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lundi 12 mars 2012 à 10 h 20

Monday 12 March 2012 at 10.20 a.m.

8 The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, pursuant to Article 43 *et seq*. of its Statute, to hear the oral arguments of the Parties in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*.

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc*. Mr. Serge Sur, chosen by Senegal, and Mr. Philippe Kirsch, chosen by Belgium, were both duly installed on 6 April 2009 as judges *ad hoc* in the case at the opening of the hearings on the Request for the indication of provisional measures submitted by Belgium.

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I shall now recall the principal steps of the procedure in this case.

On 19 February 2009, the Kingdom of Belgium filed in the Registry of the Court an Application instituting proceedings against the Republic of Senegal in respect of a dispute concerning "Senegal's compliance with its obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad, or to extradite him to Belgium for the purposes of criminal proceedings". Belgium bases its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, as well as on the conventional and customary international law relating to international crimes.

Belgium invokes, as bases for the jurisdiction of the Court, the declarations made under Article 36, paragraph 2, of the Statute, by Belgium on 17 June 1958 and by Senegal on 2 December 1985, and Article 30 of the Convention against Torture.

In its Application, Belgium contends that Senegal, where Mr. Habré has been living in exile since 1990, has taken no action on its repeated requests that the former President of Chad be prosecuted in Senegal, failing his extradition to Belgium, for acts characterized as including crimes of torture and crimes against humanity. Belgium explains that, following a complaint filed on 25 January 2000 by seven individuals and a non-governmental organization, the Association of Victims of Political Repression and Crime, Mr. Habré was indicted by the senior investigating

9 judge of the Dakar *Tribunal régional hors classe*, on 3 February 2000, for complicity in "crimes against humanity, acts of torture and barbarity" and placed under house arrest. Belgium adds that this indictment was dismissed by the *Chambre d'accusation* of the Dakar Court of Appeal on 4 July 2000 on the grounds that Senegalese law did not allow for the prosecution of crimes against humanity and that the Senegalese courts could not exercise jurisdiction in respect of acts of torture and barbarity committed by an alien outside Senegalese territory.

Belgium also states that, "[b]etween 30 November 2000 and 11 December 2001, a Belgian national of Chadian origin and Chadian nationals" filed similar complaints in the Belgian courts. Belgium notes that, since the end of 2001, its competent legal authorities have requested numerous investigative measures of Senegal, and in September 2005 issued an international arrest warrant against Mr. Habré on which the Senegalese courts did not see fit to take action. At the end of 2005, according to Belgium, Senegal passed the case on to the African Union. Belgium adds that, in February 2007, Senegal decided to amend its Penal Code and Code of Criminal Procedure so as to include "the offences of genocide, war crimes and crimes against humanity"; however, it points out that the Respondent has cited financial difficulties preventing it from bringing Mr. Habré to trial.

Belgium contends that

> "Senegal's failure to prosecute Mr. H[issène] Habré, if he is not extradited to Belgium to answer for the acts of torture that are alleged against him, violates the Convention against Torture of 1984, in particular Article 5, paragraph 2, Article 7, paragraph 1, Article 8, paragraph 2, and Article 9, paragraph 1".

It adds that

> "Senegal's failure to prosecute Mr. H[issène] Habré, or to extradite him to Belgium to answer for the crimes against humanity which are alleged against him, violates the general obligation to punish crimes under international humanitarian law which is to be found in numerous texts of secondary law . . . and treaty law".

On 19 February 2009, after filing its Application, Belgium also submitted a Request for the indication of provisional measures on the basis of Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court. By an Order of 28 May 2009, the Court, having heard the

10 Parties, found that "the circumstances, as they [then] present[ed] themselves to the Court, [were]

not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

By an Order of 9 July 2009, the Court fixed 9 July 2010 and 11 July 2011, respectively, as the time-limits for the filing of the Memorial of Belgium and the Counter-Memorial of Senegal. The Memorial of Belgium was duly filed within the time-limit so prescribed.

By an Order of 11 July 2011, the President of the Court, at the request of Senegal, extended to 29 August 2011 the time-limit for the filing of the Counter-Memorial. That pleading was duly filed within the time-limit thus extended.

At a meeting held by the President of the Court with the Agents of the Parties on 10 October 2011, the Parties indicated that they did not consider a second round of written pleadings to be necessary and that they wished the Court to fix the date of the opening of the hearings as soon as possible. The Court considered that it was sufficiently informed of the arguments on the issues of fact and law on which the Parties relied and that the submission of further pleadings did not appear necessary. The case thus became ready for hearing.

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Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and annexed documents would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings without their annexes will be put on the Court's website from today.

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I note the presence at the hearing of the Agents, counsel and Advocates of the two Parties. In accordance with the arrangements regarding the organization of the procedure which have been decided by the Court, the hearings will comprise a first and a second round of oral argument.

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11 In this first sitting of the first round of oral argument, Belgium may, if so required, avail itself of a short extension of time beyond 1 p.m., in view of the time taken up by the earlier public sitting today. The first round of oral argument will close on Friday 16 March 2012. The second round of oral argument will begin on Monday 19 March 2012 and will close on Wednesday 21 March 2012.

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The Kingdom of Belgium, which is the Applicant in the case, will be heard first. I shall now give the floor to Mr. Paul Rietjens, Agent of the Kingdom of Belgium. You have the floor, Sir.

Mr. RIETJENS:

1. INTRODUCTION

1. Mr. President, Members of the Court, it is a great honour to appear before you again, on behalf of the Kingdom of Belgium. As I indicated at the hearings on the request for the indication of provisional measures, Belgium has the greatest respect for the Court and the system of international justice in which it exercises its functions.

2. Allow me at the outset to recall that Belgium maintains good relations with the Republic of Senegal. The institution of these proceedings does not in any way constitute an unfriendly act and should not be perceived as casting doubt on the quality of our bilateral relations. Our two countries have long been good partners, maintaining relations of friendship and co-operation. The friendly links between us do not, however, rule out the possibility of differences. But they do enable us to discuss these differences openly so as to find solutions in line with international law.

3. It is against this background, therefore, that Belgium appears before you today. We have no choice but to return to the Court to ensure compliance with the obligation to prosecute, if not extradite, and thus to combat impunity for the most serious crimes of international law.

12 4. It is also on behalf of the victims of these crimes, some of whom are Belgian nationals, that Belgium has decided to bring this case before your Court. These victims deserve to see the

person they accuse of these crimes brought to justice, even after the lapse of so much time, or perhaps *precisely on that account*.

5. I need not dwell at length on the background to this case. Hissène Habré led Chad for eight years, between 1982 and 1990. During that period, tens of thousands of people were arrested by the government forces, killed or incarcerated as political prisoners. Many of them were tortured; grotesquely tortured. Mr. President, Members of the Court, I will spare you the harrowing details of those tortures. The final report of the National Commission of Enquiry on the crimes and misappropriations committed by ex-President Habré, his accomplices and/or accessories, set up in the early 1990s in Chad, which refers to more than 40,000 victims[1], speaks for itself.

6. In December 1990, Hissène Habré was overthrown by his opponent, Mr. Idriss Déby Itno, and sought refuge in Senegal where he has resided ever since. In January 2000, victims of the atrocities committed in Chad under the Hissène Habré régime instituted criminal proceedings against him in Senegal. Other victims filed complaints in Belgium between November 2000 and December 2001. In a few moments the Co-Agent will explain to the Court how these proceedings unfolded. To summarize, more than 12 years have elapsed between January 2000 and the opening of these hearings, and we are still no closer to the organization of proceedings in Senegal against the person accused of bearing responsibility for these crimes committed on such a massive scale. Indeed, despite the promises made by Senegal to try Hissène Habré, not the slightest progress has been made in organizing his trial in Senegal, notwithstanding the many efforts made by Belgium, the African Union, the European Union and others to assist and support Senegal in that endeavour.

7. Mr. President, the case that the Court has to decide is not, however, as we so often hear, the "Hissène Habré case". This Court is not required to adjudicate on the events that took place in

13 Chad between June 1982 and December 1990. The importance of this case goes far beyond the particular circumstances linked to the criminal proceedings against Hissène Habré. This case, between Belgium and Senegal, raises fundamental issues with regard to the solemn obligations assumed by the States Parties to the United Nations Convention against Torture and in the context

[1] *Les crimes et détournements commis par l'ex-Président Habré, ses co-auteurs et complices*, [The crimes and misappropriations committed by ex-President Habré, his accomplices and/or accessories], Report of the National Commission of Enquiry of the Chadian Ministry of Justice, L'Harmattan, Paris, 1993, p. 97.

of general international law. This case concerns the fight against impunity for "the most serious crimes of concern to the international community as a whole"[2]. This fight cannot be encapsulated in a slogan, but requires concrete action under international law. It is not enough for States to ratify the Convention against Torture and make high-sounding speeches about their determination to meet their obligations under the law. What counts, in the fight against impunity, is action. Central to such action is the effective and efficient implementation of the obligation to prosecute the perpetrators of the most serious crimes.

8. Following your Order of 28 May 2009 on the Belgian request for the indication of provisional measures, we entertained great hope, indeed, we expected the two Parties to be able to resolve their dispute concerning the obligation to prosecute if not to extradite Hissène Habré. In this connection, Belgium attached great importance to the solemn declarations made by the Agent of Senegal, Ambassador Tidiane Thiam, on which the Order is based. With the generous and highly appreciated assistance of the African Union, the European Commission and a series of third States we thought that it would have been possible rapidly to make the necessary arrangements for the initiation of criminal proceedings and the organization of Hissène Habré's trial in Senegal. Belgium has in fact always been convinced that bringing Hissène Habré before the Senegalese courts was the most appropriate solution. That is, moreover, the solution expressly envisaged in the Convention against Torture.

9. It is true that the decision taken in November 2010 by the Court of Justice of the Economic Community of West African States (ECOWAS) added a layer of complexity to the case, but this does not constitute an insuperable obstacle to its conclusion. The African Union made

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every effort to work out an acceptable solution in the light of both that decision and the obligation to prosecute, failing extradition. Nevertheless, in May 2011, discussions with the African Union aimed in the direction of that solution, despite having apparently started on the right track, were postponed *sine die* at the request of Senegal.

10. Mr. President, Members of the Court, I wish here to pay a particular tribute to the role of the African Union. The African States, in the context of the African Union, are firmly attached to

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[2]Rome Statute of the International Criminal Court, preamble.

the rule of law and to the principle that there can be no impunity for torture, crimes against humanity and other serious crimes under international law. In this spirit, the institutions of the African Union have played a highly positive role in seeking to ensure that the trial of Hissène Habré is organized within a reasonable period of time. Regrettably, however, all these efforts have proved fruitless.

11. Months later, years later, as we find ourselves before your Court today, we regret to say that the Senegalese authorities have failed to take the necessary measures to bring Hissène Habré to justice. The alternative route of extradition to Belgium has not proved any more fruitful. For reasons that remain inexplicable, the Senegalese authorities have repeatedly failed to move forward on Belgium's numerous extradition requests. No progress has been made since the day you issued your order on provisional measures, nearly three years ago. To quote a well-known saying: "Justice delayed is justice denied".

12. Mr. President, Members of the Court, the crimes at issue were committed 20 or 30 years ago. For decades, numerous victims of these crimes have been waiting to be finally awarded the justice that is due to them. Since January 2000, they have sought untiringly to have proceedings instituted with a view to enforcing their right to justice, with no concrete result. But these victims are growing old, and the inexorable passage of time has already seen many of them pass away. The survivors, for their part, despair of ever being able to reach closure on these heinous crimes. The present proceedings offer the hope of fulfilment, in the near future, of the victims' desire for justice. It is therefore our fervent wish that there will be no further delay in the prosecution of Hissène Habré in Senegal or his extradition to Belgium.

15 13. At this time of our appearance before you, it is clear that Senegal has failed and is still failing to comply with its international obligations under the Convention against Torture and other relevant rules of international law. The Convention against Torture requires any State Party in whose territory a person alleged to have committed acts of torture is present to take certain specific measures against him and, in particular, to submit the case to its competent authorities for the purpose of prosecution, unless it extradites that person to the State which so requests. The same is true of other rules of international law concerning the fight against impunity. Despite its commitments, however, Senegal has not taken the appropriate measures. Consequently, according

to Belgium, Senegal is in violation of its obligations and must assume international responsibility therefor. Belgium therefore asks the Court to adjudge that Senegal, by failing to comply with its international obligations, has incurred international responsibility and must immediately put an end to its internationally wrongful acts, either by submitting the Hissène Habré case file to its competent authorities for prosecution, or by extraditing Hissène Habré without further delay to Belgium which, on several occasions and in conformity with Senegalese law, has requested such extradition from the Senegalese authorities. Only in this way can we preserve the principle that there can be no impunity for the most serious crimes which affect the international community as a whole.

14. Mr. President, Members of the Court, this is an important case. It is important to the victims and their close relatives. It is important to the international community, which increasingly and with growing determination emphasizes the need to combat impunity, and which is following the present case closely. And finally this case is particularly important to Belgium since, at the request of certain victims, some of whom are Belgian nationals, and their families, the Belgian courts have instituted proceedings against Hissène Habré; proceedings that culminated in 2005 — that is to say, nearly seven years ago already — in a preliminary request for his extradition. The Belgian courts have also offered international judicial co-operation to Senegal as a way of facilitating the conduct of criminal proceedings in Senegal if the latter chooses that option to fulfil its international obligations. In short, the dispute between Belgium and Senegal is of major

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significance, as it relates to the respective obligations of these States in the context of the fight against impunity for perpetrators of crimes under international law (crimes of torture, crimes of genocide, crimes against humanity, war crimes); this concern is shared by the whole of the international community.

15. Mr. President, Members of the Court, in this first round, our pleadings will be structured as follows.

16. First, we shall describe the facts most relevant to this case, which include the judicial proceedings initiated in Belgium and in Senegal, as well as before international bodies and, in particular, before the Committee against Torture which, as you know, has found that Senegal

violated its obligations under the Convention against Torture. The Co-Agent, Mr. Gérard Dive, and Professor Eric David, will each in turn present this first part of our pleadings.

17. Sir Michael Wood will then deal with the jurisdiction of the Court under Article 30 of the Convention against Torture and the admissibility of Belgium's Application.

18. Lastly, in today's final address, Professor Eric David will examine the issue of the Court's jurisdiction on the basis of the declarations made by each of the Parties under Article 36, paragraph 2, of the Statute of the Court.

19. Tomorrow morning, we shall resume our presentation. Sir Michael Wood will examine matters relating to the Convention against Torture. He will deal with the specific obligations owed to Belgium under the Convention, obligations on which, in our view, Senegal has taken no action, or at least no timely or satisfactory action.

20. Professor Eric David will then deal with the violation by Senegal of the obligations owed to Belgium under general international law.

21. Subsequently, Mr. Daniel Müller will explain that the various justifications put forward by Senegal in its Counter-Memorial, including financial and other difficulties and the affirmation of its desire to comply with its obligations, are not such as to wipe out Senegal's international responsibility.

22. Finally, to conclude this first round of Belgium's pleadings, I shall briefly explain, from the standpoint of international responsibility, the consequences that must be drawn by Senegal by reason of its violation of its international obligations. I shall end with a few words on Belgium's submissions and the remedies requested from the Court.

23. I thank the Court for its kind attention and would ask you, Mr. President, to be good enough to give the floor to our Co-Agent, Mr. Gérard Dive.

The PRESIDENT: Thank you, Mr. Rietjens. I now give the floor to Mr. Gérard Dive, Co-Agent of Belgium. You have the floor, Sir.

Mr. DIVE:

2. THE FACTS: PROCEEDINGS INSTITUTED IN SENEGAL AND IN BELGIUM

1. Mr. President, Members of the Court, I have the honour to continue the summary of the facts in the present case. As the Agent has already stated, this presentation will examine the facts concerning the proceedings instituted against Hissène Habré in both Senegal and Belgium, including the requests made by Belgium to the Senegalese authorities for the extradition of Mr. Habré.

2. This presentation is not intended to go into details systematically where the Court is already aware of them[3]. However, as these sometimes complex facts are fundamentally important in the present case, Belgium has drawn up a list setting out the most relevant in chronological order, so that it is easier to follow their development. You will find this list at tab 1 in the judges' folders. For now, therefore, I will confine myself to recalling the most important facts.

