

INTERNATIONAL COURT OF JUSTICE

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

MEMORIAL OF THE KINGDOM OF BELGIUM

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TABLE OF CONTENTS

Introduction	1
I. Belgium's aim in the present proceedings	1
II. The proceedings	1
III. The structure of the Memorial.....	3
Chapter I The facts	5
I. Chad under Mr. Habré	5
II. The proceedings against Mr. Habré in Senegal.....	6
III. The legal proceedings against Mr. Habré in Belgium.....	8
IV. Belgium's efforts to encourage and help Senegal to fulfil its obligation to prosecute or extradite.....	11
V. Referral of the case to the African Union and subsequent developments.....	20
A. Referral of the H. Habré case to the African Union.....	21
B. The efforts of the African Union and the European Union to help Senegal organize proceedings	24
VI. Summary of the facts	27
Chapter II Proceedings before the Committee against Torture, the African Court on Human and Peoples' Rights and the Court of Justice of the Economic Community of West African States (ECOWAS)	30
I. Committee against Torture	30
II. African Court on Human and Peoples' Rights	32
III. Court of Justice of the Economic Community of West African States (ECOWAS)	32
Chapter III The jurisdiction of the Court.....	34
I. Jurisdiction under Article 30 of the Convention against Torture.....	34
A. The existence of a dispute	36
B. The dispute could not be settled through negotiation.....	38
C. The request for arbitration.....	39
D. The Parties were unable to agree on the organization of an arbitration within six months.....	40
II. Jurisdiction based on the declarations of acceptance of compulsory jurisdiction	41

A. The existence of a legal dispute	42
B. Inapplicability of the limit <i>ratione temporis</i>	42
C. The lack of other means of settlement.....	43
D. The conflict does not fall within the exclusive jurisdiction of Senegal	43
Chapter IV Violations of international law attributable to Senegal	44
I. Violations of the Convention against Torture.....	44
A. Obligations under the Convention against Torture	44
1. The Convention against Torture	44
2. The obligation to prosecute or extradite (<i>aut dedere aut judicare</i>) established by the Convention against Torture	46
(a) <i>The obligation to establish universal jurisdiction</i>	48
(b) <i>The obligation to prosecute or extradite</i>	50
B. Senegal has failed to fulfil its obligations under the Convention against Torture	53
1. Senegal failed to adopt the necessary measures prescribed by Article 5, paragraph 2, of the Convention against Torture	53
2. Senegal failed in its obligation to prosecute or extradite deriving from Article 7 of the Convention against Torture	55
(a) <i>Senegal failed in its obligation to prosecute or extradite Mr. Habré to Belgium</i>	56
(b) <i>The seisin of the African Union does not constitute an alternative to compliance with Senegal's conventional obligations</i>	58
(c) <i>Senegal has to date neither initiated a preliminary inquiry nor submitted the H. Habré case to the competent authorities for the purpose of prosecution</i>	59
II. Violations of other rules of conventional and customary international law	61
A. Conventional and customary obligations regarding the punishment of the other crimes alleged against Mr. Habré	61
1. Crimes against humanity	61
2. War crimes.....	66
3. The crime of genocide	67
B. The modalities of the obligation of punishment.....	71
C. Legal basis of the jurisdiction to be exercised by Senegal with regard to the crimes alleged against Mr. Habré	72

Chapter V The responsibility of Senegal and remedies	76
I. Financial, legal or other “difficulties” cannot release Senegal from its obligations or justify the violation thereof.....	76
II. Belgium is entitled to invoke the responsibility of Senegal	79
III. The content of Senegal’s responsibility	80
Submissions.....	82

INTRODUCTION

I. BELGIUM'S AIM IN THE PRESENT PROCEEDINGS

0.01. The Kingdom of Belgium (hereinafter “Belgium”) wishes to make clear that the bringing of the present case is in no way an unfriendly act towards the Republic of Senegal (hereinafter “Senegal”), with which Belgium has long enjoyed excellent relations. Belgium’s aim is to ensure compliance with the fundamental principle, recognized by Senegal as well as Belgium and endorsed by the African Union, that perpetrators of serious crimes under international law, including the crimes of torture and genocide, crimes against humanity and war crimes, must not go unpunished. To this end, full compliance with the provisions of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the “Convention against Torture”)¹ and with other rules of conventional or customary international law concerning the *aut dedere aut judicare* obligation is vital. It is in this spirit, and in the hope that they will contribute to a solution satisfactory to both Parties, that Belgium has initiated the present proceedings.

II. THE PROCEEDINGS

0.02. By Application dated 16 February 2009 and filed in the Registry of the Court on 19 February 2009, the Kingdom of Belgium (hereinafter “Belgium”) initiated proceedings against the Republic of Senegal (hereinafter “Senegal”) in connection with a dispute concerning the interpretation and application of the Convention against Torture and the application of other customary and treaty obligations to punish other serious crimes under international law. Since late 2000, various proceedings have been opened in Belgium to bring to justice Mr. Habré, a former President of Chad now in Senegal, to answer for acts ascribed to him which may be characterized as, in particular, crimes of torture and other serious crimes under international law. Since 2005 Belgium has been asking Senegal to try Mr. Habré, if not extradite him. Senegal has yet to give any concrete response to Belgium’s requests.

0.03. Belgium considers Senegal to be under an obligation to prosecute Mr. Habré for crimes of torture and other serious crimes under international law which have been ascribed to him as perpetrator, co-perpetrator or accomplice or, if Senegal fails to prosecute Mr. Habré, to extradite him to Belgium so that he can stand trial in the Belgian courts for these crimes.

0.04. The Court’s jurisdiction is founded on Article 30 of the Convention against Torture and on the declarations recognizing the compulsory jurisdiction of the Court made by Belgium and Senegal in accordance with Article 36, paragraph 2, of the Statute of the Court².

0.05. On 19 February 2009, after filing its Application instituting proceedings, Belgium also submitted a request for the indication of provisional measures in accordance with Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court. Alarmed by comments made by the President of Senegal, Mr. A. Wade, to the effect that Senegal might end Mr. Habré’s house arrest if it did not find the funds it deemed necessary to hold his trial, Belgium filed a request for the indication of provisional measures. In that request Belgium asked the Court, pending its final

¹United Nations, *Treaty Series (UNTS)*, Vol. 1465, p. 123 (1-24841), Ann. A.1.

²Ann. A.2.

decision on the merits, to indicate that Senegal was to take all measures in its power to ensure that Mr. Habré remained under the control and surveillance of the Senegalese authorities³.

0.06. At the hearings on the request for the indication of provisional measures, which took place on 6, 7 and 8 April 2009, Senegal, in answer to a question put by a Member of the Court, affirmed that it would not allow Mr. Habré to leave Senegalese territory. These assurances given to the Court were expressed as follows in paragraphs 38 and 68 of the Order:

9

“38. Whereas, in response to the question put by a Member of the Court at the hearings, referred to in paragraph 33 above, Senegal solemnly declared that it would not allow Mr. Habré to leave its territory while the present case was pending before the Court”⁴; and

“68. . . . whereas the Co-Agent of Senegal, at the end of the hearings, solemnly declared, in response to a question put by a Member of the Court, the following:

‘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.’”⁵

The Court also observed in its Order that:

“in response to a question put by a Member of the Court at the hearings, Belgium indicated that a solemn declaration made before the Court by the Agent of Senegal, in the name of his Government, could be sufficient for Belgium to consider that its Request for the indication of provisional measures had no further *raison d’être*, provided that such a declaration would be clear and unconditional, and that it would guarantee that all the necessary measures would be taken by Senegal to ensure that Mr. Habré did not leave Senegalese territory before the Court delivered its final Judgment . . .”⁶.

0.07. By reason of these assurances, solemnly given by Senegal before the Court, the Court, in an Order made on 28 May 2009 and “taking note of the[se] assurances given by Senegal, [found] that the risk of irreparable prejudice to the rights claimed by Belgium [was] not apparent on the date of [the] Order”⁷ and held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures⁸. The Court did nonetheless note that its Order “leaves unaffected Belgium’s right to submit in future a fresh request for the indication of provisional measures, under Article 75, paragraph 3, of the Rules of Court, based on new facts”⁹.

10

³Request for the indication of provisional measures, p. 2, Ann. C.8.

⁴*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, para. 38.

⁵*Ibid.*, para. 68. This assurance was given in English; CR 2009/11, 7 Apr. 2009, p. 23, para. 6.

⁶*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, para. 33.

⁷*Ibid.*, para. 72.

⁸*Ibid.*, para. 76.

⁹*Ibid.*, para. 75.

0.08. After consultation with the Parties, the Court handed down an Order on 9 July 2009 authorizing the submission of a Memorial by Belgium on 9 July 2010 and a Counter-Memorial by Senegal on 11 July 2011¹⁰. This Memorial is being presented pursuant to that Order.

0.09. By letter dated the same day, the Registrar of the Court asked Belgium and Senegal to provide to the Court as quickly as possible a document containing a detailed summary of the information in their possession in regard to certain new developments since the Court had made its Order on the Request for the indication of provisional measures; those developments concerned:

- the various measures taken by Senegal to ensure that Mr. Habré’s trial would be held as soon as possible;
- the Parties’ diplomatic exchanges aimed at facilitating co-operation between them for the purposes of that trial; and
- Senegal’s approaches to the African Union and the European Union with a view to securing funding for the trial.

0.10. Belgium replied to the Court’s request for information by letter dated 16 July 2009, communicated to the Registry through diplomatic channels on 28 July 2009.

0.11. 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” (hereinafter the “Note on the latest developments”), accompanied by a number of annexes¹¹.

11

III. THE STRUCTURE OF THE MEMORIAL

0.12. The present Memorial is divided into five chapters.

0.13. **Chapter I** sets out the facts underlying the present dispute. It summarizes:

- conditions in Chad during Mr. Habré’s presidency; though not at the heart of the dispute between Belgium and Senegal, that situation is nevertheless important, forming as it does the basis of the criminal proceedings initiated in Senegal and Belgium against the former President of Chad;
- Belgium’s efforts to prevail upon and help Senegal to fulfil its obligation to prosecute Mr. Habré or, if not, to extradite him; these efforts brought the dispute between the two States to the fore; and
- the referral of the matter to the African Union and developments since the Union’s intervention in the Habré case.

¹⁰*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Order of 9 July 2009.

¹¹Note 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, 15 June 2010, Ann. D.9.

0.14. **Chapter II** recapitulates the decisions: by the Committee against Torture regarding the Habré case; and by the African Court on Human and Peoples' Rights and by the Community Court of Justice of the Economic Community of West African States.

0.15. In **Chapter III** Belgium shows that the Court has jurisdiction to adjudicate the present dispute. This jurisdiction is founded on Article 30 of the Convention against Torture and on the declarations recognizing as compulsory the jurisdiction of the Court made by Belgium and Senegal in accordance with Article 36, paragraph 2, of the Statute of the Court.

12

0.16. **Chapter IV** establishes that, in failing to prosecute or extradite Mr. Habré, Senegal has breached, and continues to breach, obligations it bears under the Convention against Torture and under the rules of conventional and customary international law. In particular, Senegal has breached the obligations under Article 5, paragraph 2, of the Convention against Torture. It has also breached, and continues to breach, its obligation to prosecute or extradite pursuant to Article 7, paragraph 1, of that Convention and the closely related obligation in Article 6, paragraph 2. Furthermore, Senegal has not complied with the obligation international law imposes on States to combat impunity in respect of persons present in their territory and suspected of having committed serious crimes under international law.

0.17. In **Chapter V** Belgium shows that Senegal has incurred international responsibility by virtue of these breaches of international law. This responsibility is neither set aside nor tempered by financial, legal or other difficulties faced by Senegal in organizing Mr. Habré's trial. Senegal is therefore under a duty to cease its breaches and it must fulfil its international obligations. Specifically, it must submit the Habré case to its competent authorities so that criminal proceedings can be conducted or, if it fails to prosecute Mr. Habré, it must extradite him to Belgium.

0.18. Lastly, Belgium will present its **submissions**.

CHAPTER I

THE FACTS

I. CHAD UNDER MR. HABRÉ¹²

1.01. Chad, a former French colony that was part of French Equatorial Africa, gained independence in 1960 under the presidency of François Tombalbaye, who hailed from the southern part of the country. From 1968 onwards, eastern and northern areas of Chad took up arms against a government seen as being too close to the people from the south. Mr. Tombalbaye sought France's help in quelling the insurrection. He was assassinated in 1975 after a coup instigated by General Félix Malloum, who seized power.

1.02. Mr. Hissène Habré, a member of the Toubou ethnic group (which lives in the Tibesti in northern Chad), became Prime Minister of Chad in August 1978. He and Mr. Goukouni Oueddei were the leaders of FROLINAT (*Front de libération nationale du Tchad* or National Liberation Front of Chad), an armed movement founded in Sudan to oppose the régime, which was thought to favour southerners.

1.03. Mr. Habré's term as Prime Minister came to an end when General Malloum was forced to relinquish the presidency of Chad in 1979 and cede his place to Mr. Oueddei, who, like Mr. Habré, comes from the Tibesti. Mr. Oueddei formed a Transitional Government of National Unity (*Gouvernement d'unité nationale et de transition* ("GUNT")), in which Mr. Habré served as Minister of State for Defence.

1.04. Relations between Messrs. Oueddei and Habré could however be likened to those between rivals, since both claimed to lead FROLINAT and the Toubou rebels.

1.05. In 1980 FROLINAT units calling themselves the Armed Forces of the North (*Forces Armées du Nord* ("FAN")) and under Mr. Habré's leadership waged war on Mr. Oueddei's People's Armed Forces (*Forces Armées Populaires* ("FAP")). The FAP prevailed and Mr. Habré was forced to take refuge in eastern Chad, at the Sudanese border. Libyan troops which had supported the GUNT withdrew in November 1981 and remained present only in the north in the Aouzou Strip. Meanwhile, the FAN re-grouped and re-armed and regained control over areas in eastern and central Chad. On 7 June 1982, the FAN entered N'Djamena, meeting virtually no resistance from the FAP. Mr. Oueddei left Chad and Mr. Habré became the new President.

1.06. Mr. Habré abolished the office of Prime Minister on 19 June 1982. A number of political opponents were executed. He transformed the FAN into the National Armed Forces of Chad (*Forces armées nationales du Tchad* ("FANT")) and established a political police force: the Documentation and Security Directorate (*Direction de la documentation et de la sécurité* ("DDS")).

¹²Unless otherwise stated, the information in this section is taken from *Keesing's Contemporary Archives*, 1979-1982, and the Report of the National Commission of Inquiry of the Chadian Ministry of Justice on "The Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories" [*Rapport de la Commission d'enquête nationale du ministère tchadien de la Justice sur Les crimes et détournements de l'ex-Président Habré et de ses complices*], Paris, L'Harmattan, 1993. [Translator's note: For an English translation of the Report, see *Transitional Justice* (ed. N. J. Kritiz), Vol. III, Washington D.C., U.S. Institute of Peace Press, 1995, pp. 51-93.]

1.07. In 1983 Mr. Habré called for French help in fighting Libyan forces which had returned to Chad. In 1987, Chad's military succeeded in driving the Libyan forces out of the country, except for the Aouzou Strip, from which Libyan forces did not withdraw until 1994, further to the Court's Judgment of 3 February 1994¹³.

1.08. Mr. Habré remained in power until 1990. A new rebel movement (the "Patriotic Salvation Movement" ("*Mouvement patriotique du salut*" — MPS)), formed in Sudan by Mr. Idriss Déby, a former defence and security adviser to Mr. Habré, ousted Mr. Habré from power. He took refuge in Senegal. Mr. Déby is still President of Chad.

1.09. Many various human rights violations were reported in Chad during Mr. Habré's presidency: arrests of actual or presumed political opponents, detentions without trial, inhumane detention conditions, mistreatment, torture, extrajudicial executions, enforced disappearances¹⁴.

1.10. According to an assessment published in 1993 by the National Commission of Inquiry of the Chadian Ministry of Justice, Mr. Habré's presidency produced tens of thousands of victims. The Commission gives the following figures:

15

- more than 40,000 victims;
- more than 80,000 orphans;
- more than 30,000 widows;
- more than 200,000 people left with no moral or material support as a result of this repression"¹⁵.

II. THE PROCEEDINGS AGAINST MR. HABRÉ IN SENEGAL

1.11. On 25 January 2000, seven Chadian nationals residing in Chad, together with the Chadian Association of Victims of Political Repression and Crime (*Association des Victimes des Crimes et Répressions Politiques* ("AVCRP")), filed a complaint with civil-party application (*constitution de partie civile*¹⁶) against Mr. Habré with the senior investigating judge at the Dakar *Tribunal régional hors classe*¹⁷.

¹³*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6.

¹⁴See the Amnesty International Annual Reports, French editions, between 1983 and 1990: Report 1983, pp. 116-117; Report 1984, pp. 124-128; Report 1985, pp. 132-135; Report 1986, pp. 111-114; Report 1987, pp. 83-84; Report 1988, pp. 98-100; Report 1989, pp. 97-99. [*Translator's note*: Citations to the French version of these Reports have been retained, given the difficulty in obtaining the English equivalents.]

¹⁵Report by the National Commission of Inquiry of the Chadian Ministry of Justice on "The Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories", *op. cit.* (footnote 12), p. 92.

¹⁶Under Roman-Germanic law, this refers to: the filing of a complaint with an investigating judge in respect of a crime or other offence by an individual claiming to have been injured as a result of that crime or offence; and the resulting initiation of criminal proceedings if such have not already been commenced. The civil party may participate in the proceedings by receiving a hearing and may ask the court trying the case to award damages for the injury caused by the crime or other offence.

¹⁷Ann. D.1.

1.12. On 3 February 2000, the investigating judge indicted Mr. Habré for complicity in “crimes against humanity and acts of torture and barbarity”¹⁸. A few weeks later, the prosecuting authorities, who had been in favour of Mr. Habré’s prosecution¹⁹, reversed position and supported his application to the *Chambre d’accusation* of the Dakar Court of Appeal to annul the proceedings²⁰. Furthermore, the *Conseil supérieur de la Magistrature* (Judicial Service Council) transferred the investigating judge, thereby removing him from the case²¹.

16

1.13. On 4 July 2000, the *Chambre d’accusation* annulled the proceedings on the ground that they concerned crimes committed abroad by an alien against aliens and that they would involve the exercise of universal jurisdiction, whereas the Senegalese Code of Criminal Procedure did not provide for jurisdiction of this sort (Art. 669)²².

1.14. Following the dismissal of the proceedings, two Special Rapporteurs from the United Nations Commission on Human Rights — Mr. Dato Param Kumaraswamy, Special Rapporteur on the independence of judges and lawyers, and Sir Nigel Rodley, Special Rapporteur on torture — made known to Senegal their “concern” over the “circumstances”²³ surrounding the decision. According to a press release dated 2 August 2000: “The Special Rapporteurs reminded the Government of Senegal of its obligations under the Convention against Torture . . . , to which it is party”; and

“[t]hey also draw its attention to the resolution adopted this year by the Commission on Human Rights on the question of torture (resolution 2000/43), in which the Commission stressed the general responsibility of all States to examine all allegations of torture and to ensure that those who encourage, order, tolerate or perpetrate such acts be held responsible and severely punished”²⁴.

1.15. The complainants lodged an appeal with the Court of Cassation, which rejected it and on 20 March 2001 upheld the judgment to annul by the *Chambre d’accusation*²⁵.

1.16. In April 2001, President Wade publicly announced that he was giving Mr. Habré one month to leave Senegal²⁶.

1.17. On 27 September 2001, further to appeals from United Nations High Commissioner for Human Rights Mary Robinson and United Nations Secretary-General Kofi Annan, President Wade

¹⁸Ann. D.2.

¹⁹See *Le Soleil*, 29-30 Jan. 2000, Ann. G.1; *Sud Quotidien*, 4 Feb. 2000, Ann. G.2.

²⁰*Walfadjiri*, 17 May 2000, Ann. G.3.

²¹*Ibid.*, 4 July 2000, Ann. G.4; *Sud Quotidien*, No. 2173, 4 July 2000, Ann. G.5.

²²Ann. D.3.

²³United Nations Press Release dated 2 Aug. 2000.

²⁴*Ibid.*

²⁵Ann. D.4.

²⁶Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, July 2005, Vol. 17, No. 10 (A), p. 20, <http://www.hrw.org/en/reports/2005/07/11/chad-victims-hiss-ne-habr-still-awaiting-justice-0>; *Le Témoign*, No. 553, 27 Mar.-2 Apr. 2001, Ann. G.6; *Le Soleil*, 9 Apr. 2001, Ann. G.7.

stated that he was prepared to keep Mr. Habré in Senegal until another country — he mentioned Belgium — agreed to “organiz[e] a fair trial”²⁷.

17

1.18. On 16 September 2008, after constitutional and statutory amendments had been effected in 2007²⁸, 14 individuals (including a Senegalese citizen resident in Dakar, 11 Chadian citizens resident in Chad, and two Chadian citizens one of them resident in France and the other in the United States of America) filed a complaint against Mr. Habré for crimes against humanity, torture and complicity in those crimes. The complaint was addressed to the *Procureur général* (Chief Public Prosecutor) at the Dakar Court of Appeal²⁹. No action has yet (at the end of June 2010) been taken on it.

III. THE LEGAL PROCEEDINGS AGAINST MR. HABRÉ IN BELGIUM

1.19. The legal proceedings against Mr. Habré in Belgium began on 30 November 2000, when a Belgian citizen of Chadian descent submitted a complaint with civil-party application against Mr. Habré to a Belgian investigating judge; two other Belgians of Chadian descent did the same on 12 April and 3 May 2001; ten Chadian citizens living in Chad also filed a complaint, on 24 April 2001³⁰.

1.20. The complaints were based on crimes covered by the Belgian Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law, as amended by the Law of 10 February 1999³¹ (hereinafter the “1993/1999 Law”), and on crimes of torture covered by the 1984 Convention³².

1.21. In response to these complaints, the investigating judge found that the acts complained of could be characterized as “crimes against humanity” under the 1993 Law and on 19 September 2001 issued two international letters rogatory, one to Senegal and the other to Chad.

18

1.22. The first was destined for the Senegalese authorities with a view to obtaining a copy of the record from the proceedings conducted by a Senegalese investigating judge looking into similar complaints³³; it was transmitted by Note Verbale dated 10 October 2001³⁴.

1.23. On 22 November 2001, the Senegalese authorities dispatched a file of papers and documents to Belgium concerning the proceedings in Senegal in the Habré case.

²⁷Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, July 2005, Vol. 17, No. 10 (A), p. 20, <http://www.hrw.org/en/reports/2005/07/11/chad-victims-hiss-ne-habr-still-awaiting-justice-0>; *Le Témoin*, No. 553, 27 Mar.-2 Apr. 2001, Ann. G.6; *Le Soleil*, 9 Apr. 2001, Ann. G.7.

²⁸See para. 1.46 below.

²⁹Ann. D.5.

³⁰Ann. C.1.

³¹This statute was subsequently amended, notably by the Law of 5 Aug. 2003, but the amendments have no impact on the Habré case in the Belgian courts.

³²See the international arrest warrant *in absentia*, 19 Sep. 2005, pp. 22 *et seq.* and 36 *et seq.*, Ann. C.1.

³³Ann. C.2.

³⁴Ann. B.1.

1.24. The second letter rogatory — the one sent to the Chadian authorities — contained requests that:

- the Chadian complainants, the members of the Commission of Inquiry into the crimes ascribed to Mr. Habré, and various witnesses be examined;
- a copy of the Commission of Inquiry papers and documents be provided;
- the sites identified by the complainants and the Commission of Inquiry be inspected;
- those papers and documents which were helpful to the investigation and discovered during the letter rogatory proceedings be transferred to Belgium;
- Belgian representatives from the prosecutor’s office and the registry of the Brussels *Tribunal de première instance* and investigators from the Belgian federal police force be permitted to attend when the letter rogatory was carried out³⁵.

This letter rogatory was executed in Chad by the Belgian investigating judge between 26 February and 8 March 2002³⁶.

