

DISSENTING OPINION OF JUDGE *AD HOC* SUR

[*Translation*]

The decision relies on the reasoning of an advisory opinion rather than that of the settlement of a dispute — Jurisdiction of the Court — Subject-matter and critical date of the dispute are not sufficiently determined by the Court; doubts as to the satisfaction of the precondition that it has proved impossible to organize arbitration; unfounded refusal of the Court to examine the dispute relating to customary rules — Admissibility of Belgium's Application — Irrelevance of Belgium's passive criminal jurisdiction: the Court should have ruled on that point; absence of an obligation erga omnes partes on which Belgium's Application could be founded; inadmissibility of the said Application — Merits — Senegal's breach of Article 6, paragraph 2, of the Convention against Torture; disappearance of the dispute relating to Article 5 of the Convention; no breach of Article 7, paragraph 1, by Senegal; Senegal has a permanent obligation to refer the case to its competent authorities for the purpose of prosecution; Belgium is not entitled to obtain extradition from Senegal on the basis of the Convention: regrettable silence of the operative clause on this point.

1. Much to my regret, I could not endorse several parts of the Judgment's operative clause and some fundamental points of its reasoning. I am therefore appending a dissenting opinion to the Judgment of the Court in the present case.

2. The general purpose of this opinion is to raise a question mark over the way in which the Court has conceived of its task, which is to settle a legal dispute between States in accordance with international law. I wonder if the Court has not in fact set about responding to a request for an advisory opinion on the nature and authority of the Convention against Torture, rather than examining in a fair and balanced way the arguments and conduct of the Parties.

3. On the other hand, of course, some opinions are not unlike indirect settlements of unspoken or implicit disputes, and the Court's advisory role is as much a part of its judicial mission as its role in contentious cases. However, the fact remains that a judicial settlement is only a substitute for a diplomatic one, and in my view it must offer a full, balanced and clear response to all of the parties' arguments and claims. This is especially important given the non-compulsory nature of the Court's jurisdiction and the need for the parties to trust that their views have been heard and taken into consideration.

4. In this case, it is my impression that the Court had to work as quickly as possible and that, so long as a majority was achieved in respect of the solution adopted, the reasoning was of lesser importance, except in order to confirm certain principles — the Court's interpretation of which seems to be as hurried as it is lacking in legal basis — relating to the Convention against Torture. The Court appears to have given itself the task

of stating the law, if not making the law in an abstract and general way, in order to ensure its prime position at the heart of the international legal system. By way of example, let us take the reference to *jus cogens* which appears in the reasoning, a reference which is entirely superfluous and does not contribute to the settlement of the dispute, as will be seen. The purpose of this *obiter dictum* is to acknowledge and give legal weight to a disputed notion, whose substance has yet to be established. Thus, the dispute is used for other ends, namely as a starting-point for further developments outside of its scope.

5. These general observations can be divided into three parts: the jurisdiction of the Court, the admissibility of Belgium's Application, which, in my view, is at the heart of the dispute, and finally the merits of the case.

I. JURISDICTION OF THE COURT

6. Senegal did not raise preliminary objections, and so the questions relating to jurisdiction were ruled on at the same time as the merits. Belgium relied on both Article 30 of the Convention against Torture — an arbitral and judicial settlement clause — and the joint effect of the unilateral declarations of acceptance by the two Parties of the optional jurisdiction of the Court. In my view, there are three questions which were neither examined nor resolved satisfactorily by the Judgment. The first relates to the subject-matter of the dispute and its critical date; the second to the precondition that the recourse to arbitration provided for in Article 30 of the Convention has proved impossible; and the third to the Court's jurisdiction in relation to the customary rules invoked by Belgium.

Subject-Matter and Critical Date of the Dispute

7. In fact, the Court has not adopted a position on these points and thus some aspects remain up in the air. Subject-matter and critical date are linked to the extent that the dispute derives from a request made by one party to the other, to which the latter refuses to accede. These requests may evolve, in such a way that the resulting dispute may also change: parts of it may be resolved and parts may persist; certain aspects may even be altered in some measure. That is why it is necessary for the Court to fix the critical date of the dispute at the same time as its subject-matter, or to indicate all of the critical dates which may exist across the various stages of a dispute which is still evolving.

8. So, what is the subject-matter of the dispute? Does it concern the interpretation of the Convention against Torture, as claimed by Belgium and rejected by Senegal? Belgium contends that the Convention obliges Senegal to establish its criminal jurisdiction so that it may try persons suspected of violating the Convention who are present in its territory; to immediately make an inquiry into the facts invoked; and to submit the case to its competent authorities for the purpose of prosecution, if it does

not extradite the individual concerned. Belgium considers that Senegal has breached these four obligations by failing to amend in a timely manner its domestic criminal legislation ; by failing to make the necessary preliminary inquiry ; by failing to submit the case to its competent authorities ; and by failing to extradite Hissène Habré — the successive requests made to this end all having been rejected by the Senegalese courts to which they were referred. In particular, Belgium claims that it has a right to demand that Senegal perform these obligations and to invoke the latter's responsibility if it fails to do so.