3. Mr. President, my presentation will be divided into two sections. The first will focus on the complaints filed in Senegal against Hissène Habré and the proceedings instituted by the Senegalese authorities on that basis (I.). The second section will look at the complaints filed in Belgium against Mr. Habré and the action taken by the Belgian authorities as a result. I will be particularly concentrating on the key events in the development of the dispute between Belgium and Senegal, which lie at the heart of the present case (II.).

18 4. Before I begin, however, and for the sake of clarity, I would like to give the Court a brief summary of what the concepts of "investigating judge" and complaint with "civil-party application" cover in Belgian law and also Senegalese law. In the Belgian legal system, which is a civil law system by tradition, the investigating judge is a magistrate who is specially appointed to conduct an "investigation". The investigation consists of all the investigative measures carried out in order to identify the perpetrators of crimes or other offences, collect evidence and take steps to bring the case before the courts, if appropriate. A civil-party application is when a person who

[3]Application instituting Proceedings by the Kingdom of Belgium against the Republic of Senegal, 16 February 2009, Memorial of Belgium ("MB"), Vol. II, Ann. C.7; MB of 1 July 2010; letters from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 16 July 2009, 23 November 2010, 21 March 2011, 29 June 2011, 18 July 2011, 8 September 2011 and 23 January 2012.

claims to have been injured as a result of a crime or other offence files a complaint with an investigating judge, resulting in the initiation of criminal proceedings[4]. This procedure is familiar in many other countries with a Romano-Germanic legal system. It enables the victim to participate in the proceedings by being given a hearing and to seek damages for the injury caused by the offence concerned.

I. Complaints filed against Hissène Habré before the Senegalese authorities

5. Mr. President, I would thus like to begin my summary with the complaints filed against Hissène Habré in Senegal by persons who consider themselves to be victims of crimes committed or ordered by Mr. Habré while he was President of Chad. I will present the facts relating to the complaint filed in 2000 (A.), followed by those concerning the second complaint, in 2008 (B.).

A. Complaint filed in 2000

6. On 25 January 2000, more than 12 years ago, the first complaint with civil-party application was filed in Senegal against Hissène Habré by eight complainants. They considered themselves to be victims of crimes against humanity, crimes of torture, "acts of barbarity" and forced disappearances. Further to that complaint, on 3 February 2000 an investigating judge in Dakar indicted Mr. Habré for complicity in "crimes against humanity, acts of torture and barbarity". The investigating judge released him pending trial and placed him under house arrest[5]. On 18 February 2000, Mr. Habré reacted to the indictment by filing an application for annulment of

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the proceedings against him on the ground that the Senegalese courts did not have jurisdiction, in view of the lack of legal justification and expiry of the time-limit for prosecution[6].

7. On 4 July 2000[7], the Dakar Court of Appeal dismissed the indictment against Mr. Habré[8] on the ground that the Senegalese courts did not have jurisdiction to adjudicate on the facts of the

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[4]Belgian Code of Criminal Procedure, Article 63.

[5]MB, Vol. II, Ann. D.2. (CMS, p. 7, para. 16: "releasing him pending trial, under court supervision").

[6]Judgment No. 135 of 4 July 2000 of the *Chambre d'accusation* of the Dakar Court of Appeal, MB, Vol. II, Ann. D.3., corrected.

[7]The date of 4 July 2001 given in the Counter-Memorial of Senegal ("CMS") (p. 7, para. 18) appears to be a clerical error.

[8]Judgment No. 135 of 4 July 2000 of the *Chambre d'accusation* of the Dakar Court of Appeal, MB, Vol. II, Ann. D.3., corrected.

case[9]. Regarding crimes of torture, the Court also found that the Senegalese legislature had failed to comply with Article 5 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which I will refer to from now on as the Convention against Torture. Article 5 requires the States Parties to take the measures necessary to establish the jurisdiction of their courts over the offences referred to in Article 4 of the Convention.

8. The judgment of the Court of Appeal was confirmed by the Senegalese Court of Cassation on 20 March 2001[10]. That decision, which was not open to appeal, ended the victims' hopes — at that time — of seeing Hissène Habré brought to trial in Senegal.

B. Complaint filed in 2008

9. I will turn now to the second complaint filed in Senegal. As a result of legislative amendments made in 2007 and constitutional amendments adopted in 2008, finally introducing into Senegalese law the provisions necessary to establish the jurisdiction of the Senegalese courts, particularly for acts of torture — Professor Eric David will be coming back to these amendments — a fresh complaint for crimes against humanity and acts of torture was filed by fourteen persons on 16 September 2008 in Dakar[11].

20 10. To date, as far as we know, no investigative proceedings have been instituted against Mr. Habré either on the basis of this new complaint, or by the prosecuting authorities of their own motion, in flagrant breach of Senegal's international obligations.

11. As we have seen, therefore, the complaint of 2000 could not result in prosecution because the Senegalese courts lacked jurisdiction, and the complaint of 2008 has not, as far as we know, led to any judicial action.

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[9]Judgment No. 135 of 4 July 2000 of the *Chambre d'accusation* of the Dakar Court of Appeal, MB, Vol. II, Ann. D.3., corrected.

[10]The date of 20 November 2001 given in the CMS (p. 7, para. 19) appears to be a clerical error; Judgment No. 14 of the Senegalese Court of Cassation, *première chambre statuant en matière pénale*, of 20 March 2001, MB, Vol. II, Ann. D.4.

[11]Complaint filed with the Public Prosecutor at the Dakar Court of Appeal, 16 September 2008, MB, Vol. II, Ann. D.5.

II. Complaints filed against Hissène Habré in Belgium

12. Mr. President, Members of the Court, I now come to the second section of my presentation, which covers the judicial proceedings instituted against Hissène Habré in Belgium, and the extradition requests made to Senegal. The relevant facts will be presented in chronological order and will cover two periods. First, the facts which occurred from the time when the first complaint was filed in Belgium in 2000 up to the institution by Belgium of the present proceedings before the Court in 2009 (A.). Second, the facts which have occurred from that date to the present (B.).

D. From 2000 to February 2009

13. Mr. President, the facts relating to proceedings which occurred between the filing of the first complaint in Belgium in 2000 and Belgium's Application instituting proceedings before this Court in 2009 revolve around a pivotal moment. This was on 19 September 2005, when a Belgian investigating judge issued an international arrest warrant against Hissène Habré, followed by a first extradition request. I will therefore begin by focusing on the facts which occurred between 2000 and that pivotal date (i). I will then describe the facts which occurred between the pivotal date in 2005 and the date when the present proceedings were brought before the Court (ii).

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(i) The facts which occurred between 30 November 2000 and 19 September 2005

14. On 30 November 2000, a Belgian national of Chadian origin filed a complaint with civil-party application with a Belgian investigating judge against Hissène Habré for, among other things, serious violations of international humanitarian law, crimes of torture and crimes of genocide.

15. Between 30 November 2000 and 11 December 2001, another 20 persons filed complaints with civil-party applications against Mr. Habré before the Belgian courts for the same type of acts. Those complaints were joined with the first. The nationalities of the 21 complainants when they filed their successive complaints were as follows: one Belgian of Chadian origin, two persons with dual Belgian-Chadian nationality and eighteen Chadians. The three Belgian or Belgian-Chadian

complainants had acquired Belgian nationality well before the date on which their complaints were filed with the Belgian courts[12].

16. Contrary to Senegal's assertions[13], these are not the same complainants as those who filed complaints in 2000 before the Senegalese courts and who, disappointed with the judgment of the Senegalese Court of Cassation confirming the invalidation of the proceedings against Mr. Habré, then allegedly turned to the Belgian courts. A careful reading of the 2001 judgment of the Senegalese Court of Cassation and of the Belgian arrest warrant shows this to be the case[14]. The Co-Agent of Senegal also admitted that this was so in the pleadings concerning Belgium's request for the indication of provisional measures[15].

22 17. Mr. President, Members of the Court, the facts set out in detail in the international arrest warrant are extremely serious[16]. I will cite just three of those it describes, since it is important to understand what is really at stake in the present case when we talk about combating impunity. Mr. Aganaye was arrested in May 1989 by soldiers of Mr. Habré's régime; he was transferred to the "piscine", an underground prison, where he was subjected to a brutal and violent interrogation for over three hours. He would be released in December 1989[17]. Mr. Garkete Baïnde saw all the members of his family die or disappear. On 2 October 1984, his paternal uncle was "tortured first in front of his family by Habré's army rabble and then in the yard of the Telecommunications School in Sarh (. . .) where they finished him off. The perpetrators kept his body until it had fully decomposed"[18]. In 1985 his cousin was "very seriously injured by Habré's militia. They

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[12]International arrest warrant *in absentia*, sheet 14, para. 2.3.2.2, MB, Vol. II, Ann. C.1.

[13]CMS, 23 August 2011, p. 8, para. 20.

[14]The seven natural persons who filed complaints in Senegal were called Suleymane Guengueng, Zakaria Fadoul Khidir, Issac Haroun Abdallah, Younous Mahadjir, Samuel Togoto Lamaye, Ramadane Souleymane and Valentin Neatobet Bidi (Judgment No. 14 of 20 March 2001 of the Senegalese Court of Cassation, *première chambre statuant en matière pénale*, MB, Vol. II, Ann. D.4). The 21 persons who filed complaints in Belgium were: A. Aganaye, R. Dralta, N'Garkete Baïnde Djimandjoumadji, Hadje Kadjidja Daka, Ismael Hachim, Koumandje Gabin, Sabadet Totodet, Aiba Adam Harifa, Aldoumngar Mabaije Boukar, Mahamat Abakar Bourdjo, Clement Abaifouta, Mariam Abderaman, Adimatcho Djamal, Bichara Djibrine, Bechir Bechara Dagachene, Ibrahim Kossi, Souleymane Abdoulaye Tahir, Haoua Brahim, Masrangar Rimram, Mahamat Nour Dadji and Bassou Zenaba Ngolo (international arrest warrant *in absentia*, MB, Vol. I, Ann. C.1).

[15]CR 2009/9, 6 April 2009, p. 24, paras 9-10 (Kandji).

[16]International arrest warrant *in absentia*, sheet 14, para. 1.3, MB, Ann. C.1, Application instituting proceedings by the Kingdom of Belgium against the Republic of Senegal, 16 February 2009, Ann. 3, p. 36-48, MB, Vol. II, Ann. C.7.

[17]*Ibid.*, p. 38, para. 1.3.1.

[18]*Ibid.*, p. 40, para. 1.3.3.

shamelessly left him to carry his own guts to a small village, where he passed away"[19]. Mr. Gabin was arrested on 12 July 1987. "He alleges that he was tortured by the DSD many times and was subjected to the "Arbatachar" method of torture and torture by sticks and that he had match burns all over his body"[20].

18. Mr. President, at the time when the complaints were filed, the Belgian courts' jurisdiction over them was based on the Law on the punishment of serious violations of international humanitarian law of 1993/1999[21]. This law referred to crimes of international law over which it gave the Belgian courts jurisdiction, irrespective of where the acts were perpetrated and the nationality of the perpetrator or the victims. That law was amended by the law of 5 August 2003[22]. Under Article 29 of that law, the Belgian courts continue to have jurisdiction

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over complaints having a particular connection with Belgium, especially where the case in question had been the subject of an investigation on the date when the law came into force and provided that at least one complainant had Belgian nationality. It is on that basis that Belgium wishes to exercise its jurisdiction to try Hissène Habré.

19. As a result of the filing of those complaints, numerous investigative measures were carried out both in Belgium and in other countries. These included a letter rogatory of September 2001 addressed to the Senegalese authorities[23], seeking to obtain a copy of the records from the unsuccessful proceedings brought against Mr. Habré the previous year in Senegal. The Senegalese authorities forwarded the documents requested to the Belgian authorities in November 2001[24].

20. A further international letter rogatory was addressed to Chad. It sought, *inter alia*, to obtain a hearing of presumed victims and witnesses and the forwarding of documents from the

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[19]International arrest warrant *in absentia*, p. 40, para. 1.3.3.

[20]*Ibid.*, p. 42, para. 1.3.4.3; English translation, p. 43.

[21]Law of 16 June 1993 on the punishment of serious violations of international humanitarian law, *Moniteur belge* (Belgian Official Gazette), 23 June 1993, pp. 9286 and 9287.

[22]Law of 5 August 2003 on serious violations of international humanitarian law, *Moniteur belge*, 7 August 2003, pp. 40506-40515.

[23]Note Verbale of 10 October 2001 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.1.

[24]Complaints, civil-party applications, order to place Hissène Habré under house arrest of 3 February 2000, judgments of the *Chambre d'accusation* of the Dakar Court of Appeal of 4 July 2000 (MB, Vol. II, Ann. D.3, corrected) and of the Court of Cassation of Senegal of 20 March 2001 (MB, Vol. II, Ann. D.4); MB, p. 18, para. 1.23.

National Committee of Enquiry of the Chadian Ministry of Justice, which the Agent has just mentioned. This letter rogatory was executed in Chad between 26 February and 8 March 2002[25].

21. On 7 October 2002, in response to a letter from the Belgian investigating judge, the Chadian Ministry of Justice confirmed that any jurisdictional immunity which Mr. Habré had enjoyed as a former Head of State had been lifted in 1993[26].

22. A large number of other investigative measures were undertaken in Belgium as a result of these two letters rogatory, including the examination of the complainants and several witnesses and the analysis of a considerable number of documents forwarded by the Chadian authorities in execution of the letter rogatory I referred to a moment ago. Overall, these investigative measures

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generated 27 binder files of documents, showing the importance which the Belgian courts attached to establishing the truth and the fact that, despite the complex nature of the case, the Belgian judicial record has already reached an advanced stage.

23. On 19 September 2005, the famous pivotal date, after four years of investigations, the Belgian judge responsible for the case, Mr. Daniel Fransen — currently the pre-hearing judge at the Special Tribunal for Lebanon — issued an arrest warrant, called an "international arrest warrant *in absentia*", against Hissène Habré as the "perpetrator or co-perpetrator" of acts that may be classified, in Belgian law and in international law, in particular, as crimes of torture and crimes of international humanitarian law[27]. This arrest warrant led to four successive extradition requests, which we will come back to later.

(ii) International arrest warrant, first extradition request and related consequences: 19 September 2005 to 19 February 2009

24. On 19 September 2005, then, the arrest warrant was circulated by Interpol to Senegal in the form of a red notice. In accordance with practice at Interpol, of which both Belgium and

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[25]Application instituting proceedings by the Kingdom of Belgium against the Republic of Senegal, 16 February 2009, para. 4, Ann. 3, MB, Vol. II, Ann. C.7; MB, p. 18, para. 1.24 and Vol. II, Ann. C.1 (international arrest warrant *in absentia*, sheet 14).

[26]Application instituting proceedings by the Kingdom of Belgium against the Republic of Senegal, 16 February 2009, para. 5, Ann. 4, MB, Vol. II, Ann. C.7; response from the Minister of Justice of Chad lifting any possible immunity of Mr. Habré, 7 October 2002, MB, Vol. II, Ann. C.5.

[27]MB, p. 19-20, paras. 1.28-1.30.

Senegal are members[28], a red notice arrest warrant serves as a request for provisional arrest with a view to extradition.

25. Three days later, on 22 September 2005, Belgium sent a Note Verbale to the Senegalese authorities seeking Mr. Habré's extradition[29]. In accordance with practice in Senegal and its extradition legislation[30], the original of the arrest warrant and a copy of the laws applicable to the offences indicted were attached to this Note Verbale. The Senegalese authorities have thus had the original of the international arrest warrant issued by the Belgian investigating judge since September 2005. This fact is important, as we shall see.

25 26. On 16 November 2005, in the absence of any reaction from the Senegalese authorities, Belgium asked Senegal what action it was taking on its extradition request[31].

27. On 25 November 2005, the *Chambre d'accusation* of the Dakar Court of Appeal ruled on the request for extradition. I should point out here that according to the Senegalese law on extradition, which is at tab 8 in your folder, the *Chambre d'accusation* is required to deliver an opinion on every request for extradition. Where its opinion is favourable, extradition may be authorized by decree. An unfavourable opinion, however, means that the executive must refuse extradition. In the present case, the *Chambre d'accusation* did not issue an opinion, favourable or otherwise. It simply declared that it did not have jurisdiction to adjudicate on the lawfulness of the proceedings and the validity of the arrest warrant against a Head of State, and it invited the Office of the Public Prosecutor to make a better case[32]. In reaching its decision, the *Chambre d'accusation* applied to Mr. Habré, the former President of Chad, provisions of the Senegalese constitution and legislation conferring national jurisdictional immunity on the Senegalese Head of State. Furthermore, it considered that Belgium's request related to acts committed by a Head of State in the performance of his duties, and stated that Mr. Habré, the former Head of a foreign

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[28]Belgium: 7 September 1923; Senegal: 4 September 1961.

