

## DISSENTING OPINION OF JUDGE XUE

1. In principle, I agree with the Judgment that Senegal as a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (the Convention) should submit without delay the case of Mr. Hissène Habré to the competent authorities for the purpose of prosecution, if it decides not to extradite him. However, I disagree with the majority of the Members of the Court on a number of important issues in the Judgment. As required by my judicial duty, I shall explain my dissent.

### 1. THE ISSUE OF ADMISSIBILITY

2. In the proceedings, Senegal objects to the admissibility of Belgium's claims and maintains that Belgium is not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to submit the *Hissène Habré* case to its competent authorities for the purpose of prosecution, unless it extradites him. In particular, Senegal argues that none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the alleged acts were committed (Judgment, para. 64). Belgium does not dispute that fact but contends that the case is not about diplomatic protection, and “[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform” (*ibid.*, para. 65). It notes in its Application that “[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction” (*ibid.*).

3. This dispute between the Parties with respect to the qualification of passive nationality apparently has a direct bearing on the question of admissibility; should the nationality of the victim be established at the time of the commission of the alleged acts, Belgium's claim is obviously inadmissible.

4. Indeed, this case is different from diplomatic protection where nationality serves as a nexus between an injured individual and its State so as to give the latter entitlement to invoke international responsibility of the wrongful State for the protection of the individual. Nationality principle, however, is not exclusively applicable in diplomatic protection cases in international law. It is also relevant in international criminal law

cases where nationality provides one of the bases for jurisdiction. In the present case, it defines and determines the entitlement of a State party in the exercise of its jurisdiction to prosecute and the right to request for extradition from another State party.

5. Under Article 5, paragraph 1 (*c*), of the Convention, it is provided that jurisdiction can be established over torture offences by a State party “when the victim is a national of that State if that State considers it appropriate”. The Convention does not specify whether such passive nationality should be established at the time of the occurrence of tortuous acts, nor does it prescribe it as a necessary ground; it leaves certain discretion to each State party to decide. In this case, therefore, Belgium’s law and practice have relevance to the issue.

6. Belgium established absolute universal jurisdiction over crimes under international humanitarian law in 1993 (the 1993 law), including jurisdiction based on passive nationality. On 23 April 2003 and 5 August 2003, Belgium amended the 1993 law, by which it restricted, among others, the temporal condition of passive nationality, i.e., nationality should be established at the time of the events instead of at the time of filing a case (the 2003 law). The 2003 law provides to the extent that on the count of a crime under international humanitarian law committed abroad, *criminal prosecution can be exercised only when the victim is, at the time of the events, Belgian, or having been staying effectively in Belgium for at least three years*. In its decision No. 68/2005 of 13 April 2005, the Belgian Court of Arbitration, while upholding the constitutionality of the 2003 law, referred to the legislative intention of the said amendment and stated that

“as for the criterion of personal ties with the country, the lawmaker deemed *it was necessary to introduce certain limits as regards the principle of the capacity to be a defendant in proceedings; it is necessary that at the time of the events, the victim be of Belgian nationality or be effectively staying in Belgium, in a usual, legal manner for at least three years*” (emphasis added).

7. It also points out that such limits are imposed in order to avoid “an obviously abusive political use of this law”, since there are people

“who settled in Belgium for the sole purpose of obtaining the possibility, as under the auspices of the law of 16 June 1993 governing the prevention of serious violations of international humanitarian law and Article 144*ter* of the Judicial Code, of securing the jurisdiction of the Belgian courts for violations of which these persons claim they are the victims” (Court of Arbitration, judgment of 13 April 2005, communicated by the Agent of the Republic of Senegal to the Court on 13 April 2012).

Belgium's 2003 law should in no way be regarded as incompatible with the object and purpose of the Convention in the struggle against torture, although its legislative limits to passive nationality restrain Belgium's right to exercise its jurisdiction over torture.

8. By its own legislative and judicial acts, particularly the jurisdictional limits its 2003 law imposes on passive nationality, Belgium is therefore precluded from denying the applicability of the nationality rule in case it wishes to exercise passive personal jurisdiction. As a State party requesting for extradition under Article 7, paragraph 1, of the Convention, Belgium has to, as a matter of law, establish its entitlement to exercise jurisdiction.

