes the referral of a case to the ICJ subject to the failure of negotiations between the parties — as in the *Mavrommatis* case — it is worth taking a closer look at what the Court means by such failure. The Court regards negotiations as fruitless when "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"[9].

131. In its Opinion of 30 March 1950 on the *Interpretation of Peace Treaties*, the Court reiterated its definition of the concept of "dispute". It stated that "international disputes have arisen" when "[the] two sides [hold] *clearly opposite* views concerning the question of the performance or non-performance of certain treaty obligations"[10].

132. Later, in its Judgment in the case concerning the *Right of Passage over Indian Territory*, the Court referred to "*clearly-defined* legal [positions] *as against each other*"[11].

133. Finally, in the case concerning the *Northern Cameroons*, the Court held that

> "it is sufficient to say that, having regard to the facts already stated in this Judgment, the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, *reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court* and of its predecessor, between the Republic of Cameroon and the United Kingdom at the date of the Application"[12].

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[9] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13 and *Series C, No. 5*.

[10] *I.C.J. Reports 1950*, p. 74.

[11] *I.C.J. Reports 1960*, p. 34.

[12] *I.C.J. Reports 1963*, p. 27.

134. Given the facts submitted to the Court in the present case, is it possible to say that a "disagreement on a point of law or fact, a conflict of legal views" exists between Belgium and Senegal or that they hold "clearly opposite views"?

135. The Republic of Senegal has always doubted this, from the very beginning of the case. In actual fact, Senegal has never indicated that it opposed or refused to accept the principle or extent of the obligations implied by the Convention against Torture. At no time have the Parties in
34 question held opposing views about the meaning or scope of their central obligation, to "prosecute or extradite". There is nothing in the arguments put forward by Belgium to contradict Senegal's interpretation of the Convention. At the most, as has been shown above, Belgium might — if nothing else — argue that the way in which Senegal intends to perform its obligations does not accord with its own understanding of the matter or that progress is not being made at the pace that it would like, but there is certainly nothing to justify a debate on "the principles", a requirement that the Court would seem consistently to uphold and consolidate through the case law cited above.

136. Reflecting this vision of the Court, an expert in the doctrine of public international law has written that

> "disagreement, opposition . . . do not constitute a dispute unless they arise when one State makes a claim against another and that State *refuses* to accede to it; international litigation does not include either abstract disputes . . . or even differences of opinion about the action to be taken in a particular instance: it involves contradictory claims being advanced, and not just contradictory arguments, and the dispute only arises in cases where a State demands certain conduct from another and this demand is *refused*"[13]. *[Translation by the Registry]*

137. A dispute between two States does not necessarily exist just because one of them asserts that it does exist. An examination of the practice of the Court itself reveals that it is for the judge, and the judge alone, to decide whether or not a dispute exists between the parties, as the legal basis for the definition of a dispute does not depend on the States' subjective wishes. In its Opinion on the *Interpretation of Peace Treaties*, the Court held that "[w]hether there exists an international dispute is a matter for objective determination"[14]. In its Judgment of 21 December 1962 in the *South West Africa* case, the Court held that "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the
35 existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence"[15]. In the same Judgment, the Court again made it clear that "[i]t must be shown that the claim of one party is *positively opposed* by the other"[16].

138. In fact, given the nature of the request that Belgium has submitted to the Court, there is a serious risk, if the Court allows the request, of its delivering a "declaratory judgment", something that it has refused to do.

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[13] Jean Combacau and Serge Sur, *Droit international public,* 8th edition, Paris, Montchrestien, 2008, p. 556: our emphasis.

[14] *I.C.J. Reports 1950*, p. 74.

[15] *I.C.J. Reports 1962*, p. [328].

[16] *Ibid*.; our emphasis.

139. The Court is the "principal judicial organ of the United Nations" in the words of the Charter of the United Nations itself. For some considerable time, the Court has consistently regarded this status, and the role that it implies, as excluding a function confined merely to solemnly stating the applicable law, quite apart from the impact such a jurisdiction would have in practical terms. The Court has taken pains to provide *concrete* solutions to the disputes placed before it.

140. It has therefore always preferred pragmatic solutions, that have concrete effect, to judgments that simply declare the law. Here it is worth recalling what the Court itself stated in its Judgment of 2 December 1963 in the *Northern Cameroons* case:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with *concrete cases where there exists at the time of the adjudication an actual controversy* involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations."

141. In the case concerning *Certain expenses of the United Nations* (Opinion given by the Court in 1962), Judge Koretsky expressed himself as follows in his dissenting opinion: "The Court
36 must not shut its eyes to reality. The image of Themis with her eyes blindfolded is only an image from a fairy-tale and from mythology."[17]

142. On the basis of this approach, the Court has always refused to adjudicate disputes that are devoid of practical implications or to offer solutions that bear no relation to the actual situation in which the parties find themselves. Once a difficulty that has arisen between States has been resolved or eliminated, the Court refrains from delivering a verdict, as this would run the risk of not influencing the situation as it stands at the time the case is referred to it.

143. This is the direct source of the case law relating to unilateral acts.

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, [very] specific. *When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking*, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since [such a requirement] would be inconsistent with the strictly unilateral nature of the judicial act by which the pronouncement by the State was made."

144. The Judgment of 20 December 1974 added: "Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it."

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[17] *I.C.J. Reports 1962*, p. 268.

145. The Court then concluded, taking into account the unilateral declarations made by the French authorities, that "the claim of Australia *no longer has any object*".

37 **146. The Court's case law displays a concern for judicial realism, the application of which would seem to us to be particularly appropriate in this case.** Belgium's claim possesses an inherent dynamic that might lead to the Court delivering a genuine declaratory judgment. Given that Senegal has adopted a clear position on the application of the 1984 Convention against Torture and given that, over and above a mere declaration of intent, it has taken steps to prepare to implement a specific commitment — which is to "prosecute" — there is no reason why the Court should be asked to disturb this clear state of affairs, to create an artificial conflict in a situation where essentially no such conflict exists.

147. The Court has always shown itself to be concerned less simply to state the law than to settle the disputes that are submitted to it once and for all. Moreover, this concern was not missing in the approach of its predecessor, the Permanent Court of International Justice (PCIJ). In the case concerning the *Factory at Chorzów*, the Court recalled the need to take into account the practical consequences of its verdict to justify the reasoning behind its interpretation. It indicated clearly that

> "[a]n interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the [treaty] rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes"[18].

148. In fact, it is inevitably part of the duty of all judges, and of international judges in particular, to consider the appropriateness of their conclusions. The Court has always regarded itself as having a role to play in easing tensions and conciliating situations of conflict. This, indeed, is part of the specific nature of its judicial function as an organ of the United Nations. The Court serves the purposes of the United Nations itself; it cannot be considered as a separate body, disconnected from the rationale and mission of the United Nations. Moreover, this is a task assigned to it by the Charter.

149. The judicial organ itself has always regarded its specific nature as entailing the need for a degree of detachment from the way in which the parties submit problems to it. The Court has a
38 measure of liberty in this regard. Not only is it not bound by the characterizations that the parties submit to it — a principle of judicial procedure that is fairly widespread — but it also retains its prerogative to determine whether it is even appropriate to decide a case, not necessarily discerning a subject-matter for judgment where States might believe such a subject-matter to exist. In the above-mentioned *Nuclear Tests* case, it again considered that it was the Court's duty, after having heard the Parties, "to isolate the real issue in the case"[19].

150. The requirements of the Court's judicial mission sometimes take precedence over an excessive adherence to the principle that the parties control the course of the proceedings.

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[18] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 25.

[19] *I.C.J. Reports 1974*, para. 29.

151. When it examined the request for an opinion on *Certain Expenses of the United Nations*, the Court held, after declaring that it was entitled to rule on the question of the conformity of the expenses with the Charter, that it should see whether it "finds such consideration *appropriate*".

152. Further on, the Court wrote, even more explicitly, that it "must have full liberty to consider all relevant data available to it in forming an opinion"[20].

153. The Court's liberty to assess the content and scope of the disputed matters submitted to it was also underlined by Judge Lauterpacht in his separate opinion in the case concerning the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*. In that opinion, he considered that the Court had "considerable latitude in construing the question put to it or in formulating its answer in such a manner as to make its . . . function *effective and useful*"[21].

154. In the case concerning the *Western Sahara*, the Court established that its function "is to give an opinion . . . once it has come to the conclusion that the question[] put to it [is] relevant and *[has] a practical and contemporary effect* and . . . [is] not devoid of object or purpose"[22].