[29]Note Verbale of 22 September 2005 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.2.

[30]Senegalese Law No. 71-77 of 28 December 1971 on extradition, tab 8 in the judges' folder.

[31]Note Verbale of 16 November 2005 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.3.

[32]Judgment No. 138 of the *Chambre d'accusation* of the Dakar Court of Appeal of 25 November 2005, MB, Vol. II, Ann. B.6., corrected.

State, should have jurisdictional immunity, and that "this privilege is intended to survive the cessation of his duties as President of the Republic, whatever his nationality . . ."[33]. Yet a copy of the letter by which Chad confirmed, if necessary, that Mr. Habré's immunity had been lifted as early as 1993 was among the documents forwarded to the Senegalese authorities by Interpol. Moreover, the arrest warrant on which the request for extradition is based expressly refers to this letter on the lifting of his immunity[34].

28. On 30 November 2005, having discovered that the *Chambre d'accusation* had delivered a ruling, Belgium for the third time sought an official response to its extradition request, together with clarification of the Senegalese Government's position following the decision of the Dakar Court of Appeal[35].

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29. On 7 December 2005[36] Senegal forwarded to Belgium a communiqué from the Ministry of Foreign Affairs "on the Hissène Habré case"[37]. Mr. President, the first sentence of the communiqué speaks volumes: "Senegal is in no way directly involved in the Hissène Habré Case". It states that it had decided to submit the case, "which is not a Senegalese case but an African case", to the next African Union Summit of Heads of State, scheduled for January 2006, which should, according to Senegal, "indicate which court has jurisdiction to determine this case"[38].

30. On 23 December 2005 Senegal replied to the previous three Notes Verbales from Belgium and stated that "the judgment of the *[Chambre d'accusation]* puts an end to the judicial stage of the proceedings". It also informed Belgium that it had decided to transfer the "Hissène Habré records" to the African Union, saying that that decision "will . . . have to be

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[33]Judgment No. 138 of the *Chambre d'accusation* of the Dakar Court of Appeal of 25 November 2005, MB, Vol. II, Ann. B.6., corrected.

[34]International arrest warrant *in absentia*, sheet 16, para. 2.4.3., MB, Ann. C.1.

[35]Note Verbale of 30 November 2005 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.4.

[36]Note Verbale of 7 December 2005 from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, MB, Vol. II, Ann. B.5.

[37]Communiqué of 27 November 2006 *(sic)* from the Ministry of Foreign Affairs "on the Hissène Habré case", attached to the Note Verbale of 7 December 2005 from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, MB, Vol. II, Ann. B.5.

[38]*Ibid.*

considered as reflecting the position of the Senegalese Government pursuant to the judgment of the *[Chambre d'accusation]*"[39].

31. On 11 January 2006 Belgium noted the transfer of the case to the African Union and once again asked Senegal to notify it of its final decision on Belgium's request for extradition[40]. It expressly referred to the Convention against Torture to reiterate its interpretation of the obligation *aut dedere aut judicare*, but also to place this new approach within the framework of the negotiation procedure covered by Article 30 of the Convention against Torture.

27 32. In the absence of a response to this latest Note Verbale, Belgium sent a further Note Verbale on 9 March 2006[41]. Again within the framework of Article 30 of the Convention against Torture, it asked Senegal how it should interpret the transfer of the case to the African Union, wondering whether it meant that Senegal no longer intended to extradite Mr. Habré to Belgium or to have him judged by the competent Senegalese judicial authorities.

33. In view of the importance of the case, the sending of these Notes Verbales was systematically accompanied by personal approaches from the Belgian Embassy in Dakar to the Senegalese authorities, sadly without success.

34. As almost another two months had gone by without any response from Senegal, the Belgian Department of Foreign Affairs summoned the Senegalese diplomatic authorities in Brussels for talks, at which they were handed a further Note Verbale[42]. This Note Verbale, dated 4 May 2006, noted the absence of an official reaction by the Senegalese authorities to Belgium's previous approaches. Belgium reiterated its interpretation of the obligation "aut dedere aut judicare" and referred to the possibility of recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture if the dispute between the two States could not be resolved by negotiation.

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[39]Note Verbale of 23 December 2005 from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, MB, Vol. II, Ann. B.6.

[40]Note Verbale of 11 January 2006 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.7., tab 4.1 in the judges' folder.

[41]Note Verbale of 9 March 2006 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.8.

[42]Note Verbale of 4 May 2006 from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels, MB, Vol. II, Ann. B.9.; tab 4.2 in the judges' folder.

35. On 9 May 2006 the Senegalese Embassy in Brussels stated, without further explanation, that Senegal's Notes Verbales of 7 and 23 December 2005 had replied to Belgium's request for extradition[43]. It also stated that by transferring the Habré case to the African Union Summit, Senegal "is acting in accordance with the spirit of the principle of 'aut dedere aut judicare'" provided for in Article 7 of the Convention against Torture.

36. On 20 June 2006, noting the impasse reached in the written and verbal bilateral exchanges on the interpretation and application of a number of key provisions of the Convention against Torture, Belgium stated in a Note Verbale that the attempts to negotiate with Senegal since
28 November 2005 had failed, and it proposed to Senegal that they should use the arbitration procedure[44].

37. Eight months later, on 20 and 21 February 2007, without making any reference whatsoever to the dispute noted by Belgium, Senegal informed it that it had just amended its legislation in order to close the legal loophole which had prevented the Senegalese courts from hearing the Habré case[45]. Furthermore, Senegal announced that a Working Group had been set up charged with defining the conditions and procedures necessary for prosecuting and judging Mr. Habré, but stated that the trial required substantial funds which it could not "mobilize without the assistance of the International community"[46]. It also stressed the fact that these legislative amendments and the creation of the Working Group were to be seen solely in connection with its execution of the political mandate conferred on Senegal by the African Union.

38. On 8 May 2007, the Belgian authorities once again questioned the Senegalese authorities about the dispute concerning the interpretation and application of the obligation *aut dedere aut judicare*, which Belgium had systematically highlighted since January 2006, and asked in particular whether the new legislative provisions would allow Mr. Habré to be tried in Senegal and in what

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[43]Note Verbale of 9 May 200[6] from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, MB, Vol. II, Ann. B.10.; tab 4.3 in the judges' folder.

[44]Note Verbale of 20 June 2006 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.11.; tab 4.4 in the judges' folder.

[45]Note Verbale of 20 February 2007 from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, MB, Vol. II, Ann. B.12 and Note Verbale of 21 February 2007 from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar, MB, Vol. II, Ann. B.13.

[46]Note Verbale of 21 February 2007 from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar, MB, Vol. II, Ann. B.13.

time periods[47]. Finally, Belgium offered its assistance to the Senegalese courts under the relevant rules on international judicial co-operation, provided that proceedings against Mr. Habré were actually brought before a Senegalese judicial authority. Otherwise, with whom could it co-operate?

39. On 5 October 2007, Senegal informed Belgium that it intended to organize the trial of Mr. Habré, referring, on this occasion, to the Convention against Torture, and it invited Belgium to

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attend a meeting of donors in Dakar[48], which was eventually held on 24 November 2010[49]. During the following months, Belgium declared that it was prepared to help to organize Mr. Habré's trial in Senegal and repeated its proposal for judicial co-operation[50]. These proposals once again received no response from the Senegalese authorities.

40. However, in October[51] and December 2008[52] and in February 2009[53] the Senegalese President, Mr. Wade, announced in the press that he intended to put an end to Hissène Habré's house arrest in Senegal if the funding for organizing the trial was not available in time. He added that he also intended to transfer Mr. Habré outside Senegal, to the African Union or to Chad, but on no account outside Africa[54]. On 19 February 2009, Belgium filed an application before the Court instituting proceedings against Senegal[55] and, as a result of the alarming statements referred to earlier, requested provisional measures[56].

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[47]Note Verbale of 8 May 2007 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, MB, Vol. II, Ann. B.14.

[48]Note Verbale of 5 October 2007 from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, MB, Vol. II, Ann. B.15.

[49]Letter of 22 June 2011 from the Agent of Senegal to the Registrar of the Court, Note No. 2 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, p. 5, para. 4.

[50]Note Verbale of 2 December 2008 from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, handed over on 16 December 2008, MB, Vol. II, Ann. B.16.

[51]*Le Quotidien*, "Le président Abdoulaye Wade au journal espagnol Público: La loi française est allée trop loin'", 15 October 2008.

[52]*La Croix*, "Abdoulaye Wade: 'Le Sénégal ne peut accepter la fuite des cerveaux'", 18 December 2008, available online: http://www.la-croix.com/Actualite/S-informer/Monde/Abdoulaye-Wade-Le-Senegal-ne-peut-accepter-la-fuite-des-cerveaux-_NG_-2008-12-18-681628.

[53]*Jeune Afrique*, "Procès Habré: Wade menace de remettre à l'UA l'ancien dictateur tchadien", 3 February 2009, available online: http://www.jeuneafrique.com/Article/DEPAFP20090203T092442Z.

[54]*Ibid.*

[55]Application instituting proceedings by the Kingdom of Belgium against the Republic of Senegal, 16 February 2009, MB, Vol. II, Ann. C.7.

[56]Request for the indication of provisional measures submitted by the Government of the Kingdom of Belgium, 16 February 2009, MB, Vol. II, Ann. C.8.

41. Mr. President, Members of the Court, we are now three and a half years on from the dispatch of the first request for extradition and the Senegalese authorities have still not taken any practical steps to investigate or prosecute Hissène Habré, nor have they extradited him, while President Wade is suggesting that he might be expelled from Senegalese territory.

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B. From February 2009 to date

42. On 28 May 2009, the Court's Order on the request for the indication of provisional measures noted the solemn declaration made by Senegal whereby it "will not allow Mr. Habré to leave Senegal while the present case is pending before the Court" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009,* p. 154, para. 68). The discussions between Senegal, the European Union, the African Union and, more widely, the international community on the funding and organization of the trial of Hissène Habré continued after that declaration. Professor Eric David will return to that in a few moments.

43. During the same period, Belgium maintained a constructive attitude towards Senegal with a view to helping it fulfil its obligation to try Mr. Habré, failing his extradition. This consisted, firstly, in Belgium making frequent offers to provide Senegal with judicial co-operation, even after the Application was filed before the Court (i); secondly, in Belgium sending three further extradition requests to Senegal in 2011 and 2012 (ii); and, thirdly, in Belgium's response to the Senegalese President's declarations whereby he wished to "get rid of" Mr. Habré[57] (iii). These three points will now be examined in turn.

(i) Belgium's offers of judicial co-operation to Senegal

44. First of all, the offer of judicial co-operation: as Belgium had not yet received any concrete response from Senegal regarding its offers to provide judicial co-operation, on 23 June 2009 it repeated its offer of co-operation for the third time and, moreover, offered to bear all the costs associated with the execution of a letter rogatory from Senegal aimed at enabling the

[57]Remarks made during an interview given by the President of Senegal on France 24 and RFI, judges' folder, tab 5.1, reported in an article dated 12 December 2010, available online at: http://www.france24.com/fr/20101212-senegal-wade-tchad-ancien-dictateur-habre-hissen-proces-justice-union-africaine.

31 Senegalese judicial authorities to examine, or even to obtain a full copy of, the very detailed Belgian record of investigation[58].

45. Senegal responded in two stages. First of all, on 29 July 2009, it merely noted Belgium's offer[59]. Then, on 14 September 2009, it informed Belgium that two of the four judges appointed to lead the preliminary inquiry against Mr. Habré would be designated to visit Belgium. However, the appointment of these four judges was never followed by any actual investigation[60].

46. Mr. President, Members of the Court, it is now March 2012, that is, two and a half years after that announcement by Senegal. Yet the Senegalese letter rogatory, the costs of which Belgium offered to bear, has still not transpired. One may therefore wonder how it is possible to determine properly how to fund, organize and conduct a criminal trial when no competent judicial authority has examined the existing judicial record. Such inaction is baffling. Particularly as Belgium repeated its offer to provide judicial co-operation on 14 October 2009[61], 23 February 2010[62], 28 June 2010[63], 5 September 2011[64] and again more recently on 17 January 2012[65]. Mr. President, the offer of co-operation still stands of course.

32 47. In light of the foregoing, Belgium cannot but strenuously reject the contention in Senegal's Counter-Memorial whereby "[t]he truth is that Belgium has never wanted Mr. Hissène Habré to be tried in Senegal"[66]. Mr. President, the truth lies elsewhere. Belgium has stated explicitly and on several occasions that it is in favour of Mr. Habré's trial being organized by

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[58]Note Verbale from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, 23 June 2009, MB, Vol. II, Ann. B.17.

[59]Note Verbale from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar, 29 July 2009, MB, Vol. II, Ann. B.18.

[60]Note Verbale from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar, 14 September 2009, MB, Vol. II, Ann. B.19.

[61]Note Verbale from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, 14 October 2009, MB, Vol. II, Ann. B.20.

[62]Note Verbale from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, 23 February 2010, MB, Vol. II, Ann. B.22.

[63]Note Verbale from the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, 28 June 2010, MB, Vol. II, Ann. B.26.

[64]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels, 5 September 2011, Letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 8 September 2011, Ann. 3.

[65]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels, 17 January 2012, Letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 23 January 2012, Ann. 4.

[66]CMS, p. 51, para. 204.

the country in whose territory he currently resides, that is to say Senegal[67]. It has offered eight times to provide judicial co-operation with a view to enabling the judicial record against Mr. Habré to be submitted to the competent Senegalese authorities. On five occasions it has repeated its offer to bear all the costs of such judicial co-operation[68]. The fact is, Mr. President, Members of the Court, that all these offers went unheeded by Senegal. That is the fact of the matter.

(ii) Belgium's extradition requests sent to Senegal in 2011 and 2012

(a) ***Second extradition request: 15 March 2011***

48. Let us now turn to the extradition requests transmitted in 2011 and 2012. In light of the facts recalled above, on 15 March 2011 Belgium transmitted a second extradition request to the Senegalese authorities[69]. This new request was, once again, accompanied by the documents required under Senegalese law on extradition, namely the certified true, or authenticated, copy of the international arrest warrant issued against Mr. Habré — the original being in the possession of the Senegalese authorities since September 2005 — and the texts applicable to the offences in question.

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49. Faced with the continued silence of the Senegalese authorities, Belgium twice had to ask Senegal what steps were being taken in regard to its new extradition request[70].

50. In July 2011, Senegal informed Belgium that the new extradition request sent by the above-mentioned Note Verbale of 15 March 2011 had been referred to the competent Senegalese

[67]Belgian Notes Verbales dated 15 March 2011 (letter from the Agent of Belgium to the Registrar of the Court on the latest developments, 21 March 2011, Ann. 4), 5 September 2011 (letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 8 September 2011, Ann. 3) and 17 January 2012 (letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 23 January 2012, Ann. 4).

[68]Belgian Notes Verbales dated 23 June 2009, MB, Vol. 11, B.17, 14 October 2009 (MB, Vol. II, Ann. B.20), 23 February 2010 (MB, Vol. II, Ann. B.22), 28 June 2010 (MB, Vol. II, Ann. B.26) and 5 September 2011 (letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 8 September 2011, Ann. 3).

[69]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels — 15 March 2011, Letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 21 March 2011, Ann. 4.

[70]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels — 23 June 2011, annexed to the letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 29 June 2011; Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels — 11 July 2011, letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 18 July 2011, Ann. 6; judges' folder, tab 7.1.

authorities and that any further correspondence relating to the extradition request against Mr. Habré would be transmitted to the Belgian authorities as soon as possible[71].

51. On 23 August 2011, Senegal transmitted to Belgium judgment No. 133 rendered by the *Chambre d'accusation* of the Dakar Court of Appeal on 18 August 2011 — a few days later —, which declared Belgium's second extradition request inadmissible[72]. The main reason for it being found inadmissible was that the extradition request was allegedly not accompanied by the papers and documents required under Senegalese law[73]. Senegal added that Belgium should, if it so wished, submit a new request for extradition that complied with the requirements laid down by Senegalese law.