9. It is noted that during the written pleadings, Belgium claims that the transitional provisions to the 2003 law provide to the extent that if investigative measure has already been taken on the date of entry into force of the 2003 law and at least one complainant was a Belgian national at the time the criminal proceedings were initiated, the Belgian courts shall continue to exercise jurisdiction. In this case, Mr. A. Aganaye, a Belgian national as of 19 June 1998, filed the case against Mr. Habré in the Belgian courts in 2000. Moreover, numerous investigative measures were taken before the entry into force of the 2003 law.

10. It is clear to the Court that, among the complainants against Mr. Habré in the Belgian courts, only Mr. A. Aganaye was a Belgian national. Two others were with dual nationalities of Chad and Belgium. None of them was a Belgian national at the time of the events and all were naturalized in Belgium well after the events of the commission of torture in Chad. This nexus for passive national jurisdiction was apparently fragile. Belgium does not provide any evidence to show that such national link is not solely meant to secure the jurisdiction of the Belgian courts and, as such, "displayed an 'obvious link attaching him to Belgium', to use the words of the Belgian Court of Arbitration" (Court of Arbitration, judgment No. 104/2006 of 21 June 2006, communicated by the Agent of the Republic of Senegal to the Court on 13 April 2012).

11. In answering one of the questions put forward by a Member of the Court in regard to Belgium's entitlement to invoke Senegal's responsibility in the Court, Belgium argues that "it is not the nationality of the alleged victims which is the basis of the entitlement of a State to invoke the responsibility of another State. What is relevant is to whom the obligation breached is owed." (CR 2012/6, p. 52, para. 56 (Wood).) This argument implicitly changes Belgium's original claim from a request for extradition to a general right to monitor treaty implementation. Under the Convention, whether Senegal owes an obligation to Belgium to extradite, first and foremost, depends on whether Belgium has entitlement to exercise jurisdiction in accordance with Article 5 of the Convention.

12. The Court, regrettably and questionably, fails to address this crucial issue presented by Senegal in the Judgment. Instead of interpreting Article 5, paragraph 1, of the Convention, the Court bases its reasoning on the notion obligations *erga omnes partes*, which in my opinion, goes far beyond treaty interpretation, deviating from the established jurisprudence of the Court.

13. In examining the issue of Belgium's standing, the Court focuses on the question "whether being a party to the Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument" (Judgment, para. 67). It states that,

"The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present." (*Ibid.*, para. 68.)

Taken from the *obiter dictum* of the *Barcelona Traction Judgment (Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33)*, the Court defines such obligations as obligations *erga omnes partes*.

14. By virtue of the nature of such *erga omnes partes* obligations, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke Senegal's responsibility for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1. Therefore, Belgium's claims are admissible. This conclusion is abrupt and unpersuasive.

15. In the first place, the Court's reference to the *Barcelona Traction* case misuses the *obiter dictum* in that Judgment in several aspects. In that case the Court specifically drew the distinction between obligations owed to the international community as a whole and those arising vis-à-vis another State. It stated that "[b]y their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." (*Ibid.*) In terms of standing, however, the Court only spelt out the conditions for the breach of obligations in bilateral relations and stopped short of the question of standing in respect of obli-

gations *erga omnes*. The Court apparently referred to substantive law rather than procedural rules, with no indication to change the state of the law in the sense that there is no general standing resident with each and every State to bring a case in the Court for the vindication of a communal interest.

16. Since the *Barcelona Traction* Judgment, the Court has referred to obligations *erga omnes* in a number of cases (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 616, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 (I), p. 199, paras. 155-157; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, pp. 31-32, para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 104, para. 147). In none of them, has it pronounced that the existence of a common interest alone would give a State entitlement to bring a claim in the Court.