19

1.25. On 27 March 2002, the Belgian investigating judge asked the Chadian Minister of Justice whether Mr. Habré enjoyed immunity from jurisdiction as a former Head of State³⁷. On 7 October 2002, the Minister of Justice of Chad responded to the effect that the Sovereign National Conference held in N’Djamena from 15 January to 7 April 1993 had “officially lifted all immunity from legal process from Mr. Hissein Habré”³⁸.

1.26. Between 2002 and 2005, various investigative steps were taken in Belgium; these included examining complainants and witnesses, and analysing very many of the documents provided by the Chadian authorities in execution of the letter rogatory referred to above. These documents in total take up some 27 binder files, which constitute the judicial record in Belgium.

1.27. On 23 February 2003, President Wade confirmed that an extradition request could be submitted to the Senegalese judicial authorities, and stated that, if it were up to him alone, the extradition would be approved, but that he had not yet received any request for extradition³⁹.

1.28. On 19 September 2005, the Belgian investigating judge issued an international warrant *in absentia* for the arrest of Mr. Habré “as the perpetrator or co-perpetrator” of crimes under international humanitarian law. The warrant was circulated by Interpol (red notice) to Senegal; in accordance with Interpol practice⁴⁰ (Belgium and Senegal having been members of Interpol since

³⁵Ann. C.3.

³⁶International arrest warrant *in absentia*, 19 Sep. 2005, p. 17, Ann. C.1.

³⁷Ann. C.4.

³⁸Ann. C.5.

³⁹*Le Soleil* (Senegal), 24 Feb. 2003, Ann. G.8.

⁴⁰<http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS13fr.asp>.

7 September 1923 and 4 September 1961, respectively), this notice serves as a request for provisional arrest with a view to extradition⁴¹.

1.29. The warrant sets out, *inter alia*, the complainants' names, the substance of their complaints⁴² and the various bases for the jurisdiction of the Belgian judge; in respect of those bases, the warrant states that:

20

- *ratione materiae*, the acts in question amount to serious violations of international humanitarian law and the Belgian judge has jurisdiction over them pursuant to the 1993/1999 Law; furthermore, that the acts complained of by the complainants actually took place is confirmed in the above-cited report by the Commission of Inquiry of the Chadian Ministry of Justice, published in 1993⁴³; finally, the fact that serious violations of international humanitarian law were made crimes under Belgian domestic law in 1993 and 1999 does not constitute a violation of the principle of non-retroactivity of penal laws, since these were crimes under international law at the time the acts in question were committed⁴⁴;
- *ratione loci*, the 1993/1999 Law confers universal jurisdiction on the Belgian judge over serious violations of international humanitarian law; the Law of 5 August 2003, which restricted the ambit of this jurisdiction as it was initially provided for in the 1993/1999 Law, imposes no bar to such universal jurisdiction, because the 2003 Law provides that investigations begun before its entry into force may be pursued if they follow from complaints filed by Belgians⁴⁵;
- *ratione personae*, the judge retains jurisdiction in respect of Mr. Habré inasmuch as Mr. Habré has enjoyed no immunity ever since he ceased to be President of Chad and as Chad itself has, in so far as is necessary, lifted the immunities which Mr. Habré may have sought to claim⁴⁶;
- *ratione temporis*, the facts being investigated occurred while Mr. Habré was President of Chad, between 1982 and 1990, but they are not time-barred because crimes under international humanitarian law are involved and there is no statute of limitations on these under international law as it has been incorporated into Belgian domestic law⁴⁷.

1.30. Finally, it is noted in the warrant that there is a great deal of evidence indicating that the events described in the complaints actually took place and justifying further action by the investigating judge upon the complaints⁴⁸.

21

1.31. Accordingly, the warrant states, if Mr. Habré were to remain at liberty, he might interfere with the course of the investigation or destroy evidence. The warrant therefore calls for his arrest⁴⁹.

⁴¹Ann. C.6.

⁴²Ann. C.1, pp. 1-11.

⁴³*Ibid.*, pp. 11-15.

⁴⁴*Ibid.*, pp. 23-30.

⁴⁵*Ibid.*, pp. 15-17.

⁴⁶*Ibid.*, pp. 17-20.

⁴⁷*Ibid.*, pp. 20-22.

⁴⁸*Ibid.*, p. 33.

⁴⁹*Ibid.*

1.32. As Mr. Habré continues to reside in Senegal, the other procedural matters in respect of him concern Belgium's requests to Senegal to extradite or prosecute, such requests having given rise to the present dispute between the two States⁵⁰.

IV. BELGIUM'S EFFORTS TO ENCOURAGE AND HELP SENEGAL TO FULFIL ITS OBLIGATION TO PROSECUTE OR EXTRADITE

1.33 The present dispute arises out of the failure of the Senegalese authorities to carry out the extradition requested by Belgium despite the fact that Senegal is required, by virtue of its international obligations, to extradite Mr. Habré if it does not try him in Senegal. Senegal's replies to the Belgian Notes Verbales and requests, and the absence of any concrete measure to bring the H. Habré case before the competent judicial authorities, show that it has breached and continues to breach its international obligations to prosecute Mr. Habré or, failing prosecution, to extradite him to a State which has so requested.

1.34 On 22 September 2005, Belgium transmitted a Note Verbale to Senegal containing the international arrest warrant *in absentia* issued by the Belgian investigating judge against Mr. Habré for crimes of torture, crimes of genocide, war crimes, murder, and intentional assault and battery⁵¹.

Senegal failed to reply.

1.35. Two months later, on 16 November 2005, Belgium informed Senegal that members of the Federal Public Prosecutor's Office could go to Dakar

22

“to give additional information about the request for extradition against Hissène Habré if the Senegalese authorities so wished”⁵².

It added that it would be grateful to receive a reply from the competent authorities with a view to informing the Belgian Federal Public Service⁵³ concerned⁵⁴.

1.36. On 25 November 2005, the *Chambre d'accusation* of the Dakar Court of Appeal ruled on the request for extradition transmitted by Note Verbale from Belgium to Senegal, and dated 22 September 2005⁵⁵. In its judgment of 25 November 2005, the *Chambre d'accusation* found that Article 101 of the Constitution and the Organic Law 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”

and

“that consequently 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 allegedly committed in the exercise of his functions”.

⁵⁰See paras. 1.34 *et seq.* below.

⁵¹Ann. B.2. See also paras. 1.28-1.32 above.

⁵²Ann. B.3.

⁵³The official title of a “Ministry” in Belgium is “Federal Public Service”.

⁵⁴Ann. B.3.

⁵⁵Ann. B.2. See also Ann. C.7.

According to the *Chambre d'accusation*, “Hissène Habré should therefore be given jurisdictional immunity such as to survive the cessation of his duties as President of the Republic, whatever his nationality and regardless of any convention on mutual assistance”; the *Chambre* concluded that it had no jurisdiction “to adjudicate the lawfulness of proceedings and the validity of the arrest warrant against the Head of State”⁵⁶. The judgment ends with a cryptic phrase inviting “the Office of the Public Prosecutor to make a better case”⁵⁷.

1.37. On 30 November 2005, Belgium, having taken note of the judgment of 25 November, requested Senegal, by Note Verbale, to reply to the following questions:

- 23** — “What are the implications of this judicial decision” for Belgium’s request for extradition?
- “What is the current stage of the proceedings?”
- Could Senegal reply officially “to the request for extradition” and provide “explanations about the position of the Senegalese Government pursuant to this decision”?⁵⁸

1.38. By Note Verbale of 7 December 2005⁵⁹, Senegal transmitted to Belgium a communiqué of the Senegalese Ministry of Foreign Affairs “concerning the Hissène Habré case”⁶⁰. The communiqué referred to Belgium’s request for extradition, the above-mentioned judgment of 25 November 2005 by the *Chambre d'accusation* concerning that request⁶¹, and the referral of the case to the African Union. The Note Verbale specified that

- Senegal agreed to host Mr. Habré “without ever trying to protect him from the law”;
- thus, it remained committed “to its traditional values of hospitality”, but also remained attached “to the principles of justice and democracy”;
- “furthermore” it had referred the matter to the African Union Summit, which
- “prefigures a concerted approach on an African scale of issues that fall in principle under the States’ national sovereignty”,
- contributes “to the continent’s political integration”,
- consolidates “justice and the rule of law in Africa”, and
- 24** — encourages “compliance with rules of good governance”⁶².

1.39. On 23 December 2005, the Senegalese Ministry of Foreign Affairs replied to the Notes Verbales sent by Belgium in November 2005 concerning the H. Habré case. The Ministry referred to the judgment delivered by the *Chambre d'accusation* of the Dakar Court of Appeal and pointed

⁵⁶Ann. B.2. See also Ann. C.7.

⁵⁷*Ibid.*

⁵⁸Ann. B.4.

⁵⁹Ann. B.5.

⁶⁰*Ibid.*

⁶¹See para. 1.36 above.

⁶²*Ibid.*

out that “the decision” to submit the H. Habré case to the Assembly of Heads of State and Government of the African Union reflects “the position of the Senegalese Government pursuant to the judgment of the Prosecution Chamber”⁶³.

1.40. By Note Verbale of 11 January 2006, sent to the Ministry of Foreign Affairs of Senegal, the Embassy of Belgium in Dakar observed that the Convention against Torture, and specifically the obligation *aut dedere aut judicare*, imposed obligations only on *States parties*, that is, in the context of the request for the extradition of Mr. Habré, on *Senegal*; in particular, the Embassy wished to be notified of the “final decision” of Senegal “to grant or refuse the . . . extradition application” concerning Mr. Habré⁶⁴.

Senegal did not reply to this Note Verbale.

1.41. On 9 March 2006, Belgium, through its Embassy in Dakar, referred to four earlier Notes Verbales (16 November 2005⁶⁵, 30 November 2005, 23 December 2005, 11 January 2006) and requested the Ministry of Foreign Affairs of Senegal to “be so kind as to inform it as to whether its decision to transfer the Hissène Habré case to the African Union is to be interpreted as meaning that the Senegalese authorities no longer intend to extradite him to Belgium or to have him judged by their own courts”⁶⁶.

25

1.42. On 4 May 2006, the Ambassador of Senegal in Brussels was summoned to the Belgian Ministry of Foreign Affairs⁶⁷ for talks with the Director-General of Legal Affairs. During those talks, he was given a Note Verbale expressing

“the concern of the Belgian Government with regard to the absence of an official reaction by the Senegalese authorities to the repeated applications by the Belgian Government, to which there has been no response to date, with a view to obtaining the extradition from Senegal to Belgium of former President Hissène Habré, who is wanted for serious violations of international humanitarian law”⁶⁸.

The Note Verbale from the Belgian Ministry of Foreign Affairs added that “former President Hissène Habré fled to Senegal in 1990” and that Belgium’s request for extradition “was sent to the Senegalese authorities in September 2005”. However, in spite of

“verbal notes and personal approaches by the Embassy of Belgium in Dakar on 30 November 2005, 11 January 2006 and, once again, on 10 March 2006, the Senegalese authorities have not advised the Belgian Government as to whether or not they have decided to extradite Hissène Habré to Belgium”⁶⁹.

In the opinion of the Belgian Ministry of Foreign Affairs, “the decision to pass the Hissène Habré case on to the African Union does not . . . relieve Senegal of its obligation to either

⁶³Ann. B.6. [*Translator’s note: Chambre d’accusation* is rendered as Prosecution Chamber in Belgium’s translations of Notes Verbales contained in Ann. B to the Memorial.]

⁶⁴Ann. B.7.

⁶⁵In the Note Verbale of 9 Mar. 2006, the date of this Note Verbale is erroneously specified as 11 Nov. 2005.

⁶⁶Ann. B.8.

⁶⁷The official title of the Belgian “Ministry of Foreign Affairs” is “Federal Public Service for Foreign Affairs” (SPF AE).

⁶⁸Ann. B.9.

⁶⁹*Ibid.*

judge or extradite the author of the crimes covered by the relevant Articles of the Convention against Torture . . . ”⁷⁰.

The Belgian Ministry of Foreign Affairs referred to what it had already stated in its Note Verbale of 9 March 2006⁷¹, namely that “Belgium interprets Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him unless it has judged him”⁷².

26

The Ministry added: “An unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture.”⁷³

It insisted, in view of

“the willingness already expressed by Senegal to combat impunity for the most serious crimes such as those of which Mr. Hissène Habré is accused . . . on Senegal respecting the obligations arising from the Convention on Torture and responding to the request by the Belgian authorities accordingly”⁷⁴.

1.43. Senegal replied to that Note Verbale by Note Verbale addressed to the Belgian Ministry of Foreign Affairs on 9 May 2006⁷⁵, in which Senegal expressed the view that the Notes Verbales of 7 and 23 December 2005⁷⁶ answered Belgium’s questions and added

— concerning the interpretation of Article 7 of the Convention against Torture

“that by transferring the Hissène Habré case to the African Union, Senegal, in order not to create a legal impasse, is acting in accordance with the spirit of the principle ‘aut dedere aut punire’ the essential aim of which is to ensure that no torturer can escape from justice by going to another country”⁷⁷;

— “[that] by taking this case to the highest level on the continent, Senegal, while respecting the separation of powers and the independence of its judicial authorities, has thus opened up throughout Africa new prospects for upholding human rights and combating impunity”⁷⁸;

— that it “[takes] note” of “the possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture”, but restates “the commitment of Senegal to the excellent relationship between the two countries in terms of co-operation and the combating of impunity”.

27

1.44. On 20 June 2006, Belgium, through its Embassy in Dakar, wrote to the Senegalese Ministry of Foreign Affairs to remind it of the two Belgian Notes Verbales of November 2005 and

⁷⁰Ann. B.9.

⁷¹See para. 1.41 above.

⁷²Ann. B.8.

⁷³Ann. B.9 [*Translator’s note*: not *ibid.* as in the French original].

⁷⁴*Ibid.*

⁷⁵Ann. B.10.

⁷⁶See paras. 1.38 and 1.39 above.

⁷⁷Ann. B.10.

⁷⁸*Ibid.*

the three Notes Verbales of January, March and May 2006, as well as two Senegalese Notes Verbales of December 2005 and one Note Verbale of May 2006⁷⁹. Senegal acknowledged that those Notes fell within the framework of the negotiations provided for by Article 30 of the Convention against Torture with regard to the Belgian request for the extradition of Mr. Habré. Belgium recalled that its Note of 4 May 2006 noted the existence of “an unresolved dispute” regarding the interpretation of Article 7 of the 1984 Convention, which should lead to recourse to the arbitration procedure provided for in Article 30 of that Convention⁸⁰. Senegal had moreover referred to this “in its reply of 9 May . . . while reiterating its differing interpretation of the relevant provisions of said Convention”⁸¹.

According to Belgium, “the attempted negotiation with Senegal, which started in November 2005, has not succeeded and, in accordance with Article 30.1 of the Torture Convention, [Belgium] consequently asks Senegal to submit the dispute to arbitration under conditions to be agreed mutually”⁸².

28

1.45. Senegal did not reply to this Note Verbale of 20 June 2006 and did not resume contact with Belgium until 20 February 2007. On that date, the Senegalese Embassy in Brussels informed the Belgian Ministry of Foreign Affairs that Senegal’s Council of Ministers, on 9 November 2006, had submitted two bills amending the Senegalese Penal Code and Code of Criminal Procedure “to allow the prosecution and judgment of Mr. Hissène Habré in Senegal”⁸³; these bills “were scheduled for adoption by the Senegalese National Assembly during its plenary meeting of 2 February 2007”⁸⁴. In addition, “on 23 November 2006 already, a National Commission charged with defining the conditions of Mr. Habré’s trial was established”; it was to “[examine] all the legal, judicial, diplomatic, security and financial implications . . . of said trial”⁸⁵. The Senegalese Embassy cited a decision by the Summit of the African Union which commended Senegal for its efforts regarding “the implementation of the Banjul Decision”, encouraged it “to pursue its initiatives to accomplish the mandate entrusted to it”, and appealed to the international community to mobilize the “financial resources required” for the trial⁸⁶. On 21 February 2007, the Senegalese Ministry of Foreign Affairs confirmed the above-mentioned points and indicated that the National Assembly of Senegal had adopted these two bills on 31 January 2007; it added: “With these two texts, Senegal is filling the legal vacuum which, for technical reasons related to the unsuitability of national legislation, had prevented the Senegalese courts from hearing the Hissène Habré case.”⁸⁷

1.46. The crime of torture had been introduced into Senegalese criminal law by Law No. 96-15 of 28 August 1996, but it had been necessary to amend the Code of Criminal Procedure in order to enable the Senegalese courts to exercise universal jurisdiction; this was done by new laws which, in addition, declared the non-applicability of statutory limitation to the crimes provided for in the Statute of the International Criminal Court. On 31 January 2007, the National Assembly of Senegal adopted two laws amending the Penal Code and the Code of Criminal Procedure of Senegal:

⁷⁹Ann. B.11.

⁸⁰*Ibid.*

⁸¹*Ibid.*

⁸²*Ibid.*

⁸³Ann. B.12.

⁸⁴*Ibid.*

⁸⁵*Ibid.*

⁸⁶*Ibid.* See also para. 1.72 below.

⁸⁷Ann. B.13.

29

- new Articles 431-1 to 431-6 of the Penal Code introduce into Senegalese criminal law the crimes of genocide, crimes against humanity, including torture, and war crimes⁸⁸;
- Article 669 of the Code of Criminal Procedure was amended to provide for the jurisdiction of Senegalese courts over the above-mentioned crimes committed by a foreigner outside Senegal if the alleged perpetrator of the crime is located in Senegal (universal jurisdiction), or if his victim is resident in Senegal (passive personal jurisdiction), or if the alleged perpetrator has been extradited to Senegal⁸⁹.

1.47. Moreover, in its Note Verbale of 21 February 2007, the Ministry of Foreign Affairs of Senegal observed that “the principle of non-retroactivity” does not block the sentencing of any individual found guilty of acts “considered criminal under the general principles of law recognized by all States”⁹⁰. Senegal also established “a working group charged with producing the proposals necessary to define the conditions and procedures suitable for prosecuting and judging the former President of Chad, on behalf of Africa, with the guarantees of a just and fair trial”⁹¹.

On this basis

30

- “a special system must be established from the infrastructure, legislative and administrative standpoint to bring it into conformity with the highest relevant standards and enable a fair trial to be held”⁹²;
- steps must be taken to facilitate letters of request and the working stays abroad of judicial personnel “for purposes of investigation”⁹³;
- the broadest possible accessibility must be assured for persons interested in the trial, as well as the use of information and communication technologies⁹⁴;
- the “highest degree of protection” must be assured for judges, witnesses and victims⁹⁵;
- such a trial requires funds to be mobilized with “the assistance of the international community”, as is moreover suggested by the African Union⁹⁶.

Senegal submitted a report dealing with these points to the Assembly of Heads of State and Government of the African Union (29-30 January 2007). The Assembly took note of the report and invited the Member States and the entire international community to mobilize “the resources”, particularly the financial resources, required for the trial⁹⁷.

⁸⁸Ann. D.6.

⁸⁹Ann.D.7.

⁹⁰Ann. B.13.

⁹¹*Ibid.*

⁹²*Ibid.*

⁹³*Ibid.*

⁹⁴*Ibid.*

⁹⁵*Ibid.*

⁹⁶*Ibid.*

⁹⁷*Ibid.*

1.48 By Note Verbale of 8 May 2007⁹⁸, Belgium reminded Senegal of the request for arbitration which it had transmitted in June 2006, and in which it had referred to the relevant provisions of the Convention against Torture.

This Note Verbale from Belgium met with no response.

1.49. On 5 October 2007, Senegal informed Belgium, by Note Verbale, of its decision to organize the trial of Mr. Habré in Senegal and invited Belgium, together with other Member States of the European Union, to attend a “meeting of potential donors to finance it” scheduled for 16 October 2007⁹⁹. That meeting never took place.

1.50. Subsequently, several exchanges concerning the holding of a conference of donors took place between the Representative of the European Commission and the diplomatic missions of Member States of the European Union based in Dakar, on the one hand, and Senegal, on the other. However, no donor conference was actually organized for want of a realistic and mutually agreed budget covering the costs of organizing Mr. Habré’s trial in Senegal¹⁰⁰.

31

1.51. In a Note Verbale of 2 December 2008, transmitted to the Senegalese Ministry of Foreign Affairs on 16 December 2008, the Belgian Embassy in Dakar referred to the dispute between the two States concerning the interpretation and implementation of several provisions of the Convention against Torture. Belgium “reiterates its receptiveness to establishing international judicial co-operation with Senegal, in particular by forwarding to Senegal the Belgian investigation file in response to a letter of request from the Senegalese authorities”. Belgium was prepared “to receive, as soon as possible and as most convenient to them, the Senegalese investigating judges handling this case”. Belgium hoped that this co-operation would result in “decisive progress in the next few weeks”¹⁰¹.

1.52. On 19 February 2009, Belgium filed with the Registry of the Court an Application instituting these proceedings. Together with its Application, Belgium filed a request for the indication of provisional measures, having regard to the statements made by President Wade in the press and to the media, to the effect that Senegal could lift the house arrest of Mr. Habré if it failed to find the budget which it regarded as necessary for organizing his trial¹⁰².

1.53. On 29 May 2009, the Minister of Justice of Senegal stated that four judges had been appointed “to lead the investigation against Mr. Habré”¹⁰³. By Note Verbale of 23 June 2009, transmitted on 2 July 2009, Belgium recalled its Note Verbale of 2 December 2008¹⁰⁴ and added that it would defray the costs associated with the execution of a preliminary letter rogatory aimed at enabling Senegalese judges to examine the Belgian record of investigation¹⁰⁵. By Note Verbale of

⁹⁸Ann. B.14.

⁹⁹Ann. B.15.

¹⁰⁰See paras. 1.76 to 1.79 below.

¹⁰¹Ann. B.16.

¹⁰²Ann. C.7 and C.8.

¹⁰³Article in *Sud Quotidien*, 29 May 2009 (Ann. G.9) and article in *Walfadjiri*, 29 May 2009 (Ann. G.10); see also Ann. B.19.

¹⁰⁴See para. 1.51 above.

¹⁰⁵Ann. B.17.

32

29 July 2009, Senegal took note of Belgium's proposal for judicial co-operation in the H. Habré case; it indicated that the proposal had been referred to the competent authorities and that "any development in this connection will be communicated to the Embassy as soon as possible"¹⁰⁶. By Note Verbale of 14 September 2009, Senegal welcomed Belgium's offer of judicial assistance. Senegal also announced the designation of two of the four judges, Messrs. Diouf and Seck, to visit Belgium, and stated that concrete arrangements could be established "at the convenience of the Belgian and Senegalese parties, once the period of judicial recess in mid-November 2009 has come to an end"¹⁰⁷.

1.54. In a Note Verbale of 14 October 2009, transmitted in the context of an approach made to the Minister for Foreign Affairs on 22 October 2009, Belgium took note of the designation of four Senegalese judges to conduct the investigation against Mr. Habré¹⁰⁸. It repeated that the Belgian judicial authorities were prepared to furnish to the Senegalese judges, in connection with a letter rogatory to be executed in Belgium, a copy of the Belgian record of investigation against Mr. Habré, and to bear the costs associated with the letter rogatory. Belgium laid stress on compliance with the rules governing mutual judicial assistance. On 28 October 2009, in an interview given to the Ambassador of Belgium, certain Ambassadors of other States of the European Union and the Representative of the European Commission, the Senegalese Minister of Justice thanked Belgium in particular for its offer of co-operation and said that he had undertaken to respond to it at the earliest opportunity. The Minister also referred to budgetary matters and said that the Senegalese authorities were not in agreement with the revised budget presented by the African Union following the mission of the African Union Commission in June 2009¹⁰⁹.

1.55. On 19 November 2009, in the course of a telephone conversation between the Ambassador of Belgium and the Senegalese Minister of Justice, the latter announced that his services were preparing a formal letter rogatory in response to Belgium's proposal of mutual judicial assistance.