9. Beyond that direct right which is claimed by Belgium, Senegal does not dispute any of these obligations in principle. It has continually stated that it is committed to organizing the trial of Hissène Habré ; it advises Belgium to re-issue its extradition request so that it complies with Senegalese law ; and it points out that its domestic rules, both constitutional and legislative, have been modified to allow for a trial to be held in Senegal. It considers that the approaches it has made to the regional African authorities so as to receive help with the organization of a trial do not constitute an abandonment of its efforts to institute proceedings, especially given the fact that Belgium has itself supported these efforts with the promise of financial assistance.

10. *A priori*, therefore, the dispute does not concern the interpretation of the Convention since, rightly or wrongly, both States appear to agree on the content of the obligations contained therein — to prosecute or extradite. But are they correct, when the Convention simply requires that the case be submitted to the competent authorities for the purpose of prosecution and when, as the Court correctly points out, it is not established that prosecution and extradition are alternatives, or that the two should be given equal weight? If we accept this interpretation, however, which both Parties seem to share, there is no dispute between them, but there is one over an alleged delay by Senegal in the implementation and performance of these obligations. This is a question on the merits and, to some extent, involves an assessment of the relevant facts and conduct, to which I shall return later. Such is not the view taken by the Court, which adopts its own definition of the dispute, although it fails to set out exactly what that definition is and proceeds to examine aspects of the dispute without first having clearly identified it, together with its critical date or successive critical dates.

11. On this subject, I must point out that the circumstances changed between 2009, when Belgium's request for the indication of provisional measures was examined, and 2012, the year of the Judgment. In 2009, I believed that the dispute no longer had any object, since Senegal had confirmed that it was committed to organizing a trial and to exercising its criminal jurisdiction in accordance with the Convention, either by submitting the case to its domestic courts or by working towards the creation of an *ad hoc* tribunal. Three years later, those efforts have been unsuccessful. It is legitimate, therefore, to question the reasons for this delay. In the light of this, it is my view that a dispute does exist. However, keeping to

the Parties' common position, that dispute seems to concern, *a priori*, the application of the Convention against Torture and Senegal's delay in this respect, rather than its interpretation.

12. Such is not the view of the Court, which finds that there is a dispute — of which it has its own reading — relating to the interpretation of the Convention. Rather than defining the dispute in general terms, the Court considers it in parts. This leads it to find, for example, that the part of the dispute relating to Senegal's failure to establish its criminal jurisdiction in respect of suspects present in its territory ended in 2007, on the date of the adoption of the measures concerned. It implicitly dismisses another part of the dispute — that relating to the financial difficulties mentioned by Senegal — since Senegal has never invoked these as justification for a breach of its obligations. However, the Court substitutes the Parties' apparently convergent positions with its own interpretation of the Convention against Torture in respect of at least two points: first with regard to the *erga omnes partes* character of the obligations laid down in the Convention, and then to the difference in nature between the obligation to submit the case to the competent authorities for the purpose of prosecution and the obligation to extradite. In so doing, it departs from the Parties' reasoning in order to develop its own interpretation. Thus, although the Court relies on a difference of interpretation, it is in fact its interpretation which differs from that of the Parties, rather than the Parties' interpretations which differ from each other.

13. The Court is perfectly founded in so doing, since it falls to it to determine the subject-matter of the dispute. Nevertheless, I am far from convinced by the interpretation that the Convention establishes an *erga omnes partes* obligation to submit the case to the competent authorities for the purpose of prosecution. What is more, it seems to me that this interpretation is either a deliberate tactic to establish the admissibility of a questionable Belgian Application, or a means of achieving an end other than the settlement of the dispute, namely, to give the Convention against Torture the status of an *erga omnes* norm. The two things may even go hand-in-hand: one being the object of a sort of sacralization of the Convention, the other being the means by which to achieve it. It is in this respect in particular that the Court's reasoning seems to me to be more like that of an advisory opinion, abstract and general in its application, than that of the settlement of an individual dispute limited to specific States. In that context, establishing the exact nature of the dispute and its critical date or dates becomes of secondary importance. I shall return to this point in connection with the merits, since the critical date or dates determine how Senegal's delay in the implementation of the Convention is assessed.

Arbitration

14. The Court did not uphold Senegal's argument that one of the conditions of its jurisdiction, namely, that it has proved impossible to organize arbitration between the Parties, has not been met in this instance. It

simply observes that Belgium made known to Senegal that it wished to have recourse to arbitration and that this request went unanswered, Senegal merely taking note of it. It is true that this rejection of Senegal's argument is in keeping with earlier jurisprudence and that the Court is not formalistic on this point. Regrettably so, perhaps, since a minimal amount of formalism would avoid any ambiguity in the matter. When the Court sets out Belgium's approaches on the subject of arbitration, it attributes to them a continuity, coherence and clarity that is far from evident in the documents furnished to the Court. On the contrary, these are somewhat confusing, intentionally or otherwise, making it impossible clearly to discern the Parties' positions in this respect and the continuity of Belgium's position in particular.