39 155. This is so because the Court has always embraced a constructive conception of its role, to the point of considering that its right to redefine the terms of the case submitted to it stems from its "inherent jurisdiction". This was stated in the same *Nuclear Tests* case, which bears a striking resemblance to the present case in more than one respect:

> "it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute . . . Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the [purposes] just indicated, derives from the mere existence of the Court . . ."[23]

156. However, it is the clarity of the arguments with which it concludes its reasoning that makes this decision so important for the present proceedings between Senegal and Belgium. The Court took note of the statements of the French authorities, indicated the scope of such unilateral acts and concluded that it was not relevant to adopt a contentious approach to the question submitted to it. When a State, in the international order, not only declares its intention to perform a specific action but carries it out as part of its conventional obligations, which do not raise any problems of interpretation, there is no reason not to take into account such a declaration and every reason to consider that there is no cause for contentious proceedings on this specific point. This is a simple and logical argument that is fully consistent with the requirements of a system of social organization, such as the international order. In the *Nuclear Tests* case, the Court formulated a statement of principle that applies perfectly to the dispute at present before it: "The Court," it stated,

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[20] *I.C.J. Reports 1962*, p. 157.

[21] *I.C.J. Reports 1956*, separate opinion of Judge Lauterpacht, p. 36.

[22] *I.C.J. Reports 1975*, p. 37.

[23] *I.C.J. Reports 1974*, para. 23.

"sees no reason to allow the continuance of *proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of*
40 *litigation is an obstacle to such harmony* . . . It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*."[24]

157. The Court's reluctance to deliver judgments that are purely declaratory is a logical consequence of a realistic approach. In this instance, not only has Senegal taken steps that are consistent with beginning to fulfil its obligations but also it is difficult to imagine the implications of the Court's accepting Belgium's claim. Is it conceivable that the Court would ask Senegal to execute a commitment that that State has begun to fulfil? Unless the Court were to adopt an excessively managerial role, issuing actual commands to States and drawing up a precise and rigorous timetable for them to fulfil their obligations, it is difficult to see how the Kingdom of Belgium's submissions might be allowed. The case law from the *Northern Cameroons* case also contains some salutary lessons. There the Court indicated that it was concerned about the objective impact of its ruling, declaring that if it "were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application"[25].

158. A ruling delivered in accordance with the terms of the Belgian claim would be of only questionable utility. It would not help either Belgium or Senegal to perform their obligations. Indeed, it might on the contrary constitute a sort of unwelcome intrusion into a normal process, in which a State assents to a request made by another State under a Convention to which they are both parties. In this case, Belgium is requesting the Court to declare that Senegal must prosecute or extradite Mr. Hissène Habré. In fact, Senegal, in accordance with the 1984 Convention against Torture to which it is party, and which allows extradition to be refused provided that there is a prosecution, has long been striving to implement all of the necessary measures to enable Mr. Habré to be put on trial.

159. Senegal believes that punishing the acts referred to in the Convention against Torture is a peremptory requirement for all States. The fight against impunity, the importance of which
41 Belgium wished to recall, is supported by a broad consensus, which was particularly apparent when the 1984 Convention was adopted. It is incumbent on the entire international community to engage in that vital fight. Senegal is a State that is committed to punishing the crimes referred to in this international instrument. It believes, therefore, that it should spare no effort to combat violations of international law. It does not see this position as in any way exceptional; its obviousness is commensurate with the gravity of the acts concerned.

160. Senegal would have preferred the consensus in favour of punishing acts of torture not to be overshadowed by any cloud of suspicion or by any initiative that might give the impression that there are some States whose willingness to combat impunity is fading or weakening.

161. It is as determined now as it was in the past to remain part of the international consensus against allowing practices that shock the conscience of humanity to go unpunished.

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[24] *I.C.J. Reports 1974*, [paras.] 58 [and 59].

[25] *I.C.J. Reports 1963*, p. 33.

162. Therefore, to avoid delivering purely declaratory decisions, the Court does not examine a claim laid before it on its merits if it believes that the case falls outside its jurisdiction, which is true in this instance because no dispute exists between the Parties.

163. In this case, Belgium founds the Court's jurisdiction on the provisions of Article 30 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. In its view, four conditions must be satisfied before a party can submit an application to the Court on the basis of this text:

"— there must be a 'dispute between two or more States Parties concerning the interpretation or application of [this] Convention';

— the dispute 'cannot be settled through negotiation';

— one of the parties to the dispute must have requested that it be submitted to arbitration; and

— 'within six months from the date of the request for arbitration the Parties are unable to agree on . . . the arbitration'".

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164. This argument is not new. It had already been used by Belgium in its Application instituting proceedings and its request for the indication of provisional measures, as follows:

> "The two States have been parties to the United Nations Convention against Torture of 10 December 1984 since 21 August 1986 [Senegal] and 25 June 1999 [Belgium]. The Convention has been in force since 26 June 1987. Article 30 of the Convention provides that any dispute between two States parties concerning the interpretation or application of the Convention which it has not been possible to settle through negotiation or arbitration may be submitted to the ICJ by . . . the States. In this instance, Belgium has been negotiating with Senegal since 2005 for the latter to prosecute Mr. H. Habré directly, failing his extradition to Belgium. As Senegal has taken no action on these alternatives in practical terms, Belgium is now in a situation where the other party has declared itself unable, or refuses, to give way, thereby exhausting the obligation to settle the dispute by negotiation." (See paragraph 14, first subparagraph, of the Application instituting proceedings of 16 February 2009.)

165. Senegal has sincere doubts about whether the positions defended by the two States before the Court really do conflict in this way. A demand was made for an obligation to be fulfilled and the party to which it was addressed solemnly confirmed its willingness to assume the obligation concerned. The matter could have been left as it stood, the rest being a question of mutual trust and good faith. Belgium would have been entitled to seise the Court if Senegal had given any intimation that it was suspending its commitments or laying them open to different assessments. In fact, nothing of the kind has occurred.

166. In Senegal's view, even a superficial examination of the Application submitted by the Kingdom of Belgium reveals that there is no real legal dispute in this case. Indeed, it is clearly apparent from the terms of the Application that Belgium is requesting the Court to adjudge and declare that the Republic of Senegal is obliged to begin criminal proceedings against Mr. Hissène Habré. In fact, Senegal has already taken all of the appropriate measures to achieve this objective and the steps that it has taken hitherto demonstrate its willingness to hold the trial.

167. Senegal has now completed all the necessary legal reforms to enable it to hold a fair and equitable trial reasonably quickly. Amendments have been made not only to its substantive and
43 procedural criminal rules but also to the Constitution, with the result that no legal obstacles now remain to proceeding with the prosecution.

168. How can there be talk of a dispute concerning the interpretation and application of the 1984 Convention when Senegal has fulfilled all the conditions that the Convention requires of it?

169. Mention may be made in this connection of the introduction into the Senegalese Penal Code of provisions (Articles 431-1 to 431-5) to punish the crime of genocide, crimes against humanity, war crimes and, in general, crimes of international humanitarian law. Although these provisions were only introduced into Senegalese legislation after the commission of the acts of which Mr. Hissène Habré is accused, they can perfectly well serve as a basis for the proceedings as they are explicitly declared to be retroactive, as permitted by the Constitution. It is worth recalling that our Basic Law, in its current form, provides for a derogation from the principle of non-retroactivity for any act or omission which, at the time when it was committed, was defined as criminal under the rules of international law concerning acts of genocide, crimes against humanity and war crimes.

170. These reforms of substantive criminal law are accompanied by far-reaching changes to the rules on jurisdiction and procedure: the international jurisdiction of the Senegalese courts has been extended so that they can henceforth prosecute certain crimes committed abroad by foreigners; in addition, there is the guarantee of expedited proceedings in accordance with the requirement that a fair trial should take place within a reasonable period of time.

171. However, this intense legislative activity could not produce the desired effect if the appropriate organs and resources were not in place; this explains why, some considerable time ago, the competent authorities appointed four investigating judges, three prosecuting judges, a pool of registrars and secretaries, a co-ordinator and a Committee on Follow-up and Communication. This demonstrates the desire of the Senegalese authorities to ensure that Mr. Hissène Habré is tried under proper conditions.

44 172. Senegal has taken all of these steps because it believes that its courts, given the scope of their jurisdiction, are well placed to hold the contemplated trial.

173. Apart from Mr. Hissène Habré's presence in Senegalese territory — a not insignificant factor if only because it averts all the complications associated with an extradition request — the fact that Senegal has the option of exercising universal jurisdiction means that the Senegalese courts can hear all the facts at issue, regardless of the nationality of the victims.

