

**REHABILITATION OF VICTIMS: REFLECTIONS ON SOME
ISSUES RAISED IN THE CASE BELGIUM VERSUS SENEGAL (2012)
ADJUDICATED BY THE INTERNATIONAL COURT OF JUSTICE**

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I. Introduction

It is a source of satisfaction to me to contribute, with two lectures, to this XL Course of International Law organized by the OAS Inter-American Juridical Committee. I am likewise pleased to meet in this auditorium my two distinguished friends for many years, Ambassador João Clemente Baena Soares, President of the OAS Inter-American Juridical Committee, and Dr. Jean-Michel Arrighi, Under-Secretary General for Juridical Affairs of the OAS. The topic which I shall address, on the Rehabilitation of Victims (in the context of a recent case resolved by the International Court of Justice), is of great importance and has been attracting much attention in contemporary international legal doctrine. In its recent Judgment, of 20 July 2012, in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal)*, the International Court of

Justice (ICJ) has established violations of Articles 6(2) and 7(1) of the 1984 United Nations Convention against Torture¹, has asserted the need to take immediately measures to comply with the duty of prosecution under that Convention², and has rightly acknowledged that the absolute prohibition of torture is one of *jus cogens*³.

The Court's Judgment paves the way for considerations pertaining to restorative justice, in particular on the relevance of the realization of justice for the rehabilitation of the victims. I have sought to stress this point in my Separate, namely, the Court's jurisdiction in respect of obligations under customary international law, and the handling of the time factor under the U.N. Convention against Torture.

The present study derives from my aforementioned Separate Opinion in the *cas d'espèce*. My reflections pertain to considerations at factual, conceptual and epistemological levels, on distinct points in relation to which I have not found the reasoning of the Court entirely satisfactory or complete. At the factual level, I have dwelt upon: a) the factual background of the present case: the regime Habré in Chad (1982-1990) in the findings of the Chadian Commission of Inquiry (Report of 1992); b) the significance of the decision of 2006 of the U.N. Committee against Torture; c) the clarifications on the case before the ICJ, in the responses to questions put to the contending parties in the course of the legal proceedings; and d) the everlasting quest for the realization of justice in the present case.

At the conceptual and epistemological levels, my reflections have focused on: a) *urgency* and the needed provisional measures of protection in the *cas d'espèce*; b) the acknowledgement of the absolute prohibition of torture in the realm of *jus cogens*; c) the obligations *erga omnes partes* under the U.N. Convention against Torture; d) the *gravity* of the human rights violations and the compelling struggle against impunity (within the law of the United Nations itself); e) the obligations under customary international law; and f) the *décalage* between the time of human justice and the time of human beings revisited (and the need to make time work *pro victima*). In sequence, I have proceeded to: a) an Opinion appended to the Court's Judgment, whereby I stated the reasons which led me to support most of the findings of the Court, though advancing a distinct reasoning on two particular points) a rebuttal of a regressive interpretation of the U.N. Convention against Torture; and b) the identification of the possible emergence of a new chapter in restorative justice, with attention focused on the relevance of the realization of justice for the rehabilitation of victims.

As to the reassuring assertion by the Court that the absolute prohibition of torture is one of *jus cogens* (para. 99), - which I have strongly supported, - I have gone further than the Court, as to what I have perceived as the pressing need to extract the legal consequences therefrom, which the Court has failed to do. The

¹ Judgment's *dispositif*, paras. 4 and 5.

² Judgment's *dispositif*, para. 6.

³ Court's reasoning, para. 99.

way was then paved for the presentation of my concluding reflections on the matter dealt with in the aforementioned Judgment of the Court. In the present article, these issues are reviewed in sequence.

II. The Factual Background of the Present Case: The Regime Habré in Chad (1982-1990) in the Findings of the Chadian Commission of Inquiry (Report of 1992)

In the written and oral phases of the proceedings before the ICJ, both Belgium and Senegal referred to the *Report* of the National Commission of Inquiry of the Chadian Ministry of Justice, concluded and adopted in May 1992. Thus, already in its *Application Instituting Proceedings* (of 19.02.2009), Belgium referred repeatedly to the findings of the 1992 *Report* of the Truth Commission of the Chadian Ministry of Justice, giving account of grave violations of human rights and of international humanitarian law during the Habré regime (1982-1990) in Chad⁴. Subsequently, in its *Memorial* (of 01.07.2010), in dwelling upon Chad under the regime of Mr. H. Habré, Belgium recalled that,

“According to an assessment published in 1993 by the National Commission of Inquiry of the Chadian Ministry of Justice, Mr. Habré’s presidency produced tens of thousands of victims. The Commission gives the following figures: - `more than 40,000 victims; more than 80,000 orphans; more than 30,000 widows; more than 200,000 people left with no moral or material support as a result of this repression” (para. 1.10).

The aforementioned *Report* was also referred to in the course of the oral arguments at the provisional measures phase⁶. Subsequently, Belgium referred repeatedly to the *Report*, from the very start of its oral arguments on the merits of the case⁷. For its part, in its oral argument of 16.03.2012 before the Court, Senegal also referred to those findings of the Chadian Truth Commission, as evoked by Belgium⁸. Those findings were not controverted.

In my understanding, those findings ought to be taken into account in addressing the questions lodged with the Court in the present case, under the CAT Convention,

⁴ ICJ, *Application Instituting Proceedings* (of 19.02.2009, *Belgium versus Senegal*), pp. 13, 39, 57, 89 and 93.

⁵ Ministère Tchadien de la Justice, *Les crimes et détournements de l’ex-Président Habré et de ses complices - Rapport de la Commission d’enquête nationale du Ministère tchadien de la Justice* [The Crimes and Misappropriations Committed by Ex-President Habré and his Accomplices - Report by the National Commission of Inquiry of the Chadian Ministry of Justice], Paris, L’Harmattan, 1993, pp. 3-266.

⁶ ICJ, document CR 2009/08, of 06.04.2009, pp. 18-19.

⁷ Cf. ICJ, document CR 2012/2, of 12.03.2012, pp. 12 and 23.

⁸ ICJ, document CR 2012/5, of 16.03.2012, p. 31.

one of the “core Conventions” on human rights of the United Nations. (This is of course without prejudice to the determination of facts by the competent criminal tribunal that eventually becomes entrusted with the trial of Mr. H. Habré). After all, the exercise of jurisdiction - particularly in pursuance to the principle *aut dedere aut judicare* - by any of the States Parties to the CAT Convention (Articles 5-7) is prompted by the *gravity* of the breaches perpetrated to the detriment of human beings, of concern to the members of the international community as a whole. Bearing this in mind, the main findings set forth in the *Report* of the Chadian Truth Commission may here be briefly recalled, for the purposes of the consideration of the *cas d'espèce*. They pertain to: a) the organs of repression of the regime Habré in Chad (1982-1990); b) arbitrary detentions and torture; c) the systematic nature of the practice of torture of detained persons; d) extra-judicial or summary executions, and massacres. The corresponding passages of the *Report*, published in 1993, can be summarized as follows.

1. The Organs of Repression of the Regime Habré in Chad (1982-1990)

According to the aforementioned *Report* of the Chadian Truth Commission, the machinery of repression of the Habré regime in Chad (1982-1990) was erected on the creation and function of four organs of his dictatorship, namely: the Directorate of Documentation and Security (*Direction de la Documentation et de la Sécurité* - DDS) or the “political police”, the Service of Presidential Investigation (*Service d'Investigation Présidentielle* - SIP), the General Information [Unit] (*Renseignements Généraux* - RG) and the State Party (*Parti-État*), called the *Union Nationale pour l'Indépendance et la Révolution* - UNIR). And the *Report* added:

“Tous ces organes avaient pour mission de quadriller le peuple, de le surveiller dans ses moindres gestes et attitudes afin de débusquer les prétendus ennemis de la nation et les neutraliser définitivement.

La DDS est l'organe principal de la répression et de la terreur. De toutes les institutions oppressives du régime Habré, la DDS s'est distinguée par sa cruauté et son mépris de la vie humaine. Elle a pleinement accompli sa mission qui consiste à terroriser les populations pour mieux les asservir.

Habré a jeté les bases de sa future police politique dès les premiers jours de sa prise de pouvoir. Au début, elle n'était qu'un embryon appelé 'Service de Documentation et de Renseignements' (...). Quant à la DDS telle qu'elle est connue aujourd'hui, elle a été créée par le décret n° 005/PR du 26 janvier 1983”⁹.

⁹ Ministère Tchadien de la Justice, Les crimes et détournements de l'ex-Président Habré et de ses complices - Rapport de la Commission d'enquête nationale du Ministère tchadien de la Justice, op. cit. *supra* n. (5), pp. 20-21.

The “territorial competence” of the DDS extended over “the whole national territory” and even abroad. No sector, public or private, escaped its supervision¹⁰. Promotions were given in exchange for information. The DDS aimed also at those who opposed the regime and were based in neighbouring countries, whereto it sent its agents to perpetrate murder or kidnappings¹¹. The DDS was directly linked and subordinated to the Presidency of the Republic, as set forth by the decree which instituted the DDS; given the “confidential character” of its activities, there was no intermediary between President H. Habré and the DDS¹².