1.56. On 5 December 2009, President Wade received the Belgian Minister of Development Co-operation, Charles Michel, on a visit to Dakar, and reiterated Senegal's intention to try Mr. Habré provided that all the necessary funds were available. He once again threatened to refer Mr. Habré "to the African Union or to Belgium" if no solution was found by January 2010.

33

1.57. On 14 January 2010, the Court of Justice of the Economic Community of West African States held a hearing to examine the case brought against the Republic of Senegal in the context of the H. Habré case. In their pleadings, counsel for Senegal noted *inter alia* that, at that stage, no proceedings were pending against Mr. Habré in the Senegalese courts¹¹⁰.

1.58. In February 2010, the Belgian Minister for Foreign Affairs met his Senegalese counterpart in Addis Ababa on the sidelines of the African Union Summit. The Senegalese Minister indicated that the only remaining obstacle to the organization of the trial was merely of a

¹⁰⁶Ann. B.18.

¹⁰⁷Ann. B.19.

¹⁰⁸Ann. B.20.

¹⁰⁹See para. 1.89 below.

¹¹⁰ECOWAS Court of Justice, *Hissein Habré v. Republic of Senegal, Judgment on Preliminary Objections*, 14 May 2010, para. 14 (Ann. E.1). See also para. 2.10 below.

financial nature. He also indicated that Mr. Habré was under house arrest and that there was no risk of his escaping.

1.59. On 23 February 2010, the Belgian Ambassador transmitted to the Senegalese Ministry of Foreign Affairs a Note Verbale in which Belgium again reiterated its offer of judicial co-operation and set 30 April 2010 as the deadline for execution of the letter rogatory for Senegalese judges to go to Belgium and be provided with a copy of the record of investigation drawn up concerning H. Habré by the Belgian judicial authorities¹¹¹.

1.60. In March 2010, the Ambassador of Belgium met the new Senegalese Minister of Justice who expressed receptiveness to the Belgian offer of judicial co-operation without, however, wishing to make a specific commitment regarding transmission of an international letter rogatory.

1.61. In a Note Verbale dated 30 April 2010, the Senegalese Ministry of Foreign Affairs replied to the Note of 23 February 2010 from the Belgian Embassy regarding the Belgian offer of judicial co-operation whereby the Senegalese judges responsible for the case would be received in Belgium on the basis of an international letter rogatory, and recalled that “the competent Senegalese authorities welcomed this proposal” and that “[a]ll that remained to be decided by the parties were the terms of implementation”¹¹².

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1.62. On 26 May 2010, the Belgian Minister for Foreign Affairs met his Senegalese counterpart in Brussels. The Ministers discussed *inter alia* the H. Habré case. During the discussion, the Senegalese Minister for Foreign Affairs told the Belgian Minister that no judge had to date been put in charge of the investigation, given the lack of agreement on the budget to finance the proceedings. In that context, the Senegalese Minister stated that he was unable to transmit a letter rogatory in proper form and proposed, by way of alternative, that four prosecutors (“those in charge of the criminal proceedings”) should undertake an exploratory mission to examine the case file in Belgium.

1.63. In the Note on the latest developments transmitted to the Court by Senegal on 15 June 2010¹¹³, Senegal stated that “[t]he Senegalese authorities welcomed”¹¹⁴ Belgium’s offer to receive the judges in charge of the H. Habré case on the basis of an international letter rogatory and to bear the costs of their visit. Senegal referred repeatedly to its desire to fulfil its “international commitments” with regard to initiating judicial proceedings against Mr. Habré¹¹⁵. Senegal also

¹¹¹Ann. B.22.

¹¹²Ann. B.23.

¹¹³See para. 0.11 above.

¹¹⁴Ann. D.9, p. 1.

¹¹⁵See: “Senegal . . . its *commitment* to put Mr. Hissène Habré on trial”, *ibid.*; “Senegal’s *desire* both to continue the efforts that it has made on various levels to ensure that the trial can indeed take place soon”, *ibid.*; the President of the Republic [. . .] reiterate[d] his *commitment* to have judicial proceedings opened against Mr. Habré”, *ibid.*, p. 2; “the Senegalese authorities replied by reaffirming Senegal’s desire to *comply with the obligations* arising from its signature and ratification of the Convention against Torture”, *ibid.*, p. 3; “its [Senegal’s] *commitment* to fighting impunity”, *ibid.*; “Senegal has been summoned to appear [before two African Courts] in two cases that are 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”, *ibid.*, p. 4; “the applicant was clearly attempting to prevent Senegal from achieving its declared objective of putting Mr. Hissène Habré on trial in compliance with its *international obligations*, an attempt that would appear to have definitively failed”, *ibid.*; “the clear desire of the Senegalese Government and Head of State to open judicial proceedings against [Mr. Habré], in accordance with the State of Senegal’s *international commitments* and its own national law”, *ibid.*, p. 6. Emphasis added by Belgium, in the preceding extracts.

indicated that it “would not be invoking any argument based on a lack of financial resources in order to escape its obligations and [that it] had not considered doing so”¹¹⁶.

1.64. By Note Verbale dated 15 June 2010 from the Ministry of Foreign Affairs of Senegal, addressed to the Belgian Embassy in Dakar,

35

“[t]he competent Senegalese authorities reiterate their thanks to the Embassy for this initiative and wish to express once again their willingness to accept this offer [of a letter rogatory], as soon as the forthcoming Donors’ Round Table has taken place. This is being held under the aegis of the European Union and the African Union to raise financial contributions from States and institutions.”¹¹⁷

1.65. In a Note Verbale of 28 June 2010 from the Embassy of Belgium in Dakar to the Senegalese Ministry of Foreign Affairs¹¹⁸, the Belgian authorities:

“while welcoming Senegal’s readiness to take up Belgium’s offer, recall that a State should ‘not be invoking any argument based on a lack of financial resources in order to escape its [international] obligations’. This, moreover, was recalled by Senegal itself in its ‘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’, sent to the International Court of Justice by letter of 15 June 2010 in the context of the dispute between Belgium and Senegal, brought before the International Court of Justice by Belgium through its Application filed on 19 February 2009.”

And they added:

“If Senegal were to maintain its position consisting of making the transmission of an initial letter rogatory to Belgium conditional upon the holding of a Donors’ Round Table — a Round Table which would be unlikely to take place for at least several months — the Senegalese judicial authorities would risk finding themselves unable to initiate proceedings against Mr. Hissène Habré in accordance with the principle of a reasonable period of time. Accordingly, Belgium respectfully points out to Senegal that it is still possible for it to honour its obligation to prosecute or extradite by opting for the second of those alternatives.”

V. REFERRAL OF THE CASE TO THE AFRICAN UNION AND SUBSEQUENT DEVELOPMENTS

1.66. The present section will deal with

- the referral by Senegal of the H. Habré case to the African Union (A); and
- the efforts made by the African Union and the European Union to assist Senegal in instituting proceedings (B).

¹¹⁶Ann. D.9, p. 3.

¹¹⁷Ann. B.25.

¹¹⁸Ann. B.26.

A. Referral of the H. Habré case to the African Union

1.67. 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"¹¹⁹. Moreover, Senegal's statements show a continued lack of certainty on the question whether Senegal considers that it is acting solely under a mandate from the African Union, or whether it is seeking to fulfil its obligations under the Convention against Torture and other rules of international law.

1.68. The day after the decision of 25 November 2005 in which the *Chambre d'accusation* held that it had no jurisdiction to deal with the request for extradition, i.e., on 26 November 2005, the Senegalese Minister of the Interior issued a decree "placing Mr. Habré . . . at the disposal of the Chairman of the African Union", while indicating that, after a lapse of 48 hours, Mr. Habré would be expelled to Nigeria (a country which, at that point in time, was exercising the presidency of the African Union)¹²⁰. However, the Senegalese Minister for Foreign Affairs stated on 27 November 2005, in a communiqué, that Mr. Habré would remain in Senegal as long as the African Union Summit had not "indicate[d] which court has jurisdiction to determine this case"¹²¹.

1.69. In a communiqué of its Ministry of Foreign Affairs, annexed to the Note Verbale addressed to Belgium on 7 December 2005¹²², Senegal stated that it "is in no way directly involved in the 'Hissène Habré' case" and that this case "is not a Senegalese case but an African case". As noted above, the Minister of the Interior had adopted a decree placing Mr. Habré "at the disposal of the Chairman of the African Union"¹²³.

1.70. Senegal duly informed the Assembly of Heads of State and Government of the African Union, at its sixth ordinary session held in Khartoum on 23-24 January 2006, that the Senegalese Government had taken the decision to transmit the dossier to the African Union so that the Heads of State and Government could decide what follow-up should be given to this case¹²⁴.

1.71. In its Decision 103 (VI), the Assembly of the African Union established a Committee of Eminent African Jurists to consider, among other things, "all aspects and implications of the Hissène Habré case"¹²⁵. That committee reported to the next session of the Assembly, held in Banjul on 1-2 July 2006. On that occasion, the Assembly adopted Decision 127 (VII)¹²⁶ in which it took note of the report presented by the Committee of Eminent African Jurists¹²⁷. The Assembly then noted that, under the terms of Articles 3 (*h*), 4 (*h*) and 4 (*o*) of the Constitutive Act of the

¹¹⁹ECOWAS Court of Justice, *Hissein Habré v. Republic of Senegal, Judgment on Preliminary Objections*, 14 May 2010, para. 14 (Ann. E.1).

¹²⁰HRW chronology: <http://www.hrw.org/en/news/2009/02/12/chronology-habr-case>.

¹²¹Ann. B.5.

¹²²*Ibid.*

¹²³See para. 1.68 above.

¹²⁴Assembly/AU/8 (VI) Add. 9.

¹²⁵Assembly/AU/Dec.103 (VI), para. 3 (Ann. F.1).

¹²⁶Assembly/AU/Dec.127 (VII), (Ann. F.2).

¹²⁷*Ibid.*, para. 2.

African Union, “the crimes of which Hissène Habré is accused fall within the competence of the African Union”¹²⁸. Further, considering that “in its present state, the African Union has no legal organ competent to try Hissène Habré”¹²⁹, and “considering the jurisdiction of the International Court of Justice . . . , and the ratification by Senegal of the United Nations Convention against Torture”¹³⁰, the Assembly:

- “(i) DECIDES to consider the Hissène Habré case as falling within the competence of the African Union;
- (ii) 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;
- 38 (iii) FURTHER MANDATES 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;

.....

- (v) CALLS UPON the international community to avail its support to the Government of Senegal”¹³¹.

1.72. At its eighth ordinary session, held in Addis Ababa on 29-30 January 2007, the Assembly of the African Union recalled the decision adopted in Banjul and took note of an interim report from Senegal¹³². At its twelfth ordinary session, held again in Addis Ababa (1-3 February 2009), the Assembly of Heads of State and Government of the African Union adopted Decision 240 (XII)¹³³. In that Decision, the Assembly:

“4. CONSIDERS that the final budget of the case should be prepared and adopted by the African Union, in conjunction with the Government of the Republic of Senegal and the European Union; [and]

5. CALLS ON all Member States of the African Union, the European Union and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to the African Union Commission.”

1.73. At its thirteenth ordinary session, held in Sirte, Libya (1-3 July 2009), the Assembly of Heads of State and Government of the African Union:

- “4. REITERATES its appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the AU mandate to prosecute and try Hissène Habré;

¹²⁸ Assembly/AU/Dec.127 (VII), (Ann. F.2), para. 3.

¹²⁹ *Ibid.*, para. 4.

¹³⁰ *Ibid.*, para. 5.

¹³¹ *Ibid.*

¹³² Assembly/AU/Dec.157 (VIII), (Ann. F.3).

¹³³ Assembly/AU/Dec.240 (XII), (Ann. F.4).

5. DECIDES that the AU should make a token contribution to the budget of the trial for a sum to be determined following consultations between the Commission and the Permanent Representatives Committee (PRC).”¹³⁴

1.74. At its fourteenth ordinary session (Addis Ababa, 31 January-2 February 2010), the Assembly of Heads of State and Government of the African Union;

39

- “4. REITERATES its appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the African Union (AU) mandate to prosecute and try Hissène Habré;
5. RECALLS its Decision Assembly/AU/246 (XIII) adopted in Sirte, Great Libyan Arab Jamahiriya in July 2009, calling for the African Union to make a token contribution to the budget of the trial for a sum to be determined following consultations between the Commission and the Permanent Representatives Committee (PRC);
6. REQUESTS the Government of Senegal, the Commission and partners, particularly the European Union to continue with consultations with the view to ensuring the holding of the Donors’ Round Table as soon as possible.”¹³⁵

1.75. At the hearings on the request for the indication of provisional measures, Senegal stated: “[A]t no point has Senegal established any link between the decision of the African Union and the obligations incumbent upon it under the 1984 Convention.”¹³⁶

Senegal also indicated that: “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”¹³⁷.

1.76. While Belgium welcomes these statements, it notes that the decisions of the African Union concerning the Hissène Habré case, including decisions subsequent to the statements made by Senegal to the Court, relate to proceedings against Mr. Hissène Habré “in compliance with the mandate from the African Union”. Moreover, the terms of reference decided in October 2009 by the Senegalese authorities explain that “[i]n the light of such a clear mandate [from the African Union], the Senegalese authorities were required to make suitable arrangements for the trial to take place as quickly as possible”¹³⁸ and that it was necessary to “ensure the proper implementation of their political commitment”¹³⁹. This is consistent with certain statements by Senegal to the effect that

40

- it had voluntarily accepted the “mandate” of the African Union;
- the latter could terminate the mandate whenever it so wished;
- the entire case now came under the responsibility of Africa, not Senegal.

¹³⁴ Assembly/AU/Dec. 246 (XIII), 3 July 2009 (Ann. F.5).

¹³⁵ Assembly/AU/Dec. 272 (XIV), 2 Feb. 2010 (Ann. F.6).

¹³⁶ CR 2009/11, 8 Apr. 2009, p. 13, para. 10 (Diouf).

¹³⁷ *Ibid.*, p. 18, para. 11 (Sall).

¹³⁸ Ann. D.8, p. 2.

¹³⁹ *Ibid.*, p. 3.

B. The efforts of the African Union and the European Union to help Senegal organize proceedings

1.77. In July 2007, the Senegalese authorities requested financial support from the international community to organize Mr. Habré's trial in Senegal, but no realistic or agreed budget could be established¹⁴⁰.

1.78. On 18 July 2007, in a letter from the Senegalese President to the Belgian Prime Minister, the Senegalese authorities communicated their own revised estimate of the budget needed to organize the trial (+/-€7 million) and requested financial and technical support from Belgium. The President also announced his intention to hold a meeting of potential donors in September 2007¹⁴¹. Several partners of the European Union received a similar letter. At the suggestion of certain other Member States, it was decided that the Presidency of the European Union would reply on behalf of the Union to the request from the Senegalese authorities and would suggest sending an expert mission from the European Union to help the Senegalese authorities in the calculation of a realistic budget for the trial.

41

1.79. On 14 September 2007, the Presidency of the European Union sent a letter to President Wade proposing the dispatch of an "expert technical mission to be tasked with analysing, with the competent authorities [of Senegal], existing needs for the organization of the trial"¹⁴². In spite of this letter, the Senegalese Embassy transmitted a Note Verbale to the Belgian Ministry of Foreign Affairs on 5 October 2007, inviting Belgium to a meeting of potential donors on 16 October 2007¹⁴³. A similar Note Verbale was sent to all the diplomatic missions in Brussels and to the European Commission. After consultations between the Heads of Mission of Member States of the European Union in Dakar, the Presidency of the European Union in Dakar spoke to the Principal Private Secretary to Minister Gadio with a view to postponing the meeting of potential donors until after the expert mission of the European Union, as the excessive budget estimates for the organization of the trial by the Senegalese authorities had not been revised in the meantime. The Minister agreed to the adjournment of the meeting to a date to be decided, and requested the representatives of the European Union in Senegal to propose a new date at their convenience.

1.80. Nevertheless, by a facsimile of 4 December 2007 addressed to Prime Minister Verhofstadt, the President of Senegal again convened a meeting of potential donors for 13 and 14 December 2007¹⁴⁴. A similar invitation was sent to the other diplomatic missions of the Member States of the European Union in Dakar and to the Representative of the European Commission. The latter immediately requested and was granted a postponement *sine die* of the meeting until after the expert mission of the European Union. By letter of 7 December 2007, the Senegalese President informed the Belgian Prime Minister of the postponement "to a later date" of the conference of potential donors "for scheduling reasons"¹⁴⁵. Belgium, for its part, exerted pressure to have the expert mission organized as quickly as possible.

¹⁴⁰The terms of reference for the organization of the trial of Mr. Hissène Habré, prepared in Oct. 2009 by the Committee on Follow-up and Communication established by Senegal, provided for a budget of more than 18 billion CFA francs (+/-€7 million), a budget identical in amount to the one already estimated in 2007.

¹⁴¹Ann. D.14.

¹⁴²This item of European correspondence has been classified as restricted by the Secretariat of the Council of the European Union.

¹⁴³Ann. B.15.

¹⁴⁴Ann. D.15.

¹⁴⁵Ann. D.16.

1.81. Since January 2008, the African Union and the European Union have endeavoured to determine the type of assistance that Senegal should receive for the purpose of organizing Mr. Habré's trial.

42

1.82. On various occasions, the Assembly of Heads of State and Government of the African Union has called on the Member States of the Union to contribute to the budget for the trial¹⁴⁶. In its Note on the latest developments, Senegal noted that, at its most recent Summit in February 2010, Senegal had been invited to "continue with consultations with a view to holding the Donors' Round Table in Dakar in 2010"¹⁴⁷. Senegal also refers to two preliminary drafts of terms of reference proposed by the African Union, one on the organization of the Donors' Round Table and the other on the management of the funds earmarked for the trial¹⁴⁸, although these documents have not been communicated to the Court or to Belgium.

1.83. In January 2008, an expert mission from the European Union went to Dakar to formulate recommendations on support for the organization of the trial of Mr. H. Habré by the Senegalese authorities, including recommendations on a revised and finalized budget.

1.84. In May 2008, the Senegalese Minister of Justice announced that, in order to prepare for Mr. Habré's trial, he had appointed Mr. Ibrahima Gueye as co-ordinator, and a "Committee on Follow-up and Communication" whose members included judges and representatives of non-governmental organizations. He also announced the establishment of a working group on budgetary aspects¹⁴⁹.

1.85. By letter of 4 November 2008, the Senegalese authorities transmitted to the Office of the Representative of the European Commission in Dakar a draft budget for the organization of Mr. Habré's trial: the draft was in the amount of 18 billion CFA francs (approximately €7 million)¹⁵⁰.

43

1.86. In December 2008-January 2009, in an exchange of letters between the Senegalese President and the President of the Council of the European Union, the French President, President Sarkozy, noted that the investigative stage of the trial had not started and that no credible budget had been established. He proposed providing for technical support from the European Union in order to work out a schedule and a budget which would make it possible to raise funds from the international community swiftly. President Wade reiterated Senegal's willingness to hold the trial as soon as the financial and logistical conditions necessary to ensure its credibility had been met¹⁵¹.

1.87. In March 2009, Mr. Robert Dossou, special envoy of the African Union for the H. Habré case, went to Dakar on a mission concerning the preparation of the budget. There he met,

¹⁴⁶See also the Note on the latest developments, pp. 2-3.

¹⁴⁷*Ibid.*, p. 3.

¹⁴⁸*Ibid.*

¹⁴⁹*Agence de Presse Sénégalaise (APS)*, communiqué of 21 May 2008.

¹⁵⁰Ann. D.10.

¹⁵¹Letter from President Sarkozy to President Wade of 15 Dec. 2008 (Ann. D.11) and letter of reply from President Wade to President Sarkozy of 6 Jan. 2009 (Ann. D.12).

among others, the Ambassadors of Belgium, France, the Netherlands and Switzerland, and the Representative of the European Commission.

1.88. By letter of 2 June 2009 addressed to the Representative of the European Commission in Dakar, the Senegalese President requested technical assistance for the evaluation of the budget needed for H. Habré's trial¹⁵². The Representative of the Commission responded favourably and began drafting terms of reference for the technical assistance mission. At his request, the Senegalese Minister of Justice forwarded to him, on 25 June 2009, a set of documents relating to the estimated budget for the trial (provisional budget estimate of 18 billion CFA francs prepared in 2007, with an additional budget for the co-ordinator and a budget for the prison administration).

1.89. A delegation from the African Union Commission visited Dakar from 4 to 10 June 2010 in order to draw up a draft budget in accordance with the "mandate from the African Union"¹⁵³. No meeting with representatives of the European Union was organized and the latter were informed of the visit only after the event by a letter of 25 June 2009 from the Minister of Justice of Senegal to the Representative of the Commission of the European Union. At the conclusion of that mission, the African Union re-estimated the budget needed as US\$16 million.

44

1.90. In October 2009, terms of reference for the organization of the trial of Mr. Hissène Habré¹⁵⁴ were prepared by the Committee on Follow-up and Communication established by Senegal. The terms of reference referred to the "mandate" from the African Union and to the "political commitment" undertaken by the Senegalese authorities¹⁵⁵. The objectives consisted in establishing the physical and legal conditions necessary for organizing a fair trial within 28 months (20 months for preparation and training, five months for the trial, three months for the appeal). The terms of reference described the legislative amendments already made in Senegal. They also described the working group established after the decision of the African Union to examine the legislative amendments, evaluate the costs, provide for a co-ordinator and a committee on follow-up and communication, and the training needs of judges and legal officials in the near future. It was recommended to designate the persons concerned, provide them with training (including study trips), and address issues of security and communication. The budget would exceed 18 billion CFA francs (approximately €27 million).

1.91. In a letter of 29 October 2009 from the Senegalese Minister of Justice to the Representative of the European Commission, the former proposed a tripartite African Union-European Union-Senegal meeting on budgetary matters¹⁵⁶. The Representative of the Commission, in his reply, requested postponement of the meeting until after the second expert mission of the European Union scheduled to take place before the end of the year and proposed extending the invitation to other parties (for example, the United States of America and Switzerland).

¹⁵²Letter of 2 June 2009 from the Senegalese authorities to the European Commission delegation in Dakar (Ann. D.13).

¹⁵³Letter from the Minister of Justice of Senegal to the Representative of the European Commission, dated 25 June 2009 (Ann. D.17).

¹⁵⁴Ann. D.8.

¹⁵⁵*Ibid.*, p. 3.

¹⁵⁶Ann. D.18.

1.92. From 7 to 17 December 2009, three European Union experts visited Dakar in order to assist the Senegalese authorities in finalizing the budget for the trial. This was the first phase in the second expert mission of the European Union.

1.93. Taking advantage of the presence in Dakar of the European Union's experts, the Senegalese authorities, on 9 December 2009, organized a "day of validation of the terms of reference for the organization of the trial of H. Habré", in which the experts of the European Union and representatives of the African Union Commission participated as observers.

45

1.94. The second phase of the second expert mission of the European Union, scheduled for 19 to 23 April 2010, was postponed on account of disruptions in European airspace. It was finally held in the week of 17 May 2010.