52. Mr. President, Members of the Court, the judgment of the *Chambre d'accusation* raises a number of questions. Firstly, the only document to which the *Chambre d'accusation*[74] refers as the basis for Belgium's new extradition request is Belgium's Note Verbale dated 11 July 2011[75]. It is

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abundantly clear from the wording of the Note Verbale — which can be found in your folders at tab 7.1 — that it is simply a reminder of the extradition request transmitted previously by Belgium by the Note Verbale of 15 March 2011. Furthermore — and I repeat —, in their Note Verbale of July 2011, which can be found in your folders at tab 7.2, the Senegalese authorities explicitly acknowledge receipt of Belgium's Note Verbale of 15 March and its annexes and explicitly state

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[71]Note Verbale from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar — 19 July 2011, judges' folder, tab 7.2.

[72]Note Verbale from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar, 23 August 2011.

[73]Senegalese Law No. 71-77 of 28 December 1971 on extradition, Art. 9:

> "Every request for extradition shall be addressed to the Senegalese Government through diplomatic channels and be accompanied either by a judgment or finding of guilt, including by default or *in absentia*, or by a document of criminal procedure formally or by operation of law ordering that the suspect or the accused be sent for trial before a criminal court or tribunal, or a warrant of arrest or any other document having the same force, issued by the judicial authorities, provided that these latter documents contain a precise statement of the act in respect of which they have been issued and the date of that act.
>
> The above documents must be produced in original or authentic office form.
>
> The requesting Government must at the same time produce a copy of the legal texts applicable to the offence in question. It must attach a statement of the facts of the case." Judges' folder, tab 8.

[74]Third citation and first recital of Judgment No. 133 of the *Chambre d'accusation* of the Dakar Court of Appeal of 18 August 2011, judges' folder, tab 9.

[75]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels, 11 July 2011, Letter from the Agent of Belgium to the Registrar of the Court on the latest developments, Ann. 6; judges' folder, tab 7.1.

that they will transmit these documents to the competent authorities. It is apparent from reading the judgment that these documents were quite clearly not transmitted by the *Chambre d'accusation*. Only the reminder Note Verbale of 11 July 2011 was transmitted, which led to the ruling of inadmissibility.

(b) ***Third request for extradition: 5 September 2011***

53. Following the ruling of the *Chambre d'accusation*, Belgium sent Senegal a third extradition request, by Note Verbale dated 5 September 2011, to the Senegalese Embassy in Brussels[76], which acknowledged receipt thereof. That Note Verbale was, once again, duly accompanied by the documents required under the Senegalese law on extradition, namely an 87-page document containing the certified — that is the authentic office — copy of the arrest warrant for Mr. Habré, together with the relevant provisions of national legislation and international law applicable to the offences charged. I should like to recall that the original arrest warrant and annexes are still in the possession of the Senegalese authorities. On 11 January 2012, the Belgian authorities learnt from the press[77] that, by a decision of 10 January 2012[78], the

35 *Chambre d'accusation* of the Dakar Court of Appeal had found Belgium's third extradition request to be inadmissible. As of today, that decision has still not been transmitted to Belgium by the Senegalese authorities. Last Thursday, however, that decision was transmitted by Senegal to the Court which in turn forwarded it to us on the following day. The *Chambre d'accusation* this time states that it did receive the correct Note Verbale, the one dated 5 September 2011, but points out that

> "notwithstanding the affirmation by the Applicant in its . . . Note [of 5 September 2011] that it has produced 'a new certified copy of the international arrest warrant *in absentia* issued on 19 September 200[5] by investigating judge D. Fransen . . . against Mr. Habré', there are grounds for concluding that the present Application has not been submitted in accordance with the . . . legal

[76]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels — 5 September 2011, letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 8 September 2011, Ann. 4.

[77]In particular, an article published on the website of *Radio France Internationale*: "Senegalese court refuses to extradite former Chadian President Hissène Habré to Belgium", available online at: http://www.rfi.fr/afrique/20120111-justice-senegalaise-refuse-extrader-vers-belgique-ancien-president-tchadien-hissene.

[78]Judgment No. 7 of 10 January 2012 of the *Chambre d'accusation* of the Dakar Court of Appeal, letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 23 January 2012, Ann. 3.

provisions; indeed, the copy of the international arrest warrant placed on the file is not authentic"[79].

54. Mr. President, if I may briefly touch on the concepts of certified copy and authentic office copy that are at issue here. Article 9 of the Senegalese law on extradition, which can be found at tab 8 of your folders, provides that any extradition request shall be addressed to the Senegalese Government through diplomatic channels accompanied by a document providing the basis for the extradition request. Under this law, the document may be an arrest warrant, provided that "an original or authentic office copy" is produced together with the copy of the legal texts applicable to the offences charged[80]. The term "authentic office copy" thus refers to an official document that is a true copy of the original, when the original cannot, for whatever reason, be submitted. A certified copy is precisely such a document. It must therefore be concluded, in the light of this information, that the *Chambre d'accusation* does not appear to have received from the Senegalese authorities the authenticated documents annexed by Belgium to its third extradition request, but rather simply photocopies thereof.

55. The findings of the *Chambre d'accusation* are particularly surprising given that at no time did the Senegalese authorities inform Belgium that the documents submitted in support of the extradition requests might not be in compliance. The fact that the Senegalese Foreign Minister
36 transmitted the extradition requests to the Minister of Justice nevertheless indicates that, under Article 10 of the Senegalese law on extradition — reproduced at tab 8 —, the file should have been checked and that at the time it was transmitted to the Senegalese Minister of Justice it did indeed include all the necessary documents required under that law. Finally, at no time did the Senegalese Minister of Justice ever indicate that the requests were not complete or in order, for which there is also a provision under the same law. Need I say more?

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[79]Judgment No. 7 of 10 January 2012 of the *Chambre d'accusation* of the Dakar Court of Appeal, letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 23 January 2012, Ann. 3.

[80]Senegalese Law No. 71-77 of 28 December 1971 on extradition, Art. 9, judges' folder, tab 8.

(c) ***Fourth extradition request: 17 January 2012***

56. On 17 January 2012, Belgium transmitted a fourth extradition request to the Senegalese Embassy in Brussels[81] accompanied by all the requisite documents, as was the case with the three previous requests. On 23 January 2012, the Senegalese Embassy in Belgium acknowledged receipt of Belgium's Note Verbale containing the new extradition requests and the accompanying documents and stated that all these documents had since been transmitted to the competent authorities. Belgium has not received any further information at all regarding the follow-up to this request.

(iii) Statements made by Mr. Wade, President of Senegal

57. Turning to my final point, Mr. President, I would now like to draw your attention to a number of statements and decisions made by the Senegalese President after Belgium filed its Application. They are indicative of the prevarication of the Senegalese authorities in this case.

58. Indeed, despite the assurances of the Senegalese authorities to try Mr. Habré, the President of Senegal has continued to make statements in the press declaring his intention to get rid of the *Habré* case. There was an increasing number of such statements following the ruling of the

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Court of Justice of the Economic Community of West African States (ECOWAS)[82] whereby the Senegalese courts were no longer able to try Mr. Habré. Professor Eric David will return to this point later on.

59. President Wade in particular declared on 11 December 2010 that he intended to "get rid of" Hissène Habré and ask the African Union to take the case over[83]. On 7 February 2011, he declared that Senegal was not entitled to try Mr. Habré and that it was "rid" of the case. He added

[81]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels — 17 January 2012, letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated 23 January 2012, Ann. 4.

[82]Court of Justice of the Economic Community of West African States, case of *Hissein Habré* v. *Republic of Senegal*, judgment of 18 November 2012, letter from the Agent of Senegal to the Registrar dated 22 June 2011, Note No. 2 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, Ann. 2.

[83]See in particular the article published on the website of France 24 on 11 December 2012, available online at: http://www.france24.com/fr/20101212-senegal-wade-tchad-ancien-dictateur-habre-hissene-proces-justice-union-africaine.

that he would not hand Mr. Habré over to Belgium and that it was up to the African Union to assume its responsibilities[84].

60. Furthermore, on the evening of Friday 8 July 2011, Belgium learnt, from the press, that the Senegalese President had decided to expel Mr. Habré to Chad three days later, on Monday 11 July 2011[85]. In an interview on Senegalese television, Mr. Madické Niang, the Minister for Foreign Affairs of Senegal, stated in this regard that "it has turned out today, [Senegal is] not able to try [Mr. Habré]. What else was left for us to do? Extradite him, perhaps. Belgium is the only country to have requested his extradition. President Wade felt that to extradite him to Belgium was to hand over an African to the Europeans. Therefore, the only remaining option was to expel him to his own country . . ."[86]. Mr. Niang further stated that Senegal had asked the African Union to send observers to attest to the expulsion of Mr. Habré to Chad being carried out correctly[87]. In a press release, Belgium expressed its regret that "in the light of the Senegalese Government's commitment to not allow Hissène Habré to leave Senegal as long as the dispute with [Belgium] has not been resolved . . . [Senegal] is not complying with its obligations towards the International Court of Justice in The Hague"[88]. In a press release reproduced in your folders at tab 6.3, the United Nations High Commissioner for Human Rights also urged Senegal to review its decision to expel Mr. Habré to Chad[89].

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61. In the wake of these reactions, Senegal announced on 10 July 2011 that it was suspending its decision to expel Mr. Habré to Chad "in view of the request made by the United Nations High Commissioner for Human Rights" and that it "intends forthwith to enter into consultations with the United Nations, the African Union and the international community in order

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[84]*La Croix*, "Abdoulaye Wade says he is rid of the Hissène Habré trial", available online at: http://www.la-croix.com.prd-jsp.bayardweb.com/Abdoulaye-Wade-se-declare-dessaisi-du-proces-de-Hissene-Habr/documents/2454507/4077.

[85]See in particular the article from *L'Express* posted online on 8 July 2011: "Senegal to extradite Hissène Habré to Chad", available online at: http://www.lexpress.fr/actualites/2/monde/le-senegal-va-extrader-hissene-habre-vers-le-tchad_1010711.html.

[86]Transcript of an interview with Mr. Madické Niang, Minister for Foreign Affairs of Senegal, on Senegalese television on 9 July 2011 (available online at: www.youtube.com/watch?v=kbnjZttnsfQ), judges' folder, tab 6.1

[87]*Ibid.*

[88]Press release dated 10 July 2011 from the Belgian Ministry of Foreign Affairs, Letter from the Agent of Belgium to the Registrar of the Court on the latest developments, dated [18 July 2011], Ann. [3].

[89]Press release dated 10 July 2011 from the High Commissioner for Human Rights, available online at: http://www.un.org/apps/news/story.asp?NewsID=38993&Cr=Chad&Cr1#, judges' folder, tab 6.3.

that a rapid settlement can be found, since the judgment of the Court of Justice of the Economic Community of West African States (ECOWAS) precludes it from trying Mr. Hissène Habré and recommends the creation of a special court . . ."[90]. Mr. President, there is no mention of the solemn assurance given before this Court. No mention of Belgium's request for extradition.

62. On 11 July 2011, Belgium expressed concern over Senegal's decision — which was not implemented — to expel Mr. Habré from its territory and hand him over to the Chadian authorities, recalling that this decision was in breach of the assurances given by Senegal before this Court, and urged Senegal to reaffirm its assurances[91]. This request has so far remained unanswered.

63. Mr. President, Members of the Court, to sum up I shall very briefly underline the following facts:

1. In 2000, eight people filed a complaint, unsuccessfully, against Mr. Habré before the Senegalese courts;
2. In 2000 and 2001, 21 other people filed a complaint before the Belgian courts;

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3. Following an in-depth inquiry, a Belgian investigating judge issued an arrest warrant against Mr. Habré in 2005;
4. Belgium then sent four successive requests for extradition to Senegal, without success so far;
5. In 2008, a number of victims filed a new complaint in Senegal;
6. And yet, throughout this period, over the last twelve years, the Senegalese authorities have not undertaken any actual investigation or proceedings in respect of Mr. Habré.

64. Mr. President, I now ask you to give the floor to Professor Eric David, who will set out the facts relating to interventions by actors external to the States present before you today, which have contributed to Belgium's efforts to ensure that Mr. Habré is brought to justice.

65. Mr. President, Members of the Court, I thank you for your kind attention.

The PRESIDENT: Thank you, Mr. Dive. The Court will hear the presentation of Professor David after a ten-minute break. The sitting is adjourned for ten minutes.

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[90]Press release dated 10 July 2011 from Mr. Madické Niang, Minister for Foreign Affairs of the Republic of Senegal, letter from the Agent of Belgium to the Registrar on the latest developments, dated 18 July 2011, Ann. 5.

[91]Note Verbale from the Ministry of Foreign Affairs of Belgium to the Senegalese Embassy in Brussels — 11 July 2011, judges' folder, tab 7.1.

The Court adjourned from 11.40 to 11.50 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I now give the floor to counsel for Belgium, Mr. Eric David. You have the floor, Sir.

Mr. DAVID: Thank you, Mr. President.

3. THE FACTS: EXTERNAL INTERVENTIONS

Mr. President, Members of the Court, the years pass but the excitement remains. Appearing before the Court on behalf of one's country remains an unaccustomed honour for me.

40 1. Following Mr. Dive's description of the factual twists and turns in the dispute, it falls to me to examine the role played by various actors other than Belgium and Senegal in the facts relating to this case. These actors are many in number and variety. The following have all, at one time or another, been involved in the dispute: the Committee against Torture, the African Court on Human and Peoples' Rights, the Court of Justice of the Economic Community of West African States, the African Union, the European Union and several States.

Mr. President, each of these interventions could give grounds for detailed descriptions and lengthy arguments which would take up the whole of the morning, but rest assured, given the short time available to me, I shall be brief and succinct.

As in a play, these different actors will be presented in the order in which they appear on the stage.

A. The procedure before the Committee against Torture

2. As Mr. Dive has just mentioned, victims of the Hissène Habré régime had filed complaints in Senegal against Mr. Habré in January 2000. The lack of success of these complaints led their authors, in April 2001, to submit a "communication" to the Committee against Torture established by the United Nations Convention of 1984 (the Convention against Torture). In substance, the applicants considered that Senegal had violated Article 5, paragraph 2, and Article 7 of the

Convention by not prosecuting Hissène Habré. Senegal had raised objections of inadmissibility which were rejected by the Committee in November 2001[92].

3. In its final decision delivered in 2006 — which you will find at tab 10 in your folders — the Committee found in favour of the applicants since Senegal had not adopted "such measures as may be necessary" to establish its jurisdiction (Art. 5, para. 2) and had failed to prosecute Hissène Habré (Art. 7)[93]; the Committee observed that the obligation to prosecute Hissène Habré existed "at least at the time when the complainants submitted their complaint in January 2000"[94], thus even before Belgium's extradition request, on account of the mere fact of Hissène Habré's

41 presence in Senegal. Furthermore, the Committee concluded "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"[95]. Allow me to underline the word "again".

4. This decision was rendered on 17 May 2006. However, Senegal took no action on it other than to amend its legislation, as it states in its Counter-Memorial[96]. The amendments thus made by Senegal to its Penal Code and its Code of Criminal Procedure are certainly a step in the right direction, but it must be noted, first, that this was a very late step, and secondly, that the adoption of a law which is not applied does not meet the obligation to take *concrete* action to prosecute Hissène Habré. For this reason, the Committee against Torture continued to demand explanations from Senegal on the institution of proceedings against Hissène Habré or his extradition to a State willing to prosecute him.

I shall not detail all the requests addressed by the Committee to Senegal with regard to the action taken by the latter on the decision rendered by the Committee in May 2006[97], but would merely point out that, since that decision was taken, nearly six years ago now, Senegal has still not put Hissène Habré on trial or indeed extradited him to Belgium.

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[92]Committee against Torture, communication No. 181/2001, *Suleymane Guengueng et al.* v. *Senegal*, decision of 17 May 2006, United Nations, doc. CAT/C/36/D/181/2001, paras. 6.1-6.5, in MB, Vol. II, Ann. E.2

[93]*Ibid.*, paras. 9.1-9.5.

[94]*Ibid.*, para. 9.8.