2. The Systematic Practice of Torture of Persons Arbitrarily Detained, of Extra-Judicial or Summary Executions, and Massacres

The same *Report* added that, in the period of the Habré regime, most victims were arbitrarily detained by the DDS, without knowing the charges against them. They were systematically torture, either for “intimidation” or else as “reprisal”¹³. And the *Report* added that

“La torture est une pratique institutionnalisée au sein des services de la DDS. Ainsi les personnes arrêtées sont systématiquement torturées puis détenues dans les cellules exigües, dont les conditions de vie sont épouvantables et inhumaines. (...) [L]a DDS a pratiquement érigé la torture en système de travail et que la presque totalité de ses détenus y sont soumis d’une façon ou d’une autre, sans aucune distinction de sexe ou d’âge”¹⁴.

And the Chadian Truth Commission proceeded in its account of the facts it found:

“Toute personne arrêtée par la DDS, que ce soit à N’Djamena ou en province, est systématiquement soumise au moins à une séance d’interrogatoire à l’issue de laquelle un procès-verbal d’audition est établi. La torture étant l’outil de préférence lors des interrogatoires, les agents de la DDS y recourent de façon systématique.

Plusieurs anciens détenus de la DDS ont fait état à la Commission d’Enquête de la torture et des mauvais traitements auxquels ils ont

¹⁰ *Ibid.*, p. 22: - “Des agents ont été disséminés partout à travers le territoire à commencer par les préfectures, les sous-préfectures, les cantons et même les villages. Il a été implanté une antenne par circonscription. Celle-ci, pour superviser son territoire, recrute des agents locaux à titre d’indicateur ou informateur. Chaque antenne est composée d’un chef et d’un adjoint. (...)”.

¹¹ *Ibid.*, p. 22.

¹² He gave all the orders, and the DDS reported to him daily; *Ibid.*, p. 22. This was how, during his 8 years in power, he imposed a regime of terror in Chad.

¹³ *Ibid.*, p. 38.

¹⁴ *Ibid.*, p. 38. Such practice was conducted pursuant to superior orders, in the hierarchy of power; cf. *Ibid.*, pp. 38-39.

été soumis pendant leur détention. Des traces de ces tortures et des examens médicaux ont corroboré leurs témoignages”¹⁵.

The *Report* of the Chadian Truth Commission also acknowledged cases of extra-judicial or summary executions, and of massacres:

“Durant huit années de règne, Hissein Habré avait instauré un régime où toute opinion politique contraire à la sienne pouvait entraîner la liquidation physique des ses auteurs. Ainsi, depuis son arrivée au pouvoir en juin 1982 jusqu’en novembre 1990, date de sa fuite, un grand nombre de Tchadiens étaient persécutés pour leur prise de position tendant à modifier sa politique autocratique. C’est pourquoi des familles entières ont été interpellées et détenues sans aucune forme de procès, ou tout simplement traquées et exterminées. (...)

Les personnes arrêtées par la DDS ont très peu de chance de sortir vivantes. Cette triste réalité est connue de tous les Tchadiens. Aussi, les détenus meurent généralement de deux façons: soit la mort lente qui survient après quelques jours ou quelques mois, soit la mort expéditive donnée par les bourreaux de Hissein Habré dès les premiers jours suivant l’arrestation. (...) Certains mouraient d’épuisement physique dû aux conditions inhumaines de détention (...). D’autres par contre meurent par asphyxie. Entassés dans de minuscules cellules (...), les détenus s’éteignent les uns après les autres. (...)

Les enlèvements de nuit et les exécutions extra-judiciaires sont pratiqués régulièrement par les agents de la DDS sur les détenus. Ce sont généralement les agents les plus sanguinaires (...) qui procèdent aux sélections des prisonniers destinés à l’abattoir situé aux alentours de N’Djamena. Ces actes odieux et barbares visent une certaine catégorie de détenus”¹⁶.

3. The Intentionality of Extermination of Those Who Allegedly Opposed the Regime

In its remaining parts, the *Report* of the Chadian Truth Commission addressed aggravating circumstances of the oppression of the regime Habré, mainly the *intentionality* of the atrocities perpetrated. In its own words,

“Le régime de Hissein Habré a été une véritable hécatombe pour le peuple tchadien; des milliers de personnes ont trouvé la mort, des milliers d’autres ont souffert dans leur âme et dans leur corps et continuent d’en souffrir. Tout au long de ce sombre règne, à

¹⁵ *Ibid.*, p. 39.

¹⁶ *Ibid.*, pp. 51 and 54.

N'Djamena comme dans le reste du pays, la répression systématique était la règle pour tous les opposants ou supposés opposants au régime. Les biens des personnes arrêtées ou recherchées étaient pillés et leurs parents persécutés. Des familles entières avaient été ainsi décimées. À l'intérieur du pays, des villages ont été complètement brûlés et leurs populations massacrées. Rien n'échappait à cette folie meurtrière et le pays tout entier était soumis à la terreur. (...)

(...) Jamais dans l'histoire du Tchad il n'y a eu autant de morts. Jamais il n'y a eu autant de victimes innocentes. Au début de ses travaux, la Commission d'Enquête pensait avoir affaire, au pire des cas, à des massacres, mais plus elle avançait dans ses investigations, plus l'étendue du désastre s'agrandissait pour aboutir finalement au constat qu'il s'agissait plutôt d'une extermination. Aucun groupe ethnique, aucune tribu, aucune famille n'a été épargnée, exceptés les Goranes et leurs alliés. La machine à tuer ne faisait aucune différence entre hommes, femmes et enfants. (...) À N'Djamena comme en province, les arrestations étaient effectuées à un rythme frénétique. L'on était arrêté pour n'importe quel motif et même sans aucun motif. (...) Les chiffres des détenus politiques recensés par la Commission d'Enquête pour la période de 1982 à 1990 ainsi que ceux des personnes mortes pendant la même période défient toute imagination”¹⁷.

The Report of the Chadian Truth Commission, published in 1993, was in fact concluded on 07.05.1992, with a series of recommendations¹⁸. Its over-all assessment was quite somber. In its own words,

“Le bilan de huit ans de règne qu'a laissés Habré est terrifiant. (...) En récapitulant le mal qu'il a fait contre ses concitoyens, le bilan est lourd et bien sombre; il se chiffre à:

- plus de 40.000 victimes;*
- plus de 80.000 orphelins;*
- plus de 30.000 veuves;*
- plus de 200.000 personnes se trouvant, du fait de cette répression, sans soutien moral et matériel.*

Ajouter à cela les biens meubles et immeubles pillés et confisqués chez de paisibles citoyens, évalués à 1 milliard de francs CFA chaque année. (...) Huit ans de règne, huit ans de tyrannie (...)”¹⁹.

¹⁷ *Ibid.*, pp. 68-69.

¹⁸ Cf. *Ibid.*, pp. 98-99.

¹⁹ *Ibid.*, p. 97.

III. The Decision of May 2006 of the U.N. Committee against Torture

On 18.04.2001, a group of persons who claimed to be victims of torture during the regime Habré in Chad lodged a complaint with the U.N. Committee against Torture, supervisory organ of the U.N. Convention against Torture (CAT Convention). They did so under Article 22 of the CAT Convention, in the exercise of the right of individual complaint or petition²⁰. The Committee then proceeded to the examination of the case of *Souleymane Guengueng et alii versus Senegal*. It should not pass unnoticed, at this stage, that the Committee was enabled to pronounce on this matter due to the exercise, by the individuals concerned, of their right of complaint or petition at international level.

Half a decade later, on 19.05.2006, the Committee against Torture adopted a decision, under Article 22 of the CAT Convention, on the case *Souleymane Guengueng et alii*, concerning the complaints of Chadian nationals living in Chad, who claimed to be victims of a breach by Senegal of Articles 5(2) and 7 of the CAT Convention²¹. The Committee did so taking into account the submissions of the complainants and of the respondent State, bearing in mind the factual background of the case as contained in the *Report* (of May 1992) of the National Commission of Inquiry of the Chadian Ministry of Justice²². In their complaint lodged with the U.N. Committee against Torture, the complainants claimed, as to the facts, that, between 1982 and 1990, they were tortured by agents of Chad who answered directly to Mr. H. Habré, the then President of Chad during the period at issue.

The Committee referred to the aforementioned *Report* by the National Commission of Inquiry established by the Chadian Ministry of Justice (cf. *supra*), giving account of 40.000 “political murders” and “systematic acts of torture” allegedly committed during the H. Habré regime. The Committee recalled that, after being ousted by Mr. Idriss Déby in December 1990, Mr. H. Habré took refuge in Senegal, where he has been living ever since. The Committee further recalled the initiatives of legal action (from 2000 onwards) against Mr. H. Habré, in Senegal and in Belgium. The Committee then found the communication admissible and considered that the principle of universal jurisdiction enunciated in Articles 5(2) and 7 of the CAT Convention implies that the jurisdiction of

²⁰ Article 22 of the CAT Convention has been accepted by both Senegal (on 16.10.1996) and Belgium (on 25.07.1999). Up to date, 64 of the 150 States Parties to the CAT Convention have accepted this optional clause of recognition of the competence of the U.N. Committee against Torture. For an up-dated digest of the consideration of complaints under Article 22 of the CAT Convention, cf. U.N., *Report of the Committee against Torture*, 45th-46th Sessions (2010-2011), U.N. doc. A/66/44, pp. 150-203.