15. In its communications with Senegal, Belgium has always pursued three approaches in parallel: negotiations — another precondition to the seisin of the Court —, and there is no question that these have taken place, with no prospect of success; judicial co-operation, as provided for in Article 9 of the Convention against Torture, which is of a different nature; and the request for arbitration, which was not followed by any additional details, such as an indication of the subject-matter of the dispute to be submitted to the arbitral tribunal, proposals relating to the composition of that tribunal or the substantive rules to be examined. The request for arbitration was, however, sometimes accompanied, often followed, and as such obscured, by other approaches from Belgium concerning the continuation of negotiations or proposals of judicial co-operation, in such a way that Senegal might question in good faith whether the request for arbitration was still valid, or whether it had been superseded by proposals of a return to judicial co-operation or negotiations, that is to say, by another means of settling, or even preventing, the alleged dispute. For its part, Senegal took note of the request for arbitration, but this request was not followed by any concrete proposals from Belgium regarding the practical details of its organization. The Convention, however, makes a clear distinction between these two stages.

16. Although, in fact, I subscribe to the Court's finding that, since arbitration could not be organized, this precondition of its jurisdiction has been met, I am nevertheless disappointed that the Court did not take this opportunity to clarify the condition in question. The Court could have stated that, in order to avoid any confusion in the matter, a request for arbitration should be put to the other party in an autonomous, distinct and separate way, with no other communication extraneous to the request, and should clearly set out the dispute in question and the essential organizational arrangements of the said arbitration. There would therefore be no ambiguity about a refusal by the party approached or its silence over a given period, or about the failure of negotiations concerning the organization of the arbitration. In my view, this is not true of the present proceedings, especially since the subjects of the dispute — extradition, delay in adopting the domestic measures to enable Senegal to exercise its criminal jurisdiction, delay in referring the case to the competent

authorities for the institution of proceedings — remained undetermined until the filing of the Application with the Court.

Customary Rules

17. The Court found that it did not have jurisdiction to rule on Belgium's allegations that Senegal had breached other rules of international law, in particular a possible customary rule containing the obligation to prosecute or extradite, which has given its title to the present Judgment. It had jurisdiction on another basis: the convergent declarations of Belgium and Senegal recognizing the jurisdiction of the ICJ. In my view, the Court has completely failed to justify its refusal. It seems to me, therefore, that this refusal is unfounded in law and that proper consideration has not been given to Belgium's claim in this respect. Senegal also deserved clarification on this point.

18. I am sorry to note that this declaration of lack of jurisdiction appears to be the result of a twofold concern. On the one hand, to avoid being drawn into a lengthy discussion which might delay the deliberation in the case, and thus to simplify the dispute by confining it to the Convention against Torture; on the other, to avoid having to find that the customary rule invoked by Belgium did not exist, so as not to hinder its possible subsequent establishment in customary law, and thus to maintain the uncertainty surrounding this point, pending further developments. Despite the Court's silence — perhaps even on account of it — it seems clear that the existence of a customary obligation to prosecute or extradite, or even simply to prosecute, cannot be established in positive law. It was necessary to determine that in order to respond to Belgium's claim. To my mind, the Court should have declared that it had jurisdiction over this issue and considered it on the merits. In this respect, I believe that it has failed fully to carry out its task of settling the dispute. For that reason, I voted against this part of the operative clause.

II. ADMISSIBILITY OF BELGIUM'S APPLICATION

19. This, to my mind, is the central point of the case, and the aspect of the Court's decision with which I find it hardest to agree. Is Belgium entitled to request that Senegal perform obligations which the former claims are incumbent upon it under the Convention? What right can it assert? Is it a State injured by a possible breach, meaning that it may seek the finding of the alleged breach and reparation for it? Belgium puts forward two arguments to this effect. On the one hand, it argues that it has passive criminal jurisdiction, since Belgian nationals have filed complaints against Hissène Habré in Belgium, which justifies its extradition request. This is in fact its principal argument. On the other hand, it contends that its status as a party to the Convention is, in itself, grounds for requesting as a non-injured State that Senegal should initiate pro-

ceedings and, if it fails to do so, should extradite Mr. Habré to Belgium. It was this second argument that was pushed to the fore during the proceedings before the Court and which, in the end, appeared to take precedence over the first, thereby demonstrating that Belgium had been forced to take account of the weakness of that first argument.

20. In the present Judgment, the Court decided not to examine Belgium's passive criminal jurisdiction, despite the fact that this served as the basis of the latter's conduct throughout the dispute, and was indeed a fundamental argument in its Application. The Court resorts to an economy of means, regrettable in that it fails to address all of the Parties' arguments, whether positive or negative. The Court also avoids noting that this basis, i.e., the passive criminal jurisdiction of Belgium, cannot be relied upon in this case. The Court simply upholds another basis of admissibility: the existence of an obligation *erga omnes partes*, which was invoked only belatedly, whose foundation is doubtful to say the least and which, in my view, the Court fails to justify in any way.

Irrelevance of Belgium's Passive Criminal Jurisdiction

21. Belgium initially founded its extradition request, and its right to request that the case be submitted to the competent authorities for the purpose of prosecution in Senegal, on its passive criminal jurisdiction, on account of the Belgian nationality of some of the alleged victims. However, the Belgian nationals in question had only acquired that nationality several years after the facts, and thus relying on this naturalization vis-à-vis Senegal raised difficulties, since Senegal only recognizes Belgium's passive jurisdiction in respect of victims who possessed Belgian nationality at the time of the facts. Under the Convention against Torture, the parties are not obliged to establish their passive criminal jurisdiction, meaning that the other parties are not obliged to recognize it, in particular when their own criminal law makes no provision for it. Accordingly, Belgium's request for extradition became inadmissible, as did its right to request that Senegal exercise its criminal jurisdiction, since it no longer had a direct right to invoke as an injured State.