17. Secondly, the Court's conclusion on obligations *erga omnes partes* in this case is not in conformity with the rules of State responsibility. Even though prohibition of torture has become part of *jus cogens* in international law, such obligations as to make immediately a preliminary inquiry and the obligation to prosecute or extradite are treaty rules, subject to the terms of the Convention. Notwithstanding the fact that the States parties have a common interest in their observance, by virtue of treaty law, the mere fact that a State is a party to the Convention does not, in and by itself, give that State standing to bring a case in the Court. Under international law, it is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring a claim against another State for the breach of such obligations in the Court. A State party must show what obligations that another State party owes to it under the Convention have been breached. Such "injury", to use the language in Article 42 of the International Law Commission's Articles on State Responsibility, distinguishes the State from other States parties as it is "specially affected" by the breach. These procedural rules in no way diminish the importance of prohibition of torture as *jus cogens*. *Jus cogens*, likewise, by its very nature, does not automatically trump the applicability of these procedural rules (*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012 (I), pp. 140-141, paras. 93-95).

18. By adopting the notion *erga omnes partes*, it seems that the Court has blurred the distinction between the claimant State and the other States parties by prescribing a general right to invoke international responsibility in the Court. As a requesting State for extradition, Belgium, provided that its jurisdiction is properly established under Article 5, is entitled to bring a claim against Senegal for the alleged breach of Article 7, paragraph 1, of the Convention. Belgium's entitlement to raise a claim against Senegal for breach of its obligations to make immediately a preliminary inquiry under Article 6, paragraph 2, and the obligation to prosecute under Article 7, paragraph 1, should be tenable only if such claim is intrinsically connected with its request for extradition. As a matter of fact, the dispute between the Parties arose over the interpretation and application of the principle *aut dedere aut judicare* under Article 7, paragraph 1. In other words, Belgium's Application rests on the terms of the Convention rather than the existence of a common interest. When the Court, in addressing the issue of standing, states that

“any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end” (Judgment, para. 69),

I am afraid that its pronouncement can find no support of State practice in the application of the Convention.

19. Thirdly, the Court's conclusion on admissibility is contrary to the terms of the Convention. In order to achieve the object and purpose of the Convention, a reporting and monitoring system is established under Articles 17-20 of the Convention to supervise the implementation of the Convention by the States parties. Besides, a communication mechanism is created under Article 21, by which a State party may send communications to the Committee against Torture to the effect that it considers that another State party is not fulfilling its obligations under this Convention. These mechanisms are designed exactly to serve the common interest of the States parties in the compliance with the obligations under the Convention. The Court's concern in the reasoning that, should a special interest be required for making a claim concerning the cessation of an alleged breach by another State, in many cases no State would be in the position to make such a claim (Judgment, para. 69), is therefore unfounded.

20. Under the Convention, conditions for the operation of these mechanisms demonstrate that the States parties in no way intended to create obligations *erga omnes partes* in Article 6, paragraph 2, and Article 7, paragraph 1.

21. Under Article 22, communications can be made only upon prior declaration by a State party recognizing the competence of the Com-

mittee and can be made only against those States parties that have made a declaration to the same effect. The Committee will not receive and consider any communications if such communication concerns a State party that has not made such a declaration.

22. Furthermore, under Article 30, paragraph 2, each State may, at the time of signature or ratification of the Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this Article, particularly with regard to the jurisdiction of the International Court of Justice.

23. Obviously, if the States parties had intended to create obligations *erga omnes partes*, as pronounced by the Court, Articles 21 and Article 30, paragraph 1, should have been made mandatory rather than optional for the States parties. In accordance with treaty law, any interpretation and application of the object and purpose of the Convention should not contradict, or even override, the clear terms of the treaty.

## 2. RELATIONSHIP BETWEEN THE OBLIGATIONS CONCERNED

24. On the question of jurisdiction, the Court finds that the dispute between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed. The Court therefore lacks jurisdiction to rule on that issue. However, the Court is of the view that it may still have to consider the *consequences* of Senegal's conduct on the compliance with other obligations under the Convention, provided its jurisdiction is established. This fragmented approach to the interpretation and application of treaty provisions, in my view, is problematic in law.