174. Belgium, it should be recalled, has amended its legislation to make its courts' jurisdiction over certain acts committed abroad conditional on certain factors demonstrating a connection to Belgium, so that passive personal jurisdiction, the only possible basis for prosecution in the Belgian courts, severely limits the possibility of referral to those courts because they will be able to take cognizance only of acts to which persons of Belgian nationality have allegedly fallen victim.

175. If no judicial investigation has been opened, it is because Senegal wished to ensure that all the necessary conditions, in particular the financial conditions, were met so that the trial could take place reasonably quickly. It is Senegal's conviction that everyone has the right, no matter how serious the acts with which they are charged, to be tried within a reasonable time. It cannot therefore take the risk of starting a trial that might be interrupted because of insufficient resources. Once the proceedings have started, they must be carried through to completion without being interrupted for longer or shorter periods in order to mobilize the necessary funds to enable them to continue, as happens in some international courts.

176. It is true that the case has evolved since the Court was seised because of the judgment of the ECOWAS Court of Justice. Senegal has therefore worked with the African Union to explore possible ways of overcoming the obstacle presented by that judgment.

177. Furthermore, Belgium has obviously "manufactured" a dispute in order to seise the Court. Given all of the amendments that have been made to the Code of Criminal Procedure to
45 enable the Senegalese courts to prosecute offences committed abroad by foreigners once those offences have been classified as "torture", how can it request the Court to adjudge and declare that:

> "1. *(a)* Senegal breached its international obligations by failing to incorporate in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"?

178. How can a dispute exist as to the interpretation and application of the Convention when Senegal has fulfilled all its obligations?

179. These arguments should show convincingly that there is no real dispute between the Parties, particularly if reference is made to the Court's case law (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*).

180. There is no need, in this instance, to undertake a detailed analysis of the Applicant's claims to realize that there is no opposition between the Parties in the form of a claim made by one against the other to which the latter refuses to accede.

181. Given that the conditions provided for in Article 30 of the Convention against Torture are cumulative, as the Kingdom of Belgium itself accepts, it is enough for one of them, in this case the existence of a dispute, to be lacking for the Court to be obliged to find that it lacks jurisdiction.

182. It is true that, when the Court examined the request for the indication of provisional measures, it held that it had prima facie jurisdiction to hear the case under Article 30 of the Convention against Torture and therefore, if necessary, to indicate provisional measures. **However, we should not lose sight of the fact that this is simply, as has been observed[26], a manifestation of the "precautionary principle" in respect of jurisdiction, which the Court finds it necessary sometimes to apply when the Applicant is unable to invoke any serious title**
46 **of jurisdiction.** A decision by which the Court finds that it has prima facie jurisdiction within the

[26]See Pierre-M. Martin, *Un différend entre la Belgique et le Sénégal: l'affaire Habré, [Recueil Dalloz]*, 2009, [No. 31], p. 2125.

context of a request for the indication of provisional measures does not therefore constitute *res judicata*, which means that when, on examining the case on its merits, the Court finds, as in the present case, that there is nothing to decide as no current dispute exists, it must decline jurisdiction despite its previous decision.

183. Having regard to the foregoing, Senegal requests the Court to find that there is no need, today, for it to exercise its jurisdiction or to make an adjudication on which the two States agree, despite Belgium's persistent claims to the contrary.

184. Even if the Court were to deem it appropriate to proceed regardless and to uphold its jurisdiction, the patent inadmissibility of the Application, based on the violation of Article 30 of the Convention against Torture, should lead to the rejection, without any examination on their merits, of the measures sought.

II. THE INADMISSIBILITY OF THE APPLICATION

185. To justify its action before the Court and support its assertion that the Court has jurisdiction to decide this dispute, the Kingdom of Belgium relies, firstly, on the two unilateral declarations made under Article 36 of the Statute of the Court, by the two Parties to the proceedings, and, secondly, on the provisions of Article 30 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

186. According to paragraph 1 of the latter,

> "[a]ny 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."

Two questions arise here.

187. The first question to be answered by the Court is therefore whether the Kingdom of Belgium, which initiated the proceedings, has complied with this provision. In other words, have
47 the avenues first of diplomatic negotiation and then of arbitration been explored and exhausted?

188. In the document submitted to the Court, the Kingdom of Belgium, referring to these "negotiations", mentions the following initiatives that it claims to have taken:

— 30 November 2005: it "asks" the Government of Senegal to explain "the implications" of a judgment by the *Chambre d'accusation* of the Dakar Court of Appeal in which it held that it lacked jurisdiction. It should be noted that Senegal responded to this request through its ambassador in Brussels. In particular, this response shows that, notwithstanding the judicial decision, the Republic of Senegal intended to raise the "[Habré] matter" during the African Union (AU) summit, scheduled to take place a few months later in Banjul;

— 11 January 2006: according to Belgium, it "notes" the decision of the Senegalese authorities to raise the matter with the AU and, it writes, "refers" to the negotiation procedure contemplated in Article 30 of the 1984 Convention against Torture;

— 9 March 2006: Belgium "points out" the negotiation process and "asks" Senegal whether the raising of the "Habré matter" means that Senegal will neither extradite Mr. Habré to Belgium nor try him. Senegal responded to this question as well. Its response was that, in raising the matter with the African Union, the Republic of Senegal did not seek to shirk its obligation under the 1984 Convention (namely, to try or to extradite), but, on the contrary, intended to assume its duty to prosecute.

189. By Belgium's own admission, and as discerned from its description of the process leading up to the proceedings before the Court, those were the main stages said to have marked the negotiations which Article 30 of the 1984 Convention makes a precondition to any action before the International Court of Justice.

190. The Court will thus have the opportunity to observe the liberty taken by the applicant State in interpreting the obligation to negotiate. International negotiation presupposes a minimum number of contacts and a minimum amount of follow-up and definition of the terms of the discussion; the Kingdom of Belgium has clearly paid no heed to these minima in the present case. There has never been any offer to negotiate, never any of the exchanges characteristic of diplomatic negotiations. The only approaches cited by Belgium in this regard consisted of addressing questions to the Senegalese authorities, questions simply calling for answers, and the Republic of Senegal always gave these. Moreover, why should negotiations have taken place given that Senegal is fulfilling its obligations? Negotiations would be conceivable and welcomed by Senegal only if it were in breach, which is not the case, as Senegal has shown.

48

191. Thus, everything points to the applicant State wishing to move "by surprise" and to bring proceedings against the Republic of Senegal before the Court by retrospectively interpreting some of its approaches as connected with a precondition imposed by the 1984 Convention against Torture.

192. Everything points to Belgium having had a preconceived intention to bring proceedings, the rest — that is to say, its earlier *démarches* — being mere formalities or pretexts for meticulously planned legal proceedings.

193. The obligation to negotiate is not a rather "vague" instruction to States to perform duties that are not perfectly clear. It has a positive content that international case law has long underlined. In the arbitral award delivered on 9 December 1978 in the case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France*, the Arbitral Tribunal recalled that,

> "the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance. There is the very general obligation to negotiate which is set forth by Article 33 of the Charter of the United Nations and the content of which can be stated in some quite basic terms. But there are other, more precise obligations. The Tribunal recalls the terms of Article VIII of the 1946 Agreement, which reads as follows: 'In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of

> the principles . . . outlined in the present Agreement . . .' This Article provides for an obligation of continuing consultation between the Parties."

194. International negotiation is understood to require "transparency" and good faith on the
49 part of States. It bars "surprises" or dissembling; and it must, so to speak, present itself as such. It is on this condition that it may be invoked against a State.

195. The Kingdom of Belgium never expressed its intention to engage in negotiations with any real conviction to the Republic of Senegal. Moreover, how could it have done so since Senegal was fulfilling its obligation? As Belgium itself writes, it merely "pointed out" the precondition laid down by Article 30 of the Convention against Torture. Such conduct is not in strict accordance with the requirements of good faith in inter-State relations. The Court itself has repeatedly established a link between the obligation to negotiate and good faith.

196. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, it indicated, in connection with the obligation to negotiate expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, that this obligation

> "includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'."

197. In the *Nuclear Tests* case, the Judgment of 20 December 1974 delivered by the Court also recalls that, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential." (*I.C.J. Reports 1974*, p. 268, para. 46.)

198. The link that the Court establishes between the obligation to negotiate, the principle of good faith and mutual trust is particularly apposite in the present case.