22. Belgium's reliance on its passive criminal jurisdiction was not simply theoretical. It can be seen in its unwavering conduct throughout the case. Indeed, it was only after having registered and addressed in Belgium the complaints of the alleged victims, five years after the filing of those complaints, that Belgium transmitted an extradition request to Senegal. That is when it considered that it had a direct right entitling it to seek extradition or the institution of proceedings in Senegal. The basis for that entitlement is the complaints filed in Belgium. This conduct alone demonstrates that Belgium did not, therefore, envisage relying on any basis other than this passive criminal jurisdiction. It was this which it cited at the outset of the dispute and which was the basis of its initial Application, even if it was not the reason behind its belated ratification of

the Convention against Torture. Naturalization, ratification, the filing of complaints in Belgium: they all followed on from one another within the space of a few months with propitious speed, indeed almost simultaneously.

23. Although Belgium founded the request it made in 2005 on a right or special interest which it claimed to enjoy under the Convention by sole virtue of its capacity as a State party, on the basis of an alleged obligation *erga omnes partes*, it should have made that request as soon as it became a party to the Convention, in 1999. It should have called at that time for the opening of proceedings in Senegal, proceedings which would have been owed to it irrespective of any complaints and simply in its capacity as a party to the Convention against Torture. Above all, since Belgium considers that the alleged breach dates back to 2000, that is to say, to the point when complaints against Hissène Habré failed in Senegal, it should have raised the matter then. It would even have been justified in so doing, I would reiterate, as soon as it became a party to the Convention, since the presence of Hissène Habré in Senegalese territory was common knowledge, as were the allegations against him.

24. Belgium's lack of action at that stage demonstrates that it did not hold this interpretation of the Convention at the time. If a complaint by an individual which has not resulted in proceedings being brought is necessary for an inter-State dispute to exist and for implementation of the Convention to be required, that amounts to "privatizing" an *erga omnes partes* obligation which, if it exists, must be borne directly and exclusively by the States parties. On the other hand, if the title invoked is passive criminal jurisdiction, there is justification for complaints being a pre-requisite for extradition requests. In other words, *erga omnes partes* jurisdiction takes effect immediately and is not dependent on individual complaints, whereas a title of specific criminal jurisdiction invoked by one party against another supposes that the exercise of such jurisdiction was initiated by victims or their dependants and that the State having that title claims it in respect of the State addressed. I shall return to this point, overlooked by the Court, when examining whether or not there is an *erga omnes partes* obligation in the Convention against Torture to submit a case to the competent authorities for the purpose of prosecution, failing extradition.

25. Thus, Belgium's entire conduct up to and including the oral proceedings was founded on its passive criminal jurisdiction. For example, it is on this ground that it requested on several occasions, including quite recently, the extradition of Hissène Habré, each time on the basis of complaints of alleged victims. The Court, of course, is not bound by this reasoning. In determining and interpreting the rules that it applies, it may invoke other elements and base its finding on its own considerations. It was in response to a question put by one of the judges that Belgium focused on its particular position as a non-injured State, which is the basis for the Court's positive ruling on the admissibility of the Application. The Court should explain and justify its position legally. In my view, it merely asserts that there is an *erga omnes partes* obligation incumbent

on Senegal, an examination of which demonstrates the weakness, if not lack, of legal bases in the Convention itself.

Non-Existence of the Obligation Erga Omnes Partes Which Is Invoked

26. The obligation for the parties, as soon as the alleged perpetrator of an offence as defined in the Convention is discovered in territory under their jurisdiction, to submit the case to their competent authorities for the purpose of prosecution is a procedural obligation, but not a substantive one, since it may be that proceedings cannot take place, for reasons which are not of interest to us here. The Court considers that this obligation is valid *erga omnes partes*, meaning that all parties may call for its performance, regardless of whether they have a specific connection to the alleged victims. To this end, it puts forward three general and undifferentiated principles or presuppositions, none of which is truly demonstrated, and which even appear to be contradicted by an examination of the Convention.

27. The three presuppositions in question are the following. First, there are certain treaties establishing obligations *erga omnes partes*. Second, the Convention against Torture is one of these, because it falls into a particular category of treaties, a category which, incidentally, is overlooked by the Vienna Convention on the Law of Treaties codifying customary law on the subject. Third, all of the obligations contained in the Convention fall into this category, in particular the obligation to submit the case to the competent authorities for the institution of criminal proceedings. I shall refer briefly to the first assertion because, supposing it to be true in positive law, it would in no way imply that the Convention against Torture, particularly the Convention in its entirety, meets the conditions that are laid down.