[95]Committee against Torture, communication No. 181/2001, *Suleymane Guengueng et al.* v. *Senegal*, decision of 17 May 2006, United Nations, doc. CAT/C/36/D/181/2001, para. 9.11, in MB, Vol. II, Ann. E.2.

[96]CMS, para. 38.

[97]Report of the Committee against Torture, United Nations, doc. A/63/44, 2008, pp. 154-155; *ibid.*, doc. A/64/44, 2009, p. 170; *ibid.*, doc. A/66/44, 2011, pp. 196 *et seq.*, and 226.

5. Six months ago, at the end of November 2011, the Rapporteur on follow-up to individual communications of the Committee against Torture, Mr. Fernando Mariño, wrote to Senegal to remind it of

> "its obligations under the Convention against Torture 'to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since Belgium has made an extradition request, to comply with that request, or, should the case arise, with any other extradition request made by another State, in accordance with the Convention'"[98].

This letter, Mr. President, Members of the Court, sets out precisely what Belgium has expected of Senegal since 2005. No further comment is therefore needed. I now come to the interventions of the African Union.

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B. The interventions of the African Union

6. Mr. President, Members of the Court, as we have been reminded this morning, in November 2005, the *Chambre d'accusation* of the Dakar Court of Appeal found that it lacked jurisdiction to adjudicate the validity of a request for the extradition of a former foreign Head of State, the reason given by the *Chambre d'accusation* being that Senegalese law provides for the immunity of the Head of State of Senegal[99], and this allegedly prevented Senegal from extraditing Hissène Habré to Belgium.

7. There is no point in commenting further on this judgment. It is particularly important to note that, in January 2006, Senegal then transferred the case file to the Assembly of the African Union, which decided to mandate a committee of eminent African jurists "to consider all aspects . . . of the Hissène Habré case" and "the options available", taking into account the "total rejection of impunity"[100].

8. In June 2006, the committee affirmed that Senegal was obliged to bring Hissène Habré to justice[101], mainly on account of the decision of the Committee against Torture; the committee

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[98]Letter to the Ambassador of Senegal to the United Nations, 24 Nov. 2011.

[99]Court of Appeal of Dakar, *Chambre d'accusation*, judgment No. 138, 25 Nov. 2005, MB, Vol. II, corrected text of Ann. B.6.

[100]African Union, doc. Assembly/AU/Dec. 103 (VI), MB, Vol. II, Ann. F.1.

[101]African Union, report of the Committee of Eminent African Jurists on the Hissène Habré case, n.a., paras. 17-18.

added that "Senegal is the country best qualified to try Hissène Habré since it is bound by international law to comply with its obligations"[102] *[translation by the Registry]*.

At its seventh session, in July 2006, the Assembly of the African Union, having been informed of the committee's report, mandated Senegal to "prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial"[103].

9. In response to this mandate, the National Assembly of Senegal, in January 2007, amended the Penal Code to provide for criminal sanctions for genocide, war crimes and crimes against humanity; it also amended the Code of Criminal Procedure and, in April 2008, the Constitution. Henceforth, Senegalese courts could exercise universal jurisdiction and it was specified that the non-retroactivity of criminal laws does not prevent the prosecution of perpetrators of war crimes, crimes against humanity and crimes of genocide[104].

43 10. From February 2007, the Hissène Habré case developed in a new direction involving budgetary issues[105] and giving rise to the intervention of new actors in addition to the African Union, namely the European Union and certain States.

The early discussions on the budget for the Hissène Habré trial can be encapsulated in a few figures. In July 2007, the President of Senegal, Mr. Wade, referred to an amount of approximately €29 million as the cost of the trial[106]. In November 2008, Senegal lowered this figure to €27 million[107], not without the intervention of the President of the European Union, in the person of Mr. Sarkozy at that time, who wrote to President Wade that "[t]he investigative stage of the trial has not started and no credible budget has been established"[108].

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[102]African Union, report of the Committee of Eminent African Jurists on the Hissène Habré case, n.a., para. 29.

[103]African Union, doc. Assembly/AU/Dec. 127 (VII), MB, Vol. II, Ann. F.2, para. 5 (ii).

[104]CMS, Vol. I, paras. 42 *et seq.* and 169 *et seq.*

[105]Note Verbale of 21 February 2007 from the Ministry of Foreign Affairs of Senegal to the Belgian Embassy in Dakar, p. 3, MB, Vol. II, Ann. B.13.

[106]Letter from President Wade to the Belgian Prime Minister, 18 July 2007, MB, Vol. II, Ann. D14.

[107]Letter from the Senegalese authorities to the European Commission delegation in Dakar, 4 Nov 2008, MB, Vol. II, Ann. D.10.

[108]Letter from President Sarkozy to President Wade, 15 Dec. 2008, MB, Vol. II, Ann. D.11.

11. Parallel to these financial issues, a third type of actor, separate from the main protagonists in the case, now came into the picture, namely judicial bodies, in the form of the African Court on Human and People's Rights and the Court of Justice of ECOWAS.

C. The intervention of judicial actors: the African Court on Human and People's Rights and the Court of Justice of ECOWAS

12. Following a fruitless effort by a Chadian national to bring proceedings against Senegal in the African Court on Human and People's Rights in August 2008 — I say fruitless because the Court quickly found that it lacked jurisdiction[109] — two months later, in October 2008, Hissène Habré seised the Court of Justice of ECOWAS, alleging violations of human rights committed against him by Senegal, and citing: violation of the non-retroactivity of criminal law, violation of the right to an effective remedy, violation of the right to a fair trial and violation by Senegal of various rules contained in the ECOWAS Protocol on Democracy and Good Governance.

44 13. After dismissing the preliminary objections raised by Senegal[110], in its judgment on the merits of 18 November 2010, the ECOWAS Court of Justice rejected in substance the application of Hissène Habré other than in so far as it acknowledged that the rule of non-retroactivity of criminal laws could be violated by the amendment of the Senegalese Penal Code effected in 2007, since that amendment to Senegalese law made it possible to convict a person for an act which, prior to the amendment, was not punishable under Senegalese law[111]. The court added, however, that although the acts alleged against Hissène Habré "did not constitute *criminal offences under national law* in Senegal . . . they were held to be so under *international law*"[112]. And these words were emphasized with regard to international law by the court itself. The court cited for this purpose Article 15, paragraph 2, of the International Covenant on Civil and Political Rights and

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[109]African Court on Human and People's Rights, Application No. 001/2008, 15 Dec. 2009, paras. 1, 21 and 23 (5-6), MB, Vol. II, Ann. E.3.

[110]ECOWAS Court of Justice, *Hissène Habré* v. *Republic of Senegal*, Preliminary Judgment, 14 May 2010, General List No. ECW/CCJ/APP/07/08, MB, Vol. II, Ann. E.l.

[111]ECOWAS Court of Justice, *Hissène Habré* v. *Republic of Senegal*, Judgment, 18 November 2010, General List No. ECW/CCJ/APP/07/08, para. 58, CMS, Vol. II, Ann. 2.

[112]*Ibid.*; emphasis added in the original French.

noted that, by mandating Senegal to try Hissène Habré "on behalf of Africa", the African Union was merely applying Article 15 of the above-mentioned Covenant. And the court concluded that it

> "agrees with the noble objectives contained in the African Union's mandate, reflecting that organization's support for the principles of ending impunity for serious human rights violations and of protecting victims' rights"[113].

The court pointed out nevertheless that, "in accordance with international custom", the proceedings against Hissène Habré should be conducted before an *ad hoc* international judicial body[114].

14. Belgium will refrain from commenting on this judgment, by which it is not bound and which has been criticized by legal writers[115], but it has two observations to make: first, the Court of Justice notes that, according to Senegal itself, at the time when Hissène Habré seised the court, "no proceedings against the applicant" were pending before the Senegalese courts[116].

45 As to the substance, the judgment goes on to stress the need to try Hissène Habré in accordance with the principle of ending impunity.

Senegal does accept this as a principle, but it remains wishful thinking, since its Minister for Foreign Affairs states that "the establishment of a special court [is] an unacceptable solution to Senegal, which has undertaken to have Mr. Hissène Habré tried by its own courts and not by a new court established on a questionable basis"[117] *[translation by the Registry]*.

15. In its Counter-Memorial, Senegal states that, despite that judgment, "Senegal's efforts to prepare for the . . . trial of Mr. Hissène Habré have continued unabated"[118].

Mr. President, Members of the Court, Belgium would be happy to agree with this statement by Senegal, but it is forced to observe that both in 2009, when it filed its Application with this

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[113]ECOWAS Court of Justice, *Hissène Habré* v. *Republic of Senegal*, Judgment, 18 November 2010, General List No. ECW/CCJ/APP/07/08, para. 58, CMS, Vol. II, Ann. 2.

[114]*Ibid.*, para. 61.

[115]Jan Arno Hessbruegge, "ECOWAS Court Judgment in Habré v. Senegal Complicates Prosecution in the Name of Africa", *ASIL Insights*, Vol. 15, issue 3, 3 Feb. 2010, available at: http://www.asil.org/pdfs/insights/insight110203pdf.pdf; Valentina SPIGA, "Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga", *JICJ*, Vol. 9, 2011, pp. 5-23.

[116]ECOWAS Court of Justice, *Habré* v. *Senegal*, Judgment, 18 Nov. 2010, General List No. ECW/CCJ/APP/07/08, para. 23, CMS, Vol. II, Ann. 2.

[117]Communiqué from the Minister for Foreign Affairs, Mr. Niang, 10 July 2011, on www.rfi.fr/afrique/20110710-dakar-suspend-expulsion-ex-president-tchadien-hissene-habre.

[118]CMS, Vol. I, para. 70.

Court, and one year later, in 2010, when the Court of Justice of ECOWAS delivered its judgment, and again in 2011, when Senegal reacted to that judgment, and today, in 2012, as I speak to you now, no form of prosecution has been instituted.

16. However, pursuant to the efforts of the African Union, a meeting of experts was scheduled for late May-early June 2011 to work out the arrangements for an expeditious trial of Hissène Habré by a special international court; hardly had the meeting begun than Senegal, on the pretext of not having received the documents in time, postponed it *sine die*[119].

D. The current situation in the light of the interventions of the African Union, the European Union and certain States

17. While it is clear to Belgium that, at the time when it seised the Court, Senegal had not fulfilled its international obligations by prosecuting Hissène Habré or extraditing him to Belgium, the following facts confirm this observation. On the one hand, President Wade affirmed his desire "to proceed in accordance with the undertakings" given by Senegal to the Court — this Court[120] —

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while on the other hand, he declared on four separate occasions that he wished "to dispose of the matter of" Hissène Habré and to refer the case file to the African Union[121].

18. At the same time, he let it be understood that the trial of Hissène Habré was a budgetary matter, and this in fact gave rise to meetings between representatives of the European Union, the African Union and Senegal, in 2009 and 2010, to prepare a draft budget in an effort to facilitate the trial[122]. Lastly, on the occasion of a round table held in Dakar, in November 2010, attended by Senegal, Belgium, the African Union, the European Union, several member States of the European Union (France, Germany, Luxembourg, the Netherlands, Spain and the United Kingdom) and non-members of the European Union (Canada, Chad, Switzerland and the United States), the Office of the United Nations High Commissioner for Human Rights and the United Nations Office

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[119]Note Verbale from Belgium to Senegal, 23 June 2011, annexed to the letter of 29 June addressed by Belgium to the Court.

[120]Letter of 2 June 2009 from the Senegalese authorities to the European Commission delegation in Dakar, MB, Vol. II, Ann. D.13.

[121]RFI interview of 20 Dec. 2010, statement to the Senegalese Council of Ministers on 13 Jan. 2011, press release of 20 Jan. 2011 and interview of 7 Feb. 2011 in the newspaper *La Croix*, NV Belgique in Senegal, 15 Mar. 2011.

[122]See MB, Vol. I, paras. 1.88-1.94; letter of 2 June 2009 from the Senegalese authorities to the European Commission delegation in Dakar, MB, Vol. II, Ann. D.13; letter of 21 Oct. 2009 from the AU Commission to the EU Commission, MB, Vol. II, Ann. D.18 (with attachments).

for Project Services, all these actors adopted a *final document* in which eight donors agreed to fund the trial up to an amount of €8.6million[123], and Belgium agreed to contribute up to €1million towards that amount[124]. Senegal confirmed its agreement to that budget in its Counter-Memorial[125].

19. At its 2011 and 2012 sessions, the Assembly of the African Union reiterated on each occasion its commitment to fighting impunity[126] and confirmed the mandate given to Senegal to try Hissène Habré[127]; in 2011 (at the 17th session), the Assembly called for the swift organization of his trial or his extradition to any country willing to put him on trial[128]; at the 18th session (quite recently, in 2012), the Assembly observed that the Dakar Court of Appeal had not yet taken a
47 decision on the Belgian request for the extradition of Hissène Habré — the last request referred to by Mr. Dive[129] — and that Rwanda was willing to organize his trial[130]. The Assembly also took note of the report prepared by the Commission of the African Union. This report states that the priority given to an African solution by the Assembly could be revised in view of the difficulties associated with that solution and the principle of rejecting impunity[131]. The report also emphasizes that a trial could be organized expeditiously in Belgium, this being essential given the age of the victims of the Hissène Habré régime, some of whom are already deceased[132].

20. Without reference to the interventions of international institutions like the European Union and the African Union, some States have agreed to provide financial assistance to Senegal for the Hissène Habré trial — which testifies to these States' high level of commitment to a purely

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[123] *Donors Round Table for the funding of the Hissène Habré trial — final document*, 24 Nov. 2010, para. 16, CMS, Vol. II, Ann. 5.

[124] *Ibid.*, para. 15.

[125] CMS, Vol. I, para. 81.

[126] AU doc. Assembly/AU/Dec. 340 (XVI), para. 4, MB, Vol. II, Ann. F.1 ; AU doc., Assembly/AU/8 (XVII), para. 2 ; AU doc. Assembly/AU/12 (XVIII), para. 3, available at: http://www.africa-union.org/root/au/Documents/Decisions/decisions_fr.htm.

[127] AU doc. Assembly/AU/Dec. 340 (XVI), *op. cit.*, para. 3, MB, Vol. II, Ann. F.1; AU doc., Assembly/AU/8 (XVII), *op. cit.*, para. 3.

[128] AU doc. Assembly/AU/8 (XVII), *op. cit.*, para. 3.

[129] AU doc. Assembly/AU/12 (XVIII), *op. cit.*, para. 4.

[130] *Ibid.*, para. 5.

[131] AU doc. Assembly/AU/11 (XVII) Rev. 1, para. 15, available at: http://www.africa-union.org/root/au/Documents/Decisions/decision_fr.htm.

[132] *Ibid.*, para. 16.

humanitarian and moral cause[133]. It is noteworthy that one of these States, Chad, is not only prepared to contribute to the cost of the trial, but also, at a meeting with the Commission of the African Union, supported extradition of the person concerned to Belgium.

21. The above-mentioned events concerning external aspects of this case, which I have attempted to summarize to the best of my ability, give rise to three observations:

1. first observation: the European Union, the African Union and several States — including Belgium — undertook to fund the trial of Hissène Habré at the Donors Round Table in November 2010; Senegal was present and accepted a final budget of €8.6 million, that is — even so — 20 times the cost of the most expensive trial organized in Belgium for Rwandan nationals who had been charged and prosecuted for crimes of genocide; the pledges made by the contributing parties to this budget were firm and unconditional; Senegal accepted them, but
48 despite this acceptance, took no steps to try Hissène Habré: to Belgium's knowledge — as has already been said — no investigative measures were ordered, no Senegalese investigating judge responded to the invitation to come to Belgium at the latter's cost to examine the 27 binders — 27 binders — in the investigative file compiled by the Belgian courts;
2. second observation: the African Union continues to insist that Senegal fulfil its obligations in the fight against impunity;
3. third and final observation: despite the gestures of support of the European Union, the African Union and other States — including Belgium and Chad — in particular for the funding of the Hissène Habré trial in Senegal, the latter has not yet performed the obligations incumbent on it under international law in respect of the fight against impunity for the crimes concerned.

Mr. President, Members of the Court, that concludes what I myself acknowledge to be an inordinately lengthy enumeration of the external aspects of the dispute between Belgium and Senegal. I am left with the always pleasant duty of thanking you for your patient attention and asking you to be good enough to give the floor to Sir Michael Wood.

The PRESIDENT: Thank you, Professor. Je donne maintenant la parole à sir Michael Wood.