199. The Republic of Senegal considers not only that the applicant State did not properly observe its duty to negotiate, but also that the Applicant's action before the Court, and the sort of
50 excessive haste accompanying it, reflect a clear defiance and abuse of the right to take proceedings for which there is neither any basis nor any justification, in the light of the measures that Senegal has taken thus far to organize the trial of the former Chadian Head of State.

200. In the present context, it must be recognized that there was no reason for the "negotiation" required by Article 30 of the 1984 Convention against Torture and none took place. When a party intends to enter into a process of discussion, it should clearly say so. More or less "general" questions aimed at eliciting factual information cannot suffice.

201. The Kingdom of Belgium will therefore be hard put to demonstrate the failure of an initiative that never really took place. In order for judicial proceedings to be initiated against a State party to the Convention, the negotiations entered into must have failed; all the avenues explored to reconcile the points of view must have reached an impasse. However, the Kingdom of Belgium fails to demonstrate the existence of any such impasse; it cannot say that any efforts it supposedly made ended in failure. If we go by its own presentation of the facts, we cannot help but observe the strangeness of the circumstances in which it claimed to have exhausted its obligation to negotiate. In fact, it was subsequent to a reply from the Government of the Republic of Senegal, providing assurances that it intended to prosecute or extradite Mr. H. Habré, in accordance with the Convention (statement of 9 May 2006), that Belgium pointed out that the negotiations based on Article 30 of the Convention had "not succeeded" (20 June 2006). As strange as this may seem, Belgium thus considered that it had to "point out" a failure after receiving a reply which should actually have satisfied it. This conduct lends credence to the idea that the judicial proceedings that have now started had been planned well in advance and that the claimed failure of the negotiations is merely an "alibi".

202. The second question that arises in this case is whether there has been a failure of negotiations. The Court takes a very strict view of what constitutes the "failure of negotiations". In the *Mavrommatis Palestine Concessions* case (Judgment of 30 August 1924), the Permanent Court of International Justice defined what was meant by the failure of a negotiation, justifying recourse to judicial settlement. The State relying on the failure of negotiations to take court proceedings can justify its position only if, in the negotiations, "a dead lock is reached, or if finally
51 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*" (*P.C.I.J. Reports, Series A, No. 2,* p. 13).

203. Can it be said in the present case that the Government of the Republic of Senegal adopted any such attitude or gave the slightest evidence of any such refusal? Were negotiations ever begun and, *a fortiori*, did they ever reach a deadlock of the kind which the Court defines as the test for the failure of negotiations?

204. The fact is that the Kingdom of Belgium has never entered into any real negotiations with the Government of the Republic of Senegal. Its only approach to the Senegalese authorities was through Notes Verbales consisting of questions about the status of the proceedings or about the Senegalese Government's plans in respect of the Habré case. Answers were provided to all those questions. The truth is that Belgium has never wanted Mr. Hissène Habré to be tried in Senegal.

205. It might be added that Belgium has also failed to comply properly with another precondition laid down by Article 30 of the 1984 Convention against Torture: the recourse to arbitration.

206. It will be recalled that, according to the relevant provision,

> "[a]ny 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."

207. Not only did the Kingdom of Belgium not enter into any negotiations in the strict sense of the term with the Government of the Republic of Senegal — and consequently could not legitimately argue that negotiations in any sense failed — but also, by its conduct, it skirted round the other precondition laid down by Article 30 of the 1984 Convention. The only reference to arbitration is in a statement by the Belgian Government dated 20 June 2006, which Belgium claims to have sent to the State of Senegal, and it is evasive. According to its own presentation of the
52 facts, Belgium "[observed] that the negotiations based on Article 30 of the Convention have failed; it [noted] that there [was] a dispute between the two States concerning the interpretation of Article 7 of the Convention and [asked] Senegal to submit to the arbitration process contemplated by Article 30 of the Convention".

208. The three assertions lurking in this seemingly innocuous sentence are all questionable:

— Belgium speaks of the failure of negotiations that never actually took place;

— it refers to the existence of a "dispute concerning the interpretation of Article 7" of the Convention when nowhere in the Notes exchanged with the Republic of Senegal was there ever any discussion of or dispute over this provision of the Convention; on the contrary, Senegal's response of 9 May 2006, the only document in which it refers to this provision, clearly states that Senegal "is complying with the spirit of the rule *aut dedere aut punire*" laid down in Article 7";

— the invitation that Belgium claims to have addressed to Senegal to submit to the arbitration procedure was extended only once, in a very surreptitious manner, in a statement whose subject was not the invitation in question (statement of 20 June 2006).

209. At a time when the African Union had just taken charge of the Hissène Habré matter and referred to the Convention against Torture, Belgium disregarded that fact and invited Senegal to negotiate.

210. As an essential prerequisite for action before the International Court of Justice was involved, Senegal was entitled to expect a clearer, less evasive proposal. Here, too, the circumstances reflect Belgium's desire to "expedite" the formalities required by Article 30 of the Convention, so as to satisfy as quickly as possible the conditions required for the Court to be seised.

211. Most importantly, however, the Kingdom of Belgium's desire to bring the matter to litigation was doomed to fail since the Republic of Senegal had begun the process that was, in principle, to lead to the trial of the former Chadian Head of State. The applicant State itself
53 recognized, soon afterwards, that constitutional and legislative reforms had taken place to remove the obstacles barring jurisdiction on the part of the Senegalese courts, obstacles which had justified the findings against jurisdiction previously handed down by the national courts.

212. Taken together, these circumstances show that the Republic of Senegal's good faith cannot be called into question. A detailed account has already been given of the steps taken and reforms implemented by Senegal since receiving the mandate from the African Union, with a view to trying Mr. Habré. Once it had been established in principle that the trial was to be held by the State of Senegal, the necessary arrangements had to be made for such a trial, the nature of those arrangements being not only legislative (necessary reforms), but also practical and budgetary (Senegal having entered into discussions with the European Union, of which Belgium is a member,

on this subject, as well as with the African Union, which, as we will see, has pledged budgetary support to the Republic of Senegal).

213. The Court will easily appreciate the striking contrast between the attitude of the Kingdom of Belgium, unquestionably in a hurry to try the case in its courts and skipping the steps required for that purpose, and the conduct of the State of Senegal: legitimately cautious to begin with but then sedulous once it became clear that it had the possibility to put Mr. Habré on trial.

214. In conclusion, the Kingdom of Belgium has not satisfied the condition laid down by Article 30 of the 1984 Convention against Torture: exhaustion of the negotiation procedure and a proposal to submit to arbitration. The Court is therefore requested to declare its action inadmissible.

CHAPTER 4

SENEGAL'S COMPLIANCE WITH ITS OBLIGATIONS AS A PARTY TO THE 1984 CONVENTION

215. In the Memorial that it submitted to the Court, Belgium persists in arguing that Senegal has committed "violations of international law". Senegal vigorously contests these allegations. It intends to show, firstly, that the accusations made in the Belgian Memorial should not be accepted **(I)**, and, secondly, that it has **already begun** to perform its obligations as a State party **(II)**.

54

I. REBUTTAL OF BELGIUM'S ACCUSATIONS

216. Belgium makes a series of assertions that Senegal cannot, of course, accept. These assertions relate to both the obligation to take the measures prescribed by various provisions of the 1984 Convention, aimed at ensuring the domestic implementation of conventional rules (A), and the specific obligation to "prosecute or extradite" (B). In addition, there is a further weakness in the Belgian *démarche* in the form of its use of the time factor in its Application (C).

A. Domestic implementing measures prescribed by the 1984 Convention against Torture

217. Despite all of the steps taken by Senegal since it undertook to comply with the obligation to bring its national law into line with its commitments as a State party to the Convention against Torture, Belgium, curiously, puts forward a version of the facts that is out of step with reality. The Belgian Memorial states:

> "Through its actions and omissions, Senegal has violated the obligations deriving from Article 5, paragraph 1, Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture . . .
>
> Up to the end of January 2007, Senegal had not incorporated in its domestic law the necessary provisions to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in the Convention. This omission violated Article 5, paragraph 2, of the Convention.
>
> [D]uring consideration of the second periodic report of Senegal, six years later, in 1996, the Committee had requested Senegal to

'consider introducing explicitly in national legislation the following provisions:

(a) The definition of torture set forth in article 1 of the Convention and the classification of torture as a general offence, in accordance with article 4 of the Convention, which would, *inter alia*, permit the State party to exercise universal jurisdiction as provided in articles 5 *et seq.* of the Convention.'