VI. SUMMARY OF THE FACTS

1.95. The facts of this case may be summarized as follows:

- from 1982 to 1990, Mr. Habré was President of Chad; during his presidency, numerous violations of the most fundamental human rights were committed against several tens of thousands of persons (paras. 1.05-1.10 above); having been deposed in 1990, H. Habré took refuge in Senegal where he has been resident ever since (para. 1.08 above);
- in January 2000, victims of Mr. Habré filed a complaint against him in Senegal; the investigating judge charged Mr. Habré with complicity in "crimes against humanity, acts of torture and barbarity", but the *Chambre d'accusation* annulled the proceedings on grounds of lack of jurisdiction of the Senegalese courts in the absence of a law enabling them to exercise the extraterritorial jurisdiction required by the case (paras. 1.11-1.13 above); in March 2001 the Court of Cassation of Senegal rejected the appeal of the victims who had filed complaints in Senegal (para. 1.15 above);
- in November 2000, complaints were filed in Belgium against Mr. Habré (paras. 1.19-1.20 above);
- in September 2005, upon completing his investigation, the Belgian investigating judge issued a warrant *in absentia* for the arrest of Mr. Habré; the arrest warrant was transmitted to Senegal via the Interpol system, with a red notice, and served as a request for provisional arrest with a view to extradition (paras. 1.28-1.31 and 1.34);
- in November 2005, the *Chambre d'accusation* of the Dakar Court of Appeal declared that it had no jurisdiction to rule on the request for extradition from Belgium, given the immunity enjoyed by the President of Senegal under Senegalese law (para. 1.36 above);
- in December 2005, Senegal transmitted two Notes Verbales to Belgium referring to the judgment of the *Chambre d'accusation* of the Dakar Court of Appeal and pointing out that the case had been referred to the African Union (paras. 1.38-1.39 above);
- in January and March 2006, Belgium transmitted two Notes Verbales to Senegal, requesting Senegal to clarify its position on the request for the extradition of Mr. Habré, in the light of the Convention against Torture (paras. 1.40-1.41);

46

- in May 2006, in its reply to the Notes Verbales of Belgium, Senegal stated that the transfer of the case file to the African Union was in keeping with its obligations under the 1984 Convention (para. 1.43 above);
- in June 2006, Belgium transmitted a Note Verbale to Senegal in which it noted that it had not been possible to resolve by negotiation the difference of views between the two States on the interpretation and implementation of the Convention against Torture and that, consequently, it proposed having recourse to the arbitration procedure provided for in the Convention (para. 1.44 above);
- in 2008, victims of Mr. Habré filed a further complaint against him in Senegal (para. 1.49 above);
- in December 2008, Belgium offered to extend judicial co-operation to Senegal by forwarding the investigation file relating to Mr. Habré and receiving Senegalese investigating judges in Belgium (para. 1.51 above);
- in February 2009, Belgium filed an Application instituting proceedings with the Court and submitted a request for the indication of provisional measures (para. 1.52 above);
- in July 2009, Belgium reiterated the proposals it had made in December 2008 (para. 1.53 above);
- 47** — in July and September 2009, Senegal welcomed the proposal for Belgian judicial assistance and designated two judges to go to Belgium; Belgium took note of this and declared its readiness to finance this letter rogatory (para. 1.53 above);
- in November 2009, the Minister of Justice of Senegal informed the Ambassador of Belgium that a formal letter rogatory would be sent to Belgium (para. 1.55 above); up to the present time (end of June 2010), Belgium has not received a letter rogatory;
- in December 2009, President Wade stated that Senegal would try H. Habré on condition that all the necessary funds were available (para. 1.56 above);
- in February 2010, the Senegalese Minister for Foreign Affairs repeated this message to the Belgian Minister for Foreign Affairs (para. 1.58 above);
- in February 2010, Belgium reiterated its offer of judicial co-operation for the third time (para. 1.59 above);
- in March 2010, the new Senegalese Minister of Justice said that he was receptive to the Belgian offer, but could make no concrete commitment regarding the transmission of a letter rogatory to Belgium (para. 1.60 above);
- in June 2010, Senegal transmitted to the Court documents intended to demonstrate Senegal's willingness to initiate criminal proceedings against Mr. Habré (para. 1.63 above);
- also in June 2010, Senegal reaffirmed its readiness to accept the Belgian offer of a letter rogatory "as soon as the forthcoming Donors' Round Table has taken place. This is being held under the aegis of the European Union and the African Union." (Para. 1.64 above);
- 48** — in a Note Verbale in reply, also dated June 2010, the Belgian authorities indicated to the Senegalese authorities that, by making further proceedings conditional on the actual holding of a Donors' Round Table, the Senegalese authorities might not be able to honour, within a

reasonable period of time, the obligation to prosecute if not extradite, unless they opted for the second of those alternatives (para. 1.65 above).

1.96. To sum up, Mr. Habré has been living in Senegal for 20 years during which the competent Senegalese authorities have at no time taken concrete action on

- the international rules on action to combat impunity for the acts alleged against him;
- two sets of individual complaints addressed to the Senegalese courts (2000, 2008);
- the request for extradition addressed by Belgium to Senegal (2005);
- the offers of judicial co-operation from Belgium to Senegal (2008, 2009, 2010);
- the commitments explicitly undertaken by Senegal.

**PROCEEDINGS BEFORE THE COMMITTEE AGAINST TORTURE, THE AFRICAN COURT
ON HUMAN AND PEOPLES' RIGHTS AND THE COURT OF JUSTICE OF THE
ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)**

2.01. Several international forums have dealt with various aspects of the H. Habré case: the United Nations Committee against Torture and two international courts, the African Court on Human and Peoples' Rights and the Court of Justice of the Economic Community of West African States (as was stated by Senegal during the hearings on provisional measures in April 2009)¹⁵⁷. This chapter updates the information on those proceedings, in so far as such information is available.

I. COMMITTEE AGAINST TORTURE

2.02. On 17 May 2006, the Committee against Torture rendered its decision on a communication submitted against Senegal by Suleymane Guengueng¹⁵⁸ *et al.* The Committee concluded that Senegal had violated the Convention against Torture by failing in its obligation to extradite or prosecute Mr. Habré¹⁵⁹.

2.03. The Committee concluded:

“9.3 On the merits, the Committee must determine whether the State party violated article 5, paragraph 2, and article 7 of the Convention. It finds — and this has not been challenged — that Hissène Habré has been in the territory of the State party since December 1990. In January 2000, the complainants lodged with an examining magistrate in Dakar a complaint against Hissène Habré alleging torture. On 20 March 2001, upon completion of judicial proceedings, 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’. The courts of the State party have not ruled on the merits of the allegations of torture that the complainants raised in their complaint.

9.4 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.

9.5 The Committee recalls 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 . . .’. It notes 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

¹⁵⁷CR 2009/9, 6 Apr. 2009, pp. 28-29, para. 43 (Kandji).

¹⁵⁸Mr. Suleymane Guengueng is one of the victims who filed a complaint with the Senegalese judicial authorities.

¹⁵⁹Ann. E.2.

considered that the State party had not taken such measures. It also considers that the reasonable time frame within which the State party should have complied with this obligation has been considerably exceeded.

9.6 The Committee is consequently of the opinion that the State party has not fulfilled its obligations under article 5, paragraph 2, of the Convention.

9.7 The Committee recalls 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’. It notes that the obligation to prosecute the alleged perpetrator of acts of torture does 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 exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) 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.

9.8 The Committee considers that the State party cannot 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. It is of the opinion that the State party was obliged to prosecute Hissène Habré for alleged acts of torture unless it could show that there was not sufficient evidence to prosecute, at least at the time when the complainants submitted their complaint in January 2000. Yet by its decision of 20 March 2001, which is not subject to appeal, the Court of Cassation put an end to any possibility of prosecuting Hissène Habré in Senegal.

51

9.9 Consequently and notwithstanding the time that has elapsed since the initial submission of the communication, the Committee is of the opinion that the State party has not fulfilled its obligations under article 7 of the Convention.

9.10 Moreover, the Committee finds that, since 19 September 2005, the State party has been in another situation covered under article 7, because on that date Belgium made a formal extradition request. At that time, the State party had the choice of proceeding with extradition if it decided not to submit the case to its own judicial authorities for the purpose of prosecuting Hissène Habré.

9.11 The Committee considers that, by refusing to comply with the extradition request, the State party has again failed to perform its obligations under article 7 of the Convention.

9.12 The Committee against Torture, acting under article 22, paragraph 7, of the Convention, concludes that the State party has violated article 5, paragraph 2, and article 7 of the Convention.”¹⁶⁰

2.04. In its Note on the latest developments transmitted to the Registry of the Court, Senegal refers to a confidential fact-finding mission by the Commission against Torture which visited Senegal from 4 to 7 August 2009 in order to “ascertain what steps the State of Senegal had taken to prepare for the trial of Mr. Hissène Habré and how much progress had been made”¹⁶¹. The

¹⁶⁰Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, paras. 9.3-9.12 (Ann. E.2).

¹⁶¹Ann. D.9, p. 3.

Committee's mission met the administrative and judicial authorities in charge of the H. Habré case. It is reported that, following an observation made by the members of the mission, the Senegalese authorities reaffirmed "Senegal's desire to comply with the obligations arising from its signature and ratification of the Convention against Torture" and also gave assurances that "Senegal would not be invoking any argument based on a lack of financial resources in order to escape its obligations, and had not considered doing so"¹⁶². According to the explanation given in the Note on the latest developments, "the members of the Committee had opted for an approach that involved, above all, hearing the views of the State concerned on this issue"¹⁶³.

52

II. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

2.05. In the *Michelot Yogogombaye v. Republic of Senegal* case, the applicant requested "suspension of the ongoing proceedings instituted" by Senegal against Mr. Habré. In its judgment of 15 December 2009, the African Court on Human and Peoples' Rights unanimously ruled that it had no jurisdiction to hear the case as Senegal had made no declaration accepting the jurisdiction of the Court under Article 34, paragraph 6, of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of that Court¹⁶⁴.

III. COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

2.06. In an application filed on 6 October 2008 against Senegal, Mr. Habré seised the Court of Justice of the Economic Community of West African States, requesting it to find numerous violations of international instruments for the protection of human rights, including the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. He requested the Court to

- "adjudge and declare that any proceedings instituted on the grounds indicated in [the] application would be liable to perpetuate the said violations;
- 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"¹⁶⁵.

53

2.07. The Note on the latest developments transmitted by Senegal to the Court indicates that, on 27 November 2009, the Court of Justice, by preliminary judgment No. ECW/CCJ/ADD/11/09, rejected the application to intervene submitted by the "Victims' Collective"¹⁶⁶.

¹⁶²Ann. D.9, p. 3.

¹⁶³*Ibid.*

¹⁶⁴Judgment of 15 Dec. 2009, *Michelot Yogogombaye v. Republic of Senegal*, application No. 001/2008 (Ann. E.3). See also the explanations of Senegal in its Note on the latest developments in Senegal's preparations for the trial of Mr. Hissein Habré since the delivery of the Order of 28 May 2009 on the request for the indication of provisional measures submitted by Belgium, 15 June 2010, p. 4 (Ann. D.9).

¹⁶⁵ECOWAS Court of Justice, *Hissein Habré v. Republic of Senegal, Judgment on Preliminary Objections*, 14 May 2010, para. 2 (Ann. E.1).

¹⁶⁶Ann. D.9, p. 7.

2.08. In a Note Verbale of 12 May 2010 addressed to the Minister for Foreign Affairs of Senegal¹⁶⁷, Belgium requested the Senegalese authorities to provide confirmation, in the event that a decision of the Court of Justice of the Economic Community of West African States declared Mr. Habré's appeal to be well-founded, of their interpretation of their solemn commitment made before the International Court of Justice to keep Mr. Habré on their territory. At the end of June 2010, that Note Verbale had still met with no response.

2.09. On 14 May 2010, the Court of Justice held that it had jurisdiction and that the application was admissible¹⁶⁸. The Court decided that

- “— the Court has jurisdiction to hear the case referred to it by Mr. Hisssein Habré;
- finds that the application by Mr. Hisssein Habré is admissible;
- consequently, rejects the preliminary objections raised by the State of Senegal;
- orders the continuation of the proceedings on the merits”¹⁶⁹.

2.10. In their pleadings on the jurisdiction of the Court of Justice of the Economic Community of West African States, the representatives of Senegal acknowledged that “at the time when Mr. Hisssein Habré seised this Court, no proceedings against him were pending, nor are any pending at this date, in the Senegalese courts”¹⁷⁰.

54

2.11. The Court of Justice held hearings on the merits of the case on 18 June 2010. At those hearings, Senegal reaffirmed that no violation of instruments for the protection of human rights had been committed and that only potential violations are at issue, having regard to the fact that, at the present time, no judicial proceedings have been formally instituted against Mr. Habré. The Court's decision is expected on 19 October 2010.

¹⁶⁷Ann. B.24.

¹⁶⁸ECOWAS Court of Justice, *Hisssein Habré v. Republic of Senegal, Judgment on Preliminary Objections*, 14 May 2010 (Ann. E.1).

¹⁶⁹*Ibid.*, para. 71.

¹⁷⁰*Ibid.*, para. 14.

CHAPTER III

THE JURISDICTION OF THE COURT

3.01. In its Application instituting proceedings, Belgium invoked two bases of jurisdiction:

- Article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷¹;
- the declarations made by Belgium and Senegal under Article 36, paragraph 2, of the Statute of the Court¹⁷².

3.02. These bases of jurisdiction were addressed in the oral proceedings on the indication of provisional measures. In its Order of 28 May 2009, the Court held that it had *prima facie* jurisdiction under Article 30 of the Convention against Torture¹⁷³. It also decided that

“consequently there is no need to ascertain, at this stage of the proceedings, whether the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute might also, *prima facie*, afford a basis on which the Court’s jurisdiction could be founded”¹⁷⁴.

3.03. Article 30 of the Convention against Torture applies to the dispute inasmuch as it concerns the obligations of Senegal under that Convention. Moreover, the jurisdiction founded on Article 36, paragraph 2, of the Statute covers the entire dispute brought before the Court, whether based on the Convention against Torture or on any other rule of conventional or customary international law. Belgium considers that the Court has jurisdiction on this double basis¹⁷⁵.

3.04. **Section I** of this Chapter will examine the jurisdiction of the Court from the standpoint of Article 30 of the Convention against Torture. **Section II** will deal with the optional declarations of acceptance of the compulsory jurisdiction of the Court.

I. JURISDICTION UNDER ARTICLE 30 OF THE CONVENTION AGAINST TORTURE

3.05. Article 30, paragraph 1, of the Convention against Torture is a compromissory clause providing that disputes concerning the interpretation or application of the Convention shall be submitted to arbitration or, if “the parties are unable to agree on the organization of the arbitration”, to the International Court of Justice:

¹⁷¹Ann. A.1.

¹⁷²Ann. A.2.

¹⁷³*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Request for the indication of provisional measures, Order of 28 May 2009, para. 53. See also the consideration of Article 30 at paras. 42-52.

¹⁷⁴*Ibid.*, para. 54.

¹⁷⁵The argument put forward by Senegal during the public hearings on the request for the indication of provisional measures, to the effect that the condition for jurisdiction under Article 30 and that deriving from the optional declarations of compulsory jurisdiction are “cumulative in such a way that it is enough for one of them to be lacking for the Court to be unable to uphold its jurisdiction” (CR 2009/11, 8 Apr. 2009, p. 15, para. 21 (Diouf)), is utterly without foundation.

“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.”

3.06. Belgium and Senegal are parties to the Convention against Torture. Senegal ratified it on 21 August 1986. It entered into force for Senegal at the time of its general entry into force on 26 June 1987. Belgium ratified the Convention on 25 June 1999. It entered into force for Belgium, including in its relations with Senegal, on 25 July 1999.

3.07. Neither Belgium nor Senegal have made any reservation to the Convention, particularly on the basis of Article 30, paragraph 2, which authorizes a State party to opt out of the compromissory clause provided for in paragraph 1 of that Article. Belgium and Senegal are therefore bound by Article 30, paragraph 1, of the Convention.

57

3.08. Article 30, paragraph 1, is a relatively common provision in international conventions. It is similar to Article 14 of the Montreal Convention¹⁷⁶, which the Court examined in the *Lockerbie* cases¹⁷⁷. It is also similar to Article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women¹⁷⁸ which the Court had to examine in the dispute between the Democratic Republic of the Congo and Rwanda¹⁷⁹.

3.09. Four conditions must be satisfied before a party can submit a dispute to the Court under Article 30 of the Convention against Torture:

- 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 organization of the arbitration”.

¹⁷⁶Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 Sep. 1971, *UNTS*, Vol. 974, p. 178 (I-14118).

¹⁷⁷*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 115.

¹⁷⁸Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, Art. 29, para. 1, *UNTS*, Vol. 1249, p. 13 (I-20378). Although this provision of the 1979 Convention refers to any dispute “which is not settled by negotiation”, whereas the 1984 Convention refers to any dispute “which cannot be settled through negotiation”, there is no substantive difference. In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) (New Application: 2002)*, the Court, in referring to the 1979 Convention, used the phrase: “which could not have been settled by negotiation” (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 89).

¹⁷⁹*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, pp. 246-247, paras. 76-79.

3.10. These conditions are cumulative. If they are met, the dispute may be submitted to the Court under Article 30 of the Convention by each of the parties.

A. The existence of a dispute

58 3.11. The dispute between Belgium and Senegal relates to the interpretation and, in particular, the application of the Convention against Torture, as will be explained in more detail in Chapter IV below¹⁸⁰. Belgium considers that Senegal is not fulfilling its obligations under the Convention against Torture, while this is denied by Senegal. Furthermore, Belgium and Senegal do not agree on the meaning to be attached to certain provisions of the Convention. According to Belgium, Senegal's acts and omissions are contrary to the Convention and give rise to the international responsibility of Senegal. These acts and omissions include

- the fact of not having taken, before 2007, the necessary measures to implement the Convention in accordance with Article 5, paragraph 2, thereof;
- the referral of the H. Habré case file to the African Union, and Senegal's claim to be now acting under the "mandate" of the Union;
- its refusal to prosecute or extradite Mr. Habré within a reasonable period of time;
- the suggestion that financial considerations would in some way justify the failure to comply with the Convention.

3.12. The Court examined the question of the existence of a dispute in its Order concerning the indication of provisional measures of 28 May 2009; it held that, *prima facie*, a dispute existed on the date the Application instituting proceedings was filed¹⁸¹ and that this dispute continued to exist, even if its scope might have changed:

59 "Whereas the Court will next consider whether such a dispute continues, *prima facie*, to exist in the light of the way in which the Parties explained their positions at the hearings; whereas Senegal has affirmed that its obligations do not derive from the mandate given by the African Union in 2006 and that a State party to the Convention against Torture cannot fulfil the obligations under Article 7 thereof by the mere act of referring the matter to an international organization; whereas the Parties nonetheless seem to continue to differ on other questions relating to the interpretation or application of the Convention against Torture, such as that of the time frame within which the obligations provided for in Article 7 must be fulfilled or that of the circumstances (financial, legal or other difficulties) which might be relevant in considering whether or not a failure to fulfil those obligations has occurred; whereas, moreover, the Parties seem to continue to hold differing views as to how Senegal should fulfil its treaty obligations; and whereas in consequence it appears that *prima facie* a dispute of the kind contemplated by Article 30 of the Convention against Torture continues to exist between the Parties, even if the scope of that dispute may have changed since the Application was filed."¹⁸²

¹⁸⁰See paras. 4.02-4.59 below.

¹⁸¹*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009*, para. 47.

¹⁸²*Ibid.*, para. 48. For a different point of view, see the joint separate opinion of Judges Al-Khasawneh and Skotnikov, paras. 8-15, and the separate opinion of Judge *ad hoc* Sur, paras. 13-15.

3.13. According to the classic definition given by the Permanent Court of International Justice, “[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons”¹⁸³.

As this Court has stated, “it must be shown that the claim of one party is positively opposed by the other”¹⁸⁴.

3.14. A dispute of this type exists between Belgium and Senegal concerning the interpretation and application of the Convention against Torture¹⁸⁵. It has to be ascertained whether or not the failure to prosecute Mr. Habré for acts of torture and the refusal to extradite him to Belgium are consistent with Article 7 and other provisions of the Convention against Torture. Senegal is clearly bound by an obligation to prosecute or extradite Mr. Habré for the crimes of torture alleged against him, an obligation which, to date, it has failed to fulfil. In particular, this obligation was not fulfilled by transmitting the “Hissène Habré” case file to the African Union. On the other hand, Senegal places a very different interpretation on its obligations and their implementation in regard to the Convention.

3.15. This point emerges very clearly from the lengthy exchange of Notes Verbales between Belgium and Senegal and the diplomatic contacts between the two countries¹⁸⁶, as well as from the actions and omissions of Senegal.

60

3.16. In those Notes, Belgium repeatedly recalled its interpretation of the relevant provisions of the Convention against Torture and clearly stated that “a dispute existed within the meaning of Article 30 of the Convention”. Senegal, for its part, prevaricated either by citing the referral of the case to the African Union, or by invoking the spirit of the Convention, or again by failing to reply. Senegal’s position at the time is explained in its Note of 23 December 2005¹⁸⁷: “The decision to submit ‘the Hissène Habré case’ to the African Union will consequently have to be considered as reflecting the position of the Senegalese Government pursuant to the judgment of the Prosecution Chamber.”

3.17. A dispute therefore existed between Belgium and Senegal over the interpretation or application of the Convention. The dispute continued to exist when the Application instituting proceedings was filed and when the Order on the request for the indication of provisional measures was made on 28 May 2009. Senegal’s persistent failure to fulfil its obligation to take the necessary steps to prosecute or extradite Mr. Habré since the date of the Order on the indication of provisional measures confirms the continued existence of the dispute.

¹⁸³*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.*

¹⁸⁴*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 40, para. 90.*

¹⁸⁵Application instituting proceedings, 19 Feb. 2009, para. 8.

¹⁸⁶See paras. 1.33-1.60 above and Anns. B.1 to B.26.

¹⁸⁷Ann. B.6.

B. The dispute could not be settled through negotiation

3.18. In its Order on the indication of provisional measures, the Court concluded that “the requirement that the dispute is one which ‘cannot be settled through negotiation’ must be regarded as having been satisfied *prima facie*”¹⁸⁸. In order to reach this conclusion, the Court noted

“[that] an attempt has been made by Belgium to negotiate; [that . . .] the diplomatic correspondence, in particular the Note Verbale of 11 January 2006, whereby Belgium wished to submit certain clarifications to the Government of Senegal ‘within the framework of the negotiation procedure covered by Article 30 of the Convention against Torture . . .’, shows that Belgium attempted to resolve the said dispute by negotiation and that it cannot be concluded that the negotiations thus proposed had the effect of resolving the dispute”¹⁸⁹.

61

3.19. Negotiations concerning this dispute did indeed begin with the Note Verbale of 30 November 2005, in which Belgium requested “explanations about the position of the Senegalese Government pursuant to [the decision of the *Chambre d’accusation* of the Dakar Court of Appeal]”. This request was followed by a lengthy exchange of Notes and diplomatic contacts in Dakar and Brussels. Notwithstanding these exchanges, it was clear, in 2006, that the dispute would not be settled through negotiation.

3.20. In its Order on the indication of provisional measures of 15 October 2008 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, the Court examined Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). This compromissory clause provides for the submission to the Court of any dispute concerning the interpretation or application of the Convention which “is not settled by negotiation”. The Court considered that this provision “does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court”¹⁹⁰.

However, the Court pointed out that Article 22 “does suggest that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD”¹⁹¹.

The Court noted that “it is apparent from the case file that such issues have been raised in bilateral contacts between the Parties, and, that these issues have manifestly not been resolved by negotiation prior to the filing of the Application”¹⁹².

It therefore considered that, “*prima facie*, it has jurisdiction under Article 22 of CERD to deal with the case”¹⁹³.

¹⁸⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, para. 50.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Provisional Measures, Order of 15 October 2008*, para. 114.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, para. 115.

¹⁹³ *Ibid.*, para. 117.

62

3.21. In that case, Georgia had not explicitly referred to the Convention on the Elimination of All Forms of Racial Discrimination in its bilateral contacts with the Russian Federation, whereas in the present case, Belgium has expressly referred to the Convention against Torture throughout its contacts with Senegal. Belgium has, indeed, been very precise in citing the Convention and some of its provisions on numerous occasions. For example, in its Note Verbale of 11 January 2006, Belgium expressly referred to “the negotiation procedure covered by Article 30 of the Convention against Torture”¹⁹⁴. In its Note Verbale of 9 March 2006¹⁹⁵, Belgium again referred to the procedure for negotiation and observed that it interpreted the provisions of Articles 4, 5.1 (c), 5.2, 7.1, 8.1, 8.2, 8.4 and 9.1 of the Convention “as requiring the State on whose territory the alleged author of an offence under Article 4 of the aforesaid Convention is located to extradite this offender, unless it has judged him on the basis of the charges covered by said Article”.