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[133]Press release by the Chadian Ministry of Foreign Affairs, 22 July 2011.

M. WOOD :

4. LA COMPÉTENCE DE LA COUR EN VERTU DE LA CONVENTION CONTRE LA TORTURE ET LA RECEVABILITÉ DE LA REQUÊTE DE LA BELGIQUE

I. Introduction

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est pour moi un très grand honneur que de plaider devant vous au nom du Royaume de Belgique.

2. La Belgique invoque deux bases de compétence distinctes. Premièrement, le paragraphe 2 de l'article 36 du Statut de la Cour et les déclarations faites par la Belgique et le Sénégal en vertu de cette clause facultative. Deuxièmement, le paragraphe 1 de l'article 36 du Statut de la Cour et l'article 30 de la convention des Nations Unies contre la torture. La compétence conférée à la Cour en vertu de la clause facultative s'étend à l'intégralité du différend en cause dans la présente instance, y compris en ce qu'il se rapporte à la convention contre la torture[134]. L'article 30 de cette convention n'est donc qu'une base de compétence supplémentaire et parallèle, qui s'applique au différend dans la mesure où celui-ci se rapporte à l'interprétation ou à l'application dudit instrument.

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3. Par commodité, nous commencerons cependant, comme nous l'avons fait dans notre mémoire[135], par l'article 30 de la convention contre la torture. C'est d'ailleurs ce que la Cour elle-même a fait dans son ordonnance en indication de mesures conservatoires, dans laquelle elle a conclu qu'elle avait compétence *prima facie* en vertu de cet instrument (*Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009,* p. 151, par. 53). Cela ne remet toutefois nullement en cause le fait que, selon nous, la compétence de la Cour en vertu de la clause facultative s'étend au différend dans son intégralité, y compris en ce qu'il se rapporte à la convention contre la torture. L'existence de bases de compétence parallèles n'a en effet rien d'inhabituel.

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[134] MB, par. 3.03.

[135] MB, chap. III.

4. Monsieur le président, j'examinerai pour ma part la question de la compétence de la Cour en vertu de l'article 30 de la convention contre la torture, ainsi que celle de la recevabilité de la requête de la Belgique. M. David se penchera ensuite sur la question de la compétence en vertu de la clause facultative.

5. Je me permets de renvoyer la Cour au chapitre III du mémoire de la Belgique, dans lequel cette question de la compétence est succinctement examinée. Bien qu'il n'ait soulevé aucune exception d'incompétence ou d'irrecevabilité dans le délai de trois mois prévu par le Règlement de la Cour, le Sénégal a consacré pas moins des deux cinquièmes de son contre-mémoire à ce qu'il a appelé «[l]es obstacles à l'examen du fond de la requête de la Belgique»[136]. Au chapitre 3 de cette pièce, il remet ainsi en question la compétence de la Cour en vertu de la convention contre la torture et, semble-t-il, de la clause facultative.

6. L'argumentation du Sénégal est résumée au paragraphe 121 de son contre-mémoire, dans lequel il prie la Cour de constater

> «non seulement l'absence de différend entre les Parties, ce qui devrait [la] conduire … à se déclarer incompétente, mais aussi et surtout l'inexécution par l'Etat requérant de son obligation d'engager la procédure de négociation et d'arbitrage avant toute saisine de la Cour, ce qui devrait entraîner l'irrecevabilité de la requête belge».

50 7. En résumé, le Sénégal fait valoir deux arguments s'agissant de la compétence : l'absence de différend, argument qui vaut en ce qui concerne la compétence de la Cour en vertu de la clause facultative comme de la convention contre la torture ; et l'absence de tentatives de négociation et d'arbitrage, ce qui n'est pertinent qu'en ce qui concerne l'article 30 de la convention contre la torture. Or, comme nous le verrons, le Sénégal n'a, en fait, réussi à démontrer le bien-fondé d'aucun de ces deux arguments.

II. La compétence de la Cour en vertu de l'article 30 de la convention contre la torture

8. Monsieur le président, Mesdames et Messieurs de la Cour, la Belgique et le Sénégal sont tous deux parties à la convention contre la torture, qui est entrée en vigueur entre eux le 25 juillet 1999. Ni la Belgique ni le Sénégal n'ont fait de déclaration en vertu du paragraphe 2 de

[136] CMS, chap. 3, p. 31-53.

l'article 30. Ils sont donc tout deux liés par la clause compromissoire figurant au paragraphe 1 de ce même article.

9. Copie de la convention figure, en français et en anglais, sous l'onglet n° 2 du dossier de plaidoiries. Permettez-moi simplement de donner lecture du paragraphe 1 de l'article 30, qui est ainsi libellé :

> «Tout différend entre deux ou plus des Etats parties concernant l'interprétation ou l'application de la présente Convention qui ne peut pas être réglé par voie de négociation est soumis à l'arbitrage à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de Justice en déposant une requête conformément au Statut de la Cour.»

10. Comme vous le voyez, cette disposition énonce quatre conditions :

— *premièrement*, un «différend» doit exister un «entre deux ou plus des Etats parties concernant l'interprétation ou l'application de la … convention» ;

— *deuxièmement*, le différend ne doit pouvoir «être réglé par voie de négociation» ;

— *troisièmement*, l'une des parties au différend doit avoir fait une demande d'arbitrage ; et

— *quatrièmement*, «les parties ne [doivent pas être] parv[enues] à se mettre d'accord sur l'organisation de l'arbitrage» «dans les six mois qui suivent la date de la demande».

11. Ces conditions, qui sont cumulatives (*Activités armées sur le territoire du Congo (Nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 39, par. 87), ont, selon nous, toutes été remplies. Je les examinerai tour à tour.

51 A. L'existence d'un différend

12. La première condition est donc l'existence d'un différend. Monsieur le président, Mesdames et Messieurs de la Cour, vous avez jugé, *prima facie*, lors de l'examen des mesures conservatoires sollicitées en la présente affaire, qu'un différend sur l'interprétation ou l'application de la convention contre la torture opposait les Parties à la date du dépôt de la requête (c'est-à-dire le 19 février 2009) (*Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009*, p. 149, fin

du par. 47). La Cour a également conclu, *prima facie*, que ce différend demeurait à l'époque du prononcé de l'ordonnance (c'est-à-dire le 28 mai 2009), et ce, bien que sa portée ait pu évoluer depuis le dépôt de la requête (*ibid.*, fin du par. 48).

13. Il ressort clairement de l'exposé des faits présenté ce matin — par MM. Dive et David — que, bien qu'il ait connu des rebondissements pour le moins inhabituels, le différend opposant les Parties continue — et c'est fort regrettable — d'exister. La Belgique considère que le Sénégal a manqué, et continue de manquer, à l'obligation qui lui incombe en vertu de la convention contre la torture de prendre les mesures nécessaires afin de poursuivre M. Hissène Habré ou, à défaut, de l'extrader vers la Belgique. Ce manquement a continué tout au long des presque trois années qui se sont écoulées depuis que la Cour a rendu son ordonnance en indication de mesures conservatoires. Le Sénégal nie, pour sa part, avoir violé la convention contre la torture.

14. Monsieur le président, avant d'en venir aux faits et à la jurisprudence, permettez-moi de rappeler les termes dans lesquels la Cour a, *prima facie*, estimé que le différend continuait d'exister à la fin du mois de mai 2009. Je le fais non parce qu'il s'agirait là d'un prononcé revêtant un caractère définitif — tel n'est bien évidemment pas le cas —, mais parce qu'il s'agit, selon nous, d'un juste reflet de la situation qui existe aujourd'hui encore. Comme vous vous en souviendrez, la Cour a, dans son ordonnance en indication de mesures conservatoires, indiqué ce qui suit :

> «Considérant … que les Parties semblent ... continuer de s'opposer sur d[es] questions d'interprétation ou d'application de la convention contre la torture, telles que celle du délai dans lequel les obligations prévues à l'article 7 doivent être remplies ou celle des circonstances (difficultés financières, juridiques ou autres) qui seraient pertinentes pour apprécier s'il y a eu ou non manquement auxdites obligations ; que les vues des Parties, par ailleurs, continuent apparemment de diverger sur la façon dont le Sénégal devrait s'acquitter de ses obligations conventionnelles ; et qu'en conséquence il appert que, *prima facie*, un différend de la nature de celui visé à l'article 30 de la convention … demeure entre les Parties…» (*Ibid.*, par. 48.)

15. Monsieur le président, ce passage renferme les principaux éléments du différend qui continue d'exister aujourd'hui. Les Parties continuent de s'opposer quant au «délai dans lequel les
52 obligations prévues à l'article 7 doivent être remplies». Elles continuent d'être en désaccord quant aux «circonstances (difficultés financières, juridiques ou autres) qui seraient pertinentes pour apprécier s'il y a eu ou non manquement auxdites obligations». Leurs vues «continuent … de diverger sur la façon dont le Sénégal devrait s'acquitter de ses obligations conventionnelles». En

conséquence, les Parties continuent de s'opposer sur la question de la responsabilité internationale du Sénégal et des conséquences juridiques qui en découlent, telles qu'exposées dans la deuxième partie des articles sur la responsabilité de l'Etat.

16. Dans l'arrêt qu'elle a rendu le 1er avril 2011 en l'affaire *Géorgie c. Fédération de Russie (Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires*, arrêt du 1er avril 2011, par. 29-30), la Cour a rappelé la jurisprudence constante en ce qui concerne l'existence d'un différend. Il n'est pas nécessaire que je donne ici lecture des paragraphes 29 et 30 de cet arrêt dans leur intégralité, mais les passages suivants, qui s'appliquent également à la convention contre la torture, font autorité :

— La Cour a commencé par indiquer qu'«il n'y a[vait] pas de raison de s'écarter du sens généralement admis du terme «différend» dans la clause compromissoire contenue dans l'article 22 de la [convention contre la discrimination raciale]» (*ibid.*, par. 29). Cela vaut également pour l'article 30 de la convention contre la torture ;

— le point de départ de la jurisprudence (*ibid.*, par. 30) mentionnée à cet égard est le prononcé de la Cour permanente en l'affaire *Mavrommatis*, suivant lequel «[u]n différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes» (*Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I., série A, no 2*, p. 11). Autrement dit, «[i]l convient de «démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre»» (*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires*, arrêt du 1er avril 2011, par. 30), et ce, bien que, comme il a été relevé, cela doive être apprécié en fonction du contexte ;

— dans l'affaire *Géorgie c. Russie*, la Cour a ensuite précisé que la question de savoir s'il existe un différend demandait à être «établie objectivement» par elle et que, pour ce faire, elle devait s'attacher aux faits de l'espèce. «Il s'agit d'une question de fond, et non de forme.» (*Ibid.*, par. 30.) ;

53 — puis, elle a indiqué que «l'existence d'un différend p[ouvait] être déduite de l'absence de réaction d'un Etat à une accusation, dans des circonstances où une telle réaction s'imposait» *(ibid.)* ; cette remarque pourrait se révéler particulièrement pertinente en la présente espèce ;

— enfin, le différend doit porter sur «l'interprétation ou l'application de la … convention». S'il n'est pas nécessaire qu'un Etat mentionne, dans ses échanges avec l'autre Etat, un traité particulier, il doit néanmoins s'être référé assez clairement à l'objet du traité pour que l'Etat contre lequel il formule un grief puisse savoir qu'un différend existe ou peut exister à cet égard *(ibid.)*. En la présente espèce, la Belgique a, à maintes reprises, mentionné les obligations qui trouvent leur expression dans la convention contre la torture — et sont, d'ailleurs, énoncées dans des dispositions spécifiques de cet instrument — et, plus généralement, l'obligation de soumettre la question aux autorités chargées d'engager des poursuites judiciaires, à défaut d'extradition.

17. Monsieur le président, Mesdames et Messieurs de la Cour, dans la présente affaire, les éléments de preuve attestant l'existence d'un différend entre la Belgique et le Sénégal au sujet de l'interprétation ou de l'application de la convention contre la torture, différend qui existait au moment du dépôt de la requête et s'est poursuivi jusqu'à aujourd'hui, sont, selon nous, écrasants.

18. Il ressort clairement de leurs écritures que les Parties interprètent différemment plusieurs points importants de la convention. Elles divergent ainsi sur la question de savoir si de simples déclarations, des engagements de prendre à l'avenir certaines mesures ou ce qui est présenté par le Sénégal comme un «commencement d'exécution» des obligations suffisent pour que celui-ci satisfasse effectivement aux obligations qui lui incombent aux termes de la convention, y compris aux dispositions relatives à l'obligation «d'extrader ou de poursuivre». Les Parties sont en désaccord sur le point de savoir si le fait que le Sénégal n'a ni extradé ni poursuivi M. Hissène Habré pendant une longue période constitue une violation de la convention. Enfin, elles divergent sur la question de savoir si des difficultés d'ordre pécuniaire ou autre pourraient, au regard de la convention, excuser le fait que le Sénégal n'a pas pris les mesures prescrites par cet instrument.

19. L'existence de ces divergences ressort tout à fait clairement de l'abondante correspondance entre la Belgique et le Sénégal, ainsi que des contacts qu'ils ont eus par les voies diplomatiques.

54 20. Dans l'affaire *Géorgie c. Fédération de Russie (ibid.*, par. 51-62, 65-104, 108-112*)*, la Cour a examiné de manière approfondie chaque document et déclaration invoqué par la Géorgie. Selon nous, il n'est pas nécessaire de suivre une approche aussi détaillée en la présente espèce car — contrairement à l'affaire précitée — il ressort clairement d'un simple coup d'œil aux documents et déclarations invoqués par la Belgique qu'ils soulèvent expressément des questions litigieuses, qui relèvent notamment de la convention contre la torture.

21. M. Dive a déjà appelé votre attention sur certains passages essentiels des échanges diplomatiques. Il est donc inutile que j'y revienne. La situation est claire. La Belgique a, à maintes reprises, fait part de son interprétation de dispositions particulières de la convention contre la torture et, le moment venu, indiqué clairement qu'il existait un différend au sens de l'article 30. Le Sénégal, pour sa part, semble avoir tout fait pour éviter de répondre aux observations précises formulées par la Belgique. Il a évité de manifester son désaccord avec celle-ci sur certains points spécifiques relevant de la convention. Il n'a pas réagi, dans des circonstances où une telle réaction s'imposait.

22. La Cour se souviendra que, au moment des audiences relatives à la demande en indication de mesures conservatoires, le Sénégal a semblé vouloir se présenter comme agissant uniquement et volontairement dans le cadre d'un mandat de l'Union africaine, et non au titre des obligations qui sont les siennes aux termes de la convention contre la torture. Cela a constitué alors un point de divergence fondamental entre la Belgique et le Sénégal au sujet de l'interprétation et de l'application de la convention qui, malgré les assurances données dans le contre-mémoire[137], semble perdurer, puisque les autorités sénégalaises n'ont pas entièrement renoncé à cette position intenable. Ainsi, lorsque le Sénégal a tenté de renvoyer M. Hissène Habré au Tchad en juillet 2011, le ministre sénégalais des affaires étrangères a cherché à justifier cette décision en

[137] CMS, par. 108 et 225.

invoquant le mandat de juger ou d'extrader M. Hissène Habré que l'Union africaine avait donné à son pays (voir l'onglet n° 6)[138].

23. Comme cela vous a été rappelé tout à l'heure, la Belgique a tout d'abord communiqué une demande d'extradition au Sénégal sous le couvert d'une note datée du 22 septembre 2005[139] à laquelle, plus de six ans et demi après, elle n'a toujours pas reçu de réponse claire et suffisante. Dans sa note du 30 novembre 2005[140], la Belgique a par ailleurs demandé des éclaircissements sur
55 la décision de la cour d'appel de Dakar en date du 25 novembre 2005. Plutôt que de lui répondre directement, le Sénégal l'a, dans des notes en date des 7 et 23 décembre 2005[141], informée qu'il avait transféré le «dossier» à l'Union africaine.

24. La note du Sénégal en date du 7 décembre 2005 contenait simplement un communiqué de son ministère des affaires étrangères dans lequel il était notamment indiqué, au dernier paragraphe, que «l'Etat du Sénégal … s'abstiendra[it] de tout acte qui pourrait permettre à M. Hissène Habré de ne pas comparaître devant la justice».