55 Despite this reminder by the Committee, Senegal failed to fulfil its obligation to take appropriate legislative measures to remedy this gap in Senegalese legislation and to introduce the universal jurisdiction provided for in the Convention. This omission and the inconsistency of Senegalese legislation with the 1984 Convention became particularly sensitive matters in 2001 during the Court of Appeal and Court of Cassation proceedings concerning the annulment of the procedure instituted against Mr. Habré on the grounds of the *lack of jurisdiction of the Senegalese courts*."[27]

218. Senegal cannot fail to express its astonishment at such an argument. The accusations that Belgium makes in its Application obviously date from a period relatively far back in the past — 1990, 1996, 2000, 2001 — and refer to an outdated legal situation, the description of which is undoubtedly of only little help for the Court's purposes. The Court is seised of a specific legal and factual situation, which has nothing to do with the description given in Belgium's Memorial. In fact, Senegal could not have been clearer on this point. It has always said that, although domestic measures to implement the Convention were not adopted by Senegal until 2006-2007, meaning that previously it was undeniably in breach of its conventional obligations, that has certainly no longer been the case since that omission was rectified more than four years ago.

219. The Memorial submitted by Belgium to the Court says nothing about this development, even though it clearly forms part of the evidence before the Court. Everything would seem to suggest that the Belgian State closed its eyes to the steps taken by the Senegalese authorities, thus reinforcing an impression — created during the hearings on the request for the indication of provisional measures — of a desire to bring to litigation a situation which is undoubtedly less tense than the rather "dated" description of it suggests.

220. The Court is requested to rule on a legal situation as it stands *at present*, not in the past. It is called on to declare whether, at the time of its seisin, Senegal is in breach, as Belgium claims, of its obligations as a State party to the Convention against Torture.

B. The obligation to "prosecute or extradite"

56 221. In its Memorial produced before the Court, Belgium writes that "Senegal failed in its obligation to prosecute or extradite Mr. Habré to Belgium", and that "The obligation to try or extradite provided for in the Convention derives from the mere presence of the person alleged to have committed acts of torture in the territory of the State Party concerned. In fact, it is a responsibility incumbent on Senegal as the forum State."[28]

222. Senegal intends vigorously to contest that statement or, at the very least, the implications which Belgium attaches to it. It considers that Belgium is thereby high-handedly dismissing all the measures that Senegal has been taking for some time in preparation for the Habré

[27] Memorial of the Kingdom of Belgium, pp. 81-82.

[28] *Ibid*., pp. 85 and 88.

trial, which are described here as constituting the "first steps towards fulfilling" the obligation to "prosecute" inferred from the Convention against Torture.

223. Suffice it merely to note the following initiatives, which are, incidentally, not the only ones which Senegal has taken with a view to bringing Mr. Habré to trial:

— on 9 November 2006, two bills amending the Senegalese Penal Code and the Code of Criminal Procedure were adopted by the Council of Ministers and then tabled in Senegal's Parliament;

— on 23 November 2006 a National Commission charged with defining the modalities for Mr. Habré's trial was established;

— on 31 January 2007 the National Assembly of Senegal adopted two laws amending the Penal Code and the Code of Criminal Procedure. The explanatory introduction thereto makes it clear that the intention of the Senegalese authorities in proposing those laws is to fulfil their international commitments and, as is traditional in their foreign policy, to help to combat impunity, a major issue in international relations today. New Articles 431-1 to 431-6 of the Penal Code introduce into national criminal law the crimes of genocide, crimes against humanity, including torture, and war crimes. Article 669 of the Code of Criminal Procedure has been amended to give Senegalese courts jurisdiction over the above-mentioned crimes if they are committed by a foreigner outside Senegal, if the perpetrator of the crime is present in Senegalese territory, if his victim is Senegalese, or if the alleged perpetrator has been extradited to Senegal. Senegal also established a working group charged with producing proposals to define the conditions and procedures suitable for prosecuting and judging Mr. Habré, with the guarantees of a just and fair trial;

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— on 29 May 2010 — after both States had set out their positions before the International Court of Justice in The Hague — Senegal's Minister of Justice stated that four judges had been appointed to lead the investigation against the former Chadian Head of State;

— in October 2009 terms of reference for the organization of Mr. Habré's trial were prepared by the Committee on Follow-up and Communication established by Senegal;

— on 5 December 2009 the President of the Republic of Senegal received the Belgian Minister of Development Co-operation in Dakar; he reiterated Senegal's intention to try Mr. Habré provided that the conditions for the trial were met. That statement was reaffirmed by the Senegalese Minister for Foreign Affairs to his Belgian counterpart on the sidelines of the African Union Summit in Addis Ababa (Ethiopia) in February 2010.

224. If, as the Memorial which Belgium presented to the Court suggests, Senegal had intended to shirk its obligations, it would certainly not have taken the trouble to amend its Constitution, adopt laws, and organize regular diplomatic exchanges with a number of States; nor would it have hosted international meetings to decide the conditions for conducting the trial of the former Chadian Head of State, including the Donors' Round Table to raise funds for the trial, etc.

In respect of the alleged breach of the "aut dedere aut judicare" rule, Belgium also contends that the current lack of funds to organize the trial does not constitute a "justification". In its Memorial, Belgium notes that

> "The seisin of the African Union does not constitute an alternative to compliance with Senegal's conventional obligations . . . The 'mandate' conferred on Senegal by the African Union to try Mr. Habré does not in any way exempt Senegal from its obligation, as the forum State, to submit the case to its competent authorities

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> or to extradite him to a State which so requests. This obligation continues to exist despite the intervention of the African Union. The obligation to try or extradite provided for in the Convention derives from the mere presence of the person alleged to have committed acts of torture in the territory of the State Party concerned. In fact, it is a responsibility incumbent on Senegal as the forum State."[29]

225. Senegal regrets to note, on this point as on others, the rather artificial nature of the disagreement which Belgium is attempting to highlight. In actual fact, the question of the interpretation of the African Union's "mandate" has already been discussed at the hearings on the request for the indication of provisional measures. Senegal has more than once explained to the Court the meaning and scope which it attached to the African Union's intervention. It has stated on a number of occasions that it did not see that intervention as the source of its obligation to try, but that it was, of course, legally bound only by its status as a Party to the 1984 Convention. That being so, Senegal finds it difficult to understand Belgium's insistence on an interpretation which has never been that of the State liable to fulfil the obligation in question — which is, precisely, to "try". Senegal therefore reiterates, in the hope of finally closing this discussion, that it regards the 1984 Convention against Torture as the sole legal basis for all the measures it has taken with a view to putting Mr. Habré on trial. In other words, the interpretations which the two Parties give to that "mandate" do not differ, but fully coincide. Moreover, the African Union decision conferring that "mandate" on Senegal mentions the Convention against Torture and refers to its content as the source of Senegal's commitments. Furthermore, the various measures and initiatives which Senegal has taken more than prove that it is indeed planning to honour its commitments as a State Party to the Convention against Torture, as is apparent from the following arguments.

226. Senegal would also like to clarify its position on another point in Belgium's argument, having to do with the "financial difficulties" to which it refers.

59 The interpretation given to that aspect of Senegal's submission should certainly be corrected. Belgium appears to view this factor as a sort of excuse relied on by Senegal in order to evade its commitment. The Belgian Memorial states that

> "Financial . . . difficulties cannot release Senegal from its obligations or justify the violation thereof . . . Belgium is aware of the legal, logistical and financial implications of organizing a trial in Senegal. Nevertheless, the failure to fulfil the requirement under Article 7, paragraph 1, of the Convention against Torture and under customary international law concerning the obligation *aut dedere aut judicare* cannot be justified, in international law, by such considerations. Compliance with these international obligations cannot be made subject to obtaining financial support, and financial difficulties do not constitute a state of necessity such as to exclude the unlawfulness of violations of these obligations."[30]

227. Senegal cannot accept this view. It has never presented the problem of financial support for Mr. Habré's trial as justification for failing to fulfil an obligation. Senegal has never at any point in the judicial proceedings sought to free itself from its commitment. The Court cannot therefore point to lack of funds or difficulties in establishing a special budget as exonerating factors, for the simple reason that that has never been Senegal's position.

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[29]Memorial of the Kingdom of Belgium, p. 88.

[30]Belgian Memorial, pp. 113 and 115.