28. (a) On this first point, the Court invokes the dictum of the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*) relating to *erga omnes* obligations. This is of no relevance to the present case because it pertains to obligations of conventional, not customary origin and because, moreover, the Court has ruled that it does not have jurisdiction to take cognizance of customary rules in the context of the present dispute. The Court also invokes a dictum from its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (I.C.J. Reports 1951)*, which concerned a treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, and therefore obligations *erga omnes partes*. In those proceedings, however, the Court noted that the rules in question were customary ones that were obligatory irrespective of participation in the Convention. What is more, it used this finding to temper the right to make reservations having effect for other States, by stipulating that the reservation must be compatible with the object and purpose of the Convention. It is a para-

dox to invoke some form of international public order so as to justify making reservations to it — and, in any event, that disregards the *erga omnes partes* character of the provisions to which such reservations may be made.

29. These two cases involved either an *obiter dictum* or a finding that was not essential to the settlement of the dispute or the response to the question. Here, by contrast, the *erga omnes partes* effect is crucial to admissibility, and thus must be considered carefully. It might have been possible to consider whether the rule invoked by Belgium was customary as well as conventional. However, the Court cannot rule on this point because of its declaration that it lacks jurisdiction. In any event, obligations should be distinguished from their normative, conventional or customary framework. A treaty may contain obligations of differing natures, and the *erga omnes partes* character of a treaty as a whole cannot be presumed or inferred from the presence of an *erga omnes partes* obligation therein.

30. (b) With respect to the second point, the provisions of the Convention must therefore be considered one by one, in order to distinguish between those which have an *erga omnes* character and those which do not. To reason otherwise would be to adopt an approach to the question that is more ideological than legal. In my view, regarding the Convention as a unit — even though reservations may be made to it, including in respect of the very definition of torture, even though some requirements are optional and others discretionary, and even though certain stipulations reflect customary rules while others do not — has no legal basis. The legal issue is thus the interpretation of the Convention against Torture and not its inclusion by declaration of the Court in a specific category of treaties said to create *erga omnes partes* obligations by their nature. The Court relies implicitly on the draft Articles of the International Law Commission (the “ILC”) on Responsibility of States. However, it is far from accepted that these express international customary law in the matter, and the adoption of a convention codifying the international responsibility of States has never been seriously envisaged, due to a lack of agreement on the subject. How can a norm of positive law be drawn from this without further explanation?

31. The ILC itself believed that the articles relating to “*States other than injured States*” fell within the realm of progressive development, i.e., that they were not part of customary law as *lex lata*. In this case, I fear that the Court’s desire to support their establishment has taken precedence over the objective consideration of a dispute which it has to settle “*in accordance with international law*”, under the terms of Article 38 of its Statute. It is on this very questionable basis, however, that the Court finds the admissibility of Belgium’s Application, even though this contradicts the actual conduct of the latter in the present case. It is essential not to start from a general presupposition, but to interpret the relevant provision of the Convention against Torture which lays down the obligation for every State party to submit “*to its competent authorities for the*

purpose of prosecution" any person suspected of committing the offences referred to in the Convention present in its territory.

32. This provision should not be confused with those which call for measures aimed at the prevention of torture or the establishment of the parties' criminal jurisdiction in the matter. Furthering the fight against torture begins with measures providing for its absolute prohibition, in all circumstances and under any pretexts, as laid down in Article 2 of the Convention against Torture. Prevention is key: if prosecution is necessary, it is already too late. The universal prohibition of torture is thus a customary rule; the same is not true of the obligation to prosecute. In my view, there is no question that the prohibition of torture is also an "*intransgressible obligation*", in the sense of the Court's Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (I.C.J. Reports 1996 (I)). However, this definition does not automatically apply; nor does it extend in either law or fact to all other obligations in the Convention.

33. With regard to the prohibition of torture, the notion of an "*intransgressible obligation*" is certainly preferable to a reference to *jus cogens*, since the latter is supposed to render incompatible treaties null and void. Is a treaty in which States would mutually authorize the practice of torture really conceivable? It is rather by material actions that the obligation is breached. In any case, the obligation relates to physical and psychological conduct, in other words, the orders and instructions given and the premeditated acts in question, rather than to international treaties. This is clear from the terms of Article 2, in particular. Such acts call for individual criminal sanctions, and the raising of their systematic condemnation to the level of an international norm has no tangible effect other than the moral satisfaction of those pronouncing it.

34. (c) As for the third point, the provision establishing the obligation to submit the case to the competent authorities for the purpose of prosecution is clearly of a different nature to the prohibition of torture itself. Its interpretation must be based on the general rule of interpretation as set forth in the Vienna Convention on the Law of Treaties between States, which is considered and applied by all States, including those not party to it, as reflecting customary law. This rule is unquestionably better established than that which seeks recognition of the rights of "*States other than injured States*". The general rule of interpretation refers to the text of the treaty according to the natural and ordinary meaning of its terms, while also taking account of its context, including the practice followed by States in the application of the treaty, the intention of the parties, and the treaty's object and purpose.

35. The Court does not appear to have taken account of these directives. Rather, it has adopted a teleological interpretation, constructing, on the basis of a purpose which is said by it to govern all of the provisions, an obligation *erga omnes partes* which is not substantiated by the

text or the intention of the parties, and even less so by their practice. Furthermore, the Court does not even attempt to consider the above directives, confining itself to unfounded assertions of principle. The object and purpose of the Convention, as determined by the Court, have superseded and removed all other considerations. In this respect, the Court seems anxious to appear up to date, in touch with certain courts, notably the international criminal courts, and not outmoded by comparison. However, what is involved here is interpreting a convention, not conducting a trial.