This detailed list of convention provisions was repeated in the Belgian Note Verbale of 20 June 2006¹⁹⁶, where Belgium noted that “the attempted negotiation with Senegal, which started in November 2005, has not succeeded and, in accordance with Article 30.1 of the Torture Convention [Belgium] consequently asks Senegal to submit the dispute to arbitration”.

3.22. These facts are not contested by Senegal. At no time has Senegal initiated or sought to prolong the negotiations. The conclusion is therefore clear: this dispute was not capable of being settled through negotiation.

C. The request for arbitration

63

3.23. Belgium announced the possibility of having recourse to arbitration in its Note Verbale of 4 May 2006¹⁹⁷. It wrote: “[a]n unresolved dispute regarding this interpretation [of Article 7 of the Convention against Torture] would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture”.

Senegal itself, in its Note Verbale of 9 May 2006, “[took] note” of “the possibility of . . . recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture”¹⁹⁸.

In its Note Verbale of 20 June 2006, Belgium formally requested recourse to the arbitration procedure provided for in Article 30 of the Convention¹⁹⁹: “Belgium cannot fail to point out that the attempted negotiation with Senegal, which started in November 2005, has not succeeded and, in accordance with Article 30.1 of the Torture Convention consequently asks Senegal to submit the dispute to arbitration under conditions to be agreed mutually”.

3.24 During the public hearings on the request for the indication of provisional measures, Senegal stated that it was not able to find the Belgian Note Verbale of 20 June 2006 in its archives²⁰⁰. Belgium explained that the Note in question had been transmitted to the Secretary-General of the Ministry of Foreign Affairs on 21 June 2006 and referred in this

¹⁹⁴Ann. B.7.

¹⁹⁵Ann. B.8.

¹⁹⁶Ann. B.11.

¹⁹⁷Ann. B.9.

¹⁹⁸Ann. B.10.

¹⁹⁹Ann. B.11.

²⁰⁰CR 2009/9, 6 Apr. 2009, p. 14, para. 34 (Thiam).

connection to an internal report of the same date²⁰¹. Senegal replied that the Note Verbale had not been notified correctly or officially²⁰². In any event, as the Court stated in its Order of 28 May 2009, “even supposing that the said Note Verbale never reached its addressee, the Note Verbale of 8 May 2007 explicitly refers to it; and . . . it has been confirmed that this second Note was communicated to Senegal and received by it more than six months before the date of referral to the Court”²⁰³.

64

D. The Parties were unable to agree on the organization of an arbitration within six months

3.25. The request for arbitration under Article 30 of the Convention against Torture was made on 21 June 2006. Eleven months later, by Note Verbale of 8 May 2007²⁰⁴, Belgium reminded Senegal of this request for arbitration and once again listed the relevant provisions of the Convention against Torture.

3.26. Senegal failed to reply to either of these two requests (the initial request for arbitration of 21 June 2006 and the reminder of 8 May 2007). As was stated by the Court in the *Lockerbie* cases, the request “met with no answer”²⁰⁵. An unanswered arbitration proposal was precisely the situation considered by the Court in the *Lockerbie* cases. In those cases, the United States of America and the United Kingdom had clearly informed the Security Council that they would not accept arbitration²⁰⁶ (a particularly pertinent fact from the standpoint of the Court’s decision concerning the six-month time-limit, which is not at issue here).

3.27. The Court again considered the question in its Judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* in which the Respondent had made no answer to a proposal for arbitration. After noting that “the lack of agreement between the parties as to the organization of an arbitration cannot be presumed”, the Court, citing the *Lockerbie* cases, added

“The existence of such disagreement [on the organization of arbitration] can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept.”²⁰⁷

65

3.28. In the instant case, Belgium requested that the dispute be submitted to arbitration²⁰⁸. The request met with no answer. The Parties were therefore unable to agree on the organization of

²⁰¹CR 2009/10, 7 Apr. 2009, p. 21, para. 16 (Wood). For the internal report, see Ann. C.9.

²⁰²CR 2009/11, 8 Apr. 2009, pp. 15-16, paras. 23-25 (Diouf).

²⁰³*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009*, para. 52.

²⁰⁴Ann. B.14.

²⁰⁵*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 21; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20.

²⁰⁶*Ibid.*, p. 17, para. 21 and p. 122, para. 20.

²⁰⁷*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 41, para. 92.

²⁰⁸See paras. 3.23-3.24.

the arbitration within the six-month period provided for in Article 30 of the Convention against Torture.

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3.29. All the conditions of Article 30 have been met. The Court therefore has jurisdiction under Article 30 of the Convention against Torture over the dispute between Belgium and Senegal which concerns the interpretation or application of that Convention.

II. JURISDICTION BASED ON THE DECLARATIONS OF ACCEPTANCE OF COMPULSORY JURISDICTION

3.30. Belgium and Senegal have made declarations of acceptance of the compulsory jurisdiction of the Court, and those declarations are still in force.

3.31. The current declaration by Belgium dates from 3 April 1958²⁰⁹. It was filed with the Secretary-General of the United Nations and came into effect on 17 June 1958. Belgium declares that it recognizes the jurisdiction of the Court in “legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date”. This declaration excludes legal disputes “in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement”.

3.32. The declaration of Senegal dates from 2 October 1985²¹⁰. It was filed and took effect on 2 December 1985. It extends to “all legal disputes arising after²¹¹ the present declaration”. It also provides that:

66

“Senegal may reject the Court’s competence in respect of:

- disputes in regard to which the parties have agreed to have recourse to some other method of settlement;
- disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal”.

3.33. By virtue of the principle of reciprocity applied to these declarations, the competence of the Court extends to all legal disputes arising after 2 December 1985, provided that they concern situations or facts subsequent to 13 July 1948, with two exceptions:

- (i) disputes in regard to which the parties have agreed to have recourse to another method of settlement²¹²;

²⁰⁹UNTS, Vol. 302, p. 251 (4364) (Ann. A.2).

²¹⁰UNTS, Vol. 1412, p. 155 (23644) (Ann. A.2).

²¹¹*Translator’s note:* The French wording of footnote 211 highlights disparities in the English language versions of the Belgian and Senegalese declarations. For the purposes of this translation, the versions that appear on the Court’s website have been used.

- (ii) disputes which, under international law, fall “exclusively within the jurisdiction” of one of the parties.

A. The existence of a legal dispute

3.34. In its Application instituting proceedings, Belgium wrote: “A dispute between Senegal and Belgium therefore exists, relating to the application and interpretation of conventional and customary international obligations regarding the punishment of torture and crimes against humanity.”²¹³

3.35. The dispute relates to the failure to prosecute Mr. Habré for crimes against humanity, crimes of genocide and war crimes, and to the international responsibility of Senegal resulting from violations of conventional and customary rules. Belgium considers that Senegal did not fulfil its obligation to prosecute or extradite Mr. Habré for the crimes that are alleged against him. Senegal, for its part, through its actions and inaction, including its failure to respond to the repeated requests of Belgium, clearly showed that it did not interpret conventional and customary rules in the same way as Belgium.

67

3.36. The diplomatic correspondence²¹⁴ is also relevant in regard to the crimes that are not covered by the Convention against Torture and of which Mr. Habré is accused. The request for extradition, transmitted on 22 September 2005, covered the crimes in question as well as those referred to in the Convention against Torture. Senegal’s failure to act on that request, or to bring proceedings itself, violates Senegal’s conventional and customary obligation to prosecute or extradite Mr. Habré and to ensure that he does not benefit from impunity. There is therefore a legal dispute between Belgium and Senegal on these points.

B. Inapplicability of the limit *ratione temporis*

3.37. As was stated earlier²¹⁵, a double limit *ratione temporis* follows from the combined effect of two declarations of acceptance of the compulsory jurisdiction of the Court. Under those declarations, the competence of the Court extends to all legal disputes arising after 2 December 1985, provided that they concern situations or facts subsequent to 13 July 1948. The two key dates are therefore 2 December 1985 and 13 July 1948.

3.38. The dispute between Belgium and Senegal concerns Senegal’s obligation, under conventional or customary international law, to prosecute or extradite Mr. Habré for certain crimes, and the failure by Senegal, since 2005, to fulfil that obligation. The dispute did not arise when the alleged crimes were committed in Chad, between 1982 and 1990, crimes for which Senegal obviously bears no responsibility; it arose when Belgium and Senegal came into conflict over the interpretation and application of the conventional and customary obligation of Senegal to ensure that Mr. Habré did not enjoy impunity. It is not necessary to establish the precise date on which the dispute arose; it was in any case long after 2 December 1985, since Mr. Habré did not seek refuge in Senegal before 1990.

²¹²The slight difference in wording between the two declarations entails no difference with regard to their substance.

²¹³Application instituting proceedings, 19 Feb. 2009, para. 9 (Ann. C.7).

²¹⁴See paras. 1.33-1.60 above.

²¹⁵See para. 3.33 above.

68

3.39. Similarly, it is clear that the dispute concerns facts or situations subsequent to 13 July 1948.

3.40. The present dispute does not therefore fall outside the limits *ratione temporis* of the optional declarations recognizing the compulsory jurisdiction of the Court made by Belgium and Senegal.

C. The lack of other means of settlement

3.41. The exclusion of the jurisdiction of the Court in regard to cases concerning which the parties have agreed on another method of settlement is not a factor in this case. Belgium and Senegal have not reached agreement on any other means of settling this dispute.

D. The conflict does not fall within the exclusive jurisdiction of Senegal

3.42. Finally, Senegal excluded the jurisdiction of the Court over “disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal”. This is an “objective” reservation of internal jurisdiction which does not raise the difficult questions the Court has faced when it has had to deal with the same type of reservation presented in “subjective” form.

3.43. The present dispute obviously does not fall under this type of exception: it relates to violations of conventional or customary rules of international law and does not therefore come within the exclusive jurisdiction of one of the Parties.

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3.44. All the conditions covered by the optional declarations recognizing compulsory jurisdiction have been met. The Court has jurisdiction, under Article 36, paragraph 2, of its Statute, over the entire dispute between Belgium and Senegal, both with regard to the Convention against Torture and with regard to other rules of conventional and customary international law.

VIOLATIONS OF INTERNATIONAL LAW ATTRIBUTABLE TO SENEGAL

4.01. By not prosecuting Mr. Habré and not extraditing him to Belgium despite the request for extradition duly formulated by the Belgian authorities, Senegal breached and continues to breach its obligations under the Convention against Torture (I) and other rules of conventional and customary international law (II).

I. VIOLATIONS OF THE CONVENTION AGAINST TORTURE

A. Obligations under the Convention against Torture

1. The Convention against Torture

4.02. The Convention against Torture was adopted by resolution 39/46 of 10 December 1984 at the thirty-ninth session of the United Nations General Assembly²¹⁶. Pursuant to Article 25 of the Convention, it was opened for signature by all States. At the end of June 2010, it had 146 States Parties²¹⁷, including Belgium and Senegal²¹⁸.

4.03. The object and purpose of the Convention against Torture are clearly established in its preamble: it was adopted to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”²¹⁹. In the above-mentioned resolution 39/46, the General Assembly also expressed itself desirous “of achieving a more effective implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment”²²⁰.

4.04. To that end, the Convention is in no sense limited to prohibiting torture, but imposes other essential obligations on States Parties.

4.05. The States Parties undertook obligations in regard to preventing acts of torture and other cruel, inhuman or degrading treatment or punishment and strengthening the prohibition thereof. Under Article 2, paragraph 1, they undertook in particular to take “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction”²²¹. As the Committee against Torture reaffirmed in its general comment No. 2 on the implementation of Article 2 of the Convention by States Parties:

“States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective

²¹⁶General Assembly, resolution 39/46, 10 Dec. 1984.

²¹⁷See *Multilateral Treaties deposited with the Secretary-General*, online at <http://treaties.un.org/>, ch. IV, 9.

²¹⁸See para. 3.06 above.

²¹⁹Sixth preambular paragraph of the Convention. See also M. Nowak and E. Mc Arthur, *The United Nations Convention against Torture, A Commentary*, Oxford University Press, 2008, p. 8.

²²⁰*Op. cit.* (cf. footnote 216).

²²¹Under Article 16, paragraph 1, States Parties are required to take similar measures in respect of “other acts of cruel, inhuman or degrading treatment or punishment . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

measures to ensure that such conduct and any recurrences thereof are effectively prevented.”²²²

More specifically, they are required to include the prohibition of torture in the training of certain categories of staff exercising public authority prerogatives (Art. 10), to keep under systematic review interrogation or detention rules and practices on their territory (Art. 11) and to ensure that the competent authorities proceed to a prompt investigation *ex officio* of any suspected case of torture (Art. 12). Further to the aim of preventing any form of torture, the States Parties undertook not to expel or return (“refouler”) any individual, in accordance with Article 3 of the Convention.

71

4.06. The Convention also recognizes the right of victims to an effective remedy (Art. 13) and adequate compensation (Art. 14). Pursuant to Article 22, any individual who claims to be the victim of a violation of a provision of the Convention has the possibility of filing a communication with the Committee against Torture, provided that the State under whose jurisdiction the victim is found has recognized the Committee’s jurisdiction in respect of individual communications. Belgium and Senegal have recognized the jurisdiction of the Committee against Torture in that regard.

4.07. Lastly, the third category of obligations contained in the Convention against Torture requires States Parties to introduce in their domestic legal systems the necessary standards and criminal procedures to punish any act of torture. This is in fact a “special *raison d’être* for the entire Convention”²²³, the avowed purpose of which is precisely to “make more effective the struggle against torture”²²⁴. The Convention is thus not confined to requiring States Parties to “ensure that all acts of torture [and the attempted practice of torture and complicity or participation in torture] are offences under its criminal law” (Art. 4), but obliges them to establish their jurisdiction in order to deal with such offences in a particularly comprehensive manner. States Parties must not only establish criminal jurisdiction; they are also obliged to exercise such jurisdiction in cases where the alleged perpetrator of acts of torture is present in any territory under their jurisdiction (Art. 5, para. 2), or, if they deem it more appropriate, they must extradite him in accordance with the provisions of Article 8. This is not just a right recognized by international law but a real conventional obligation on any State Party to establish and exercise criminal jurisdiction which, depending on the circumstances, may be territorial (Art. 5, para. 1 (a)), active personal (Art. 5, para. 1 (b)) or universal jurisdiction (Art. 5, para. 2). In addition, the Convention provides for the establishment of passive personal jurisdiction if the State concerned “considers it appropriate” (Art. 5, para. 1 (c)). All of these forms of jurisdiction are indicative of the obligation to combat impunity.

4.08. The dispute between Belgium and Senegal concerns more particularly the failure by the Senegalese authorities to comply with their obligation to exercise the universal jurisdiction embodied in the “prosecute or extradite” rule (Art. 5, para. 2) deriving from the obligation to combat impunity.

²²²Committee against Torture, general comment No. 2 (Implementation of Article 2 by States Parties), CAT/C/GC/2, para. 4, in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44)*, Ann. VI, p. 176.

²²³M. Nowak and E. McArthur, *The United Nations Convention Against Torture, A Commentary*, Oxford University Press, 2008, p. 10.

²²⁴Convention against Torture, sixth preambular paragraph. See also para. 4.03 above.

72 2. The obligation to prosecute or extradite (*aut dedere aut judicare*) established by the Convention against Torture

4.09. The obligation to prosecute or extradite (*aut dedere aut judicare*) established by the Convention is set out in Articles 5 to 9.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:

- (a) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) when the alleged offender is a national of that State;
- (c) when the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise 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 pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

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.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in Article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

73

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.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this Article in conformity with any treaties on mutual judicial assistance that may exist between them.

74 4.10. The obligation to prosecute or extradite comprises two fundamental, closely linked and interdependent characteristics²²⁵:

- the obligation to take such measures as may be necessary to establish the universal jurisdiction of national courts in cases where the alleged perpetrator of acts of torture is present in the territory of the forum State (Art 5, para. 2);
- in the absence of a request for extradition or in cases where the forum State chooses not to extradite the alleged perpetrator of acts of torture present in its territory, the State Party is obliged to submit the case to its competent authorities for the purpose of prosecution (Art. 7, para. 1).

4.11. The obligations contained in Articles 6, 8 and 9 are closely linked to the exercise of universal jurisdiction and to the obligation to prosecute or extradite²²⁶. Their purpose is to ensure the effectiveness of the prosecution, in particular by guaranteeing the presence of the alleged perpetrator of acts of torture under the jurisdiction of the forum State and the conduct of preliminary inquiries into the facts, by allowing mutual judicial assistance between several States and by facilitating extradition procedures.

(a) *The obligation to establish universal jurisdiction*

4.12. Apart from the obligation incumbent on any State Party to the Convention against Torture to take such measures as may be necessary to establish territorial and personal jurisdiction for any act of torture (Art. 5, para. 1 (a) and (b)), States Parties are also obliged to establish universal jurisdiction in accordance with Article 5, paragraph 2, of the Convention, which provides:

75 “Each State Party shall likewise 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 pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.”

4.13. This provision is closely linked to the obligation to prosecute or extradite contained in Article 7, and to the scope of the criminal jurisdiction which States are required to institute. Its purpose is to ensure that “no safe havens for perpetrators of torture shall continue to exist in our contemporary global world”²²⁷. To this end, the States Parties must equip themselves with legal resources for the effective implementation of their obligation to prosecute or extradite and, in this case, bring the alleged perpetrator of the crime of torture before the national authorities with criminal jurisdiction. Their jurisdiction may be based on domestic criminal law or, more directly, on international law.

²²⁵In its recent study entitled “Survey of multilateral conventions which may be of relevance for the Commission’s work on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’”, the Secretariat of the International Law Commission observed: “Firstly, clauses usually qualified as containing an obligation to extradite or prosecute share two fundamental characteristics, namely: (1) their objective to ensure the punishment of certain offences at the international level; and (2) their use, for that purpose, of a mechanism combining the possibility of prosecution by the custodial State and the possibility of extradition to another State.” (A/CN.4/630, para. 150 (available on the website of the International Law Commission: <http://www.un.org/law/ilc/>.)

²²⁶See also para. 4.23 below.

²²⁷M. Nowak and E. McArthur, *The United Nations Convention against Torture, A Commentary*, Oxford University Press, 2008, p. 10.

4.14. In this connection, J. H. Burgers and H. Danelius wrote: “To be in a position to bring criminal proceedings against the offender, the State concerned must have jurisdiction over the offence, and this is what Article 5 seeks to ensure.”²²⁸

4.15. This interpretation of Article 5 is corroborated by the work of the International Law Commission concerning the establishment of a code of crimes against the peace and security of mankind. At its 2408th meeting, the introduction by the Drafting Committee of Article 5*bis* in the Commission’s draft articles concerning the establishment of jurisdiction to deal with crimes against the peace and security of mankind²²⁹ was explained in the following terms:

“If the ‘prosecute or extradite’ option recognized in Article 6 [of the Commission’s draft] was to be effective, either alternative should be capable of implementation. The ‘prosecute’ option required that the State where the alleged criminal was found should have jurisdiction over the crime. That requirement was addressed in new article 5 *bis*. The text proposed by the Drafting Committee . . . modelled on the corresponding provision which appeared in all the penal law conventions to which he had referred earlier . . . was self-explanatory. Inasmuch as article 6 now laid down an obligation to ‘refer the case to its competent authorities’ — and not an obligation to try, as provided for in the text adopted on first reading — article 5 *bis* was of special importance, bearing in mind that the whole purpose of the ‘extradite or prosecute’ principle would be frustrated if the courts of a State in whose territory an individual alleged to have committed a crime under the Code was found were to decide, once they had been seized of the case by the competent authorities, that they lacked jurisdiction.”²³⁰

76

4.16. With regard to the system of universal jurisdiction and the obligation to prosecute or extradite established by the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, which was a major source of inspiration for the authors of the 1984 Convention, Judge G. Guillaume explained in his separate opinion attached to the Judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*:

“[The Hague Convention of 1970] places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or prosecute him. But this would have been insufficient if the Convention had not at the same time placed the States parties under an obligation to establish their jurisdiction for that purpose. Thus Article 4, paragraph 2, of the Convention provides:

‘Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to [the Convention].’

This provision marked a turning point, of which the Hague Conference was moreover conscious. From then on, the obligation to prosecute was no longer

²²⁸J. H. Burgers and H. Danelius, *The United Nations Convention against Torture, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1988, p. 131.

²²⁹Draft Article 5 *bis* provided that: “Each State party shall take such measures as may be necessary to establish its jurisdiction over crimes against the peace and security of mankind.” (*Yearbook of the International Law Commission (YILC)*, 1995, Vol. I, 2408th meeting, 30 June 1995, p. 196, para. 1.)

²³⁰*Ibid.*, p. 200, para. 20.

conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible.”²³¹

4.17. The Article 5 obligation thus constitutes an essential precondition for the obligation to prosecute or extradite under Article 7. As the Permanent Court of International Justice noted in connection with Article 18 of the Lausanne Convention on the exchange of Greek and Turkish populations:

77 “[this] clause, however, merely lays stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken”²³².

4.18. Although Article 5, paragraph 2, permits States to adopt such measures as may be necessary to achieve the desired result in their domestic legislation, States are still obliged to ensure that their domestic law is consistent, upon entry into force, with the provisions of the Convention. The Committee against Torture regularly calls on States to adopt the necessary legislation or to reform their system of universal jurisdiction²³³.

(b) *The obligation to prosecute or extradite*

4.19. According to Article 7, paragraph 1, of the Convention against Torture:

“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.”

4.20. While Article 5 on the establishment of jurisdiction to try the alleged perpetrators of acts of torture merely requires States Parties to create the necessary legal framework in order to exercise their criminal jurisdiction, Article 7, paragraph 1, requires them to use such jurisdiction effectively by bringing any person alleged to have committed acts of torture before the competent authorities unless they decide to extradite him.

78 4.21. The obligation to try or to extradite under Article 7 of the Convention is subject to the sole and exclusive condition that the alleged perpetrator of acts of torture is present in the territory of the State Party. Once he has been discovered to be present, the State Party is obliged to ensure the presence of the alleged perpetrator on its territory (Art. 6, para. 1), immediately to make a preliminary inquiry into the facts (Art. 6, para. 2), and to notify any States that might be capable of establishing their jurisdiction on the basis of Article 5, paragraph 1 (Art. 6, para. 4).

4.22. After carrying out these preliminary measures, the forum State is required, pursuant to Article 7, paragraph 1, to submit the case to its competent authorities for prosecution. This

²³¹*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, separate opinion of President Guillaume, I.C.J. Reports 2002, pp. 38 and 39, para. 7.*

²³²*Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10, p. 20.*

²³³See, for example, Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, para. 29 (18).

obligation (and the universal jurisdiction which States must establish in accordance with Article 5, paragraph 2) is not made conditional on a request for extradition from another State, but is imposed by reason of the mere presence of an alleged perpetrator of acts of torture in the territory of the forum State.

4.23. It emerges from the *travaux préparatoires* that “[s]everal delegations indicated particularly that they had difficulties, in view of their legal systems, in accepting a clause of universal jurisdiction which was not subject to some conditions”²³⁴. It was proposed on several occasions to add the words “after receiving a request for extradition”²³⁵ in draft Article 5 of the Convention, or to introduce a more flexible régime on the basis of the Brazilian proposal²³⁶. However, all amendments aimed at softening the obligation to exercise universal jurisdiction were rejected and were not included in the text of the Convention²³⁷. In its decision of 17 May 2006, the Committee against Torture emphasized unambiguously that “the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition”²³⁸.