228. For the Senegalese authorities it has simply been a question of ensuring that basic preparations were made for a trial which really is unique. Senegal has already described to the Court the particular problems associated with having to try the former Head of State in Dakar. It has consistently drawn attention to the large number of his alleged victims and the need for them to be heard in any judicial proceedings. Likewise, the complaints received show that the allegations cover more than a decade, corresponding to the time spent by the accused as Chad's Head of State. Belgium's own account of the facts shows that at least 3,780 people were affected by Mr. Habré's alleged actions, but it is claimed that this figure itself represents only one tenth of the total number of victims, which some sources put at around 40,000. The latter figure does not take account of the 54,000 political prisoners allegedly registered between 1982 and 1990. In total, therefore,
60 Mr. Habré's alleged victims could number at least 94,000. These are not figures which Senegal has produced, but are based on the complaints of the alleged victims. In those circumstances, it is understandable that the trial of the former Chadian Head of State is a case like no other. The scale of the challenge has not, however, prevented Senegal from taking the first steps along the lines required by the Convention against Torture.

C. Weaknesses in Belgium's argument relating to the use of the time factor

229. These weaknesses are on two levels.

230. First of all, Belgium has no hesitation in applying the Convention against Torture retroactively in order to take account of situations which occurred well before its own ratification of that instrument.

231. Second, the nationality of the alleged Belgian victims was acquired very recently, long after the period when the wrongful acts were allegedly committed. Here again, Belgium has no scruples about applying its jurisdiction over them retroactively. These observations may be expanded in due course.

II. First steps towards fulfilling Senegal's obligations

232. Senegal's determination to comply with its obligations is evident, first of all, from a series of initiatives which it has taken over a number of years, and which, as the Court will note, would serve no purpose other than in connection with the organization of Mr. Habré's trial (A).

233. Alongside these considerations relating to the application of the 1984 Convention against Torture itself, it must be added that Belgium's allegations concerning the commission of an internationally wrongful act by Senegal can have no basis in the principles governing the international responsibility of States in general or in the work of the International Law Commission (ILC) in particular (B).

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A. Initiatives taken by Senegal in order to fulfil its obligations as a State Party to the 1984 Convention

234. Senegal cannot agree with the central claim in Belgium's argument, that it is not fulfilling its international obligations. Unless it intends to dictate precisely how Senegal should fulfil those commitments, Belgium cannot argue that Senegal has failed to discharge, or has not adequately discharged, its duties as a State Party to the 1984 Convention against Torture.

235. How a State fulfils an international obligation, particularly in a case such as that before the Court, where the State must take internal measures of application, is to a very large extent left to the discretion of that State. Belgium cannot therefore imply that there is a specific way in which Senegal should comply with the 1984 Convention, which, in any case, does not contain any provision contradicting the overriding principle of freedom under international law.

236. That principle of freedom is evident from a series of decisions which the Court itself has delivered.

237. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court stated that

> "an act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself"[31].

238. The possibility for a State Party to the 1984 Convention to "try" rather than to "extradite" is clearly provided for in the Convention. Article 7, paragraph 1, is very clear on this point:

> "1. 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."

62 239. Arbitral jurisprudence has also stressed the State's freedom to choose how it intends to fulfil international obligations. In the dispute between the Islamic Republic of Iran and the United States of America, the arbitrator gave an assessment in the form of a principle, stating that

> "Unless otherwise agreed by treaty, general international law permits a state to choose the means by which it implements its international obligations within its domestic jurisdiction." [Iran-United States Claims Tribunal, Award No. 590-A15(IV)/A24-FT, para. 96.]

240. The principle that a State is free to choose how to fulfil its commitments also prevails at the regional level. In the *Colozza* case the European Court of Human Rights declared that the Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with conventional requirements, particularly those laid down in Article 6, paragraph 1, of the European Convention on Human Rights[32]. The Court notes that:

> "The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 para. 1 (art. 6-1) in this field. The Court's task is not to

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[31] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, p. 136, para. 272.

[32] *Colozza* v. *Italy case, ECHR, Series A No. 89* (1985).

indicate those means to the States, but to determine whether the result called for by the Convention has been achieved."[33]

241. From the outset, as soon as Senegal realized its commitments as a Party to the Convention, it made its choice and decided not to extradite, but to try. The finding of the Senegalese courts that it was not possible to try corresponded to the law as it stood, which did not, in fact, allow a trial to be conducted. That situation is now behind us, and as things stand at present — which is the "normal" situation for a State Party — Senegal has, more than once, explained why it has chosen to try rather than the alternative offered by the 1984 Convention. Here again, it is appropriate to recall the position expressed by the Agent of Senegal at the opening of the hearings concerning the request for the indication of provisional measures:

"Senegal is meeting its obligations to prosecute Hissène Habré stemming from the Convention Against Torture, on which the African Union's decision is based. Consequently, there is no request for extradition which has to be met in this case. *Aut dedere aut judicare*: either one thing or the other. And above all, it is extradition if there can be no trial. When the extradition avenue is blocked, and the country pledges to conduct a trial, it is hard to see — in relation to the Convention Against Torture — where any dispute could lie on the application and interpretation of that Convention. A request for provisional measures which consisted of the Court reminding Senegal of its obligations could not endow those measures with any protective quality. Under cover of an invitation to ensure compliance with international law, the purpose of the proceedings instituted by Belgium is to get the Court to order Senegal to extradite Hissène Habré as soon as possible so that he can be tried in Belgium in disregard of Senegal's rights and obligations under the Convention Against Torture and which task Senegal is tackling with unflagging determination."[34]

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The decision delivered on 18 November 2010 by the ECOWAS Court of Justice has introduced a new factor external to the proceedings before the Court, which is designed to block the proper implementation of Senegal's still very strong resolve to hold a trial. It creates a conflict between international obligations, which the Court might find as a fact and assess as to its scope.

Belgium is not unaware of this situation and has on several occasions questioned Senegal about what is to become of its earlier extradition request of 2005, which it wished to resubmit.

In response, the *Chambre d'accusation* of the Court of Appeal considered Belgium's request. Its examination led it to conclude that the extradition request did not fulfil the formal conditions laid down by Senegalese Law No. 71-77 of 1971 on extradition. It rejected the request as inadmissible because it had not taken account of the legal requirements.

That decision is particularly important in the present case. Its immediate implications are that it paves the way for Belgium to present a fresh extradition request should it so desire.

That request will therefore have to comply with the law if it is to succeed and result, if appropriate, in a decision in favour of extradition. The two alternatives offered by the principle *aut dedere aut judicare* are thus once again both available, allowing Senegal to choose to give serious consideration to extradition alongside the option of a trial.

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242. The obligation to prosecute or extradite laid down in Articles 5 and 7 of the Convention is a way of expressing the general obligation to combat impunity. Under that Convention, and as is

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[33] *Ibid*., pp. 15 and 16, para. 30.

[34] CR 2009/9, p. 20, para. 56 (Thiam).

clear from the preparatory work on it, a State Party is perfectly entitled to refuse extradition[35]. Since there is provision in the 1984 Convention for extradition to be refused, a refusal cannot under any circumstances breach the object and purpose of the Convention.

243. In the Convention against Torture, extradition occurs only where, for one reason or another, the State cannot "prosecute". The obligation to combat impunity, of which the principle of universal jurisdiction is an instrument, is not in itself a legal obligation. It serves to interpret the legal obligations to prosecute or extradite the perpetrator of acts referred to by the Convention. It is in that overall perspective that the States' commitments must be seen.

244. At issue here, first and foremost, is a general principle for interpreting international conventions, as provided for in Article 31 of the 1969 Vienna Convention on the Law of Treaties:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

245. It is a principle which the International Court of Justice in The Hague has also affirmed on a number of occasions, such as in the judgment it delivered in the *Oil Platforms* case between the Islamic Republic of Iran and the United States of America:

> "Article 1 must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied."[36]

65 246. The obligation "aut dedere aut judicare" is an alternative obligation, prescribing the duty to try or to extradite. International law gives neither of these possibilities precedence. The commentary on the Draft Code of Crimes considers that States did not intend to "give priority to either alternative course of action"[37].

247. The Report of the International Law Commission (ILC) also stresses the equivalence of the two alternatives offered to States, and the fact that "The physical presence of the alleged offender provides a sufficient basis for the exercise of jurisdiction by the custodial State."[38]

248. The International Law Commission naturally concludes that the State has "discretion to decide which part of the obligation it would execute"[39].

249. The efforts which Senegal has thus made may seem slow to Belgium, but there is no disputing their reality and the good faith in which they have been carried out. The most conspicuous evidence of the international community's recognition of those efforts lies in the series of positive assessments and even praise voiced by almost all institutions, States or bodies which

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[35]Preparatory work on the United Nations Convention against Torture, doc. E/CN.4/1984/72, para. 34.