²¹ Paras. 1.1-1.3. The Committee (acting under Article 108(9) of its Rules of Procedure) requested Senegal, as an interim measure, not to expel Mr. H. Habré and to take all necessary measures to prevent him from leaving the country (other than an extradition), - a request to which Senegal acceded.

²² Para. 2.1.

States Parties “*must extend to potential complainants in circumstances similar to the complainants*”²³.

As to the merits of the communication in the case *Souleymane Guengueng et alii*, the Committee, after reviewing the arguments of the parties as to the alleged violations of the relevant provisions of the CAT Convention, noted that Senegal had not contested the fact that it had not taken “such measures as may be necessary” under Article 5(2). The Committee found that Senegal had not fulfilled its obligations under that provision²⁴. In reaching this decision, the Committee deemed it fit to warn, in its decision of 19.05.2006, that

*“the reasonable time-frame within which the State Party should have complied with this obligation [under Article 5(2) of the CAT Convention] has been considerably exceeded”*²⁵.

As to the alleged breach of Article 7 of the CAT Convention, the Committee noted that “the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition”; it further observed that the objective of Article 7 is “to prevent any act of torture from going unpunished”²⁶. The Committee also pondered that Senegal or any other State Party “cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with [its] obligations under the Convention”²⁷. The Committee found that Senegal was under an obligation to prosecute Mr. H. Habré for alleged acts of torture, unless it could demonstrate that there was not sufficient evidence to prosecute (at the time of the complainants’ submission of their original complaint of January 2000).

The Committee recalled that the decision of March 2001 by the Court of Cassation had put an end to any possibility of prosecuting Mr. H. Habré in Senegal, and added that since Belgium’s request of extradition of September 2005, Senegal also had the choice to extradite Mr. H. Habré. As Senegal decided neither to prosecute nor to extradite him, the Committee found that it had failed to perform its obligations under Article 7 of the CAT Convention²⁸. The Committee then concluded that Senegal had violated Articles 5(2) and 7 of the CAT Convention; it added that its decision in no way influenced the possibility of “the complainants’ obtaining compensation through the domestic courts for the State Party’s failure to comply with its obligations under the Convention”²⁹. This decision of the

²³ Para. 6.4, and cf. paras. 6.1-6.5.

²⁴ Paras. 9.1-9.6.

²⁵ Para. 9.5.

²⁶ Para. 9.7.

²⁷ Para. 9.8.

²⁸ Paras. 9.7-9.12.

²⁹ Paras. 9.12 and 10.

Committee against Torture is, in my view, of particular relevance to the present case before this Court³⁰.

IV. The Case before the ICJ: Responses to Questions Put to the Contending Parties

1. Questions Put to Both Parties

At the end of the public hearings before this Court, I deemed it fit to put to the two contenting parties, on 16.03.2012, the following questions:

“(…) First question:

1. *As to the facts* which lie at the historical origins of this case, taking into account the alleged or eventual projected costs of the trial of Mr. Habré in Senegal, what in your view would be the probatory value of the Report of the National Commission of Inquiry of the Chadian Ministry of Justice?

Second question:

2. As to the law:

a) Pursuant to Article 7(1) of the United Nations Convention against Torture, how is the obligation to ‘submit the case to its competent authorities for the purpose of prosecution’ to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill the obligation under Article 7(1) of the United Nations Convention against Torture?

b) According to Article 6(2) of the United Nations Convention against Torture, a State Party wherein a person alleged to have committed an offence (pursuant to Article 4) is present, ‘shall immediately make a preliminary inquiry into the facts’. How is this obligation to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill its obligation under this provision of the United Nations Convention against Torture?’³¹.

2. Responses by Belgium

Concerning the *first* question I posed, Belgium gave its response on the basis of the relevant rules of Belgian law, and invited Senegal to elaborate on the rules applicable under Senegalese law. Belgium contended that Belgian law espouses

³⁰ Cf. also section XV, *infra*.

³¹ ICJ, document CR 2012/5, of 16.03.2012, pp. 42-43 [original in French, translated into English].

the principle of “*liberté de la preuve*” in criminal contexts, which, according to Belgium, entails, first, the free choice of evidence and, secondly, allows the trial judge to have discretion to assess its probative value. Belgium pointed out that the Belgian Court of Cassation has upheld this principle many times³². Belgium further argued that the corollary of the principle of “*liberté de la preuve*” is that of firm conviction, whereby the judge can only uphold the charges in case all the evidence submitted to him by the prosecutor warrants the firm conviction that the individual has committed the offence he is charged with.

Belgium contended, in addition, that, essentially, any type of evidence is thus admissible, as long as it is rational and recognized, by reason and experience, as capable of convincing the judge; any evidence taken into account by the judge in a criminal case must be subjected to adversarial argument. Belgium contended that the judge in a criminal case may take into consideration all the evidence which has been gathered abroad and which has been transmitted to the Belgian authorities, such as, a copy of the *Report* of the National Commission of Inquiry of the Chadian Ministry of Justice (hereinafter: “the *Report*”), as long as that evidence does not violate the right to a fair trial³³.

As to the *second* question I posed³⁴, Belgium argued that there were three steps to be taken pursuant to Article 6 of the Convention against Torture (CAT Convention): “*first*, to secure the offender’s presence; *second*, to conduct, immediately, a preliminary inquiry; and, *third*, to notify, immediately, certain States what is going on, including in particular reporting to them its findings following the preliminary inquiry and indicating whether it intends to exercise jurisdiction”. As to the first requirement of Article 6, Belgium argued that it never contested that Senegal fulfilled this first step, even though from time to time, Belgium has had serious concerns about Senegal’s continuing commitment to this obligation, given certain statements by high-level officials of Senegal.

³² ICJ, document CR 2012/6, of 19.03.2012, p. 21.

³³ ICJ, document CR 2012/6, of 19.03.2012, p. 21. Belgium further claimed that when the international arrest warrant against Mr. Habré was issued, the Belgian investigating judge took account, in particular, of the evidence contained in the *Report*. Thus, - to conclude, - Belgium argued that, while keeping in mind that it is for the trial judge to rule on the probative value of the *Report* at issue, it could certainly be used as evidence in proceedings against Mr. Habré. Belgium added that the use of the *Report* could save a considerable amount of time and money in pursuit of the obligation to prosecute, even if - and Belgium referred to Senegal’s arguments in this regard - it is not possible to point to “lack of funds or difficulties in establishing a special budget as exonerating factors” concerning the responsibility of the State which is obliged to prosecute or, failing that, to extradite. ICJ, document CR 2012/6, of 19.03.2012, p. 22.

³⁴ Namely: - “According to Article 6(2) of the United Nations Convention against Torture, a State Party wherein a person alleged to have committed an offence (pursuant to Article 4) is present, ‘shall immediately make a preliminary inquiry into the facts’. How is this obligation to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill its obligation under this provision of the United Nations Convention against Torture?”

As concerns Article 6(2), Belgium argued that Senegal's counsel did not make arguments in this regard during the oral hearings. Belgium claimed that Article 6 is a common provision in Conventions containing *aut dedere aut judicare* clauses (as, e.g., in the Hague and Montreal Conventions concerning Civil Aviation), and referred to the United Nations Study of such clauses, to the effect that the preliminary steps set out in the Conventions, including "measures (...) to investigate relevant facts", are indispensable to allow the proper operation of the mechanism for the punishment of offenders in the relevant conventions. Belgium went on to argue that, from the structure of the *aut dedere aut judicare* provisions of the Convention against Torture, the reference to a preliminary inquiry in Article 6(2), is of the kind of preliminary investigation which precedes the submission of the matter to the prosecuting authorities³⁵. In Belgium's submission, "[t]he preliminary inquiry referred to in Article 6, paragraph 2, thus requires the gathering of first pieces of evidence and information, sufficient to permit an informed decision by the competent authorities of the territorial State whether a person should be charged with a serious criminal offence and brought to justice"³⁶. Belgium concluded by claiming that there is no information before the Court speaking to any preliminary inquiry on the part of Senegal.

As to my question concerning the *interpretation of Article 7*³⁷, Belgium first argued that the obligation under Article 7(1) is closely related to the obligations under Articles 5(2), and 6(2) of the CAT Convention, - which in its view Senegal has also violated, - and Belgium further claimed in this regard that "the breach of Article 7 flowed from the breach of the other two provisions". Belgium explained that "[t]he absence of the necessary legislation, in clear breach of Article 5, paragraph 2, until 2007/2008 meant that Senegal's prosecutorial efforts were doomed to failure. So the prosecutorial efforts undertaken in 2000 and 2001 cannot be seen as fulfilling the obligation laid down in Article 7, paragraph 1, of the Convention"³⁸.

³⁵ Belgium claimed that Article 6(4) made it clear that the preliminary inquiry should lead to findings, and that the main purpose of the inquiry is to enable the State in whose territory the alleged offender is present, to take a decision on whether it intends to take jurisdiction, and to report its findings to other interested States so that they may take a decision whether or not to seek extradition.

³⁶ ICJ, document CR 2012/6, of 19.03.2012, pp. 42-44. Belgium also cites the *Commentary*, by Nowak and McArthur, in this sense: "[s]uch criminal investigation is based on the information made available by the victims and other sources as indicated in Article 6 (1) and includes active measures of gathering evidence, such as interrogation of the alleged torturer, taking witness testimonies, inquiries on the spot, searching for documentary evidence, etc."; M. Nowak, E. McArthur *et alii*, *The United Nations Convention Against Torture - A Commentary*, Oxford, Oxford University Press, 2008, p. 340.