36. If one first considers *the text* of the Convention against Torture, it can be observed that the parties do not form a single homogeneous group which assumes the same obligations and can claim the same rights. For example, the parties are not all obliged to establish their criminal jurisdiction on the same basis. A general obligation exists only for jurisdiction in respect of persons present in the parties' territory; this is termed universal jurisdiction — which is an overstatement, since it concerns only the parties. Passive criminal jurisdiction, as has been pointed out, is optional. Only those parties which themselves have a title of criminal jurisdiction opposable to other States may request extradition on the basis of the Convention. Here is already an area in which rights and obligations are differentiated.

37. It should be added that the Convention contains a particular mechanism, set forth in Articles 17 to 24, which make provision for the establishment of a Committee against Torture. Article 21 of the Convention specifically authorizes States parties to refer to that Committee failures to give effect to the provisions of the Convention. A State acting in this context need not have a subjective interest. It may thus be considered that a common interest, collectively protected and guaranteed, is accepted and established. However, this special procedure does not concern all parties. It is dependent upon their express consent. Moreover, they can unilaterally withdraw this consent at any point (Art. 21, para. 2).

38. It would be very difficult, therefore, to argue that the parties all have the right to request performance of an *erga omnes partes* obligation to seize the competent authorities for the purpose of prosecution. That procedure can only be applied on the basis of specific provisions, the parties' acceptance of which is optional and may be withdrawn at any time. It can only be implemented between those parties which have consented to it. If the obligation were *erga omnes partes*, participation in the procedure provided for in Article 21 would not be optional but compulsory, giving a specific substance to that *omnes partes* character. On the other hand, the very existence of such an optional procedure demonstrates the lack of a general right of action outside and independent of the protection of a direct right of a State party. Its object is even to compensate for the absence of such a right, while at the same time drawing attention to that absence.

39. Finally, it should be added that the Court's jurisdiction and the recourse to arbitration provided for in Article 30 of the Convention are

also optional, which creates a further distinction between the parties, between those who may claim respect for their rights before independent courts and those who may not. Regrettable or not, it is very difficult to establish an *erga omnes partes* public order on such bases, to introduce verticality into a system which is by nature horizontal, in which parties' rights and obligations must be considered not in a general and abstract way, but on a party-by-party basis, according to the commitments they have made and their individual circumstances.

40. Lastly, if an obligation *erga omnes partes* does exist, as the Court states, this obligation is not dependent on complaints by individuals, as noted above. It is incumbent on the parties' government authorities; it falls to them to initiate public proceedings, and where they do not take action, they are at the same time showing that they are in no way obliged to do so. Article 7, paragraph 1, of the Convention is clear on this subject: "The State Party . . . shall . . . submit the case." This is particularly true of the obligation immediately to make a preliminary inquiry into the allegations, an obligation which is incumbent directly on the parties and which may be carried out independently of a complaint. By waiting, in practice, for complaints to be filed before they turn to the mechanisms for prosecution provided for by the Convention, the parties show that they do not consider themselves to be bound by an obligation *erga omnes partes*.

41. More broadly, the *practice of the parties* could compensate for these limitations of the text by pointing to a common understanding of the Convention and by exercising a perceived and accepted right to demand that the competent authorities be seised when a suspect is present in a party's territory. The Convention has been in force for 25 years and practice should not be lacking. Unfortunately, there is no evidence to support this. If anything, it is the opposite. Which parties have demanded that another State party which is sheltering individuals suspected of torture in its territory should seise its competent authorities, and when? Who, for example, has protested to the United States, or to other States parties to the Convention, regarding the continuation of numerous acts of torture whose existence was not disputed but indeed justified in the eyes of the States in question on grounds of security? Belgium itself rejected the notion of universal criminal jurisdiction, following pressure from the United States. It may be supposed that it has attempted to resurrect it here, vis-à-vis Senegal, undoubtedly a much easier prospect.

42. In the context of this dispute in particular, which parties to the Convention have called for Chad to prosecute the perpetrators of or accomplices in alleged acts of torture, even though the majority of the victims — and the perpetrators — are of Chadian origin and, for the most part, still in Chadian territory? According to the Court's logic, 150 parties would have been in a position to do so. Has Belgium troubled itself to do this? Has it requested that Chad prosecute the persons suspected? The Court does not seem concerned by this practice, or rather negative practice, which is nevertheless pertinent for establishing the

existence of a right belonging to “*States other than injured States*”. This further demonstrates that, in reality, Belgium has founded its conduct on nothing more than its purported status as an injured State, by virtue of its passive criminal jurisdiction.

43. For its part, Chad has been a party to the Convention against Torture since 9 July 1995, before Belgium even. The obligation to prosecute the perpetrators of or accomplices in the corresponding crimes fully applies to it, since criminal jurisdiction is retroactive, even when the accusations are not. It is clear from the case file that Belgium sought and obtained the judicial co-operation of Chad on the condition that prosecution take place elsewhere, without the involvement of the latter. Moreover, when Belgium therefore declares that it is worried about the victims, in practice it appears more concerned about putting Senegal on trial; for its part, Senegal is seeking to organize a trial for Hissène Habré which involves it only very indirectly.