[36]*I.C.J. Reports 1996*, p. 814, para. 28.

[37]Article 9, p. 31, para. 6, Draft Code of Crimes . . . with commentaries.

[38]Article 9, p. 31, para. 7.

[39]ILC Report A/CN.4/603, p. 22, para. 104.

have been led to enquire, in Senegal itself, about progress in the preparations for the trial. Suffice it to say that:

— on 15 March 2008, the European Union, of which Belgium itself is a member, acknowledged and welcomed the steps Senegal had taken to comply with its international commitments;

— Ms Louise Arbour, the former United Nations High Commissioner for Human Rights, praised the efforts which Senegal had made since indicating that it had opted to try the former Chadian Head of State;

— Mr. Manfred Nowak, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, highlighted in his report to the United Nations Human Rights Council
66 Senegal's commitment to try Mr. Habré, a commitment which, in his own words, "may provide a positive example to other States which so far have been reluctant to exercise universal jurisdiction over alleged perpetrators of torture present on their territory"[40];

— in February 2009, at its Assembly in Addis Ababa, the African Union welcomed the progress Senegal had made towards bringing Mr. Habré to trial.

250. Senegal considers that the issues raised by Belgium's claim cannot be discussed without regard to a fundamental concept of the law of international relations: the concept of good faith.

251. When Senegal solemnly declared, *inter alia* before the Court during the hearings relating to the request for the indication of provisional measures, that it undertook to do everything in its power to bring Mr. Habré to trial, it was giving a public undertaking which, in the tradition of international relations just as in the tradition of the Court's own judgments, should suffice or, at the very least, put the contentious issues into perspective. It appears that that undertaking was not enough for Belgium, which is pursuing its claim.

252. In these circumstances, Senegal appeals to the good faith which should govern relations between States. In its view, Belgium's Application somewhat undermines this fundamental rule of international law, which says that States are bound by the good faith of their declarations and can therefore have confidence in each other.

253. The Court itself recalled the fundamental nature of this rule in the *Nuclear Tests* case:

> "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."[41]

67 254. This is a further expression of the procedural principle of "estoppel" which the Court applied in, among others, the cases concerning *Military and Paramilitary Activities in and against Nicaragua* and the *Land and Maritime Boundary between Cameroon and Nigeria*.

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[40]Document No. 7 filed by Senegal on 2 April 2009, doc. A/HRC/4/33.

[41]*I.C.J. Reports 1974*, para. 46.

255. The structural need, within the international legal order, for the principle of mutual confidence was underlined by a former judge at the Court in The Hague, President Jules Basdevant:

> "The principle of good faith is really a principle which dominates the whole of international law and must be applied when endeavouring to define or implement any rule of the law of nations."[42]

256. The Court itself declared that:

> "Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."[43]

257. It matters little whether the binding character of a unilateral declaration of intent is based on the good faith of the declarant or on that of the party or parties to whom that expression of intent is addressed. Whether it expresses a desire to undertake an obligation or whether it refers to a social fact entailing specific consequences, a unilateral act by which a State expresses or promises a particular form of conduct creates an expectation which must always be respected. It has been analysed in this relatively simple light by a respected authority in the field of international law:

> "The [fundamental] idea is the protection of confidence. According to that principle, everyone has the right not to be disappointed in the legitimate expectations which he entertained concerning the development of a legal relationship in which he is a partner."[44]

It has also been affirmed that

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> "The justification for the binding character of a promise must . . . lie in the protection of that confidence: it is therefore evident that, even in the international legal order, that confidence is necessary for the binding character of a unilateral promise."[45]

258. Senegal was aware of all the expectations that might be engendered when it undertook to try the former Chadian Head of State. The solemnity of that undertaking and the seriousness of its consequences now lead Senegal to request that it be given sufficient space to carry out that plan. The judicial proceedings brought by Belgium are disrupting the calm approach required, even though Senegal has, for some time now, been taking steps to discharge its duties as a Party to the 1984 Convention against Torture.

259. However, over and above the actual steps taken by Senegal, which prove that it is complying with its international commitments, Belgium also faces the difficulty of demonstrating that Senegal has committed an internationally wrongful act capable of entailing its international responsibility.

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[42]J. BASDEVANT, "Règles générales du droit de la paix", *RCADI* (Collected Courses of the Academy of International Law) 1936 IV (Vol. 58), pp. 521-522. *[Translation by the Registry]*

[43]*I.C.J. Reports 1974*, p. 268.

[44]E. KAUFMANN, "Règles générales du droit de la paix", *RCADI* 1935 IV (Vol. 54), pp. 510-511. *[Translation by the Registry]*

[45]G. VENTURINI, "La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats", *RCADI* 1964 II (Vol. 112), p. 404. *[Translation by the Registry]*

B. The non-existence of an internationally wrongful act attributable to Senegal

260. Belgium writes in the Memorial which it presented to the Court that it

> "is entitled to invoke the responsibility of Senegal for internationally wrongful acts attributable to the latter in accordance with Article 42 *(b)* (i) of the Articles on Responsibility of States for Internationally Wrongful Acts"[46].

261. Senegal intends firmly to refute this view. No internationally wrongful act can be attributed to it. In order to demonstrate this, it is sufficient to recall the wording of the Articles drawn up by the International Law Commission (ILC) in its work on State responsibility.

According to Article 1

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> "Every internationally wrongful act of a State entails the international responsibility of that State."

Article 2 identifies the elements of an internationally wrongful act:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
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> *(a)* is attributable to the State under international law; and
>
> *(b)* constitutes a breach of an international obligation of the State."

262. The first question raised by Article 1, which sets out the principle on which all the following articles are based — that the violation of international law by a State entails its international responsibility — is how to define the substance of the obligation deemed to have been breached. In the present case, that obligation is laid down in the 1984 Convention against Torture: the obligation for every State Party to "try or extradite" persons accused of committing the acts referred to in the Convention. The question in the case before the Court, therefore, is the following: is Senegal refusing to fulfil its obligations?

263. Never at any point in the course of the "Habré case", either nationally or in an international context, has it been claimed that Senegal *refuses* to fulfil its obligations. An internationally wrongful act involves an attitude of repudiation, an at least implied denial, of a duty. The International Court of Justice itself has expressly stated that "it is clear that *refusa1* to fulfil a treaty obligation involves international responsibility"[47].

264. Not only has Senegal never in any way denied its duty to try Mr. Habré, it has even undertaken to bring him before its courts. It must surely be accepted that Senegal's conduct does not really raise a question of responsibility arising from the commission of an internationally wrongful act which itself consists of the avoidance of an obligation. In presenting the problem in terms of opposition or refusal to carry out a commitment, Belgium is therefore, at least in Senegal's

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[46] *Idem*, p. 117.

[47] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221; emphasis added.

70 view, departing somewhat from the accepted interpretation of the principles governing State international responsibility.

265. Senegal's conduct is also not legally wrongful if we refer to the conditions for the existence of a breach of an international obligation laid down in Article 12 of the Articles on the international responsibility of States, according to which

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

266. A breach of an international obligation therefore lies in the lack of conformity between the conduct expected of a State, "required of it" by that obligation, and the conduct it actually adopts. The International Court of Justice itself has felt bound to express this idea in a number of cases it has judged. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, it referred to acts' "compatibility or incompatibility with the obligations of [a State]"[48].

267. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court spoke of acts "contrary . . ., inconsistent"[49] with a State's given obligation. In the *Gabčikovo-Nagymaros Project* case between Hungary and Slovakia, the Court used the expression "*failure to comply with . . . treaty obligations*"[50].

268. Lastly, in the *Elettronica Sicula S.p.A. (ELSI)* case, the Court asked "whether the
71 requisition was in conformity with the requirements of [the Treaty of Friendship, Commerce and Navigation between the United States and Italy]"[51].

269. The wording of Article 12 indicates that an internationally wrongful act essentially consists of the non-conformity of the State's actual conduct with the conduct it should have adopted in order to fulfil a particular international commitment. The breach thus derives from the contradiction between the legal requirements and a State's practice.

270. Article 12 thus emphasizes "what is required" of a State. In the present case, it is to prosecute or to extradite. The act of prosecution is not a single, momentary action which a State can perform all at once, but comprises a series of steps. A trial — the action in question here — is sometimes part of a process, a judicial procedure which, by definition, comprises stages. A legal basis for bringing the former Chadian Head of State to justice was, for a time, not available in Senegal. That irregularity was rectified by the measures taken by Senegal, which have already been described.