³⁷ Namely: - "Pursuant to Article 7(1) of the United Nations Convention against Torture, how is the obligation to 'submit the case to its competent authorities for the purpose of prosecution' to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill the obligation under Article 7(1) of the United Nations Convention against Torture?"

³⁸ ICJ, document CR 2012/6, of 19.03.2012, p. 46.

Belgium claimed that the obligation in Article 7 of the CAT Convention “to submit the case to the competent authorities for the purpose of prosecution” is carefully worded as it would not seem realistic “*to prosecute whenever allegations are made*”. In this regard, Belgium argued that:

“What can be required is that the case is submitted to the prosecuting authorities for the purpose of prosecution; and that those authorities ‘shall take their decision in the same manner as the case of any ordinary offence of a serious nature’ - in paragraph 2 of Article 7, with which paragraph 1 should be read, provides. What is at issue here, in particular, is the need for the prosecuting authorities to decide whether the available evidence is sufficient for a prosecution”³⁹.

Belgium then referred to the negotiating history of Article 7 and argued that the same language is now found in many of the *aut dedere aut judicare* clauses that follow the Hague Convention⁴⁰ model, including the CAT Convention. Referring to the *travaux préparatoires* of the latter, Belgium argued that it was decided that the language should follow the “well-established language” of the Hague Convention⁴¹. Belgium also claimed that “the fact that there is no absolute requirement to prosecute does not mean that the prosecuting authorities have total discretion, and that a State may simply do nothing”, and contended that, like any other international obligation, it must be performed in good faith.

Belgium referred to the object and purpose of the CAT Convention stated in its concluding preambular paragraph - “to make more effective the struggle against torture” - which means, in its view, that the prosecuting authorities start “a prosecution if there is sufficient evidence, and that they do so in a timely fashion”. After referring to expert writing on the *travaux préparatoires* of the Hague Convention, for guidance in the interpretation of Article 7 of the CAT Convention⁴², Belgium concluded that Senegal is in breach of its obligation under Article 7 of the CAT Convention, notwithstanding the fact that the prosecuting authorities acted in the year 2000, without success, which in its view was not sufficient to fulfill its obligations under the CAT Convention⁴³.

³⁹ *Ibid.*, p. 46.

⁴⁰ Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16.12.1970, *U.N. Treaty Series*, vol. 860, p. 105 (I-12325).

⁴¹ ICJ, document CR 2012/6, of 19.03.2012, pp. 46-47.

⁴² *Ibid.*, pp. 46-48.

⁴³ Belgium further contended that, since 2000-2001, Senegal has taken no action to submit any of the allegations against Mr. H. Habré to the prosecuting authorities, a fact which Belgium submitted to be a “matter of particular concern given that the allegations against Mr. H. Habré were renewed in the Belgian extradition request of 2005, and in the further complaint laid in Senegal in 2008, not to speak of the information now publicly available concerning the crimes that have been committed when *Hissène Habré* was in power in Chad, and for which he allegedly bears responsibility”; *Ibid.*, p. 48.

3. Responses by Senegal

In respect of my *first* question (*supra*), Senegal pointed out, as far as the pertinent provisions of domestic law in force in Senegal are concerned, that the *Report* of the Chadian Truth Commission “can only be used for information purposes and is not binding on the investigating judge who, in the course of his investigations conducted by means of an international letter rogatory, may endorse or disregard it”. Senegal added that the *Report* is not binding on the trial judge examining the merits of the case, and thus the value of the *Report* is “entirely relative”⁴⁴.

As to my *second* question (*supra*), Senegal argued that, even before it adhered to the CAT Convention, it had already endeavoured to punish torture, and as such it had established its jurisdiction in relation to Article 5 (3) of the Convention, on the basis of which Mr. Habré was indicted in 2000 by the senior investigating judge when the competent Senegalese authorities had been seised with complaints. Senegal further claimed that, pursuant to Article 7(3) of the Convention, Mr. Habré “was able to avail himself of the means of redress made available by Senegalese law to any individual implicated in proceedings before criminal courts, without distinction of nationality, on the same basis as the civil parties”⁴⁵. Senegal also added that, further to the judgment of 20.03.2001 of the Court of Cassation, and the mission of the Committee against Torture in 2009, Senegal adapted its legislation to the other provisions of the CAT Convention⁴⁶.

Senegal further claimed that the CAT Convention does not contain a “general obligation to combat impunity” as a legal obligation with the effect of requiring universal jurisdiction to be established and that an obligation of *result* is not in question, “since the fight against impunity is a process having prosecution or extradition as possible aims under the said Convention”. Senegal questioned the purpose of establishing universal jurisdiction in the case of a State which already has a legal entitlement to exercise territorial jurisdiction, which, in its view is the most obvious principle in cases of competing jurisdiction. Senegal recalled that, in 2009, it established its jurisdiction concerning offences covered by the CAT Convention. Senegal further recalled the Court’s Order on the request for provisional measures of 2009 to the effect that the Parties seemed to differ on the “time frame within which the obligations provided for in Article 7 must be fulfilled

⁴⁴ ICJ, document CR 2012/7, of 21.03.2012, p. 32.

⁴⁵ *Ibid.*, pp. 32-33.

⁴⁶ Senegal further claimed that the investigating judge, in criminal proceedings, may be seised either by a complaint with civil-party application or by an application from the Public Prosecutor to open an investigation. Concerning the preliminary inquiry, Senegal claimed that its aim is to establish the basic facts and that it does not necessarily lead to prosecution, as the prosecutor may, upon review of the *results* of the inquiry, decide that there are no grounds for further proceedings; *Ibid.*, p. 33.

or [on the] circumstances (financial, legal or other difficulties)”. Senegal argued that the obligation *aut dedere aut judicare* remains an obligation either to extradite or, in the alternative, to prosecute, given that international law does not appear to “give priority to either alternative course of action”⁴⁷.

Senegal contended, moreover, that “[t]he obligation to try, on account of which Senegal has been brought before the Court, cannot be conceived as an obligation of *result*” but rather an obligation of means, where “the requirement of wrongfulness is fulfilled only if the State to which the source of the obligation is attributable has not deployed all the means or endeavours that could legitimately be expected of it in order to achieve the *results* expected by the authors of the rule”. Senegal referred to [some] international jurisprudence and argued that international law does not impose obligations of *result* on member States. Senegal concluded by arguing that the measures it has taken thus far are largely sufficient and satisfy the obligations laid down in Articles 6(2) and 7(1) of the CAT Convention. Senegal thus argued that once it “undertook major reforms to allow the trial to be held, including constitutional reforms, it may be considered to have satisfied its obligation of means or of ‘best efforts’, so as not to give the appearance of a State heedless and not desirous of implementing its conventional obligations. It may not have done this to a sufficient extent, but it has made sufficient progress in terms of acting to achieve such a *result*”⁴⁸.

4. General Assessment

In the light of the aforementioned, it is significant that, for the arrest warrant against Mr. Habré, the evidence contained in the *Report* of the Chadian Truth Commission was taken into account by the Belgian investigating judge. Furthermore, - as also pointed out by Belgium, - that *Report* can certainly be taken into account as evidence in legal proceedings against Mr. H. Habré, it being for the trial judge or the tribunal to rule on its probative value. Senegal itself acknowledged that the *Report* at issue can be taken into account for information purposes, without being “binding” on the investigating judge; it is for the judge (or the tribunal) to rule on it.

There thus seemed to be a disagreement between Belgium and Senegal as to the consideration of the evidence considered in the *Report*. In any case, the *Report* cannot be simply overlooked or ignored; it cannot be examined without care. It is to be examined together with all other pieces of evidence that the investigating judge or the tribunal succeeds in having produced before him/it, for the purpose of ruling on the matter at issue. The present case concerns ultimately a considerable total of victims, those murdered, or arbitrarily detained and tortured, during the Habré regime in Chad (1982-1990). As to the answers provided by the contending

⁴⁷ *Ibid.*, p. 34.

⁴⁸ *Ibid.*, pp. 35-36.

parties to my questions addressed to them, whether in their view the steps that Senegal alleges to have taken to date, were sufficient to fulfill its obligations under Articles 6(2) and 7(1) of the U.N. Convention against Torture, an assessment of such answers ensues from the consideration of the doctrinal debate on the dichotomy between alleged obligations of means or conduct, and obligations of *result*. I am of the view that the obligations under a treaty of the nature of the U.N. Convention against Torture are not, as the respondent State argues, simple obligations of means or conduct: they are obligations of *result*, as we are here in the domain of peremptory norms of international law, of *jus cogens*. I feel obliged to expand on the foundations of my personal position on this matter.