25. Belgium in its submissions asks the Court to adjudicate and declare that Senegal breached its obligation under Article 5, paragraph 2. The reason that the Parties have no dispute over this point, as found by the Court, is that Senegal accepts the decision of the Committee against Torture in 2006 that it breached its obligation under Article 5, paragraph 2, for failing to take necessary measures to establish jurisdiction in its domestic law in due time. The Court's decision on lack of jurisdiction over Article 5, paragraph 2, has two legal implications: one is that the Court eschews the need to pronounce on the merits of the issue, namely, Senegal's breach of its obligation under Article 5, paragraph 2, has ceased to exist by the time of Belgium's institution of the Application; secondly, Senegal's obligation to make a preliminary inquiry under Article 6, paragraph 2, and obligation to prosecute under Article 7, paragraph 1, of the Convention are separated from the obligation under Article 5, paragraph 1, in the Court's reasoning.

26. In the establishment of universal jurisdiction under the Convention, Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, are intrinsically interrelated; Article 5, paragraph 2, is the precondition for the implementation of the other two provisions for the exercise of universal jurisdiction. In other words, without established jurisdictional ground, the competent authorities of a State party would not be able to fulfil the obligation to prosecute or take a decision on a request for extradition from another State party. This is a matter of international law as well as internal law, but first and foremost international law in this case.

27. In the Judgment, although the Court recognizes “the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal’s implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention” (Judgment, para. 77; emphasis added), it has nevertheless found Senegal’s conduct before 2007 relevant for the consideration of its obligations under these Articles. Under criminal law, legal proceedings for prosecution must be based on a sound jurisdictional ground. As Senegal failed to duly adopt necessary measures to establish universal jurisdiction in its domestic law, its competent authorities dismissed the legal proceedings against Mr. Habré for lack of jurisdiction. At the international level, this means Senegal did not meet its obligation under Article 7 of the Convention, a finding by the Committee against Torture. Again, Senegal does not contest that point.

28. In the present case, given the indivisible nature of the treaty obligations under the aforesaid three provisions, Senegal’s failure to fulfil its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, is not, as the Court states, due to its domestic law (*ibid.*, para. 113), but due to its failure to fulfil its obligation under Article 5, paragraph 2. The fact that Senegal’s breach of its obligation under Article 5, paragraph 2, ceased to exist in 2007 has consequential effect on Senegal’s implementation of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1. That is to say, after Senegal established universal jurisdiction over torture offences, it should immediately conduct criminal investigation against Mr. Habré so as to decide whether to submit him to prosecution or extradite him in accordance with Article 7, paragraph 1, of the Convention. Therefore, the relevant time for the consideration of whether or not Senegal has breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, should be the time since Senegal adopted necessary legislation in 2007 rather than from 2000, or even earlier.

29. With regard to Article 6, paragraph 2, the Court finds that “the Senegalese authorities did not immediately initiate a preliminary inquiry

as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture” (Judgment, para. 88). It also considers that Senegal failed to make such an inquiry in 2008 when a further complaint against Mr. Habré was filed in Dakar. In my view, in 2000 when the first complaint was filed in the Senegalese courts, the Senegal competent authorities did take legal action and indicted him. As far as the complaint in 2008 is concerned, the fact is that by 2008 Senegal had already been in the process of preparing for the trial of Mr. Habré. The evidence before the Court demonstrates the following facts.

30. In July 2006, the Assembly of the African Union of Heads of State and Government, by Decision 127 (VII), *inter alia*, “decides to consider the *Hissène Habré* case as falling within the competence of the African Union . . . mandates Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial” (Memorial of Belgium, paras. 1.68-1.71, Ann. F.2; Counter-Memorial of Senegal, para. 106).

31. On 5 October 2007, in a Note Verbale sent from the Senegalese Embassy in Brussels to the Ministry of Foreign Affairs of Belgium, Senegal informed Belgium that it had decided to organize the trial of Mr. Habré and invited Belgium to a meeting of potential donors to finance the trial (Memorial of Belgium, Ann. B.15).

32. On 6 October 2008, only days after the filing of the aforesaid complaints against Mr. Habré in the Senegalese courts, Mr. Habré seised the ECOWAS Court of Justice against the trial over his case to be conducted by Senegal.