271. Since Senegal has made a start on fulfilling its obligation to prosecute Mr. Habré, by first creating the legal basis for a trial, as is only logical, it cannot be accused of not having assumed its responsibilities or of having committed an internationally wrongful act. Senegal

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[48] *I.C.J. Reports 1980*, p. 29, para. 56.

[49] *I.C.J. Reports 1986 (Merits)*, p. 64, para. 115, and p. 98, para. 186 (respectively).

[50] *I.C.J. Reports 1997*, p. 46, para. 57.

[51] *I.C.J. Reports 1989*, p. 50, para. 70.

definitely cannot be accused of *reluctance* or *refusal* to comply with an obligation, which constitutes an act giving rise to international responsibility.

272. It is possible to adopt a different perspective and to analyse Belgium's claim in the light of the extension in time of the breach of an international obligation. However, Senegal cannot be accused of an internationally wrongful act from that point of view either.

273. The ILC provisions relating to the extension in time of the breach of an international obligation are contained in Article 14, which provides:

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"1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

274. According to that article, the characteristic of a continuing wrongful act is that it extends over the entire period during which the act continues and remains not in conformity with the international obligation, which here consists of the alternative of "prosecuting or extraditing". Normally the examples of a continuing wrongful act which tend to be cited are: the unlawful detention of a person, the unlawful occupation of the premises of a diplomatic mission, the continuation of an unjust colonial occupation, or — an example with particular resonance in the present case — the maintenance of legislative provisions incompatible with the treaty obligations of the State which adopted them, etc. It follows that a continuing wrongful act is characterized by the fact that it does indeed persist, it is an act which has begun and is continuing at the relevant point in time, an act which is not yet finished or exhausted.

275. The question then is whether today, at the point in time when the Court is to rule on the merits of the case, Senegal has committed an act or omission contrary to its obligations, the effects of which are continuing. Belgium's insistence on referring to factors which no longer apply forces us to raise this question, to which the answer has to be no. Senegal can only be accused of having been rather late in adopting national measures to fulfil its treaty obligations. That omission has been rectified. Not only is it no longer appropriate to refer to it in the current context, but the only effect it was likely to have in practice — that of opening a breach in the enforcement mechanism established by the Convention against Torture — has been averted by the clear assumption of the duty to prosecute.

276. After all, Senegal has shown itself to be mindful of this enforcement requirement for some time now. Even though the legislation enabling the former Chadian Head of State to be tried

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was not yet in place, but rumours were spreading of the allegations against him and the prosecution to which they were likely to lead, the Senegalese authorities introduced a mechanism to prevent him from evading justice. Need we remind the Court of the measures Senegal had taken at the time, which were described to the Court in detail at the hearings on the request for the indication of provisional measures?

As Senegal made clear, Mr. Habré now has no travel documents allowing him to leave Senegalese territory. The Senegalese authorities refused to grant his request for a passport or safe conduct. The former Head of State's residence is watched round-the-clock by Senegalese police officers. Under those circumstances it is difficult to imagine how he could escape Senegal's control.

277. In taking those actions, Senegal is fulfilling a secondary obligation under the Convention, set out in Article 6:

> "Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence."

278. Senegal would respectfully draw the Court's attention to the fact that these measures to restrict the liberty of a person alleged to have committed the acts referred to in the Convention are entirely consistent with the obligation "aut dedere aut judicare". The 1984 Convention in a sense breaks down the obligation to "extradite or try" into a series of actions which a State required to comply with it should take. The measures which Senegal has taken up to now are not therefore peripheral to the Convention; they are not preliminaries to the fulfilment of obligations under the Convention, but are themselves components of the commitment "aut dedere aut judicare". It is therefore not entirely consistent with the Convention itself to suggest that Senegal has not yet fulfilled its commitments. It is one thing to bring Mr. Habré before the courts, and another to take further measures required by the Convention: the act of trying Mr. Habré is merely the culmination of a process, but it remains a commitment like other commitments; it cannot conceivably be
74 claimed that until that culminating action is complete, the State is not fulfilling its obligations.

279. Not only is Senegal taking measures which are directly inspired or justified by the Convention against Torture, but the Senegalese authorities have clearly stated, again on more than one occasion, that the purpose of those measures is indeed to "try" Mr. Habré. Is it really necessary to recall the solemn and firm commitment made by Senegal before the Court to seek to make it possible for Mr. Habré to be tried by the Senegalese courts? We would remind the Court of the words of Senegal's Co-Agent in response to a specific question from an eminent Member of the Court during the proceedings concerning the request for the indication of provisional measures:

> "Before I complete this presentation by the Republic of Senegal, I should like to respond to the important question put by the honourable Judge Greenwood. At the conclusion of the first round of oral argument, Judge Greenwood asked:
>
> > 'In view of what was said this afternoon, by the distinguished Agent of Senegal, and by learned Counsel of Senegal, first, does Senegal give a solemn assurance to the Court that it will not allow Mr. Habré to leave Senegal while the present case is pending before this Court? And secondly, if so, does Belgium accept that such assurance is a sufficient guarantee of the rights which it claims in the present case?'
>
> To respond: Senegal is of course prepared solemnly to confirm what it has already said:
>
> By order of my Government, and as Co-Agent of Senegal, I hereby confirm what Senegal said last Monday, that is — and I shall say this in English to Judge Greenwood, who put the question — 'Senegal will not allow Mr. Habré to leave

> Senegal while the present case is pending before the Court. Senegal has not the intention to allow Mr. Habré to leave the territory while the present case is pending before the Court.'"[52]

75 280. The Court will note that in acting as it did then, Senegal kept faith with the 1984 Convention. Nothing could be more inaccurate than to let it be thought that the Convention is, for Senegal, just a "piece of paper", no sooner signed than forgotten. All the measures that have been taken in relation to Mr. Habré over at least the last 15 years have been entirely consistent with the 1984 Convention. That being so, the finding by the Senegalese courts, against a specific background, of a lack of jurisdiction should not give the wrong impression. It reflected a failure to exercise due care which, though important, certainly did not mean that Senegal was flouting all the provisions of the Convention. The surveillance measures against the former President of Chad are based on a specific provision, Article 6, paragraph 1, of the Convention, which states:

> "1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted."

281. Senegal cannot, particularly now that it has introduced the legal basis for bringing Mr. Habré to trial, be suspected of taking liberties with the Convention or accused of any wrongful act. It cannot now be accused, any more than before, *of preparing the ground for* or *premeditating* a wrongful act, or in other words of planning such an act.

282. Belgium's persistent requests to the Court call for clarification on this point too. In international law, a State can be judged only on its actual deeds. Even if there is any doubt about the sincerity of what a State says, it is still absolutely impossible to infer any wrongful act from that doubt. Even where an internationally wrongful act consists of a precise action — which is not the case here — the mere preparatory measures for that action do not themselves constitute an internationally wrongful act. The Court made this clear in the *Gabčikovo-Nagymaros Project* case. The question asked of the Court concerned when the system for diversion of the waters had come **76** into operation. It replied that the breach of the law constituted by that act occurred only from the time when the waters of the Danube were *actually* diverted. According to the Court,

> "between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act

[52] CR 2009/11, 8 April 2009, p. 23, para. 5 (Kandji).

[whether instantaneous or continuous] and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'."[53]

283. The "possibility of an internationally wrongful act" therefore does not exist. Belgium's claim is essentially based on a factual and legal situation which no longer applies, and it will not in future be able to rely on criticizing Senegal's conduct. Senegal has broadly begun the process which should culminate in the trial of Mr. Habré, and is thus already fulfilling its obligations.

284. In the light of the above arguments, showing that Senegal is fulfilling its conventional commitments and has not, to date, committed any internationally wrongful act, it asks the Court to find in its favour on the following submissions.

SUBMISSIONS

For the reasons set out in this Counter-Memorial, the State of Senegal requests the International Court of Justice to adjudge and declare that

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;

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2. *In the alternative*, Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to "extradite or try" (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any rule of customary international law;

3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;

4. In taking the appropriate measures and steps to prepare for the trial of Mr. Habré, Senegal is complying with the declaration by which it made a commitment before the Court.

285. Senegal reserves the right to revise or amend these submissions, as appropriate, in accordance with the provisions of the Statute and the Rules of Court.

Dakar, 23 August 2011

(Signed) Prof. Cheikh Tidiane THIAM,
Ambassador, Agent of the Government,
Republic of Senegal.

(Signed) Demba KANDJI,
Co-Agent of the Republic
of Senegal.

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[53] *I.C.J. Reports, 1997*, p. 54, para. 79. The Court is citing the commentary on Article 30 resulting from the work of the ILC.