V. Peremptory Norms of International Law (Jus Cogens): The Corresponding Obligations of Result, and Not of Simple Conduct

In my understanding, the State obligations, - under Conventions for the protection of the human person, - of prevention, investigation and sanction of grave violations of human rights and of International Humanitarian Law, are not simple obligations of conduct, but rather obligations of *result*⁴⁹. It cannot be otherwise, when we are in face of peremptory norms of international law, safeguarding the fundamental rights of the human person. Obligations of simple conduct may prove insufficient; they may exhaust themselves, for example, in unsatisfactory legislative measures. In the domain of *jus cogens*, such as the absolute prohibition of torture, the State obligations are of due diligence and of *result*. The examination of the proposed distinction between obligations of conduct and obligations of *result* has tended to take place at a purely theoretical level, assuming variations in the conduct of the State, and even a succession of acts on the part of this latter⁵⁰, and without taking sufficient and due account of a situation which causes irreparable harm to the fundamental rights of the human person.

If the corresponding obligations of the State in such a situation were not of *result*, but of mere conduct, the doors would then be left open to impunity. The handling of the case of Mr. *Hissène Habré* to date serves as a warning in this regard. Over three decades ago, when the then *rapporteur* of the U.N. International Law Commission (ILC) on the International Responsibility of the State, Roberto

⁴⁹ Cf., to this effect: IACtHR, case of the *Dismissed Employees of the Congress versus Peru* (Interpretation of Judgment of 30.11.2007), Dissenting Opinion of Judge Cançado Trindade, paras. 13-29; IACtHR, case of the *Indigenous Community Sawhoyamaya versus Paraguay* (Judgment of 29.03.2006), Separate Opinion of Judge Cançado Trindade, para. 23; IACtHR, case *Baldeón García versus Peru* (Judgment of 06.04.2006), Separate Opinion of Judge Cançado Trindade, paras. 11-12.

⁵⁰ A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato (...), op. cit. infra* n. (55), pp. 50-55 and 128-135.

Ago, proposed the distinction between obligations of conduct and of *result*, some members of the ILC expressed doubts as to the viability of distinguishing between the two types of obligation; after all, in order to achieve a given *result*, the State ought to assume a given behaviour⁵¹. In any case, obligations of *result* admitted the initial free choice by the State of the means to comply with them, of obtaining the *results* due.

The aforementioned distinction between the two kinds of obligations introduced a certain hermeticism into the classic doctrine on the matter, generating some confusion, and not appearing much helpful in the domain of the international protection of human rights. Despite references to a couple of human rights treaties, the essence of R. Ago's reasoning, developed in his dense and substantial *Reports* on the International Responsibility of the State, had in mind above all the framework of essentially inter-State relations. The ILC itself, in the *Report* of 1977 on its work, at last reckoned that a State Party to a human rights treaty has obligations of *result*, and, if it does not abide by them, it cannot excuse itself by alleging that it has done all that it could to comply with them, that it has behaved in the best way to comply with them; on the contrary, such State has the duty to attain the *result* required of it by the conventional obligations of protection of the human person.

Such binding obligations of *result* (under human rights treaties) are much more common in international law than in domestic law. The confusion generated by the dichotomy of obligations of conduct and of *result* has been attributed to the undue transposition into international law of a distinction proper to civil law (*droit des obligations*); rather than "importing" inadequately distinctions from other branches of Law or other domains of legal theory, in my view one should rather seek to ensure that the behaviour of States is such that it will abide by the required *result*, of securing protection to human beings under their respective jurisdictions. Human rights treaties have not had in mind the dichotomy at issue, which is vague, imprecise, and without practical effect.

It is thus not surprising to find that the distinction between so-called obligations of conduct and of *result* was discarded from the approved 2001 draft of the ILC on the International Responsibility of States, and was met with criticism in expert writing⁵². Moreover, it failed to have any significant impact on international case-

⁵¹ *Report* reproduced in: Appendix I: *Obligations of Result and Obligations of Means*, in I. Brownlie, *State Responsibility - Part I*, Oxford, Clarendon Press, 2001 [reprint], pp. 241-276, esp. pp. 243 and 245.

⁵² Cf., e.g., I. Brownlie, *State Responsibility - Part I*, *op. cit. supra* n. (53), pp. 241, 250-251, 255-259, 262, 269-270 and 276; J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", in *Mélanges offerts à P. Reuter - Le droit international: unité et diversité*, Paris, Pédone, 1981, pp. 190, 198 and 200-204;

law. The ECtHR, for example, held in the case of *Colozza and Rubinat versus Italy* (Judgment of 12.02.1985), that the obligation under Article 6(1) of the European Convention of Human Rights was one of *result*. For its part, the ICJ, in the case of the *Hostages (U.S. Diplomatic and Consular Staff) in Tehran* (Judgment of 24.05.1980), ordered the respondent State to comply promptly with its obligations, which were “not merely contractual”, but rather imposed by general international law (para. 62); the ICJ singled out “the imperative character of the legal obligations” incumbent upon the respondent State (para. 88), and added that

“Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights” (para. 91).

One of such principles is that of respect of the dignity of the human person. Thus, in so far as the safeguard of the fundamental rights of the human person is concerned, the obligations of the State - conventional and of general international law - are of *result*, and not of simple conduct, so as to secure the effective protection of those rights. The absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of result, endowed with a necessarily objective character, and the whole conceptual universe of the law of the international responsibility of the State has to be reassessed in the framework of the international protection of human rights⁵³, encompassing the origin as well as the implementation of State responsibility, with the consequent and indispensable duty of reparation.

In the framework of the International Law of Human Rights, - wherein the U.N. Convention against Torture is situated, - it is not the *result* that is conditioned by the conduct of the State, but, quite on the contrary, *it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms of protection of the human person*. The conduct of the State ought to be the one which is conducive

P.-M. Dupuy, “Le fait générateur de la responsabilité internationale des États”, 188 *Recueil des Cours de l'Académie de Droit International de La Haye* (1984) pp. 47-49; and cf. also P.-M. Dupuy, “Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of *Result* in Relation to State Responsibility”, 10 *European Journal of International Law* (1999) pp. 376-377.

⁵³ A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali*, Milano, Giuffrè Ed., 2003, pp. 166-171; F. Urioste Braga, *Responsabilidad Internacional de los Estados en los Derechos Humanos*, Montevideo, Edit. B de F, 2002, pp. 1-115 and 139-203; L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht, Nijhoff, 1995, pp. 141-142 and 149, and cf. pp. 145, 150-152 and 156.

to compliance with the obligations of *result* (in the *cas d'espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered it impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly “good conduct” of the State concerned.

This would be inadmissible; we are here in before obligations of result. To argue otherwise would amount to an exercise of legal formalism, devoid of any meaning, that would lead to a juridical absurdity, rendering dead letter the norms of protection of the human person. In sum and conclusion on this point, the absolute prohibition of torture is, as already seen, one of *jus cogens*; in an imperative law, conformed by the *corpus juris* of the international protection of the fundamental rights of the human person, the corresponding obligations of the State are ineluctable, imposing themselves *per se*, as obligations necessarily of *result*.

VI. The Everlasting Quest for the Realization of Justice in the Present Case

With these clarifications in mind, it would be helpful to proceed, at this stage, to a brief view of the long-standing endeavours, throughout several years, to have justice done, in relation to the grave breaches of human rights and International Humanitarian Law reported to have occurred during the Habré regime (1982-1990). Those endeavours comprise legal actions in domestic courts⁵⁴, requests of extradition

⁵⁴ On 25-26.01.2000 the first complaints were lodged by Chadian nationals in Dakar, Senegal, against Mr. Hissène Habré, accusing him of the practice of torture (crimes against humanity). On 03.02.2000 a Senegalese judge, after hearing the victims, indicted Mr. H. Habré, and placed him under house arrest. But on 04.07.2000 the Dakar Appeals Court dismissed the indictment, ruling that Senegalese courts had no jurisdiction to pursue the charges because the crimes were not committed in Senegal. - On 30.11.2000, new complaints were filed against Mr. H. Habré, this time in Brussels, by Chadian victims living in Belgium. On 20.03.2001, Senegal's Appeals Court stood by its view, in ruling that Mr. H. Habré could not stand trial because the alleged crimes were not committed in Senegal. In 2002 (26 February to 07 March), a Belgian investigating judge (*juge d'instruction*), in a visit to Chad, interviewed victims and former accomplices of Mr. H. Habré, visited detention centres and mass graves, and took custody of DDS documents. At the end of a four-year investigation, on 19.09.2005, he issued an international arrest warrant *in absentia* in respect of Mr. H. Habré. Senegal, however, refused to extradite him to Belgium. Parallel to new developments, - at international level, - from the end of 2005 to date, at domestic level new complaints were filed, on 16.09.2008, against Mr. H. Habré in Senegal, accusing him again of the practice of torture (crimes against humanity). Earlier on, on 31.01.2007, Senegal's National Assembly adopted a law allowing Senegalese courts to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when committed outside of Senegal (thus removing a previous legal obstacle); it later amended its constitution.

(at inter-State level)⁵⁵, some other initiatives at international level⁵⁶ (including those of the *rappporteur* of the CAT Convention and of the U.N. High Commissioner for Human Rights [OHCHR], as well as of entities of the African civil society).

Thus, on 24.11.2011, the *rappporteur* of the CAT Convention on the follow-up of communications (or petitions) sent a letter to the Permanent Mission of Senegal to the United Nations, reminding it of its obligation *aut dedere aut judicare* under the Convention, and took note of the fact that, until then, no proceedings had been initiated by Senegal against Mr. H. Habré. Earlier on, on 12.01.2011, the same *rappporteur* had sent another letter to Senegal's Permanent Mission to the U.N., recalling the State Party's obligation under Article 7(1) of the CAT Convention, now that the full funding for the trial of Mr. H. Habré had been secured (*supra*).