33. These facts, among others, reveal that by 2008 the *Hissène Habré* case was well under way. It had passed the stage of preliminary inquiry for the decision whether or not the alleged perpetrator should be brought to trial; when Senegal decided to prosecute Mr. Habré, it must have possessed the necessary facts for that decision. Under such circumstances, the Court’s pronouncement on the obligation to make a preliminary inquiry under Article 6, paragraph 2, seems unnecessarily formalistic. Indeed, as the Court itself points out, “the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question” (Judgment, para. 86). It is also true by this stage Senegal has the competence to decide whether it is still necessary to conduct a preliminary inquiry.

### 3. OBLIGATION *AUT DEDERE AUT JUDICARE* UNDER ARTICLE 7, PARAGRAPH 1

34. Under Article 7, paragraph 1,

“[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found

shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.

35. On the nature and meaning of the obligation *aut dedere aut judicare* as laid down in Article 7, paragraph 1, the Court states that the obligation requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for his extradition. On a general ground, this pronouncement is in line with the object and purpose of the Convention. In the present case, the Court’s statement by implication refers to Senegal’s conduct before Belgium’s first request for extradition was raised. As stated above, Senegal’s failure to bring Mr. Habré to trial during that time was primarily due to the breach of its obligation under Article 5, paragraph 2, of the Convention. Whether Senegal has breached its obligation under Article 7, paragraph 1, should be considered from the time after it adopted necessary legislation and established universal jurisdiction over torture.

36. In the present case, the essential question rests on the issue of Belgium’s request for extradition. I agree with the Court that extradition is an option for the State concerned. It is up to that State to decide whether or not to extradite the alleged suspect. On the relations between the two options, extradition or prosecution, the Court is of the view that

“the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.” (Judgment, para. 95.)

I beg to disagree with this interpretation of Article 7, paragraph 1.

37. The object and purpose of the Convention is to establish the broadest possible jurisdiction in order to effectively fight against torture throughout the world. The establishment of universal jurisdiction and extradition bases between the States parties aims at preventing “safe haven” for the perpetrator. If the State where the alleged offender is present decides to extradite him to the requesting State, the requested State would be relieved from the obligation to prosecute. Should the State decide otherwise not to submit the case to its own competent authorities for prosecution, it is obliged under Article 7, paragraph 1, to submit the case to the extradition proceedings. Logically, if the State concerned has taken the decision to prosecute, by virtue of general principles of criminal justice that no one should be tried twice for the same offence, the extradition request should be rejected.

38. In the present case, despite Senegal's repeated assurance that it has decided to prosecute Mr. Habré to fulfil its obligation under Article 7, paragraph 1, Belgium has persistently pressed its request for extradition. As a matter of fact, it has presented its latest request to Senegal for extradition of Mr. Habré on 17 January 2012. On 15 May 2012, Senegal notified the Court that with complete documents received from Belgium, the matter is now under the consideration of the Senegalese competent authorities. In light of the foregoing events, it is clear that in Belgium's view Senegal has not yet taken the decision whether to prosecute or extradite. Before Senegal has yet decided to prosecute, as a State party, Belgium is entitled under Article 7, paragraph 1, to request for extradition of Mr. Habré, provided the issue of admissibility is settled. While the decision on extradition is still pending, however, it is questionable for Belgium to claim that Senegal has breached its obligation under Article 7, paragraph 1, for failing to prosecute, because such claim would directly contradict Belgium's own request for extradition. Instead of addressing the treaty relations between the Parties under Article 7, paragraph 1, the Court, unfortunately, focuses on Senegal's obligation to prosecute.

39. If Senegal's obligation to prosecute is presumed or mandated, Belgium's request for extradition may be deemed playing a different role: monitoring the implementation of Senegal's obligations under the Convention. It is true that Belgium's request for extradition has actually pushed the process to bring Mr. Habré to prosecution, but to give a State party an entitlement to monitor the implementation of any State party on the basis of *erga omnes partes* certainly goes beyond the legal framework of the Convention. Article 7, paragraph 1, does not provide the State requesting extradition with a right to urge the requested State to prosecute. It only allows the requesting State to claim its right to request for extradition if the requested State has failed to implement its obligation to prosecute or extradite. When the decision on prosecution is taken or the extradition request is being considered under due process, it is questionable for the Court to pronounce that Senegal has breached its obligation under Article 7, paragraph 1.