25. Soit le Sénégal a tenté de se retrancher derrière le transfert du dossier à l'Union africaine, en invoquant l'«esprit» de l'article 7 de la convention, soit il n'a tout simplement pas répondu aux demandes d'information de la Belgique. Il n'y a guère que dans sa note du 23 décembre 2005[142] qu'il a fourni un semblant d'explication de la position qu'il a adoptée suite à l'arrêt rendu le 25 novembre 2005 par la cour de Dakar, indiquant que «[l]a décision soumettant «l'affaire Hissène Habré» à l'Union africaine devra[it] dès lors être considérée comme traduisant la position du Gouvernement sénégalais suite à l'arrêt de la chambre d'accusation».

26. Sous l'onglet n° 4 du dossier de plaidoiries, vous trouverez la note de la Belgique en date du 11 janvier 2006[143]. L'article 30 de la convention contre la torture y était expressément

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[138] Déclaration du ministre sénégalais des affaires étrangères, M. Madické Niang, 9 et 10 juillet 2011. Voir également «Abdoulaye Wade va renvoyer l'ex-président Hissène Habré au Tchad», France 24, 8 juillet 2011 (peut être consulté à l'adresse suivante : http://www.france24.com/fr/20110708-senegal-tchad-abdoulaye-wade-president-hissene-habre-idriss-deby-dictateur-crimes-humanite).

[139] MB, vol. II, annexe B.2.

[140] *Ibid.*, annexe B.4.

[141] *Ibid.*, annexes B.5 et B.6.

[142] *Ibid.*, annexe B.6.

[143] *Ibid.*, annexe B.7.

mentionné et, à propos du transfert du -- je cite -- «dossier Hissène Habré» à l'Union africaine, il y était précisé que la Belgique

> «interprét[ait] la convention précitée, et plus particulièrement pour ce qui concerne l'obligation «*aut dedere aut judicare*» y incluse, comme ne prévoyant d'obligations que dans le chef d'un Etat, en l'occurrence, dans le cadre de la demande d'extradition de M. Hissène Habré, dans le chef de la République du Sénégal».

27. Dans sa note du 4 mai 2006[144] — qui figure également sous l'onglet n° 4 — la Belgique a, une fois encore, indiqué qu'elle interprétait l'article 7 de la convention «comme prévoyant l'obligation pour l'Etat sur le territoire duquel est trouvé l'auteur présumé de l'extrader à défaut de l'avoir jugé». Elle a ajouté que, si le différend relatif à cette interprétation ne pouvait être réglé, cela entraînerait un recours à la procédure d'arbitrage prévue à l'article 30 de la convention.

56 28. Toujours sous l'onglet n° 4, vous trouverez une note du Sénégal en date du 9 mai 2006[145], dans laquelle celui-ci prétend, à propos de l'interprétation de l'article 7, «se conforme[r] à *l'esprit* du principe «*aut dedere aut punire*»»[146]. Cela ne revient pas à dire que l'on agit conformément à l'obligation énoncée dans la convention.

29. Dès lors, Monsieur le président, nous considérons qu'il apparaît clairement que le différend entre la Belgique et le Sénégal s'est cristallisé entre la fin du mois de novembre 2005, lorsque la Belgique a demandé des éclaircissements sur l'arrêt de la cour d'appel de Dakar, et le 11 janvier 2006, lorsqu'elle a fait savoir qu'elle estimait que les obligations du Sénégal perduraient en dépit de la transmission du «dossier Hissène Habré» à l'Union africaine.

30. Il ressort en outre clairement des échanges qui ont eu lieu ensuite entre la Belgique et le Sénégal que le différend se poursuit, et qu'il continue de s'amplifier. En application de l'ordonnance en indication de mesures conservatoires, la Belgique a tenu la Cour informée de tous ces développements par une série de lettres[147].

31. J'en viens maintenant à ce que le Sénégal indique, au chapitre 3 de son contre-mémoire, au sujet de l'existence d'un différend. Il commence par citer la jurisprudence de la Cour

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[144] MB, annexe B.9.

[145] *Ibid.*, annexe B.10.

[146] *Ibid.* (les italiques sont de nous).

[147] Lettres en date des 16 juillet 2009, 23 novembre 2010, 21 mars 2011, 29 juin 2011, 18 juillet 2011, 8 septembre 2011 et 23 janvier 2012, adressées au greffier de la Cour par l'agent de la Belgique.

permanente et certaines de vos décisions les plus anciennes *(Mavrommatis ; Interprétation des traités de paix ; Droit de passage ;* et *Cameroun septentrional)*[148]. Puis — de manière quelque peu sibylline —, il écrit ceci :

> «Il n'y a jamais eu, à vrai dire, une opposition ou un refus manifesté par le Sénégal quant au principe ou à l'étendue des obligations impliquées par la convention contre la torture. A aucun moment, les Parties en cause ne se sont opposées sur le sens ou la portée à conférer à leur obligation centrale, celle de «juger ou extrader». Rien, dans les thèses de la Belgique, ne vient contredire l'interprétation que le Sénégal fait de la convention. Tout au plus — et on l'a montré plus haut — la Belgique pourrait-elle avancer que les modalités — et encore ! — par lesquelles le Sénégal entend s'acquitter de ses engagements ne correspondent pas à sa propre compréhension des choses, ou encore au rythme auquel elle souhaiterait que ces choses aillent…»

Cet extrait montre clairement, me semble-t-il, que le Sénégal reconnaît qu'il existe bel et bien un différend concernant l'application de la convention ; il ajoute cependant : «il n'y a certainement pas

57 matière à un débat sur «les principes», exigence que la Cour semble avec constance maintenir et consolider à travers sa jurisprudence»[149].

32. Toutefois, comme la Cour l'a récemment rappelé dans l'affaire *Allemagne c. Italie*,

> «[l]'objet d'un différend soumis à la Cour est délimité par les demandes qui lui sont présentées par les parties ... [C]e sont ces dernières qui délimitent l'objet du différend que la Cour est appelée à trancher. C'est au regard de ces demandes qu'il appartient à la Cour de rechercher si elle est compétente pour connaître de l'affaire.» (*Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant))*, arrêt du 3 février 2012, par. 39.)

33. Les arguments formulés par la Belgique dans son mémoire, ainsi que les assertions du Sénégal dans son contre-mémoire, illustrent fort bien le différend qui ressort des échanges diplomatiques entre les deux Etats. Selon la Belgique, le Sénégal a manqué aux obligations internationales qui lui incombent aux termes de la convention contre la torture et d'autres règles de droit international, et il doit mettre fin à son comportement illicite[150]. Le Sénégal, quant à lui, continue de soutenir qu'il n'a violé aucune des dispositions de la convention contre la torture ni

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[148] CMS, par. 126-129, 131-133.

[149] *Ibid*., par. 135.

[150] MB, p. 123.

aucune autre règle de droit international général[151]. On voit mal comment un désaccord entre Etats sur un point de droit ou de fait pourrait être exprimé plus clairement.

34. Le Sénégal laisse ensuite entendre, dans un assez long passage, que, en la présente affaire, la Belgique demande à la Cour de rendre un jugement déclaratoire, ce que celle-ci devrait refuser de faire. Il semble tenter par là d'étayer son argument relatif à l'absence de différend entre les Parties, et non avancer un argument distinct pour contester la faculté de la Cour de rendre un jugement déclaratoire, ce qui serait clairement indéfendable. Qu'il s'agisse d'un autre argument ayant trait à la compétence, voire à la recevabilité, toujours est-il que le Sénégal cite une série de décisions, dont beaucoup sont des avis consultatifs, et qu'il met particulièrement l'accent sur les affaires des *Essais nucléaires.*

35. De notre point de vue, Monsieur le président, cet argument est totalement dépourvu de fondement. A cet égard, un passage essentiel de l'argumentation du Sénégal semble figurer au paragraphe 146 du contre-mémoire — je cite :

58 «Dès lors que le Sénégal a pris une position claire quant à l'application de la convention de 1984 contre la torture, dès lors qu'allant au-delà d'une simple déclaration de volonté il a pris les actes préparatoires à l'exécution d'un engagement précis — qui est celui de «juger» —, il n'y a aucune raison qu'il soit demandé à la Cour de troubler cette configuration claire, de rendre artificiellement conflictuelle une situation qui ne l'est pas dans le fond.»

36. Un autre passage essentiel figure au paragraphe 157, dans lequel le Sénégal indique que «non seulement [il] a posé des actes caractéristiques d'un commencement d'exécution de ses obligations» — j'ouvre ici une parenthèse pour rappeler que cela a été rédigé en août 2011, soit environ deux ans et demi après l'introduction de la présente instance, et quelque six années après que la Belgique eut demandé pour la première fois au Sénégal d'extrader ou de poursuivre Hissène Habré —, je reprends, donc :

> «non seulement le Sénégal a posé des actes caractéristiques d'un commencement d'exécution de ses obligations, mais il est délicat d'imaginer les implications d'une acceptation de la demande formulée par la Belgique. Imagine-t-on en effet la Cour demander au Sénégal d'exécuter un engagement que cet Etat lui-même a commencé à accomplir ?»[152]

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[151] CMS, p. 77, par. 284, 2).

[152] *Ibid.*, par. 157.

Ensuite, nous apprenons dans le contre-mémoire du Sénégal que celui-ci «s'est longtemps attelé à mettre en œuvre toutes les mesures nécessaires pour le jugement de M. Habré»[153].

37. Monsieur le président, Mesdames et Messieurs de la Cour, voilà un raisonnement étrange, un raisonnement qui tourne en rond. Le Sénégal dit que la Cour devrait s'abstenir d'exercer sa compétence et de se prononcer en l'espèce parce qu'il n'a pas manqué à ses obligations. Or, c'est précisément ce que la Belgique conteste, et c'est précisément la question que la Cour est appelée à trancher.

38. Quand bien même le Sénégal commencerait — dans les faits, et pas uniquement en paroles — à se conformer à ses obligations internationales, le différend ne disparaîtrait pas pour autant et un arrêt de la Cour aurait toujours des conséquences pratiques «en ce sens qu'il d[evrait] pouvoir affecter les droits ou obligations juridiques existants des parties, dissipant ainsi toute incertitude dans leurs relations juridiques» (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963,* p. 34 ; *Application de l'accord intérimaire du 13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)*, arrêt du 5 décembre 2011, par. 47). Comme elle l'a récemment rappelé, en rejetant un argument similaire avancé par la Grèce en l'affaire relative à l'*Accord intérimaire*, rien ne s'oppose à ce que la Cour prononce des jugements déclaratoires dans les cas appropriés (*Application de l'accord intérimaire du*
59 *13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)*, arrêt du 5 décembre 2011, par. 49. Voir également *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963,* p. 37). Or, en la présente espèce, pareil jugement permettrait effectivement de «reconnaître une situation de droit une fois pour toutes et avec effet obligatoire entre les Parties, en sorte que la situation juridique ainsi fixée ne puisse plus être mise en discussion, pour ce qui est des conséquences juridiques qui en découlent» (*Interprétation des arrêts n^{os} 7 et 8 (Usine de Chorzów), arrêt n^{o} 11, 1927, C.P.J.I. série A n° 13*, p. 20 ; *Application de l'accord intérimaire du 13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)*, arrêt du 5 décembre 2011, par. 49). La convention contre la torture est toujours en vigueur entre les Parties et l'arrêt de la Cour permettrait effectivement de rétablir l'intégrité de cet important

[153] CMS, par. 158.

instrument relatif aux droits de l'homme. Il s'agit là d'un élément essentiel au regard des assertions du Sénégal, qui prétend s'être conformé à la convention en tous points, alors que, comme la Belgique le montrera demain, tel n'est tout simplement pas le cas.

39. Pour conclure sur ce sujet, Monsieur le président, il ne fait selon nous absolument aucun doute qu'un différend continue d'opposer les Parties au sujet de l'interprétation et de l'application de la convention contre la torture.

B. Le différend ne peut être réglé par voie de négociation

40. J'en viens à présent à la deuxième condition énoncée à l'article 30 de la convention, à savoir l'impossibilité de régler le différend par voie de négociation.

41. Ainsi qu'exposé par M. Dive plus tôt dans la matinée, la Belgique a tenté à plusieurs reprises, pendant un temps considérable, d'engager des discussions et de parvenir à une solution mutuellement acceptable. Malgré tous ces efforts de la Belgique pour aboutir à une solution négociée — efforts dont la Cour a pris acte dans son ordonnance de 2009 sur les mesures conservatoires —, le différend n'a pu être réglé.

42. Les négociations sur le différend ont concrètement débuté lorsque la Belgique a adressé au Sénégal sa note du 30 novembre 2005, dans laquelle elle demandait des éclaircissements à la suite de l'arrêt rendu par la cour d'appel de Dakar. Ont ensuite eu lieu un long échange de notes et des contacts diplomatiques à Dakar et à Bruxelles — autant d'échanges qui n'ont toutefois, malheureusement, donné aucun résultat. Au mois de juin 2006 au plus tard, il était clair que le différend ne serait pas réglé par voie de négociation. Rien de ce qui s'est produit depuis lors ne permet de conclure le contraire.

60 43. Vu le temps qu'il nous reste, je pense que je vais omettre quelques paragraphes. Monsieur le président, je m'apprêtais à préciser que les circonstances de la présente espèce sont fort différentes de celles de l'affaire *République démocratique du Congo c. Rwanda*, par exemple, et à exposer en quoi elles s'en distinguent.

44. Il n'est pas nécessaire, je pense, de rappeler que, dans ses nombreuses notes, la Belgique s'est expressément référée à des dispositions précises de la convention contre la torture. Elle a demandé des éclaircissements, des assurances, mais sans résultat.

45. En réalité, la présente espèce est assez similaire aux affaires *Lockerbie*, dans lesquelles la Cour a jugé que le différend ne pouvait être réglé par la négociation, au motif que les défendeurs avaient toujours soutenu qu'il n'existait «entre les Parties aucun différend concernant l'interprétation ou l'application de la convention de Montréal et que, de ce fait, il n'y avait, de l'avis du défendeur, aucune question à régler par voie de négociation conformément à la convention» (*Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 17, par. 21 ; *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 122, par. 20).

46. Après avoir annoncé que l'essentiel de ses exceptions d'incompétence (ou d'irrecevabilité) portait sur les conditions de négociation et d'arbitrage, le Sénégal a examiné ces questions de manière plutôt succincte dans son contre-mémoire[154]. Il a cependant reproché à la Belgique de tenter d'«opérer par surprise»[155], l'accusant de mauvaise foi et d'abus de droit — allégations aussi graves qu'infondées, à l'appui desquelles il n'a pas produit le moindre commencement de preuve, et que nous réfutons catégoriquement.

47. Monsieur le président, point n'est besoin de rappeler que, dans l'affaire *Géorgie c. Fédération de Russie*, la condition selon laquelle il doit s'agir d'un différend qui ne peut être réglé par la négociation s'est révélée cruciale. Or, le Sénégal n'a pas abordé cette affaire dans son contre-mémoire et nous ignorons donc à ce stade s'il se fondera, d'une quelconque manière, sur cet arrêt. Mais nous y reviendrons peut-être au second tour, à la lumière de ce que le Sénégal aura pu en dire. S'il existe incontestablement des différences notables entre l'affaire susmentionnée
61 — y compris, d'ailleurs, la clause compromissoire alors en cause — et l'article 30, on relève cependant des similitudes entre ces deux dispositions.

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[154] CMS, par. 185-204 et 205-213, respectivement.

[155] *Ibid.*, par. 191-192.

48. Ceci conclut, Monsieur le président, mon propos sur la condition selon laquelle il doit s'agir d'un différend qui ne peut être réglé par voie de négociation. Selon nous, il a été clairement satisfait à cette deuxième condition.

C. Demande d'arbitrage

49. J'en viens à présent à la troisième condition énoncée à l'article 30, à savoir qu'il y ait une demande d'arbitrage. Ainsi que M. Dive l'a précisé tout à l'heure, la Belgique a mentionné pour la première fois la possibilité de l'arbitrage en vertu de l'article 30 dans sa note du 4 mai 2006 (onglet n° 4), et le Sénégal en a pris bonne note. Par la suite, dans sa note du 20 juin 2006, la Belgique a officiellement demandé un arbitrage en vertu de l'article 30. Ce document figure lui aussi sous l'onglet n° 4.