⁵⁵ Four requests by Belgium to date, of extradition of Mr. H. Habré, are to be added. As to the first Belgian request of extradition, of 22.05.2005, the Dakar Appeals Court decided, on 25.11.2005, that it lacked jurisdiction to deal with it. On 15.03.2011, Belgium presented a second extradition request, declared inadmissible by the Dakar Appeals Court in its decision of 18.08.2011. Later on, a third extradition request by Belgium, of 05.09.2011, was again declared inadmissible by the Dakar Appeals Courts in its decision of 10.01.2012. Belgium promptly lodged a fourth extradition request (same date). To those requests for extradition, one could add the whole of the diplomatic correspondence exchanged between Belgium and Senegal, reproduced in the dossier of the present case before this Court.

⁵⁶ E.g., on 24.01.2006 the African Union (A.U.), meeting in Khartoum, set up a "Committee of Eminent African Jurists", to examine the H. Habré case and the options for his trial. In its following session, after hearing the report of that Committee, the A.U., on 02.07.2006, asked Senegal to prosecute H. Habré "on behalf of Africa". In the meantime, on 18.05.2006, the U.N. Committee against Torture found, in the Souleymane Guengueng *et alii* case (*supra*), that Senegal violated the CAT Convention and called on Senegal to prosecute or to extradite Mr. H. Habré. Shortly after the ICJ's Order of 28.05.2009 in the present case opposing Belgium to Senegal, the President and another member of the U.N. Committee against Torture embarked on an unprecedented visit *in situ* to Senegal, from 04 to 07.08.2009, to seek the application of the Committee's own decision of May 2006 in the *cas d'espèce*. – In the meantime, on 11.08.2008, a Chadian national residing in Switzerland (Mr. Michelot Yogogombaye) lodged an application against Senegal before the African Court on Human and Peoples' Rights (AfCtHPR) with a view to suspend the "ongoing proceedings" aiming to "charge, try and sentence" Mr. *Hissène Habré*. On 15.12.2009, the AfCtHPR decided that it had no jurisdiction to entertain the application at issue, since Senegal had not made a declaration accepting the jurisdiction of the AfCtHPR to hear such applications, pursuant to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights (on the establishment of the AfCtHPR). - In the period 2008-2010, moreover, given Senegal's refusal to prepare for the trial of Mr. H. Habré unless it received full funding for it, the European Union and the A.U. sent successive delegations to negotiate on the issue with Senegal. In the meantime, on 18.11.2010, the ECOWAS Court of Justice ruled that Senegal ought to try Mr. H. Habré by a special jurisdiction or an *ad hoc* tribunal, to be created for that purpose. On 24.11.2010, a donors' international roundtable held in Dakar secured the full funding to cover all the estimated costs of the proceedings of the trial of Mr. H. Habré. Shortly afterwards, on 31.01.2011, the A.U. called for the "expeditious" start of the trial of Mr. H. Habré, on the basis of the ECOWAS Court decision (cf. *infra*).

For its part, the OHCHR also expressed its concern with the delays in opening up the trial of Mr. H. Habré; on 18.03.2011, the OHCHR urged Senegal to comply with its duty of prosecution⁵⁷. Later on, the OHCHR requested Senegal not to extradite (as then announced) Mr. H. Habré to Chad (where he had already been sentenced to death *in absentia*), pondering that “[j]ustice and accountability are of paramount importance and must be attained through a fair process and in accordance with human rights law”⁵⁸. Shortly afterwards, the OHCHR warned, on 12.07.2011, that Mr. H. Habré was

*“continuing to live with impunity in Senegal, as he has done for the past 20 years. It is important that rapid and concrete progress is made by Senegal to prosecute or extradite Habré to a country willing to conduct a fair trial. This has been the High Commissioner’s position all along. It is also the position of the African Union (A.U.), as well as of much of the rest of the international community. It is a violation of international law to shelter a person who has committed torture or other crimes against humanity, without prosecuting or extraditing him”*⁵⁹.

In addition to these exhortations (of the U.N. Committee against Torture itself, the African Union, and the *rapporteur* of the CAT Convention), on 21.07.2010, Nobel Peace Prize winners Archbishop Desmond Tutu and Shirin Ebadi *et alii*, as well as 117 African human rights groups from 25 African countries, likewise called upon Senegal to move forward with the trial of Mr. H. Habré, for political killings and the systematic practice of torture, after more than 20 years of alleged difficulties to the detriment of the victims⁶⁰.

In their call for the fair trial of Mr. H. Habré, Archbishop D. Tutu and the other signatories stated:

“We, the undersigned NGOs and individuals urge Senegal rapidly to begin legal proceedings against the exiled former Chadian dictator Hissène Habré, who is accused of thousands of political killings and systematic torture from 1982 to 1990.

The victims of Mr. Habré’s regime have been working tirelessly for 20 years to bring him to justice, and many of the survivors have

⁵⁷ U.N./OHCHR, www.ohchr.org/news, of 18.03.2011, p. 1.

⁵⁸ U.N./OHCHR, “Senegal Must Review Its Decision to Extradite *Hissène Habré* to Chad”, www.ohchr.org/news, of 10.07.2011, p. 1.

⁵⁹ U.N./OHCHR, www.ohchr.org/news, of 12.07.2011, p. 1.

⁶⁰ Cf. Human Rights Watch (HRW), “Senegal/Chad: Nobel Winners, African Activists Seek Progress in Habré Trial”, www.hrw.org/news, of 21.07.2010, p. 1; HRW, “U.N.: Senegal Must Prosecute or Extradite *Hissène Habré*”, www.hrw.org/news, of 18.01.2001, p. 1.

already died. (...) Instead of justice, the victims have been treated to an interminable political and legal soap opera (...)”⁶¹.

After recalling the facts of the victims’ quest for justice, they stated that a fair trial for Mr. H. Habré in Senegal “should be a milestone” in the fight to hold “the perpetrators of atrocities (...) accountable for their crimes”. They added that this would moreover show that “African courts are sovereign and capable of providing justice for African victims for crimes committed in Africa”. They thus urged the authorities “to choose justice, not impunity, and to move quickly towards the trial of *Hissène Habré*”⁶².

Reference is also to be made to further initiatives and endeavours, this time of the African Union (reflected in the *Decisions* adopted by its Assembly), in the same search for justice in the *Hissène Habré* case. Thus, at its 6th ordinary session, held in Khartoum, Sudan, the Assembly of the African Union adopted its Decision 103(VI), on 24.01.2006, wherein it decided to establish a Committee of Eminent African Jurists “to consider all aspects and implications of the *Hissène Habré* case as well as the options available for his trial”⁶³. It requested the aforementioned Committee to submit a report at the following Ordinary Session in July 2006. At its 7th ordinary session, held in Banjul, Gambia, the Assembly of the African Union adopted its Decision 127(VII), on 02.07.2006, whereby it took note of the *report* presented by the Committee of Eminent African Jurists. It noted that, pursuant to Articles 3(h), 4(h) and 4(o) of the Constitutive Act of the African Union, “the crimes of which *Hissène Habré* is accused fall within the competence of the African Union”. Furthermore, the Assembly of the African Union mandated the Republic of Senegal “to prosecute and ensure that *Hissène Habré* is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial”.

At its 8th ordinary session, held in Addis Ababa, Ethiopia, the Assembly of the African Union adopted Decision 157(VIII), on 30.01.2007, whereby the African Union commended Senegal for its efforts on “the implementation of the Banjul Decision”, encouraged it “to pursue its initiatives to accomplish the mandate entrusted to it”, and appealed to the international community to mobilize the financial resources required for the trial. Two years later, at its 12th ordinary session, held again in Addis Ababa, from 01 to 03.02.2009, the Assembly of the African Union adopted Decision 240(XII), whereby it called on “all Member States of the African Union, the European Union and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to the African Union Commission”.

⁶¹ FIDH [Fédération internationale des ligues des droits de l’homme], “Appeal [...] for the Fair Trial of *Hissène Habré*”, www.fidh.org/news, of 21.07.2010, p. 1.

⁶² *Ibid.*, p. 1.

⁶³ It further took note of the briefing by President Wade of Senegal and President Obasanjo, the outgoing Chairperson of the African Union, on the *Hissène Habré* case.

At its following 13th ordinary session, held in Sirte, Libya, from 01 to 03.07.2009, the Assembly of the African Union adopted Decision 246(XIII), whereby it reiterated its “appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the AU mandate to prosecute and try *Hissène Habré*”⁶⁴. Next, at its 14th ordinary session, held in Addis Ababa, Ethiopia, from 31.01 to 02.02.2010, the Assembly of the African Union adopted Decision 272(XIV), wherein it requested “the Government of Senegal, the Commission and Partners, particularly the European Union to continue with consultations with the view to ensuring the holding of the Donors’ Round Table as soon as possible”. At its 15th ordinary session, held in Kampala, Uganda, the Assembly of the African Union adopted Decision 297(XV), on 27.07.2010, to the same effect.