79 4.24. In its recent study entitled “Survey of multilateral conventions which may be of relevance for the Commission’s work on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’”²³⁹, the Secretariat of the International Law Commission also confirmed this conclusion. Regarding more particularly the relationship between prosecution and extradition, the study distinguishes two categories of conventional provisions:

“(1) those clauses that impose an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition; and (2) those clauses for which the obligation to prosecute is only triggered by the refusal to surrender the alleged offender following a request for extradition.”²⁴⁰

According to the study, Article 7 of the Convention against Torture, like all comparable provisions of conventions drawn up on the basis of Article 7 of the Hague Convention of 1970 for the Suppression of Unlawful Seizure of Aircraft²⁴¹, forms part of the first of the above-mentioned categories²⁴². Concerning the legal effect of this provision, the study notes:

“The first category includes all those clauses that impose an obligation upon States Parties to prosecute any person present in their territory who is alleged to have committed a certain crime. This obligation to prosecute may be said to exist *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. It is only when the latter is made that an alternative course of action becomes available to the

²³⁴E/CN.4/1475, 1981, p. 56, para. 25.

²³⁵E/CN.4/1408, 1980, p. 59, para. 50; E/CN.4/1475, 1981, p. 57, para. 25; E/CN.4/1982/30/Add.1, p. 5, para. 15.

²³⁶E/CN.4/1983/WG.2/WP.12, in E/CN.4/1983/63, p. 6, para. 23.

²³⁷E/CN.4/1984/72, p. 7, para. 35.

²³⁸Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, para. 9.7; see also para. 2.03 above and Ann. E.2.

²³⁹A/CN.4.630 (available on the website of the International Law Commission: <http://www.un.org/law/ilc/>).

²⁴⁰*Ibid.*, para. 126.

²⁴¹*Ibid.*, paras. 90-124.

²⁴²*Ibid.*, paras. 130-131.

State, namely the surrender of the alleged offender to another State for prosecution. In other words, in the absence of a request for extradition, the obligation to prosecute is absolute, but, once such a request is made, the State concerned has the discretion to choose between extradition and prosecution.”²⁴³

80

4.25. When a request for extradition has been addressed to the forum State, the latter may then fulfil its obligations under the Convention by extraditing the alleged perpetrator of acts of torture, in accordance with Article 8 of the Convention. However, this is only one possibility afforded by the Convention. The obligation to extradite or prosecute as prescribed by Article 7 of the Convention gives the forum State the discretion to select one or the other of the two options while ensuring the detention or surveillance of the person concerned (Art. 6, para. 1). Under the Convention, the forum State is entitled to refuse extradition. As was observed in the context of the *travaux préparatoires* of the Convention:

“[E]xtradition was a sovereign act to be decided in each case by the competent court of the requested State. Some speakers observed that it was both legally and politically proper to leave the State in which the offender was found such freedom to refuse extradition, because if extradition was requested by the State in which the acts of torture had taken place, it was doubtful whether the requesting State would really punish the offender.”²⁴⁴

4.26. Although the forum State can refuse extradition, it must nonetheless have the alleged perpetrator of acts of torture prosecuted by its own competent authorities. This was the sense in which Judges Evensen, Tarassov, Guillaume and Aguilar interpreted Article 7 of the 1971 Montreal Convention, which is identical to Article 7 of the Convention against Torture. They wrote in their joint declaration appended to the Orders on the indication of provisional measures in the *Lockerbie* cases:

“[T]he Montreal Convention, which in our opinion was applicable in this case, did not prohibit Libya from refusing to extradite the accused to the United Kingdom or the United States. It implied merely that, in the absence of extradition, Libya had to submit the case to its competent authorities for the purpose of prosecution.”²⁴⁵

4.27. Articles 5 and 7 of the Convention thus establish a coherent system for the implementation of the obligation *aut dedere aut judicare*, the main objective of which is to “prevent any act of torture from going unpunished”²⁴⁶. When the alleged perpetrator of acts of torture is found in the territory of a State Party, the latter is under an obligation to arrest him, and subsequently to extradite or prosecute him. As a preliminary matter, the forum State must have established the jurisdiction of its courts to try the person concerned in the event that he is not

²⁴³A/CN.4.630 (available on the website of the International Law Commission: <http://www.un.org/law/ilc/>), para. 127 (footnotes omitted).

²⁴⁴E/CN.4/1984/72, p. 6, para. 33.

²⁴⁵*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, joint declaration by Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, pp. 24 and 25, para. 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, joint declaration by Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, pp. 136 and 137, para. 3.

²⁴⁶Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, para. 9.7 (Ann. E.2).

extradited. The 1984 Convention thus ensures the universality of punishment for torture offences, so that their perpetrators may not find refuge on the territory of any State.

81

B. Senegal has failed to fulfil its obligations under the Convention against Torture

4.28. 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.

1. Senegal failed to adopt the necessary measures prescribed by Article 5, paragraph 2, of the Convention against Torture

4.29. 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.

4.30. In 1990, the Senegalese representative had sought to provide reassurances to the Committee against Torture during the examination of Senegal's initial report: "[S]ince Senegal had ratified the Convention against Torture without reservations it should therefore have no difficulty in incorporating the relevant provisions into its domestic law."²⁴⁷ Nevertheless, during 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.”²⁴⁸

4.31. 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*.

82

4.32. The *Chambre d'accusation* of the Dakar Court of Appeal found as follows in 2001:

“Whereas the Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendment[s] to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring

²⁴⁷Report of the Committee against Torture, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 44 (A/45/44)*, para. 393.

²⁴⁸*Ibid.*, *Sixty-first Session, Supplement No. 44 (A/61/44)*, p. 170, para. 8.9.

itself into conformity with the objectives of the Convention and thus recognize the principle of universal jurisdiction.”²⁴⁹

Further, the *Chambre* held:

“Whereas it follows from the foregoing that the Senegalese courts cannot deal with acts of torture committed by a foreigner outside Senegalese territory regardless of the nationality of the victims, and that the wording of Article 669 of the Code of Criminal Procedure excludes such competence.”²⁵⁰

The Court of Appeal did no more than find, therefore, that the Senegalese authorities had failed to comply with Article 5, paragraph 2, of the Convention against Torture.

4.33. The Court of Cassation of Senegal could only confirm the acknowledgment by the judicial authorities that they could find no provisions in Senegalese law which gave them the universal jurisdiction provided for in Articles 5 and 7 of the Convention. It explained:

[N]o procedural text recognizes that Senegalese Courts have universal jurisdiction to prosecute and try the presumed perpetrators or accomplices — if they are found in the territory of the Republic — of the acts which fall 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 outside the territory of Senegal by foreigners.”²⁵¹

83

4.34. The Senegalese authorities therefore recognized that Senegalese law was not consistent with the requirements of Article 5, paragraph 2, of the Convention against Torture. In 2001, therefore, Senegal had not adopted “such measures as may be necessary” to establish in its domestic law the universal jurisdiction provided for by the Convention against Torture, in violation of Article 5, paragraph 2.

4.35. Five years later, in 2006, the situation had not changed and the Committee against Torture also found that Senegal had still not brought itself into conformity with its obligation under Article 5, paragraph 2, of the Convention against Torture. The Committee 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 [. . .]’. It notes 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.”²⁵²

²⁴⁹Judgment No. 135 of the *Chambre d'accusation* of the Dakar Court of Appeal, 4 July 2000 (*Public Prosecutor's Office and François Diouf v. Hissène Habré*) (Ann. D.3).

²⁵⁰*Ibid.*

²⁵¹Court of Cassation, *Suleymane Guengueng et al. v. Hissène Habré*, Judgment No. 14, 20 Mar. 2001 (Ann. D.4).

²⁵²Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, para. 9.5; para. 2.03 above and Ann. E.2.

The Committee concluded that “the State party has not fulfilled its obligations under article 5, paragraph 2, of the Convention”²⁵³.

84

4.36. It was only after the intervention of the African Union²⁵⁴ that Senegal, in 2007, amended its legislation in order to come into compliance with the obligation contained in Article 5, paragraph 2, of the Convention against Torture and to enable universal jurisdiction and the obligation *aut dedere aut judicare* provided for in the Convention to be applied in its legal system. On 31 January 2007, the National Assembly adopted several laws amending both the Senegalese Penal Code, through the introduction of a provision creating the offence of torture in accordance with the Convention against Torture, and the Code of Criminal Procedure, Article 669, enabling Senegalese courts henceforth to deal with crimes of international scope, on the basis of the principles recognized by the international community²⁵⁵. In its Note to the Belgian Embassy in Dakar, dated 21 February 2007, the Senegalese Ministry of Foreign Affairs thus gave an assurance that “Senegal [has] fill[ed] the legal vacuum which, for technical reasons related to the unsuitability of national legislation, had prevented the Senegalese courts from hearing the Hissène Habré case”²⁵⁶. In the pleadings relating to the request for the indication of provisional measures, Mr. Gaye, on behalf of Senegal, again confirmed that

“to date, 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 above-mentioned Convention and thus to create the ideal conditions for Mr. Hissène Habré’s trial by the Senegalese courts, on a fair and equitable basis”²⁵⁷.

4.37. The fact remains, however, that from the entry into force of the Convention and up until 2007, that is for 20 years, Senegal had not taken the necessary measures prescribed by Article 5, paragraph 2, as was moreover clearly noted by the Minister for Foreign Affairs of Senegal²⁵⁸. For want of suitable legislative or judicial measures, the respondent State was unable to fulfil its obligations under the Convention, particularly the obligation *aut dedere aut judicare*, having regard to the decision of the Senegalese authorities not to fill that gap by founding their jurisdiction directly on international law. Through its omissions, Senegal violated the central obligations of the Convention, which, according to its preamble, is designed to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”²⁵⁹.

85

2. Senegal failed in its obligation to prosecute or extradite deriving from Article 7 of the Convention against Torture

4.38. Senegal also violated its obligation to prosecute or extradite (*aut dedere aut judicare*) deriving from Article 7, paragraph 1, of the Convention against Torture.

²⁵³Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, para. 9.6.

²⁵⁴See paras. 1.67 *et seq.* above.

²⁵⁵Law No. 2007-05 of [12] Feb. 2007 amending the Code of Criminal Procedure in order to implement the Treaty of Rome [Rome Statute] establishing the International Criminal Court, *Journal officiel de la République du Sénégal*, 10 Mar. 2007, p. 2384 (Ann. D.7). See also para. 1.46 above.

²⁵⁶Ann. B.13.

²⁵⁷CR 2009/9, 6 Apr. 2009, p. 55, para. 18 (Gaye).

²⁵⁸See footnote 251 above.

²⁵⁹Sixth preambular paragraph of the Convention. See also para. 4.03 above.

4.39. Regardless of the reasons why Mr. Habré was not prosecuted in Senegal²⁶⁰, Mr. Habré was not extradited by Senegal to Belgium as he should have been under Article 7 of the Convention (a). The “transfer” of the “Habré” dossier to the African Union²⁶¹ could not release Senegal from its conventional obligations and did not constitute a substitute for those obligations (b). To date, 20 years after his arrival on Senegalese territory, and despite the legislative reforms introduced in 2007, Senegal has still not submitted the case to its competent authorities for the purpose of prosecution (c).

(a) Senegal failed in its obligation to prosecute or extradite Mr. Habré to Belgium

4.40. Belgium does not dispute the fact that, in accordance with the provisions of Article 5, paragraph 2, and Article 7, paragraph 1, of the Convention, a State Party in whose territory a person alleged to have committed acts of torture is present has the choice of either extraditing him or handing him over to its own judicial authorities for the purpose of prosecution²⁶². It may therefore refuse extradition provided that it hands over the alleged perpetrator of acts of torture to its competent authorities for the purpose of prosecution²⁶³.

86

4.41. However, in view of the violation of Article 5, paragraph 2, of the 1984 Convention²⁶⁴ and the incompatibility of Senegalese law with the requirements of that Convention at the time when Belgium requested Mr. Habré’s extradition, Senegal was not able to rely on the possibility of choosing between extradition and prosecution. Not extraditing Mr. Habré to a State which has established its jurisdiction to prosecute in accordance with Article 5, paragraph 1, of the Convention and which is legitimately requesting his extradition compromised the object and purpose of the *aut dedere aut judicare* obligation. As the International Law Commission noted when drawing up the Code of crimes against the peace and security of mankind:

“the whole purpose of the ‘extradite or prosecute’ principle would be frustrated if the courts of a State in whose territory an individual alleged to have committed a crime under the Code was found were to decide, once they had been seized of the case by the competent authorities, that they lacked jurisdiction”. [YILC, 1995, Vol. I, p. 200, para. 20.]

In its commentaries attached to Article 8 of the draft Code of crimes against the peace and security of mankind, adopted in 1996, which is similar to Article 5 of the Convention against Torture, the Committee considered:

“Failing such [universal] jurisdiction, the custodial State would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial State does not have an absolute obligation to grant a request for extradition. Moreover, the alleged offender would elude prosecution in such a situation if the custodial State did not receive any request for extradition which would seriously undermine the fundamental purpose of the *aut dedere aut judicare* principle, namely, to ensure the

²⁶⁰See paras. 4.29 to 4.37 above.

²⁶¹See paras. 1.67-1.76 above.

²⁶²See also paras. 4.24-4.25 above.

²⁶³See also paras. 4.24 and 4.26 above. See also Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, para. 9.7 (Ann. E.2).

²⁶⁴See paras. 4.29 to 4.37 above.

effective prosecution and punishment of offenders by providing for the residual jurisdiction of the custodial State.”²⁶⁵

4.42. This is the situation in which Senegal found itself in 2005. By not taking the necessary measures to enable its courts to entertain the H. Habré case, Senegal not only violated Article 5, paragraph 2, of the Convention, but also made it impossible for itself to choose prosecution rather than extradition. To borrow the words used by the Agent of Senegal, Cheikh Tidiane Thiam, in the pleadings on the request for the indication of provisional measures: “*Aut dedere, aut judicare*: either one thing or the other. And above all, it is extradition if there can be no trial.”²⁶⁶ Since Senegal considered itself legally incapable of putting Mr. Habré on trial, it was obliged to extradite him to Belgium, the only State that had requested his extradition for trial.

87

4.43. The Committee against Torture found in 2006

“that, since 19 September 2005, the State party has been in another situation covered under Article 7, because on that date Belgium made a formal extradition request. At that time, the State party had the choice of proceeding with extradition if it decided not to submit the case to its own judicial authorities for the purpose of prosecuting Hissène Habré.”²⁶⁷

4.44. However, by its decision of 25 November 2005, the Court of Appeal in Dakar declared its lack of jurisdiction to hear the extradition request made by Belgium. This decision bestows on Mr. Habré the immunity provided for under Senegalese public law for the President of Senegal. A strange line of reasoning which consists in conferring on a former foreign Head of State:

- the benefit of rules provided under the Senegalese Constitution for the President in office of Senegal, not for a foreign Head of State;
- the benefit of rules of immunity which, in a less than clear manner, the *Chambre* seems to link indirectly with international law²⁶⁸, whereas international law excludes immunity for a former Head of State in respect of acts unrelated to his official functions;
- the benefit of rules of immunity which, in any event, did not apply to Mr. Habré, since Chad had confirmed in 1992, in so far as necessary, that Mr. Habré enjoyed no immunity.

4.45. Regardless of how this judgment is interpreted, it reveals, together with the decision to transmit the dossier to the African Union, that the respondent State had no intention of fulfilling its obligation to extradite Mr. Habré to Belgium.

4.46. Pursuant to Article 7, paragraph 1, of the Convention against Torture, Senegal was then required to extradite Mr. Habré and should have complied with the international arrest warrant issued on 19 September 2005 by the Belgian investigating judge²⁶⁹. By not extraditing him, if it

²⁶⁵ *Yearbook of the International Law Commission*, 1996, Vol. II, Part 2, p. 29, para. (6) of the commentary.

²⁶⁶ CR 2009/9, 6 Apr. 2009, p. 20, para. 56 (Thiam).

²⁶⁷ Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, para. 9.10 (Ann. E.2).

²⁶⁸ See *ibid.*, *in fine*, the reference made in the Judgment to the *Arrest Warrant* case.

²⁶⁹ Ann. C.2.

88 failed to exercise its universal jurisdiction, Senegal violated its conventional obligation under Article 7, paragraph 1, of the Convention against Torture.

(b) *The seisin of the African Union does not constitute an alternative to compliance with Senegal's conventional obligations*

4.47. In its Note Verbale dated 9 May 2006, the Senegalese Embassy in Brussels informed the Belgian authorities that

“With regard to the interpretation of Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Embassy considers that by transferring the Hissène Habré case to the African Union, Senegal, in order not to create a legal impasse, is acting in accordance with the spirit of the principle ‘*aut dedere aut punire*’ the essential aim of which is to ensure that no torturer can escape from justice by going to another country.”²⁷⁰

4.48. Belgium cannot endorse this interpretation of Article 7 of the Convention against Torture. It is clear from the text of that provision that the “State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found”, if it does not extradite him, must hand him over to its competent authorities for the purpose of prosecution.

4.49. The “mandate” conferred on Senegal by the African Union to try Mr. Habré²⁷¹ does not in any way exempt Senegal from its obligation, as the forum State, to submit the case to its competent authorities 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 State²⁷².

89 4.50. This interpretation is moreover confirmed by the decision of the African Union. In its decision of July 2006 on the Hissène Habré trial and the African Union, the Assembly of Heads of State and Government of the Union expressly referred to “the ratification by Senegal of the United Nations Convention against Torture”²⁷³. In the oral proceedings on the request for the indication of provisional measures, the representative of Senegal also affirmed that “the African Union, which Senegal had seized of the case — all will note that I use the term seisin, never transfer or appropriation or relinquishment — with a view to its involvement and support”²⁷⁴.

²⁷⁰Ann. B.10.

²⁷¹Ann. F.2.

²⁷²See the communiqué of the Ministry of Foreign Affairs of Senegal, 27 Nov. 2006 (Ann. B.5). In this communiqué, the Ministry observed that “Senegal is in no way directly involved in the Hissène Habré case” and that “the case (. . .) is not a Senegalese case but an African case”.

²⁷³Ann. F.2. The European Parliament also called on the African Union, “within the framework of the case against Hissène Habré, to ensure that Senegal respects its international commitments as a State Party to the Convention against Torture” (legislative resolution of the European Parliament on impunity in Africa and in particular the case of Hissène Habré, P6_TA(2006)0101, 16 Mar. 2006, *Official Journal of the European Union*, C 291E of 30 Nov. 2006, p. 420, point 13).

²⁷⁴CR 2009/9, 6 Apr. 2009, p. 12, para. 24 (Thiam).

And Mr. Thiam added: “[T]he text by which the African Union asked Senegal to try Mr. Habré in its own courts is based on Senegal’s obligations deriving from its ratification of the 1984 Convention against Torture.”²⁷⁵

90

4.51. Belgium has taken note of the statements made by the Agent of Senegal in the International Court of Justice. However, certain statements made by the Senegalese authorities²⁷⁶ appear to imply that Senegal, by establishing the necessary conditions for organizing a trial of Mr. Habré on its territory, would not be fulfilling the obligations placed on it by the Convention against Torture, but merely carrying out a “mandate” of the African Union. However, as Belgium has recalled repeatedly in its Notes Verbales, it is Senegal which remains legally bound to prosecute Mr. Habré or to extradite him to Belgium, under the terms of Article 7 of the Convention against Torture and under conventional and customary rules. With all due respect for the work of the African Union, which has undeniably had positive effects, if only by facilitating essential legislative changes in the domestic law of Senegal, the fact still remains that — unless otherwise provided by international law itself — a State cannot be exempted from its international obligations by transferring a case to a regional organization any more than it could be exempted from its obligations by transferring its responsibilities to another State.

(c) *Senegal has to date neither initiated a preliminary inquiry nor submitted the H. Habré case to the competent authorities for the purpose of prosecution*

4.52. Notwithstanding the fact that, since the legislative reform introduced in 2007, Senegal has established the necessary regulatory conditions in order to fulfil its obligation to try Mr. Habré in Senegal, it has still not submitted the H. Habré case to its competent authorities for the purpose of prosecution. No measures have been taken: neither a preliminary inquiry into the facts, as provided for in Article 6, paragraph 2, of the Convention, nor the opening of an investigation of the case, despite the filing in September 2008 of a new application to the Public Prosecutor by 14 victims of Senegalese and Chadian nationality, accusing Mr. Habré of acts of torture and crimes against humanity²⁷⁷.

4.53. To date, the Ministry of Justice of Senegal has only “appointed” four judges “to lead the investigation against Mr. Habré”²⁷⁸. But no decision has been taken regarding the opening of a judicial inquiry or investigation.

²⁷⁵CR 2009/9, 6 Apr. 2009, p. 13, para. 29 (Thiam).

²⁷⁶See for example the Note Verbale of the Senegalese Embassy in Belgium to the Ministry of Foreign Affairs of Belgium, 20 Feb. 2007 (Ann. B.1), and the Note Verbale from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar, 21 Feb. 2007 (Ann. B.13). See also the statements made by the African Union: Assembly of the African Union, eighth ordinary session, 29-30 Jan 2007, Decision AU/Dec. 157(VIII) (“ENCOURAGES [Senegal] to pursue its initiatives to accomplish the *mandate* entrusted to it.”; emphasis added); *ibid.*, twelfth ordinary session, 1-3 Feb. 2009, decision AU/Dec.240(XII) (“RECALLS its Decision Assembly/AU/Dec. 127(VII) taken in Banjul, the Gambia, in July 2006 *mandating* 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.’”; emphasis added); *ibid.*, thirteenth ordinary session, 1-3 July 2009, Decision AU/Dec. 246 (XIII), 3 July 2009 (“REITERATES its appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the *AU mandate* to prosecute and try Hissène Habré.”; emphasis added); *ibid.*, fourteenth ordinary session, 1-3 Feb. 2010, Decision AU/Dec.272(XIV) Rev. 1, 2 Feb 2010 (“REITERATES its appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the *African Union (AU) mandate* to prosecute and try Hissène Habré.”; emphasis added). See also para. 1.76 above.

²⁷⁷Ann. D.5.

²⁷⁸Ann. B.19.

91

4.54. Furthermore, Belgium has repeatedly offered to receive, on the basis of an international letter rogatory, the Senegalese judges appointed to investigate the case against Mr. Habré²⁷⁹. Although the Senegalese authorities have shown themselves to be in favour of accepting these offers²⁸⁰, no letter rogatory has been submitted by Senegal to date (end of June 2010). It is worth recalling that, in the context of the investigation initiated in Belgium, the Belgian authorities transmitted a letter rogatory to Senegal in October 2001, that is, less than one year after the filing of the complaint against Mr. Habré in November 2000; this letter rogatory was aimed at obtaining a copy of the existing case file in Senegal. Five years after Belgium's request for extradition, Senegal, for its part, has still not transmitted a letter rogatory in order to obtain a copy of the Belgian case file.

4.55. In February 2010, the Senegalese Minister for Foreign Affairs assured his Belgian counterpart that there was no further obstacle to the organization of the H. Habré trial, apart from the matter of financing²⁸¹. But the fact remains that, to date, no inquiry — even a preliminary one within the meaning of Article 6, paragraph 2, of the Convention against Torture — has been made into the facts and the H. Habré case has still not been submitted to the competent Senegalese authorities for the purpose of prosecution.

4.56. Furthermore, in January 2010, before the Court of Justice of the Economic Community of West African States, the representatives of Senegal confirmed that “no proceedings against [Mr. Habré] were pending, nor are any pending at this date, in the Senegalese courts”²⁸².

92

4.57. Senegal's failure to act is not consistent with the requirements of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention. This failure contravenes the Convention.

4.58. What is more, the mere intention to try Mr. Habré, as expressed on various occasions by the Senegalese authorities, is not sufficient to implement the international commitments accepted by Senegal when it became a party to the 1984 Convention. The Convention does not grant any period of time for the implementation of the obligation to prosecute. This means that the States Parties must have the necessary legislation in place as soon as the Convention enters into force in relation to them.

4.59. So long as Senegal has not submitted the H. Habré case to the competent Senegalese authorities for the purpose of prosecution or, failing that, has not extradited him to any State which has so requested, there is a violation of Article 7 of the Convention against Torture for which Senegal incurs international responsibility.