50. Dans l'examen qu'il consacre à l'arbitrage dans son contre-mémoire, le Sénégal refuse de nouveau d'admettre que la note de la Belgique en date du 20 juin 2006 a bien été envoyée[156]. Pourtant, la Cour a traité ce point dans son ordonnance en indication de mesures conservatoires[157], comme nous l'avions d'ailleurs fait à l'audience en 1999[158]. J'estime donc qu'il n'est pas nécessaire de s'y attarder.

51. Le Sénégal avance dans son contre-mémoire que la référence à l'arbitrage dans la note du 20 juin 2006 était «évasive». La Cour a pourtant dit dans son ordonnance que «la note verbale en date du 20 juin 2006 cont[enait] une offre explicite de la Belgique au Sénégal de recourir à une procédure d'arbitrage».

52. Onze mois plus tard, dans une note datée du 8 mai 2007 (onglet n° 4), la Belgique a rappelé ladite demande au Sénégal, se référant de nouveau aux dispositions spécifiques de la convention contre la torture qui sont en litige entre les Parties.

53. Selon nous, Mesdames et Messieurs de la Cour, il a donc été satisfait à la troisième condition énoncée à l'article 30.

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[156] CMS, par. 207.

[157] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009*, p. 150, par. 52.

[158] CR 2009/10, p. 21, par. 16 (Wood).

62 **D. Les Parties n'ont pas pu s'entendre sur l'organisation d'un arbitrage dans les six mois**

54. La quatrième condition est que les Parties n'aient pas pu s'entendre sur l'organisation d'un arbitrage dans les six mois. Comme nous l'avons vu, la demande d'arbitrage a été formulée le 20 juin 2006.

55. Le Sénégal n'a pas répondu à cette demande initiale, ni au rappel du 8 mai 2007. La demande «est restée sans réponse», pour reprendre l'expression employée par la Cour dans les affaires Lockerbie[159]. Celle-ci s'est de nouveau penchée sur le cas où le défendeur n'a pas répondu à une proposition d'arbitrage dans son arrêt en l'affaire *République démocratique du Congo c. Rwanda*. Après avoir indiqué que «l'absence d'accord entre les Parties sur l'organisation d'un arbitrage ne p[ouvait] en effet pas se présumer», elle a, citant les affaires *Lockerbie*, ajouté que «[l]'existence d'un tel désaccord [c'est-à-dire un désaccord sur l'organisation de l'arbitrage] ne p[ouvait] résulter que d'une proposition d'arbitrage faite par le demandeur et restée sans réponse de la part du défendeur ou suivie de l'expression par celui-ci de son intention de ne pas l'accepter» (*Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 41, par. 92).

56. En la présente espèce, la Belgique a proposé un arbitrage, proposition qui est restée sans réponse. Les Parties n'ont donc pas pu s'entendre sur l'organisation d'un arbitrage dans les six mois, délai qui s'est écoulé depuis longtemps.

57. Monsieur le Président, Mesdames et Messieurs de la Cour, selon nous, les quatre conditions énoncées à l'article 30 de la convention contre la torture ont donc toutes été remplies. Il s'ensuit que la Cour a compétence en vertu de l'article 30 pour connaître de la partie du différend qui porte sur l'interprétation ou l'application de la convention.

III. Recevabilité

58. J'examinerai à présent très brièvement la question de la recevabilité. En réalité, on ne sait pas vraiment si le Sénégal conteste la recevabilité de la requête. J'ai en effet déjà précisé que

63 les questions relatives aux conditions prévues à l'article 30 relèvent de la compétence, et non de la

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[159] *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 9, p. 17, par. 20 ; *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 122, par. 20.

recevabilité. Cela ressort, me semble-t-il, clairement de la jurisprudence de la Cour. Une façon d'interpréter l'argument exposé aux paragraphes 148 à 162 consiste cependant à dire que, selon le Sénégal, la Cour devrait exercer son pouvoir discrétionnaire en ne statuant pas en l'espèce parce que, si elle le faisait, elle rendrait un «jugement déclaratoire». A l'appui de cet argument, le Sénégal cite plusieurs fois la Cour mais, à l'exception des affaires de *l'Usine de Chorzów* ou des *Essais nucléaires*, ces citations sont toutes tirées d'avis consultatifs, auxquels s'appliquent d'autres considérations. L'agent de la Belgique traitera cette question du jugement déclaratoire lorsqu'il conclura notre premier tour de plaidoiries ; je n'en dirai donc pas plus à ce stade.

59. Il ne nous semble pas que le Sénégal ait réellement remis en cause la recevabilité de la requête, ni qu'il pouvait le faire. Il n'existe en effet aucun motif d'irrecevabilité.

60. Monsieur le président, ainsi s'achève mon exposé sur la compétence en vertu de l'article 30 de la convention contre la torture et sur la recevabilité.

61. S'il reste du temps, je vous prierais de bien vouloir appeler à la barre M. David, qui traitera brièvement la question de la compétence en vertu de la clause facultative.

Le PRESIDENT : Merci, M Wood. I now give the floor again to Professor Eric David. As I announced this morning, you may avail yourself of a short extension of a maximum of 15 minutes beyond 1 p.m. to complete today's pleadings by Belgium, in view of the time taken by the public sitting this morning. You have the floor, Professor.

Mr. DAVID: Thank you, Mr. President and thank you for this dispensation, for granting us this extra time. Mr. President, Members of the Court,

5. THE COURT'S JURISDICTION UNDER THE OPTIONAL CLAUSE DECLARATIONS BY BELGIUM AND SENEGAL (ICJ STATUTE, ARTICLE 36, PARAGRAPH 2)

1. In its Application instituting proceedings and its written Memorial, Belgium based the Court's jurisdiction not only on Article 30 of the Convention against Torture, as Sir Michael has just recalled, but also on the declarations whereby Senegal and Belgium have accepted the Court's jurisdiction; Senegal since 2 October 1985 and Belgium since 3 April 1958. These declarations, which are still in force, have barely been touched upon by Senegal since these proceedings began. Senegal refers to them twice, very much in passing, in its Counter-Memorial: firstly when it notes

64 that the declarations recognizing the jurisdiction of the Court by Belgium and Senegal apply to legal disputes[160]; and secondly when it observes that Belgium bases its action on the Convention against Torture and on the two optional clause declarations made by the two States under Article 36, paragraph 2, of the Statute[161]. These are the only times that Senegal alludes to the declarations, namely a dozen lines which are purely informative in a Counter-Memorial of 77 pages.

2. This is not the first time that the Court's jurisdiction has been based on more than one source. It happened previously in 1939 in the *Electricity Company of Sofia and Bulgaria* case, brought by my country before the Permanent Court of International Justice, which was then led to conclude that one source of jurisdiction did not necessarily preclude another and that a treaty recognizing the jurisdiction of the Court, as is the case here, did not prevent declarations of acceptance of the Court's jurisdiction having the same effect (*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77,* p. 76). More recently, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court found that when seised on the basis of overlapping acceptances of its jurisdiction, that jurisdiction was not jeopardized by the more restrictive conditions contained in a treaty that was otherwise binding on the parties (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 312, para. 79).

3. In this case, the Court's jurisdiction based on the declarations of acceptance of that jurisdiction by Senegal and Belgium does not appear to divide the Parties and, in accordance with Article 60 of the Rules of Court, Belgium can be brief. There nevertheless remains the objection raised by Senegal regarding the application of Article 30 of the Convention against Torture, where Senegal asserts the alleged absence of a dispute with Belgium. That objection could apply to the declarations whereby the two States have accepted the Court's jurisdiction, since in both cases — the Torture Convention and the declarations based on Article 36, paragraph 2 — the Court's jurisdiction does of course presuppose that a dispute exists (I would refer you to Article 38, paragraph 1, of the Statute of the Court).

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[160] CMS, Vol. I, paras. 126-127.

[161] *Ibid.*, para. 185.

65 4. We shall begin by describing the content of the declarations of acceptance by Senegal and Belgium (A.); we shall then give a more in-depth analysis of the conditions for applying these declarations (B.). Inevitably, this presentation will remain theoretical — I am sorry if I am repeating myself —, but Senegal has not developed the application of unilateral declarations in this case in any way.

A. The content of the declarations by Senegal and Belgium

5. The unilateral declarations of acceptance of the Court's jurisdiction by the two States are very similar. They are reproduced in your folders at tabs 3.1 and 3.2. They can be summarized as follows: on the basis of Article 36, paragraph 2, of the Statute, Senegal and Belgium declare that they recognize "as compulsory *ipso facto* and without special convention, in relation to any other State accepting the same obligation, the jurisdiction of the Court over all legal disputes", disputes subsequent to 13 July 1948 in the case of Belgium and, in the case of Senegal, subsequent to 2 December 1985, the date when it filed its declaration. Further, it is necessary for the Parties not to have agreed "to have recourse to some other method of pacific settlement". Finally, Senegal does not accept disputes bearing on "questions which, under international law, fall exclusively within [its] jurisdiction". In other words, if we look at what could be considered an aggregation of all the limitations that exist in the declarations of acceptance by the two States, we see that they set out four conditions:

— there must be a legal dispute between the Parties;

— the dispute must have arisen after 2 December 1985;

— there must be no other means of settling the dispute;

— the conflict must not fall exclusively within the jurisdiction of Senegal.

If it pleases the Court, let us now examine in greater detail the four conditions — which are fully met in this case — for applying these declarations.

B. The conditions for applying the declarations

1. The existence of a legal dispute

6. This is the only point that Senegal contests. It does so only in relation to Article 30 of the Convention against Torture, but its reasoning could be transposed to the dispute referred to in the

66 declarations of acceptance by the two States. In substance, Senegal puts forward three arguments that can be summarized as follows:

(1) Senegal and Belgium interpret the 1984 Convention in the same way: therefore, there is no dispute. Senegal writes:

> "At no time have the Parties in question held opposing views about the meaning or scope of their central obligation, to 'prosecute or extradite'. There is nothing in the arguments put forward by Belgium to contradict Senegal's interpretation of the Convention."[162]

(2) It is not sufficient to assert that there is a dispute in order for such a dispute to exist, as the case law of the Court shows[163].

(3) Belgium is allegedly seeking to obtain a declaratory judgment from the Court, whereas the Court, according to Senegal, refuses to render such judgments[164].

7. Senegal has used these three arguments to contest the Court's jurisdiction solely under the 1984 Convention. It did not explicitly extend the scope of the objection to the two unilateral declarations. Senegal merely states that "[t]he concept of 'dispute' also appears in the Declarations Recognizing as Compulsory the Jurisdiction of the Court submitted by the two States"[165]. Mr. President, Members of the Court, if this is a way of suggesting that the same arguments would lead to the same effects in the case of jurisdiction based on the two declarations, Sir Michael's replies to that objection can be transposed, almost word for word, to an argument that consists in rejecting the declarations of acceptance by the two States on the basis of the alleged absence of a dispute.

8. Belgium would merely like to observe that it welcomes Senegal's clear affirmation that Hissène Habré must be tried or extradited. Everybody agrees on that, but the fact that everyone agrees on that point does not settle the dispute, because this is not a semantic dispute. As the Agent of Belgium, Mr. Rietjens, and the Co-Agent, Mr. Dive, said this morning: the dispute is material and concrete. Belgium is not asking Senegal to utter the words, to say that Mr. Habré must be tried

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[162]CMS, Vol. I, para. 135.

[163]*Ibid.*, paras. 128-137.

[164]*Ibid.*, paras. 139-162.

[165]*Ibid.*, para. 126.

67 or extradited; Belgium is asking Senegal to translate those words into action and to actually try or extradite Mr. Habré. Yes, Senegal has placed Mr. Habré under house arrest and appointed four judges to open an investigation against Mr. Habré, but placing a person suspected of crimes under house arrest and appointing judges to open an investigation — an investigation that has yet to start — does not constitute effective prosecution[166] or extradition, which is the real object of Belgium's Application before this Court.

9. Sir Michael showed that the dispute has arisen from the fact that Senegal has neither prosecuted nor extradited Mr. Habré for the crime of torture. I shall simply add that the dispute also stems from the fact that Senegal has neither prosecuted nor extradited Mr. Habré for — under the terms of the arrest warrant issued against him — crimes against humanity, war crimes and the crime of genocide.

10. Therefore a dispute does indeed exist since, on the one hand, Belgium considers that Senegal has not fulfilled its obligations and, on the other, Senegal maintains that it has done so:

— firstly, by amending its legislation[167];

— secondly, by stating that to prosecute or extradite is "a peremptory requirement for all States"[168]: Belgium accepts that Senegal recognizes that it must fulfil its legal obligation to prosecute Mr. Habré or, failing that, to extradite him;

— finally, by simply "ensur[ing] that all the necessary conditions, in particular the financial conditions, were met so that the trial could take place reasonably quickly"[169]: speaking of "reasonably quickly", the first complaints were filed against Mr. Habré in 2000 and it is now 2012.

11. In Belgium's view, the nature of the dispute will change when Senegal brings Mr. Habré to trial or extradites him to Belgium. As Senegal has done neither of these things, there is indeed a conflict of views between what Belgium considers to be a means of fulfilling the obligation

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[166]Cf. ICC, ICC-01/09-01/11-1, 8 March 2011, *Ruto et al.*, paras. 64-70.

[167]CMS, Vol. I, paras. 146, 167-173.

[168]*Ibid.*, para. 159.

[169]*Ibid.*, para. 175.

68 incumbent upon Senegal under general international law and what Senegal is not doing. The dispute therefore continues to exist in its entirety.

12. Lastly, this is a legal dispute since it concerns the *application* of a rule of law — to prosecute if not extradite — under general international law for war crimes, crimes against humanity and crimes of genocide. Maintaining that there is no dispute is tantamount to denying a blinding reality.

13. Mr. President, Members of the Court, I shall be very brief in respect of the other conditions for applying the declarations recognizing the Court's jurisdiction.

2. The dispute is subsequent to 2 December 1985

14. Both declarations of acceptance of the [Court's] jurisdiction set a *ratione temporis* limitation: 13 July 1948 for Belgium and 2 December 1985 for Senegal, as we have just seen. In this case, the dispute crystallized when it became apparent that Senegal would not extradite Mr. Habré to Belgium and that it would also not prosecute him. Belgium was unable to obtain the extradition of Hissène Habré in November 2005 and Senegal has not brought him to justice either. As the Court said recently in the *Jurisdictional Immunities* case, "the dispute undoubtedly relates to 'facts or situations' occurring entirely" (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), I.C.J.*, Judgment of 3 February 2012, p. 20, para. 44) after the two dates of application of the declarations in question — 1948 and 1985: the *ratione temporis* condition has therefore been met.

3. There is no other method of settling the dispute

15. The two declarations of acceptance exclude, in like manner, the jurisdiction of the Court if the Parties have agreed to have recourse to a method of pacific settlement other than through the Court. Since the Parties have not agreed to settle their dispute in respect of the obligation to prosecute Hissène Habré or, failing that, to extradite him by any method other than recourse to the International Court of Justice, that condition has also been met.

69 **4. The conflict does not fall exclusively within the jurisdiction of Senegal**

16. Quite rightly, Senegal has never claimed that the *aut dedere aut judicare* rule was exclusively an internal affair, since it is an issue that is typical of international law: has Senegal fulfilled its obligations under general international law or not? Since this issue does indeed relate to the application of a rule of international law, it does not concern the internal affairs of Senegal[170]. The fourth condition has thus also been fully satisfied.

17. Mr. President, Members of the Court, it is therefore clear that the declarations recognizing the jurisdiction of the Court by Senegal and Belgium give the Court jurisdiction to adjudicate all aspects of this dispute.

That concludes my presentation and the preceding ones. While at the end of the day the legal issues are fairly straightforward, the abundance of facts tends at times to make them seem complex — as you have most certainly realized. But the Court will also be quick to realize that this is merely an impression. As one author had it: "Simplicity does not precede complexity, but follows it."[171]

Mr. President, Members of the Court, Belgium in any case thanks you for listening so patiently to its oral statements throughout this long morning.

The PRESIDENT: Thank you, Professor. That concludes Belgium's oral argument for today. The Court will meet again tomorrow morning at 10 a.m. The sitting is closed.

The Court rose at 1.20 p.m.

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[170]Cf. *P.C.I.J., Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion of 7 February 1923, Series B, No. 4*, pp. 24-26.

[171]Alan J. Perlis, "Epigrams on Programming", *SIGPLAN Notices*, 1982, No. 9, p. 8.