At its 16th ordinary session, held in Addis Ababa, Ethiopia, on 30-31.01. 2011, the Assembly of the African Union adopted Decision 340 (XVI), whereby it confirmed “the mandate given by the African Union (AU) to Senegal to try *Hissène Habré*”. Furthermore, it welcomed the conclusions of the Donors Round Table concerning the funding of Mr. Habré’s trial and called on Member States, all partner countries and relevant institutions to disburse the funds pledged at the Donors Round Table. Moreover, the Assembly requested the “Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of *Hissène Habré* through a special tribunal with an international character”.

At its 17th ordinary session, held in Malabo, Equatorial Guinea, the Assembly of the African Union adopted Decision 371(XVII), on 01.07.2011, whereby it reiterated its decision (of January 2011) “confirming the mandate given to Senegal to try *Hissène Habré* on behalf of Africa”. The Assembly of the African Union urged Senegal.

“to carry out its legal responsibility in accordance with the United Nations Convention against Torture, the decision of the United Nations (U.N.) Committee against Torture, as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial”.

Next, at its 18th ordinary session, held in Addis Ababa, Ethiopia, on 29-30 January 2012, the Assembly of the African Union adopted Decision 401(XVIII), whereby it requested the “Commission to continue consultations with partner countries and institutions and the Republic of Senegal and subsequently with the Republic of Rwanda with a view to ensuring the expeditious trial of Hissène Habre and to consider the practical modalities as well as the legal and financial implications of the trial”.

⁶⁴ It also invited the partner countries and institutions to take part in the Donors Round Table, scheduled to be held in Dakar, Senegal.

As it can be apprehended from the aforementioned Decisions, the African Union has been giving attention to the *Hissène Habré* case on a consistent basis, since 2006. Although the African Union does not have adjudicatory powers, it has felt obliged to assist Senegal in the pursuit of its obligation to bring Mr. H. Habré to justice; it thus appears to give its own contribution, as an international organization, to the rule of law (at national and international levels) and to the corresponding struggle against impunity. One can note that, as time progressed, the language of the Decisions of the Assembly of the African Union has gradually strengthened.

This is evidenced, in particular, by the language utilized in its Decision 371(XVII), adopted on 01.07.2011, wherein the Assembly of the African Union reiterated its previous decision “confirming the mandate given to Senegal to try *Hissène Habré* on behalf of Africa”, and *urged* Senegal “to carry out its legal responsibility” in accordance with the U.N. Convention against Torture, the decision adopted by the U.N. Committee against Torture, as well as “the said *mandate to put Hissène Habré on trial expeditiously* or extradite him to any other country willing to put him on trial”⁶⁵. The emphasis shifted from the collection of funds for the projected trial of Mr. H. Habré to the *urgency* of Senegal’s compliance with its duty of prosecution, in conformity with the relevant provisions of the U.N. Convention against Torture.

VII. Urgency and the Needed Provisional Measures of Protection

In the period which followed the ICJ decision (Order of 28.05.2009) not to order provisional measures, Senegal’s pledge before the Court to keep Mr. H. Habré under house surveillance and not to allow him to leave Senegal pending its much-awaited trial seemed at times to have been overlooked, if not forgotten. First, concrete moves towards the trial were not made, amidst allegations of lack of full funding (which was secured on 24.11.2010). Next, in early July 2011, Senegal announced that Mr. H. Habré would be returned to Chad on 11.07.2011 (where he had been sentenced to death *in absentia* by a court for allegedly planning to overthrow the government).

In its Order of 28.05.2009, the ICJ had refrained from indicating the provisional measures of protection, given Senegal’s assurance that it would not permit Mr. H. Habré to leave the country before the ICJ had given its final decision on the case (para. 71 of the Order); the ICJ then found that there was not “any *urgency*” to order provisional measures in the present case (para. 73). Yet, on 08.07.2011, the then President of Senegal (Mr. A. Wade) wrote to the government of Chad and to the African Union to announce the imminent expulsion of Mr. H. Habré back to Chad, scheduled for 11.07.2011 (*supra*). On the eve of that date, Senegal officially retracted its decision, on 10.07.2011, given the international outcry that promptly followed, including from the U.N. High Commissioner for Human Rights⁶⁶.

⁶⁵ [Emphasis added].

⁶⁶ HRW, “*Habré Case: Questions and Answers on Belgium versus Senegal*”, www.hrw.org/news, of 29.03.2012, p. 5.

Had the return of Mr. H. Habré to Chad been effected by Senegal in such circumstances, it would have been carried out in breach of the principle of good faith (*bona fides*). The fact that it was seriously considered, and only cancelled in the last minute under public pressure, is sufficient reason for serious concern. There is one lesson to be extracted from all that has happened in the present case since the Court's unfortunate Order of 28.05.2009: I was quite right in casting a solitary and extensive Dissenting Opinion appended to it, sustaining the need for the ordering or indication of provisional measures of protection, given the *urgency* of the situation, and the possibility of irreparable harm (which were evident to me, already at that time).

A promise of a government (any government, of any State anywhere in the world) does not suffice to efface the *urgency* of a situation, particularly when fundamental rights of the human person (such as the right to the realization of justice) are at stake. The ordering of provisional measures of protection has the additional effect of dissuading a State not to incur into a breach of treaty. It thus serves the prevalence of the rule of law at international level. The present case leaves a lesson: the ordering of provisional measures of protection, guaranteeing the rule of law, may well dissuade governmental behaviour to avoid further incongruencies and not to incur into what might become additional breaches of international law.

In my extensive Dissenting Opinion appended to the Court's Order of 28.05.2009, I insisted on the issuance of provisional measures of protection, given the manifest *urgency* of the situation affecting the surviving victims of torture (or their close relatives) during the Habré regime in Chad (paras. 50-59), and the probability of irreparable damage ensuing from the breach of the right to the realization of justice (paras. 60-65). After all, the present case had been lodged with the Court under the U.N. Convention against Torture. Ever since, I have never seen any persuasive argument in support of the decision not to order provisional measures in the present case. All that has been said so far evolves around an empty *petitio principii*: the Court's decision was the right one, as was taken by a large majority (the traditional argument of authority, the *Diktat*).

The fact is that majorities, however large they happen to be, at times also incur into mistakes, and this is why I am more inclined to abide by the authority of the argument, rather than *vice-versa*. My position is that the Court should have ordered the provisional measures of protection in its decision of 28.05.2009, having thus assumed the role of *guarantee* of the relevant norms of the U.N. Convention against Torture. It should have gone beyond the short-sighted inter-State outlook, so as to behold the fundamental rights of the human person that were (and are) at stake in the present case, under the U.N. Convention against Torture.

Unilateral acts of States - such as, *inter alia*, that of promise - were conceptualized in the traditional framework of the inter-State relations, so as to extract their legal effects, given the "decentralization" of the international legal order. Here, in the

present case, we are in an entirely distinct context, that of *objective* obligations established under a normative Convention - one of the most important of the United Nations, in the domain of the international protection of human rights, embodying an absolute prohibition of *jus cogens*, - the U.N. Convention against Torture. In the ambit of these obligations, a pledge or promise made in the course of legal proceedings before the Court does not remove the prerequisites (of *urgency* and of probability of irreparable damage) for the indication of provisional measures by the Court.

This is what I strongly upheld in my aforementioned Dissenting Opinion of 28.05.2009 (para. 78), and what successive facts ever since leave as a lesson. When the prerequisites of provisional measures are present, - as they in my view already were in May 2009, as confirmed by the successive facts, - such measures are to be ordered by the Court, to the benefit of the subjects of rights to be preserved and protected (such as the right to the realization of justice). Accordingly, in my Dissenting Opinion I deemed it fit to ponder that:

“(...) A decision of the ICJ indicating provisional measures in the present case, as I herein sustain, would have set up a remarkable precedent in the long search for justice in the theory and practice of international law. After all, this is the first case lodged with the ICJ on the basis of the 1984 U.N. Convention against Torture (...).

(...) [T]he prerequisites of urgency and the probability of irreparable harm were and remain in my view present in this case (...), requiring from it the indication of provisional measures. Moreover, there subsist, at this stage, - and without prejudice to the merits of the case, - uncertainties which surround the matter at issue before the Court, despite the amendment in February 2007 of the Senegalese Penal Code and Code of Criminal Procedure.

Examples are provided by the prolonged delays apparently due to the alleged high costs of holding the trial of Mr. H. Habré, added to pre-trial measures still to be taken, and the lack of definition of the time still to be consumed before that trial takes place (if it does at all). Despite all that, as the Court's majority did not find it necessary to indicate provisional measures, the Court can now only hope for the best.

This is all the more serious in the light of the nature of the aforementioned obligations of the States Parties to the U.N. Convention against Torture. (...)

This Court should in my view have remained seized of the matter at stake. It should not have relinquished its jurisdiction in the matter of

provisional measures, on the ground of its reliance on what may have appeared the professed intentions of the parties, placing itself in a position more akin to that of a conciliator, if not an expectator. Had the Court done so, it would have assumed the role of the guarantor of the compliance, in the cas d'espèce, of the conventional obligations by the States Parties to the U.N. Convention against Torture in pursuance of the principle aut dedere aut judicare” (paras. 80, 82-84 and 88).