²⁷⁹Note Verbale from the Belgian Embassy in Dakar to the Senegalese Ministry of Foreign Affairs, 2 Dec. 2008 (Ann. B.16); Note Verbale from the Belgian Embassy in Dakar to the Senegalese Ministry of Foreign Affairs, 23 June 2009 (Ann. B.17); Note Verbale from the Belgian Embassy in Dakar to the Senegalese Ministry of Foreign Affairs, 14 Oct. 2009 (Ann. B.20); letter dated 20 Oct. 2009 from the Belgian Ambassador in Senegal to the Senegalese Minister for Foreign Affairs (Ann. B.21); Note Verbale from the Belgian Embassy in Dakar to the Senegalese Ministry of Foreign Affairs, 23 Feb. 2010 (Ann. B.22).

²⁸⁰Note Verbale from the Senegalese Ministry of Foreign Affairs to the Belgian Embassy in Dakar, 14 Sep. 2009 (Ann. B.19); Note Verbale from the Senegalese Ministry of Foreign Affairs to the Belgian Embassy in Dakar, 29 July 2009 (Ann. B.18); Note Verbale from the Senegalese Ministry of Foreign Affairs to the Belgian Embassy in Dakar, 30 Apr. 2010 (Ann. B.23).

²⁸¹See para. 1.58 above.

²⁸²ECOWAS Court of Justice, *Hissein Habré v. Republic of Senegal, Judgment on Preliminary Objections*, 14 May 2010, para. 14 (Ann. E.1).

II. VIOLATIONS OF OTHER RULES OF CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW

4.60. The arrest warrant of 19 September 2005 issued by the Belgian investigating judge in charge of Mr. Habré's case was based on the accusation that Mr. Habré had committed crimes against humanity, war crimes and crimes of genocide. Such crimes are covered, respectively, by Articles 136*ter*, 136*quater*, and 136*bis* of the Belgian Penal Code. They are additional to the crime of torture within the meaning of the Convention against Torture²⁸³ and imply the violation by Senegal of other rules of conventional or customary international law.

93

4.61. Belgium will not go into the question of the relevance of these legal classifications or the legitimacy of their application to Mr. Habré, as that is not the subject-matter of this dispute. Moreover, Senegal has never questioned them. Suffice it to note that the arrest warrant against Mr. Habré accuses him of criminal acts classified as crimes against humanity, war crimes and crimes of genocide, that these classifications are not unfounded in view of what is known of the history of Mr. Habré from the time of his presidency of Chad²⁸⁴, and that, pursuant to the obligation to combat impunity, international law requires Senegal to prosecute the alleged perpetrator of such crimes as long as he is in its territory or, if it does not prosecute, to extradite him to a State which wishes to prosecute. Belgium will thus show, firstly, the source of this obligation for each of the crimes that are the subject of the arrest warrant of 19 September 2005 (A); secondly, the terms and conditions of the obligation of punishment (B); and lastly, the basis of the jurisdiction which Senegal must exercise and which the Belgian judicial authorities intend to exercise if Senegal fails to do so (C).

A. Conventional and customary obligations regarding the punishment of the other crimes alleged against Mr. Habré

4.62. The proceedings which the Belgian judicial authorities intend to bring against Mr. Habré are founded on the allegation made against him of the classic triad of crimes, which for ease of reference will be presented in the following order: crimes against humanity (1), war crimes (2) and the crime of genocide (3).

1. Crimes against humanity

4.63. The definition and punishment of crimes against humanity are not the subject of any specific convention, unlike the crime of torture. However, their classification as specific offences is today considered a customary rule. It appears *inter alia* in the Statutes of the Nuremberg International Military Tribunals (Art. 6 (c), 1945)²⁸⁵, the Tokyo Charter (Art. 5 (c), 1946)²⁸⁶, and the Statutes of the International Criminal Tribunal for the former Yugoslavia (Arts. 4-5, 1993)²⁸⁷, the International Criminal Tribunal for Rwanda (Arts. 2-3, 1994)²⁸⁸ and the International Criminal Court (Art. 7, 1998)²⁸⁹. The International Law Commission, in its codification of the "Principles of

²⁸³See paras. 4.02 to 4.59 above.

²⁸⁴See paras. 1.09-1.10 above.

²⁸⁵Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, London, 8 Aug. 1945, 82 *UNTS* 280.

²⁸⁶Charter of the International Military Tribunal for the Far East, 19 Jan. 1946, *TIAS* 1579.

²⁸⁷Security Council, resolution 827 (1993), 25 May 1993, S/RES/827 (1993).

²⁸⁸Security Council, resolution 955 (1994), 8 Nov. 1994, S/RES/955 (1994).

²⁸⁹*UNTS*, Vol. 2187, p. 90 (I-38544).

94 International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”, as early as 1950 cited crimes against humanity as “crimes under international law” (Principle VI). In the discussions in the Sixth Committee of the General Assembly between 2 and 14 December 1950, some 18 States explicitly confirmed the customary nature of the Nuremberg Principles defined by the International Law Commission²⁹⁰.

4.64. The obligation to punish crimes against humanity is also set out in resolutions of the General Assembly, which require that the perpetrators of crimes against humanity be prosecuted or extradited. For example, resolution 2840 (XXVI) (“Question of the punishment of war criminals and of persons who have committed crimes against humanity”) of 18 December 1971 characterizes as a violation of international law the failure of a State to co-operate in the arrest, prosecution or extradition of perpetrators of war crimes or crimes against humanity. The Assembly

“Affirms that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principle of the Charter of the United Nations and to generally recognized norms of international law.” (Para. 4.)

4.65. In a similar vein, resolution 3074 (XXVIII) of 3 December 1973, entitled “Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity”, proclaims the following as the first principle:

“War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.” (Para. 1.)

Paragraph 5 of the resolution provides that “States shall co-operate on questions of extraditing such persons”. These resolutions thus recognize, albeit in general terms, a customary rule constituting the classic obligation of prosecution or extradition.

95 The obligation to prosecute is also enunciated in relation to torture by the United Nations General Assembly and the Human Rights Council, which declare, in very similar wording, that those who perpetrate acts of torture or other cruel, inhuman or degrading treatment or punishment must be held responsible, “brought to justice and punished in a manner commensurate with the severity of the offence”²⁹¹.

4.66. The explanatory memorandum to the Senegalese law which incorporates into the Senegalese Penal Code the crime of genocide, crimes against humanity and war crimes, so as to implement the definitions of offences provided for by the Statute of the International Criminal Court, specifies that “it is an opportunity to integrate international rules of conventional *and customary law*”²⁹². This confirms that Senegal acknowledges the customary nature of the classification of crimes against humanity.

²⁹⁰Extracts of declarations by States in E. David, *Éléments de droit pénal international et européen*, Brussels, Bruylant, 2009, para. 16.6.76.

²⁹¹A/RES/64/153, §6, 18 Dec. 2009, adopted without vote; Human Rights Council, A/HRC/RES/13/19, adopted without vote, §10.

²⁹²Law No. 2007-02 of 12 Feb. 2007 amending the Penal Code, *Journal officiel de la République du Sénégal*, 10 Mar. 2007, p. 2377 (Ann. D.6); emphasis added.

4.67. The draft Code of crimes against the peace and security of mankind, adopted by the International Law Commission in 1996, also affirms that the State

“in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual”²⁹³.

4.68. The obligation to prosecute is not conditional on a request for extradition from a third State. The International Law Commission considered that “[t]he custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender”²⁹⁴, but it explains that:

“In the absence of a request for extradition, the custodial State would have no choice but to submit the case to its national authorities for prosecution. This residual obligation is intended to ensure that alleged offenders will be prosecuted by a competent jurisdiction, that is to say, the custodial State, in the absence of an alternative national or international jurisdiction.”²⁹⁵

96

4.69. The obligation to punish crimes against humanity is a component of the fight against impunity which is dealt with in numerous resolutions of the General Assembly and the Security Council. These resolutions were adopted in connection with serious violations of human rights committed in a country or, more generally, in connection with respect for certain values. Thus, the following contexts have given rise to resolutions in which States were invited to combat the impunity of perpetrators of crimes against humanity and other serious crimes of international law; these resolutions were adopted:

— in response to a particular situation of unrest and violations of fundamental rights and freedoms in a particular country; for example in connection with the unrest in Burundi, the Security Council expressed its concern at the fact

“that impunity creates contempt for law and leads to violations of international humanitarian law”²⁹⁶;

— the Council has affirmed, in more than 70 resolutions, the obligation to combat impunity in the wake of serious internal tensions with which other States have been confronted; without any claim to exhaustiveness, mention may be made of: Cambodia²⁹⁷, Iraq²⁹⁸, the Democratic

²⁹³ Art. 9, *ILC Yearbook*, 1996, Vol. 2, Part 2, p. 30.

²⁹⁴ *ILC Yearbook*, 1996, Vol. II, Part 2, p. 31.

²⁹⁵ *Ibid.*, p. 32.

²⁹⁶ S/RES/1012, 28 Aug. 1995, eighth preambular paragraph; see also S/RES/1545, 21 May 2004, ninth preambular paragraph; S/RES/1602, 31 May 2005, fourteenth preambular paragraph and paragraph 5; S/RES/1650, 21 Dec. 2005, para. 9; S/RES/1719, 25 Oct. 2006, para. 2 (*j*); S/RES/1858, 22 Dec. 2008, tenth preambular paragraph and paras. 13-14; S/RES/1902, 17 Dec. 2009, eleventh preambular paragraph and paras. 18-19.

²⁹⁷ A/RES/50/178, 22 Dec. 1995 (without vote), para. 12; A/RES/51/98, 12 Dec. 1996 (without vote), para. 14; A/RES/52/135, 12 Dec. 1997 (without vote), para. 9.

²⁹⁸ A/RES/54/178, 17 Dec. 1999, para. 3 (*d*).

Republic of the Congo²⁹⁹, Haiti³⁰⁰, Rwanda³⁰¹, Côte d'Ivoire³⁰², Sierra Leone³⁰³, Timor Leste³⁰⁴, Sudan³⁰⁵, Guinea Bissau³⁰⁶, Georgia³⁰⁷, Afghanistan³⁰⁸, Somalia³⁰⁹, the Central African Republic and Chad³¹⁰, and Nepal³¹¹;

— in connection with certain more generic issues such as respect for “gender specificity”, where the Security Council

“*[e]mphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions;*”³¹²

— similarly, in connection with children and armed conflict, the Security Council has urged Member States to

“put an end to impunity, prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children and

²⁹⁹A/RES/54/179, 17 Dec. 1999, para. 3 (*d*); S/RES/1468, 20 Mar. 2003, paras. 6-7; S/RES/1484, 30 May 2003, paras. 5-6; S/RES/1565, 1 Oct. 2004, paras. 5 (*g*) and 19; S/RES/1653, 27 Jan. 2006, paras. 6-7; S/RES/1711, 29 Sep. 2006, eleventh preambular paragraph; S/RES/1756, 15 May 2007, paras. 3 (*c*), 12 and 14; S/RES/1856, 22 Dec. 2008, eleventh preambular paragraph and paras. 4 (*c*) and 25; S/RES/1896, 30 Nov. 2009, tenth and eleventh preambular paragraphs; S/RES/1906, 23 Dec. 2009, eighth preambular paragraph *et seq.*, paras. 3 and 11; S/RES/1925, 28 May 2010, eleventh and twelfth preambular paragraphs and para. 12 (*c*)-(*d*).

³⁰⁰A/RES/54/187, 17 Dec. 1999, para. 8; S/RES/1529, 29 Feb. 2004, para. 7; S/RES/1542, 30 Apr. 2004, fourth preambular paragraph and para. 8 (*a*); S/RES/1608, 22 June 2005, fifth preambular paragraph; S/RES/1743, 15 Feb. 2007, ninth preambular paragraph; S/RES/1840, 14 Oct. 2008, ninth preambular paragraph; S/RES/1892, ninth preambular paragraph.

³⁰¹A/RES/54/188, 17 Dec. 1999, para. 8.

³⁰²S/RES/1464, 4 Feb. 2003; S/RES/1528, 27 Feb. 2004, para. 6 (*n*); S/RES/1609, 24 June 2005, para. 2 (*t*); S/RES/1721, 1 Nov. 2006, para. 30; S/RES/1826, 29 July 2008, ninth preambular paragraph; S/RES/1865, 27 Jan. 2009, tenth preambular paragraph and para. 11; S/RES/1880, 30 July 2009, tenth preambular paragraph and para. 26; S/RES/1911, 28 Jan. 2010, tenth preambular paragraph and para. 13.

³⁰³S/RES/1470, 28 Mar. 2003, seventh preambular paragraph; S/RES/1610, 30 June 2005, sixth preambular paragraph.

³⁰⁴S/RES/1543, 14 May 2004, para. 8; S/RES/1573, 17 Nov. 2004, para. 6; S/RES/1745, 22 Feb. 2007, fifth preambular paragraph; S/RES/1867, 26 Feb. 2009, ninth preambular paragraph; S/RES/1912, 26 Feb. 2010, seventh preambular paragraph.

³⁰⁵S/RES/1556, 30 July 2004, para. 6; S/RES/1564, 18 Sep. 2004, ninth preambular paragraph and para. 7; S/RES/1574, 19 Nov. 2004, tenth preambular paragraph; S/RES/1590, 24 Mar. 2005, para. 4 (*a*) (*viii*); S/RES/1591, 29 Mar. 2005, tenth preambular paragraph and para. 5; S/RES/1841, 15 Oct. 2008, sixth preambular paragraph; S/RES/1881, 30 July 2009, eighth preambular paragraph and para. 11; S/RES/1891, 13 Oct. 2009, sixth preambular paragraph.

³⁰⁶S/RES/1580, 22 Dec. 2004, para. 4.

³⁰⁷S/RES/1582, 28 Jan. 2005, paras. 29-30.

³⁰⁸S/RES/1746, 23 Mar. 2007, para. 13; S/RES/1806, 20 Mar. 2008, para. 21; S/RES/1890, 8 Oct. 2009, eighteenth preambular paragraph; S/RES/1917, 22 Mar. 2010, paras. 22 and 30.

³⁰⁹S/RES/1814, 15 May 2008, para. 16; S/RES/1872, 26 May 2009, thirteenth preambular paragraph and para. 22; S/RES/1897, 30 Nov. 2009, para. 12; S/RES/1910, 28 Jan. 2010, fourteenth preambular paragraph.

³¹⁰S/RES/1778, 25 Sep. 2007, para. 2 (*e*); S/RES/1861, 14 Jan. 2009, para. 6 (*f*).

³¹¹S/RES/1909, 21 Jan. 2010, fifteenth preambular paragraph.

³¹²S/RES/1325, 31 Oct. 2000, para. 11; S/RES/1820, 19 June 2008, para. 4; S/RES/1888, 30 Sep. 2009, paras. 6-8 and seventh preambular paragraph *et seq.*; S/RES/1889, 5 Oct. 2009, para. 3.

exclude, where feasible, these crimes from amnesty provisions and relevant legislation . . . ”³¹³.

- 98 — more generally, outside any geopolitical or sociological context: thus, on the occasion of the Millennium Summit, the Security Council

“*Stresses* that the perpetrators of crimes against humanity, crimes of genocide, war crimes, and other serious violations of international humanitarian law should be brought to justice.”³¹⁴

4.70. Alongside the repeated demands of the General Assembly and the Security Council, the principle of combating impunity also corresponds to a requirement deriving from respect for human rights. Thus in 2004, the Human Rights Committee, in its general comment No. 31, affirmed in connection with the implementation of Article 2, paragraph 3, of the Covenant (obligation on States parties to the Covenant to guarantee, by judicial, administrative or legislative means, respect for the rights and freedoms provided for in the Covenant) that

“A failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant . . . Where the investigations . . . reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant . . . Indeed, the problem of impunity for these violations . . . may well be an important contributing element in the recurrence of the violations.”³¹⁵

The Commission on Human Rights and the Human Rights Council took a similar view in:

“*[r]ecalling* the Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1, annex II), and taking note with appreciation of the updated version of these principles (E/CN.4/2005/102/Add.1)”³¹⁶.

- 99 The United Nations General Assembly also refers to these principles as “a useful tool in efforts to prevent and combat torture”³¹⁷. Among the principles referred to by the Commission on Human Rights, the Human Rights Council and the Assembly, Principle 19 provides that:

“States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of

³¹³S/RES/1379, 20 Nov. 2001, para. 9 (a); see also S/RES/1460, 30 Jan. 2003, fifth preambular paragraph; S/RES/1539, 22 Apr. 2004, fourth preambular paragraph; Statement by the President of the Security Council, S/PRST/2009/9, 29 Apr. 2009, eleventh preambular paragraph; S/RES/1882, 4 Aug. 2009, fifth preambular paragraph and para. 16.

³¹⁴S/RES/1318, 7 Sep. 2000, VI.

³¹⁵General comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant, 29 Mar. 2004, paras. 15 and 18, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, pp. 175-179.

³¹⁶*Right to the truth*, Commission on Human Rights resolution 2005/66, 20 Apr. 2005 (adopted without vote), seventh preambular paragraph; *Enforced and involuntary disappearances*, Human Rights Council resolution 14/10, 18 June 2010 (adopted without vote), twelfth preambular paragraph.

³¹⁷A/RES/64/153, 18 Dec. 2009 (adopted without vote), para. 7.

criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.”³¹⁸

4.71. The customary wording of the obligation to punish crimes against humanity is set out in the preamble to the Statute of the International Criminal Court, to which 111 States are parties (end of June 2010), including Senegal and Belgium. The fourth, fifth, sixth and tenth paragraphs of the preamble read as follows:

“The States parties to this Statute,

.....

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

.....

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . .”

2. War crimes

4.72. The sources cited above which require States to take criminal proceedings against the perpetrators of crimes against humanity or, failing this, to extradite them to any State which seeks to prosecute them, also apply to war crimes. Moreover, several of the extracts reproduced above refer in the same sentence to the obligation to punish crimes against humanity and war crimes.

100

4.73. Moreover, in the specific case of war crimes, the alternative obligation to prosecute or extradite their perpetrators is set out in an article common to the four Geneva Conventions of 12 August 1949 (Arts. 49 (I), 50 (II), 129 (III) and 146 (IV)) and in the first additional Protocol thereto of 8 June 1977 (Art. 85, para. 1), instruments which are binding on both Belgium³¹⁹ and Senegal³²⁰.

4.74. The obligation to punish war crimes is conventional inasmuch as it appears in treaties binding on the two States parties to this dispute (the Geneva Conventions of 1949 and additional Protocol I thereto of 1977). It is also customary inasmuch as this Court has recognized the Geneva

³¹⁸E/CN.4/2005/102/Add.1, Principle 19.

³¹⁹Since 3 Sep. 1952 for the 1949 Geneva Conventions and since 20 May 1986 for additional Protocol I of 1977.

³²⁰Since 18 May 1963 for the 1949 Geneva Conventions and since 7 May 1985 for additional Protocol I of 1977.

Conventions as having this characteristic³²¹. In addition, the ICRC study on customary international humanitarian law provides that:

“States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.” (Rule 158.)

3. The crime of genocide

4.75. Once again, the sources cited for crimes against humanity apply equally to the crime of genocide.

4.76. Belgium is certainly not unaware that, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court affirmed that Article VI of the Convention in question obliged only the State where the genocide was carried out to exercise criminal jurisdiction³²². In that case, the Court, having been seised solely on the basis of Article IX of the Convention, ruled only on that Convention and not on customary international law. In this case, however, the jurisdiction of the Court is also founded on the identical acceptances of its jurisdiction by Senegal and Belgium with regard to “all legal disputes”³²³. Since the obligation to punish the crime of genocide derives from customary international law, the territorial limitation stipulated by the Convention is inapplicable *in casu*.

101

4.77. However, the universal customary nature of the obligation to punish genocide does not appear to be in doubt. Thus, in its Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court held:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater

³²¹*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 257, para. 79.*

³²²*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 226, para. 442.*

³²³See paras. 3.30-3.43 above.

degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.”³²⁴

102 The Court underlines the customary nature of the principles contained in the Convention when it states that:

“the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”.

In addition, through this text, the Court underlines the universal nature of the obligation of punishment,

— when it states:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ . . .”,

— or when it refers to:

“the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’”,

— or again when it emphasizes that:

“The Convention was manifestly adopted for a purely humanitarian and civilizing purpose . . . since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality”.

In mentioning “the intention of the United Nations to condemn genocide”, the “universal character” of that condemnation and its “purely humanitarian and civilizing purpose”, the Court is referring to fundamental principles of humanity central to the foundations of any civilized society. Inasmuch as the punishment of the “crime of crimes”³²⁵ is inherent in civilization and humanity, the forms of words used by the Court in 1951 constitute a way of emphasizing the universal character of the obligation of punishment.

103 4.78. In the recent discussions in the Sixth Committee of the General Assembly on “the scope and application of the principle of universal jurisdiction”, several States stressed the universal character of the prohibition of impunity with regard to the most serious crimes, particularly genocide. For example, in the case of

³²⁴*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.*

³²⁵International Criminal Tribunal for Rwanda (ICTR), case No. ICTR-96-3-T, *Rutaganda*, 6 Dec. 1999, para. 451.

— Australia:

“The principle [of universal jurisdiction] had been developed in customary international law in order to prevent pirates from enjoying impunity or safe haven and had since been extended to include genocide, war crimes, crimes against humanity, slavery and torture, which, owing to their nature or exceptional gravity, were the joint concern of all members of the international community.”³²⁶

— Switzerland:

“Justice played an essential role in crime suppression and prevention and while States had the primary responsibility to prosecute persons who fell within their jurisdiction, crimes such as genocide, crimes against humanity, war crimes and torture were particularly offensive to the international community and must not go unpunished.”³²⁷

— South Africa:

“universal jurisdiction outside a treaty relationship should be applicable only to those crimes regarded by the international community as the most heinous, namely slavery, genocide, war crimes and crimes against humanity”³²⁸.

— the Democratic Republic of the Congo:

“It was right for States to exercise universal jurisdiction so as to ensure that cases of torture, war crimes, crimes against humanity and genocide did not go unpunished.”³²⁹

— Kenya:

“the principle of universal jurisdiction . . . was a crucial tool for enabling victims of grave international crimes, such as war crimes, crimes against humanity and genocide, to obtain redress where the State in which the crime had been committed was unable or unwilling to conduct an effective investigation and trial”³³⁰.

104

— Slovakia:

“it was generally accepted that customary international law permitted the exercise of such jurisdiction over piracy, the slave trade and trafficking in persons, and its application to the *delicta juris gentia* — genocide, torture, crimes against humanity and grave breaches of the 1949 Geneva Conventions — was widely recognized”³³¹.

— Austria:

“of greater interest to the Committee, however, were cases in which States asserted universal jurisdiction solely on the basis of customary international law. It seemed

³²⁶A/C.6/64/SR.12, para. 10.

³²⁷*Ibid.*, para. 22.

³²⁸*Ibid.*, para. 43.

³²⁹*Ibid.*, para. 54.

³³⁰*Ibid.*, para. 61.

³³¹*Ibid.*, para. 64.

generally accepted that they were entitled to do so in respect of genocide, crimes against humanity, war crimes, torture and piracy.”³³²

— Slovenia:

“In general, it was accepted that customary law allowed the exercise of universal jurisdiction over the crimes of piracy, slavery, genocide, crimes against humanity, war crimes and torture.”³³³

— Belgium:

“the application of universal jurisdiction was . . . a tool of last resort in cases where there was a risk that the perpetrators of genocide, crimes against humanity, war crimes or torture might escape justice because both the State in which the crime was alleged to have been committed and the State of nationality of the suspect or the victims were unwilling or unable to prosecute”³³⁴.

— the United States of America:

105

“Under United States law, federal courts were empowered to assert jurisdiction over crimes of serious international concern, such as piracy, torture, genocide and terrorism, even in the absence of a significant link between the State and the crime in question.”³³⁵

— Liechtenstein:

“In some situations, where those States were unwilling or unable to bring the perpetrators to justice, other States that had no direct connection to the crime should do so on the basis of universal jurisdiction, which was thus an important subsidiary tool for ensuring accountability for crimes such as genocide, war crimes, crimes against humanity and torture.”³³⁶

— Togo:

“the principle of universal jurisdiction was designed to prevent impunity for serious crimes such as genocide, crimes against humanity and torture . . .”³³⁷.