44. It is therefore my conclusion that the obligation *erga omnes partes* to which the Court refers has been produced like a rabbit from a magician’s hat. It has not been established that the Convention against Torture creates an *erga omnes partes* obligation to seize the competent authorities for the purpose of prosecution and, consequently, a right enabling every party to demand its performance regardless of whether it has a special title to do so, i.e., an infringement of its direct right to prosecute under the terms of its own jurisdiction. Accordingly, Belgium’s Application cannot be based on a right belonging to all the parties or on its passive jurisdiction, which was not even taken into consideration by the Court. In my view, therefore, Belgium’s Application against Senegal is not admissible, and the Court’s decision in no way makes it so. Senegal undoubtedly has an obligation to seize the competent authorities for the purpose of prosecution, and it does not deny that, but this obligation is not owed to Belgium.

45. Which States parties, therefore, are legally entitled to demand that one or more parties seize their competent authorities for the purpose of prosecution, if not every party has that right solely on the basis of their participation in the Convention against Torture? To my mind, it is those which are obliged to establish their criminal jurisdiction under Article 5, paragraph 1, of the Convention, either because the offences in question were committed in their territory, or because the persons suspected possess their nationality. The right to ask other parties to consider prosecution is the balance to and compensation for that obligation, the complement to their own obligation.

46. They are also entitled to seek extradition on the basis of their own criminal jurisdiction, without this being granted automatically, since the requested State will only consent to it under certain conditions as laid down in the Convention. Belgium does not meet those conditions, and cannot obtain the extradition of Hissène Habré solely on the basis of its passive criminal jurisdiction. I am disappointed that the Court has failed to make this clear in the operative clause of the Judgment, even though it

states it in its reasoning. It was, however, one of Belgium's formal requests in its submissions. Here too, by failing to rule on this point, the Court has only partially resolved the dispute, which leads us on to the merits.

III. MERITS

47. I voted in favour of the Court's jurisdiction, despite the reservations I have expressed on the subject of the alternative arbitration procedure, a condition which, in my view, was not entirely satisfied. Logically, this opinion should end here, because, since I consider Belgium's Application to be inadmissible, there is no longer any need to consider the questions on the merits. I voted on the merits of the case for three reasons. First, because I respect the decision of the Court. Second, because it is the usual practice to do so — judges vote on each point individually, in an independent fashion. And, finally, because the applicable rules make no provision for abstentions and require that either a "yes" or "no" vote be cast. I would have misgivings about voting against some points in the operative clause which I consider to be well founded. I shall therefore set out some observations on the merits, by way of explaining my votes.

Article 6, Paragraph 2, of the Convention against Torture

48. In particular, I am of the view that Senegal's breach of its obligation, laid down in Article 6, paragraph 2, of the Convention against Torture, immediately to make "a preliminary inquiry into the facts" when a person suspected of offences is discovered in its territory, is established. This obligation is not dependent on measures establishing in domestic law the jurisdiction required by the Convention, and therefore does not entail any conditions additional to the ratification of the said Convention. It appears to me that, even if one considers that the necessary preliminary inquiry may depend under domestic law on the seisin of a judicial authority, the obligation is formulated in clear and precise terms which offer neither ambiguity nor an escape route. In particular, the inquiry may furnish useful information should the State party find itself seised of an extradition request when it has no intention of organizing a trial itself. Therefore, I voted in favour of the finding that Senegal has breached this obligation (point 4 of the operative clause).

Article 5 of the Convention against Torture

49. I also agree with the Court's finding that the dispute relating to the establishment of Senegal's jurisdiction under Article 5 of the Convention against Torture ceased to exist when Senegalese domestic law was modified to enable the holding of a trial, which in practice occurred even before the filing of Belgium's Application. This was a preparatory act, clearly indicating Senegal's intention to exercise its criminal jurisdiction,

given that the modification of Senegalese law was carried out following the transmission of the arrest warrant by Belgium.

50. On the other hand, I disagree with the idea that modifying domestic law to meet a treaty obligation must be carried out immediately and contemporaneously — or even simultaneously — with ratification. It seems to me that it all depends on the domestic law in question. What the international customary rules relating to the law of treaties stipulate is that the necessary modifications should be carried out within a reasonable time-limit. The practice of States and their *opinio juris* appear well established in this respect. It is true that the Court retains some ambiguity in its form of words on this point and that it adopts a prudent wait-and-see approach — and rightly so, since this point is hardly relevant to the present dispute.

Article 7, Paragraph 1, of the Convention against Torture

51. I cannot subscribe to point 5 of the operative clause, which finds that Senegal has breached the obligation to submit the case to the competent authorities for the purpose of prosecution. The Court recalls the exact sense of that obligation perfectly, rejecting the contention that it contains an “obligation to prosecute”, since the Convention gives free rein to the provisions of the parties’ domestic laws in this respect. The competent authorities should therefore be seised, but this does not necessarily result in the instigation of proceedings, either because there is insufficient evidence, or in the light of the desirability of prosecution under the domestic laws based on this principle.