#### 4. OTHER RELEVANT ISSUES

40. The Court states in the Judgment that

“the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré . . . Moreover, the

referral of the matter to the African Union . . . cannot justify the latter's delays in complying with its obligations under the Convention." (Judgment, para. 112.)

41. The Court is fully aware that the *Hissène Habré* case is now under the purview of the African Union (AU). Evidence before the Court shows that none of the decisions taken by the Organization or other regional organs, e.g., ECOWAS Court of Justice, can be considered as contrary to the object and purpose of the Convention; all of them reinforce Senegal's obligation under the Convention to bring Mr. Habré to prosecution. It would only do justice to say that the AU's decision adopted in July 2006 that urged Senegal to ensure that Hissène Habré be tried in Africa and by the Senegalese courts actually accelerated Senegal's process to amend its national law in accordance with the provisions of the Convention and paved the way for the trial of Mr. Habré. Since 2007, after Senegal adopted the necessary measures and established universal jurisdiction over torture, as the regional political organ, the AU has been a facilitating factor in the process. Nowhere can the Court ascertain that Senegal's referral of the *Hissène Habré* case to the AU was intended to delay the implementation of its obligations under the Convention.

42. More importantly, even if the AU ultimately decides to establish a special tribunal for the trial of Mr. Habré, Senegal's surrender of Mr. Habré to such a tribunal could not be regarded as a breach of its obligation under Article 7, paragraph 1, because such a tribunal is created precisely to fulfil the object and purpose of the Convention; neither the terms of the Convention nor the State practice in this regard prohibit such an option.

43. With respect to the delays in Senegal's implementation of its obligations under the Convention, for the reasons stated previously, I am of the view that the Court should look at Senegal's conduct since it established universal jurisdiction over torture in 2007. As a member of ECOWAS, Senegal has the obligation to respect the jurisdiction of the ECOWAS Court of Justice and wait for it to pronounce on the case submitted by Mr. Habré. If this procedure had caused delay, such delay was legally justifiable.

44. As a State party to the Convention, Senegal cannot justify its failure to implement its obligations by financial difficulties. The Court should not nevertheless downplay the practical difficulties that Senegal faces in the preparation of the trial, categorically disregarding the financial difficulties that Senegal may face in the trial.

45. With over 40,000 victims and several hundreds of witnesses mainly from abroad, investigation and collection of evidence alone could be a heavy task for Senegal. The experiences of many existing international/special criminal tribunals have proved that a trial on such a large scale could go on for years, even decades, with astronomical sums of money budgeted from international organizations and donated by States. Take the Special Court for Sierra Leone (SCSL) for example, the institution was established under the United Nations Security Council resolution 1315 (2000) in 2002. The original estimate for the lifespan of the SCSL was three years and the total budget for it was estimated at US\$76 million. After several extensions, the Court still functions today and its costs have amounted to over US\$200 million.

46. The Special Tribunal for Lebanon (STL) also offers an illustrative example. The STL was established by the United Nations Security Council resolution 1757 in 2007 and started to operate in 2009, with 49 per cent of its budget from Lebanon and 51 per cent from contributions. From 2009 to 2012, in three years' time of its operation, the total budget has reached US\$172 million. In February 2012, the mandate of the STL was renewed for another three years. The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) is even more telling. The ICTY has been in existence for nearly 20 years by now. In the past decade, its annual budget on average has been around US\$140 million.

47. These examples explain that, being the first case of its kind under the Convention, the trial of the *Hissène Habré* case needs political as well as financial support from the international community, particularly the AU and donor countries. It is only prudent for Senegal to get things ready before the prosecution starts.

48. In light of the foregoing considerations, I feel obliged to give my dissent to the decision of the Court. Although I disagree with the Court that Senegal has breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention since it adopted the necessary legislation and established universal jurisdiction over torture in 2007, I wish to reiterate my view that Senegal should take its decision on Belgium's request for extradition as soon as possible so as to, as it declared, submit the case of Mr. Habré to the competent authorities for prosecution.

(Signed) XUE Hanqin.

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