*

4.79. An examination of the sources cited in this section shows that States are required to ensure that they apply the obligation to combat impunity by establishing criminal sanctions for the classic triad of crimes of genocide, crimes against humanity and war crimes.

³³²A/C.6/64/SR.12, para. 81.

³³³*Ibid.*, para. 96.

³³⁴*Ibid.*, para. 102.

³³⁵A/C.6/64/SR.13, para. 25.

³³⁶*Ibid.*, para. 26.

³³⁷*Ibid.*, para. 35.

B. The modalities of the obligation of punishment

106

4.80. Customary international law prescribes no particular modalities for the punishment of crimes of genocide, crimes against humanity and war crimes. While it is clear that the punishment of these crimes implies the criminal prosecution of the alleged perpetrators, such prosecution may be implemented either directly by the State in which the perpetrators are present, or indirectly by extraditing them to a State which wishes to prosecute them. These two alternatives (prosecute or extradite — *aut dedere aut judicare*) have the same aim: to combat impunity, that is, to ensure the punishment of the crime. The Secretariat of the International Law Commission examined the multilateral conventions which enunciate this rule. By obliging States parties to prosecute the perpetrator or to extradite him to a State which wishes to prosecute him, the Secretariat observed that States fulfil the obligation to prosecute provided for in these conventions. The Secretariat wrote that *aut dedere aut judicare* clauses

“impose upon States an obligation to ensure the prosecution of the offender either by extraditing the individual to a State that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute”³³⁸.

Judicare and *dedere* are therefore in fact alternative means of implementing the obligation.

4.81. While most international criminal law conventions impose the obligation to prosecute on the State where the crime was committed, the State of nationality of the alleged perpetrator of the crime and the State refusing to extradite that perpetrator, there is no rule requiring that the State in which the alleged perpetrator is present should give priority to prosecution or extradition. Thus, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which is an expression of customary law³³⁹, provides on the one hand, that “Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed . . .” (Art. VI), and on the other hand that

“Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.” (Art. VII.)

The Geneva Conventions of 1949 on the protection of victims of armed conflicts provide that:

107

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.” (Common Article 49/50/129/146, second paragraph.)

The draft code adopted by the International Law Commission in 1996 on crimes against the peace and security of mankind provides that:

³³⁸Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, Study by the Secretariat, A/CN.4/630, para. 126.

³³⁹See para. 4.77 above.

“Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.” (Art. 9.)

The General Assembly, in its resolution 3074 (XXVIII), declares:

“1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

.....

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.”

None of these texts gives more emphasis to either prosecution or extradition: *judicare* and *dedere* are placed on the same footing.

4.82. At the most, it is found that, in the case of the crimes alleged against Mr. Habré, the State’s obligation to prosecute exists independently of any request for extradition and is based on the mere presence of the perpetrator in the territory of that State³⁴⁰: *aut dedere aut judicare* becomes *judicare vel dedere*³⁴¹. It will now be seen that the extraterritorial character of the jurisdiction to be exercised by Senegal with regard to Mr. Habré in no way detracts from the scope of its obligation to prosecute Mr. Habré or, if it does not do so, to extradite him to Belgium.

108

C. Legal basis of the jurisdiction to be exercised by Senegal with regard to the crimes alleged against Mr. Habré

4.83. Inasmuch as all the crimes alleged against Mr. Habré are crimes which were

- committed outside Senegal, and
- alleged against an individual, Mr. Habré, who is not Senegalese; and
- committed against citizens who, for the most part, are not Senegalese.

It follows that the jurisdiction to be exercised by Senegal with regard to Mr. Habré is a universal jurisdiction.

4.84. Whether such jurisdiction is of an extraterritorial nature in no way lessens the obligation incumbent on Senegal. Suffice it to recall that none of the rules cited above³⁴² limits the obligation of punishment of serious crimes under international law exclusively to the States where the crime was committed or to States having a link of nationality with the perpetrator or his victim.

³⁴⁰A/CN.4/630, paras. 127-131.

³⁴¹See para. 4.68 above.

³⁴²See para. 4.64 above.

The fight against impunity is in no way limited by considerations relating to the geography of the crime, the nationality of the perpetrator or that of his victim. Some texts expressly provide that such crimes shall be punished, “wherever they are committed”³⁴³.

4.85. The only criterion of significance for triggering the obligation of prosecution on the part of a State is the presence of the alleged perpetrator of the crime in its territory. The commentary by the International Law Commission on Article 9 of its draft Code of crimes against the peace and security of mankind points out that the mere presence of the person is sufficient to *oblige* the State to prosecute him, even in the absence of any request for extradition³⁴⁴.

109

4.86. These principles were referred to at great length in the recent deliberations of the Sixth Committee of the General Assembly on universal jurisdiction. While universal jurisdiction must obviously be exercised in good faith and not abusively³⁴⁵, most speakers laid stress on the fact that the exercise of such jurisdiction fell directly within the scope of the fight against impunity which, as we have just seen, forms the basis for Senegal’s obligation to prosecute or extradite Mr. Habré³⁴⁶. Thus,

— for El Salvador,

“universal jurisdiction was useful in combating impunity and strengthening international justice because it existed independently of the place in which a crime was committed or the nationality of the perpetrator . . .”³⁴⁷;

— for South Africa,

“acceptance of universal jurisdiction for certain international crimes of a serious nature was based on its support for the effort to combat impunity and the search for justice”³⁴⁸;

— for the Democratic Republic of the Congo,

“impunity was also combated at the national level through the application of universal jurisdiction . . . Moreover, the limits on the jurisdiction of the [International Criminal] Court and the *ad hoc* tribunals and the large number of cases brought before national courts showed that universal jurisdiction was a central element of efforts to combat impunity”³⁴⁹;

— for Kenya,

³⁴³A/RES/3074 (XXVIII), 3 Dec. 1973, para. 1.

³⁴⁴See *ILC Yearbook*, 1996, Vol. II, Part 2, p. 33. See also para. 4.68 above.

³⁴⁵A/C.6/64/SR.12, paras. 12 (Australia), 13 (Tunisia), 20 (Iran), 47 (China), 93 (Sudan); A/C.6/64/SR.13, paras. 12 (Iran), 18 (Israel), 31 (Rwanda), 35 (Togo), 40 (Senegal), 42 (Nigeria), 45 (Italy).

³⁴⁶See paras. 4.64 *et seq.* above.

³⁴⁷A/C.6/64/SR.12, para. 25.

³⁴⁸*Ibid.*, para. 38.

³⁴⁹*Ibid.*, para. 52.

“Its application [application of the principle of universal jurisdiction] also reduced the number of safe havens where those responsible for such crimes could enjoy impunity”³⁵⁰;

110 — for Thailand,

“while the two rules of international law [the rules of *aut dedere aut judicare* and universal jurisdiction] were conceptually distinct, they were both instrumental in combating impunity”³⁵¹;

— for Peru,

“while the two institutions [international criminal justice and universal jurisdiction] had the same objective— avoiding impunity— universal jurisdiction could be exercised only by States”³⁵²;

— for Norway,

“One of the major achievements of international relations and international law over the past decades was the shared understanding that there should be no impunity for serious crimes”³⁵³;

— for France, universal jurisdiction

“could apply only to acts which were universally condemned and which required, to the extent possible, a global effort to combat them. Thus, it was an essential tool in combating impunity.”³⁵⁴;

— for Austria,

“universal jurisdiction was an important tool for combating impunity, a primary goal of the United Nations”³⁵⁵.

— for Germany,

“With regard to prosecution at the national level, the principle of universal jurisdiction was a legitimate and useful tool for the prevention of impunity and customary international law clearly allowed it to be invoked for international crimes.”³⁵⁶

111

— Finland declared that it was

³⁵⁰ A/C.6/64/SR.12, para. 61.

³⁵¹ *Ibid.*, para. 66.

³⁵² *Ibid.*, para. 69.

³⁵³ *Ibid.*, para. 72.

³⁵⁴ *Ibid.*, para. 76.

³⁵⁵ *Ibid.*, para. 81.

³⁵⁶ *Ibid.*, para. 85.

“committed to promoting international accountability and would not shy away from applying the principle of universal jurisdiction where there was a risk that failure to do so could result in impunity”³⁵⁷;

— for Belgium,

“the application of universal jurisdiction was an essential tool in combating impunity for grave international crimes and providing the victims with proper redress”³⁵⁸.

4.87. Even States that were apprehensive about the risks of abuse of universal jurisdiction acknowledged the relationship between universal jurisdiction and the requirements of the effort to combat impunity³⁵⁹. The fight against impunity therefore gave expression to a principle of customary international law obliging all States to co-operate in the punishment of crimes against humanity, war crimes and the crime of genocide. This obligation to co-operate required any State in which the alleged perpetrator of such a crime was present to prosecute him in criminal proceedings, unless it extradited him to a State authorized to prosecute him.

4.88. The legal basis of the case brought by Belgium against Senegal therefore lies in the obligation, imposed on States by international law, to combat impunity for persons present in their territory who are suspected of having committed serious crimes under international law.

4.89. This obligation, which is a feature of the conventional and customary international law binding on Senegal and Belgium, requires Senegal to bring criminal proceedings against Mr. Habré, or to extradite him to Belgium to answer for the crimes alleged against him by the Belgian judicial authorities.

³⁵⁷ A/C.6/64/SR.12, para. 91.

³⁵⁸ *Ibid.*, para. 102.

³⁵⁹ *Ibid.*, para. 99 (Tunisia); A/C.6/64/SR.13, paras. 1 (Indonesia), 5 (Iran), 32 (Rwanda), 36 (Togo).

THE RESPONSIBILITY OF SENEGAL AND REMEDIES

I. FINANCIAL, LEGAL OR OTHER “DIFFICULTIES” CANNOT RELEASE SENEGAL FROM ITS OBLIGATIONS OR JUSTIFY THE VIOLATION THEREOF

5.01. In its Order on provisional measures, the Court noted that the Parties had expressed differing views as to whether financial, legal or other difficulties are relevant in considering whether or not Senegal has failed to fulfil its obligations³⁶⁰.

5.02. However, none of these difficulties can release Senegal from its international obligations or otherwise constitute a circumstance excluding the unlawfulness of the violations attributable to the Senegalese authorities.

5.03. Regarding the legal difficulties, Belgium notes that, according to Article 27 of the 1969 Vienna Convention on the Law of Treaties, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . .”³⁶¹.

Similarly, Article 3 of the Articles on Responsibility of States for Internationally Wrongful Acts confirms: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”³⁶²

5.04. Senegal cannot, therefore, rely on the difficulties it may have encountered internally in order to be released from its conventional or customary international obligations, on the one hand, or to exclude the unlawful nature of the violations of international law attributable to it. As was noted by the Permanent Court of International Justice:

“according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter’s Constitution, but only on international law and international obligations duly accepted . . . and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent on it under international law or treaties in force”³⁶³.

5.05. Furthermore, the Committee against Torture also emphasized in its decision of 17 May 2006 that

“the State party cannot 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. [The Committee] is of the opinion that the State party was obliged to prosecute Hissène Habré for alleged acts of torture unless it could

³⁶⁰*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009*, para. 48.

³⁶¹*UNTS*, Vol. 1155, p. 332 (I-18232).

³⁶²United Nations, General Assembly, resolution 56/83, 12 Dec. 2001, Annex.

³⁶³*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24.

show that there was not sufficient evidence to prosecute, at least at the time when the complainants submitted their complaint in January 2000.”³⁶⁴

5.06. In any event, the impossibility for the Senegalese authorities to prosecute Mr. Habré in their own courts because of the unsuitability for that purpose of their domestic law constitutes, in itself, a violation of international law³⁶⁵. Under Article 5, paragraph 2, of the Convention against Torture, Senegal was obliged to bring its domestic legislation into conformity with the requirements of the Convention³⁶⁶. The respondent State cannot now invoke its own breaches of international law to justify or excuse other breaches of its international obligations. *Nemo auditur propriam turpitudinem allegans*.

115

5.07. Moreover, in order to justify the absence of concrete measures and the delay in instituting proceedings against Mr. Habré, Senegal invokes financial difficulties. In its Note Verbale of 21 February 2007, the Ministry of Foreign Affairs of Senegal thus stated, in relation to the execution of the “mandate given by the African Union to Senegal to judge Mr. Hissène Habré”, that “such a trial requires substantial funds which Senegal cannot mobilize without the assistance of the international community. The mandate of the African Union is explicit in this regard.”³⁶⁷

Before the Court, the representatives of Senegal reaffirmed in their pleadings with regard to the request for the indication of provisional measures:

“The only impediment, Mr. President, Members of the Court, to the opening of Mr. Hissène Habré’s trial in Senegal is a financial one. Senegal agreed to try Mr. Habré but at the very outset told the African Union that it would be unable to bear the costs of the trial by itself.”³⁶⁸

5.08. 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 obligations³⁶⁹.

5.09. It should be borne in mind that the obligation to try Mr. Habré falls upon Senegal not by reason of a mandate given by the African Union, but by reason of Mr. Habré’s presence in Senegalese territory and the pertinent rules of international law, in particular, Article 7, paragraph 1, of the Convention against Torture. Even without any support from the political authorities of the African continent, Senegal must fulfil the obligations it accepted as a party to the 1994 Convention. No provision of that Convention entitles it to evade compliance with the provisions thereof or to suspend its application.

³⁶⁴Committee against Torture, *Suleymane Guengueng et al. v. Senegal*, communication No. 181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001, para. 9.8 (Ann. E.2).

³⁶⁵See paras. 4.29-4.37 above.

³⁶⁶See paras. 4.12-4.18 above.

³⁶⁷Ann. B.13.

³⁶⁸CR 2009/6, 6 Apr. 2009, p. 29, para. 47 (Kandji).

³⁶⁹See in particular the *Russian Indemnity* case (*Russia/Turkey*), Arbitral Award of 11 Nov. 1912, United Nations, *Reports of International Arbitral Awards*, Vol. XI, p. 443.

116

5.10. In addition, and without it being necessary to explain in detail the negotiation process currently under way between the international community, in particular the African Union and the European Union, on the one hand, and the Senegalese authorities, on the other, it is apparent from the case file that the problems relating to financial support for Mr. Habré's trial in Senegal — a support which, in principle, was pledged by several States and the European Union — have been caused by unreasonable cost assessments³⁷⁰. Currently, a European Union mission is assisting the Senegalese authorities in the establishment of a solid and reasonable budget. Moreover, the conduct of preliminary inquiries — a classic judicial procedure of a largely formal nature which is conducted by the Public Prosecutor and is also prescribed by Article 6, paragraph 2, of the Convention against Torture — requires no particular budget. The difficulties encountered in raising funds from Senegal's partners cannot in any way justify the lack of any preliminary inquiry, particularly in view of the quantity of documents and information already gathered by Chad, Belgium and many other parties which are seeking only to help Senegal. This is all the more true of the execution of an international letter rogatory in Belgium. The Senegalese authorities, however, by their Note of 15 June 2010, clearly made the execution of such a letter rogatory conditional on the holding of a Donors' Round Table³⁷¹.

5.11. In its Note on the latest developments of 15 June 2010, Senegal confirmed moreover that it "would not be invoking any argument based on a lack of financial resources in order to escape its obligations" and that it "had not considered doing so"³⁷².

5.12. If it is really impossible for Senegal to try Mr. Habré because of financial or logistical difficulties, Belgium wishes to draw the attention of the Court and the respondent State to the fact that the obligation *aut dedere aut judicare* comprises two elements: the obligation to try must be assumed only if the forum State decides not to extradite the alleged perpetrator of acts of torture. Senegal can still fulfil its international obligations by extraditing Mr. Habré to Belgium.

*

117

5.13. In view of these considerations, Senegal cannot escape its international responsibility by invoking legal, financial or other "difficulties". Its actions and omissions constitute internationally wrongful acts which entail its international responsibility³⁷³.

³⁷⁰See Application instituting proceedings, 16 Feb. 2009, pp. 3 and 4.

³⁷¹Ann. B.25. See also para. 1.64 above.

³⁷²Ann. D.9, p. 3.

³⁷³See Articles 1 and 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.* (footnote 362).

II. BELGIUM IS ENTITLED TO INVOKE THE RESPONSIBILITY OF SENEGAL

5.14. Belgium 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 Acts³⁷⁴.

5.15. As Belgium explained in its reply to the questions of Judge Cançado Trindade in the proceedings on the indication of provisional measures, the obligation *aut dedere aut judicare* is imposed, under the Convention against Torture, on all States Parties³⁷⁵. In the context of customary international law, every State must comply with the *aut dedere aut judicare* obligation vis-à-vis the international community as a whole, having regard to the object and purpose of this obligation: to combat impunity. The rule is aimed at realizing an interest which concerns all States. The Court held in 1970 that:

118

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.”³⁷⁶

5.16. In these circumstances, Belgium, like any other State Party to the Convention against Torture (as regards compliance with the latter), or any other State (as regards compliance with customary international law), is entitled to invoke the responsibility of Senegal. The International Law Commission considered in its commentaries to Article 48 of the Articles on State Responsibility that “in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of Article 42”³⁷⁷.

5.17. However, Belgium is not simply a “State other than an injured State” within the meaning of Article 48 of the Articles on State Responsibility — even if this characterization is sufficient to invoke the responsibility of Senegal. The Belgian State is “affected by the breach in a

³⁷⁴Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.* (footnote 362). Article 42 provides:

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

³⁷⁵Reply by Belgium to Judge Cançado Trindade, 8 Apr. 2009, para. 11.

³⁷⁶*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 32, para. 33.

³⁷⁷ILC Yearbook, 2001, Vol. II, Part 2, p. 126, para. (2) of the commentary.

way which distinguishes it from the generality of other States to which the obligation is owed”³⁷⁸. On the one hand, the Belgian courts are actively seized of the H. Habré case as a result of the complaints filed in 2000; some of the victims are of Belgian nationality³⁷⁹. On the other hand, Belgium has formally requested Mr. Habré’s extradition on the basis of the *aut dedere aut judicare* obligation under the 1984 Convention and customary international law. Belgium therefore has a special interest in Mr. Habré being extradited or, failing that, tried in Senegal, or in other words, in Senegal complying with its international commitments.

119

5.18. For all these reasons, Belgium is entitled to invoke the responsibility of Senegal as an “injured State”. Although the international obligations violated by Senegal are owed to a group of States or to the international community as a whole, these violations have affected Belgium in particular³⁸⁰.

III. THE CONTENT OF SENEGAL’S RESPONSIBILITY

5.19. The internationally wrongful acts that are attributable to Senegal and involve its responsibility entail several consequences which are set out in the Articles on Responsibility of States for Internationally Wrongful Acts:

- cessation of the wrongful act in question if it is continuing³⁸¹;
- continued performance of the obligation breached³⁸²;
- reparation for the injury sustained by the injured State³⁸³.

³⁷⁸ *ILC Yearbook*, 2001, Vol. II, Part 2, p. 119, para. (12) of the commentary to Article 42.

³⁷⁹ Ann. C.11.

³⁸⁰ Art. 42 (b) (i) of the Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.* (footnote 362).

³⁸¹ Article 30 (a) of the Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.* (footnote 362). Article 30 provides:

Article 30
Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

³⁸² Article 29 of the Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.* (footnote 362). Article 29 provides:

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

³⁸³ Article 31, paragraph 1, of the Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.* (footnote 362). Article 31 provides:

Article 31
Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

120

5.20. Senegal has violated and continues to violate its conventional and customary international obligations, namely, on the one hand, Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and, on the other hand, the customary rules requiring States to combat impunity.

5.21. Inasmuch as these violations are ongoing, Senegal is obliged to *cease the wrongful act*. As the International Law Commission noted in its commentary to Article 30 of the Articles on State Responsibility:

“Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct.

.....

The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State’s obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.”³⁸⁴

5.22. In its Judgment in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court noted in this regard:

“[W]hen the Court has found that the conduct of a State is of a wrongful nature, and in the event that this conduct persists on the date of the judgment, the State concerned is obliged to cease it immediately. This obligation to cease wrongful conduct derives both from the general obligation of each State to conduct itself in accordance with international law and from the specific obligation upon States parties to disputes before the Court to comply with its judgments, pursuant to Article 59 of its Statute.”³⁸⁵

121

5.23. Senegal is thus obliged to *cease its violations* of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture, and its violation of the customary rule *aut dedere aut judicare*. Such cessation consists in the performance of the obligations by which Senegal is bound and by which, in accordance with Article 29 of the Articles on State Responsibility, it continues to be bound: “the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached”³⁸⁶.

5.24. Senegal must therefore discharge the obligations that are incumbent upon it. To that end, it is obliged promptly to submit the H. Habré case to its competent authorities for prosecution or, failing that, to extradite Mr. Habré to Belgium.

5.25. Belgium is aware of the fact that:

“[i]t is not necessary, and it serves no useful purpose as a general rule, for the Court to recall the existence of this obligation [to cease the internationally wrongful act] in the

³⁸⁴ ILC Yearbook, 2001, Vol. II, Part 2, p. 89, paras. (4) and (5) of the commentary.

³⁸⁵ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, para. 148.

³⁸⁶ ILC Yearbook, 2001, Vol. II, Part 2, p. 88, para. (2) of the commentary to Article 29.

operative paragraphs of the judgments it renders: the obligation incumbent on the State concerned to cease such conduct derives by operation of law from the very fact that the Court establishes the existence of a violation of a continuing character”³⁸⁷.

However, in view of the circumstances of this case, it is essential that the Court determine unambiguously that Senegal must cease the violation of Article 7, paragraph 2, and must perform this obligation promptly. Indeed, although the two Parties do not seem to disagree on the actual existence of the obligation — and the Note on the latest developments of 15 June 2010 is further confirmation of this³⁸⁸ — they have expressed differing views on the modalities for its performance³⁸⁹. It is therefore not enough to make a finding of a breach of an international legal obligation; Belgium requests the Court to declare that Senegal must effectively prosecute or extradite Mr. Habré to Belgium, as provided for by Article 7, paragraph 1, of the Convention against Torture and customary international law. In other words, it is not enough for Senegal to recognize that it must prosecute Mr. Habré; it must also prosecute him in actual fact and promptly, without pleading practical difficulties which cannot justify inaction by a State governed by the rule of law.

122

5.26. Regarding the violation of Article 5, paragraph 2, of the Convention against Torture, Senegal, in January 2007, took the necessary steps to bring its domestic law into conformity with the requirements of the Convention. The internationally wrongful act resulting from the inconsistency of its domestic law with the requirements of the Convention therefore ceased. In the circumstances, it is neither necessary nor expedient to require Senegal to cease the internationally wrongful act and to continue performance of the obligation breached. On the other hand, it remains essential that Senegal fulfil its obligation to prosecute or, failing prosecution, to extradite Mr. Habré to Belgium.

5.27. Moreover, Senegal is obliged to make reparation for any injury sustained by Belgium in order to “wipe out all the consequences of the illegal act”, including under Article 5, paragraph 2³⁹⁰. In Belgium’s opinion, the finding by the Court of the breaches attributable to Senegal constitutes *appropriate satisfaction*³⁹¹.

123

SUBMISSIONS

For the reasons set out in this Memorial, the Kingdom of Belgium requests the International Court of Justice 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

³⁸⁷*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, para. 148.

³⁸⁸See para. 1.63 above.

³⁸⁹*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, para. 48.

³⁹⁰*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

³⁹¹*Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 35. See also *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 508, para. 116; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 452, para. 319; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, paras. 463, 465 and 469; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, para. 204.

universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- (b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 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;
- (c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

- (a) by promptly submitting the Hissène Habré case to its competent authorities for prosecution;
or
- (b) failing that, by extraditing Mr. Habré to Belgium.

124

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

1 July 2010,

(Signed) Paul RIETJENS,
Agent of the Government
of the Kingdom of Belgium,
Director-General of Legal Affairs,
Federal Public Service for Foreign Affairs,
Foreign Trade and Development Co-Operation.

(Signed) Gérard DIVE,
Co-Agent of the Government
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Head of the International
Humanitarian Law Division,
Federal Public Service for Justice.