52. As I indicated in respect of the Court’s jurisdiction, the subject-matter of the dispute is, in my view, Senegal’s delay in referring the case to its competent authorities for the purpose of prosecution. Both Parties fervently disagree on this point, which is at the heart of the dispute. The question is therefore whether or not Senegal’s delay can be justified. In my eyes, it is, for the following reasons.

53. First, a comparison with Belgium’s conduct: once complaints had been filed in Belgium, it took five years for the latter to investigate the case and to refer it to Senegal, in 2005. Second, Senegal’s conduct following that referral: Senegal immediately initiated the necessary reforms of its domestic law, which were carried out in 2007; it kept Hissène Habré under house arrest, preventing him from leaving its territory, and concerned itself with organizing a trial. Belgium contributed to these efforts, promising financial support for the holding of such a trial. The time which elapsed between then and the filing of Belgium’s Application is no greater than the time which has elapsed since, meaning that an appraisal of the situation is not necessarily unfavourable to Senegal.

54. It may also be noted that it is not clear from the case file whether or not Chad informed Senegal of the lifting of Hissène Habré’s immunity from criminal proceedings, as it did Belgium. However, unlike the Rome Statute for example, the Convention does not state that the immunity of public

authorities is unenforceable in proceedings instituted before domestic courts. I would add that the notion of “*competent authorities for the purpose of prosecution*” may be interpreted in a fairly broad manner, since the Convention against Torture neither prescribes nor suggests that this must be a judicial authority. When the Senegalese Government authorities are taking concrete measures towards the organization of a trial and, in that connection, have requested and obtained international co-operation towards that end, can it be said that criminal jurisdiction is not being exercised? Finding that there has been a breach by Senegal in this respect ignores the existence of what is an ongoing procedure, instead of encouraging it.

55. The date on which the present decision was made did not allow the Court to take account of the most recent developments in Senegal’s position. Senegal has made known in a number of communications, following the written and oral proceedings before the Court, the various decisions of its Government authorities in preparation for a trial. The Court did not examine or follow up on these, probably because they were introduced late and had not been subject to challenge, Belgium not having commented on them. But it was for the Court to decide whether that should be the case and whether the adversarial principle should be applied. Moreover, Belgium received these communications and was in a position to make its views known in its own communications, in the same way as Senegal.

56. Nothing would have been easier than to wait a few weeks longer for this purpose, to seek Belgium’s point of view where appropriate, and to take note of the planned institution, in principle, of the necessary proceedings. I regret that this was not done, and would recall here that judicial settlement is a substitute for diplomatic settlement. That is why I cannot support the finding that Senegal is already in breach of its obligation to submit the case for prosecution, when prosecution has been decided upon in principle and a very short time-limit fixed for the opening of judicial proceedings. If that time-limit had not been respected, I would have supported the finding that there had been a breach. However, I am not convinced that making such a ruling here and now will speed up the proceedings, since the dispute is now effectively considered to have been settled at the international judicial level.

57. I am therefore of the view that, in the context of its task of settling the dispute, the Court could have focused on the substance of the *Hissène Habré* case and of the dispute, rather than considering them from a formal or procedural point of view. What actually matters, in order to fulfil the object and purpose of the Convention against Torture, is that a trial should take place and that justice is delivered for the victims. If there is a trial to organize, it is that of Hissène Habré, not that of Senegal. And if there is a State about which questions may be asked, then in my view that State is Chad, far more so than Senegal. To my mind, it would have been more constructive to take account of and encourage the efforts which Senegal has made since Belgium’s first request regarding the organization of a trial.

Permanent Obligation to Seize the Senegalese Judicial Authorities

58. On the other hand, I fully subscribe to the majority's finding, in point 6 of the operative clause, that Senegal has an obligation to refer the case to its judicial authorities for the purpose of prosecution, irrespective of whether or not there is a dispute and irrespective of the Court's decision. This is not the corollary of a breach and a condition of its cessation, but the normal and undisputed application of a primary obligation resulting from a commitment by Senegal. It is not dependent on the finding of a breach. Senegal must in any event respect and perform this obligation, and it declares itself committed to do so in the very near future.

*Belgium Does Not Have the Right to Obtain Extradition
on the Basis of the Convention against Torture*

59. Finally, I am disappointed that there is nothing in the operative clause about the request concerning the extradition of Hissène Habré to Belgium, made by the latter in its submissions. The Court has rightly noted that the obligation to seize the competent authorities and the obligation to extradite, as alleged by Belgium, should not be given the same weight and are not alternatives. Although extradition, if granted, undoubtedly relieves the State concerned of its obligation to seize its competent authorities, no State is obliged to agree to extradition unless the State seeking it has a direct entitlement, either on the basis of an international commitment of the requested State or under its domestic law. Consequently, Belgium is not entitled to obtain extradition in this instance on the basis of the Convention.

60. In my view, this point should have been included in the operative clause, given that it relates to a request made to the Court by Belgium in its submissions. It is nevertheless clear in the reasoning that Belgium, which is not an "injured State", does not have a right to exercise vis-à-vis Senegal in order to obtain the extradition of Hissène Habré. But this request made by Belgium is not addressed in the operative clause. Here too, it may be noted that the dispute has only partially been resolved. It is nonetheless the Court's practice to reject unsubstantiated submissions. That could usefully have been done here.

(Signed) Serge SUR.