This point is not to pass unnoticed here. Fortunately, - for the sake of the realization of justice in the light of the integrity of the obligations enshrined into the U.N. Convention against Torture, - Mr. H. Habré did not escape from his house surveillance in Dakar, nor was he expelled from Senegal. The acknowledgment of the *urgency* of the situation was at last made by the ICJ: it underlies its present Judgment on the merits of the case, which it has just adopted today, 20 July 2012, wherein it determined that Senegal has breached Articles 6(2) and 7(1) of the U.N. Convention against Torture, and is under the duty to take “without further delay” the necessary measures to submit the case against Mr. H. Habré to its competent authorities for the purpose of prosecution (para. 121 and resolatory point 6 of the *dispositif*).

VIII. The Absolute Prohibition of Torture in the Realm of Jus Cogens

The victims’ everlasting ordeal in their quest for the realization of justice in the present case becomes even more regrettable if one bears in mind that the invocation of the relevant provisions of the U.N. Convention against Torture (Articles 5-7) in the present case takes place in connection with the absolute prohibition of torture, a prohibition which brings us into the domain of *jus cogens*. One would have thought that, in face of such an absolute prohibition, the *justiciables* would hardly face so many obstacles in their search for the realization of justice. This would be so in a world where justice prevailed, which is not ours. The time of human justice is not the time of human beings; ours is a world where one has to learn soon how to live with the surrounding irrationality, in order perhaps to live a bit longer.

1. The International Legal Regime against Torture

Yet, despite of the difficulties arisen in the *cas d'espèce*, the truth is that there is today an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, - a prohibition which falls under the domain of *jus cogens*. Such international legal regime has found judicial recognition; thus, in the case of *Cantoral Benavides versus Peru* (merits, Judgment of 18.08.2000), for example, the Inter-American Court of Human Rights (IACtHR) stated that

“a true international legal regime has been established of absolute prohibition of all forms of torture” (para. 103).

Such absolute prohibition of torture finds expression at both *normative* and *jurisprudential* levels. The basic principle of humanity, rooted in the human conscience, has arisen and stood against torture. In effect, in our times, the *jus cogens* prohibition of torture emanates ultimately from the universal juridical conscience, and finds expression in the *corpus juris gentium*. Torture is thus clearly prohibited, as a grave violation of the International Law of Human Rights and of International Humanitarian Law, as well as of International Criminal Law. There is here a normative convergence to this effect; this is a definitive achievement of civilization, one that admits no regression.

In the domain of the International Law of Human Rights, the international legal regime of absolute prohibition of torture encompasses the United Nations Convention (of 1984, and its Protocol of 2002) and the Inter-American (1985) and European (1987) Conventions against torture, in addition to the Special *Rapporteur* against Torture (since 1985) of the former U.N. Human Rights Commission (HRC) and the Working Group on Arbitrary Detention (since 1991) also of the former HRC (which pays special attention to the *prevention* of torture)⁶⁷. The three aforementioned co-existing Conventions to combat torture are basically complementary *ratione materiae*⁶⁸. Moreover, in the domain of International Criminal Law, Article 7 of the 1998 Rome Statute of the International Criminal Court (ICC) includes the crime of torture within the ICC's jurisdiction. Torture is in fact prohibited in any circumstances.

As the IACtHR rightly warned, in its Judgments in the case of the *Gómez Paquiyauri Brothers versus Peru* (of 08.07.2004, paras. 111-112), as well as of *Tibi versus Ecuador* (of 07.09.2004, para. 143), and of *Baldeón García versus Peru* (of 06.04.2006, para. 117), the

“Prohibition of torture is complete and non-revocable, even under the most difficult circumstances, such as war, ‘the struggle against terrorism’ and any other crimes, states of siege or of emergency, of civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies”.

The IACtHR was quite clear in asserting, e.g., in its Judgment in the case of *Maritza Urrutia versus Guatemala* (of 27.11.2003, para. 92), and reiterating in its Judgments in the cases of *Tibi versus Ecuador* (of 07.09.2004, para. 143), of the *Brothers Gómez Paquiyauri versus Peru* (of 08.07.2004, para. 112), and of *Baldeón García versus Peru* (of 06.04.2006, para. 117), that

⁶⁷ In addition to these mechanisms, there is the U.N. Voluntary Contributions Fund for Victims of Torture (since 1983).

⁶⁸ Cf., in this regard, A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 345-352.

“There exists an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, a regime which belongs today to the domain of jus cogens”.

Likewise, in the case of *Caesar versus Trinidad and Tobago* (Judgment of 11.03.2005), the IACtHR found that the conditions of detention to which the complainant had been subjected (damaging his health - his physical, psychological and moral integrity) amount to an inhuman and degrading treatment, in breach of Article 5(1) and (2) of the American Convention on Human Rights, which “enshrines precepts of *jus cogens*” (para. 100). And later on, in the case of *Goiburú et al. versus Paraguay* (Judgment of 22.09.2006), the IACtHR reasserted the absolute prohibition of torture and enforced disappearance of persons, in the realm of *jus cogens*, and acknowledged the duty to fight impunity with regard to those grave violations (with the due investigation of the occurrences), so as to honour the memory of the victims and to guarantee the non-repetition of those facts (para. 93).

The IACtHR and the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY) are the two contemporary international tribunals which have most contributed so far to the jurisprudential construction of the absolute prohibition of torture, in the realm of *jus cogens*⁶⁹. For its part, the ICTFY, in the same line of reasoning, held, in its Judgment (Trial Chamber, of 10.12.1998) in the *Furundzija* case, that torture is “prohibited by a peremptory norm of international law”, it is a prohibition of *jus cogens* (paras. 153 and 155). Likewise, in its Judgment (Trial Chamber, of 16.11.1998) in the *Delalic et al.* case, the ICTFY asserted that the prohibition of torture is of conventional and customary international law, and is a norm of *jus cogens* (paras. 453-454).

This view was reiterated by the ICTFY in its Judgment (Trial Chamber, of 22.02.2001) in the *Kunarac* case, wherein it stated that

“Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of jus cogens” (para. 466).

Other statements of the kind by the ICTFY, as to the *jus cogens* prohibition of torture, are found in its Judgment (Appeals Chamber, of 20.02.2001) in the *Delalic et al.* case (para. 172 n. 225), as well as in its Judgment (Trial Chamber, of 31.03.2003) in the *Naletilic et. al.* case, wherein it affirmed that

⁶⁹ Cf., recently, A.A. Cançado Trindade, “*Jus Cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law*”, in *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2008*, Washington D.C., General Secretariat of the OAS, 2009, pp. 3-29.

“Various judgments of the Tribunal have considered charges of torture as a grave breach of the Geneva Conventions of 1949, a violation of the laws and customs of war and as a crime against humanity. The Celebici Trial Judgment stated that the prohibition of torture is a norm of customary international law and jus cogens” (para. 336).

The *ad hoc* International Criminal Tribunal for Rwanda (ICTR), in turn, contributed to the normative convergence of International Human Rights Law and contemporary International Criminal Law as to the absolute prohibition of torture, in interpreting, in its decision (Chamber I) of 02.09.1998 in the case of *J.-P. Akayesu*, the term “torture” as set forth in Article 3(f) of its Statute, in accordance with the definition of torture set forth in Article 1(1) of the U.N. Convention against Torture, namely,

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act that he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” (para. 681).

The European Court of Human Rights (ECtHR), for its part, has also pronounced on the matter at issue, to the same effect. Thus, in its Judgment (Grand Chamber) of 12.11.2008, on the *Demir and Baykara versus Turkey* case, it held that the prohibition of torture has “attained the status of a peremptory norm of international law, or *ius cogens*”, and added that this finding was “incorporated into its case-law in this sphere” (para. 73). In a broader context, of prohibition of inhuman and degrading treatment (encompassing mental suffering), the reasoning developed by the ECtHR in its Judgment of 02.03.2010, in the *Al-Saadoon and Mufdhi versus United Kingdom* case, leaves room to infer an acknowledgment of a normative hierarchy in international law, giving pride of place to the norms that safeguard the dignity of the human person.

The aforementioned development conducive to the current absolute (*ius cogens*) prohibition of torture has taken place with the awareness of the horror and the inhumanity of the practice of torture. Testimonies of victims of torture - as in the proceedings of contemporary international human rights tribunals - give account of that. Even before the present era, some historical testimonies did the same. One of such testimonies, - a penetrating one, - is that of Jean Améry, himself a victim of it. In his own words,

“(...) torture is the most horrible event a human being can retain within himself. (...) Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected. (...) The person who has survived torture and whose pains are starting to subside (...) experiences an ephemeral peace that is conducive to thinking. (...) If from the experience of torture any knowledge at all remains that goes beyond the plain nightmarish, it is that of a great amazement and a foreignness in the world that cannot be compensated by any sort of subsequent human communication. (...) Whoever has succumbed to torture can no longer feel at home in the world. (...) The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully will not be regained. (...) One who was martyred is a defenseless prisoner of fear. It is fear that henceforth reigns over him. Fear - and also what is called resentments. They remain (...)”⁷⁰.

The present Judgment of the ICJ in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* contributes decisively to the consolidation of the international legal regime against torture. To this effect, the Court significantly states that

“In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)

That prohibition is grounded on a widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims, the International Covenant on Civil and Political Rights of 1966, General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora” (para. 99).

One of the features of the present-day international legal regime against torture is the establishment of a mechanism of continuous monitoring of a *preventive* character. This is illustrated by the 2002 Optional Protocol of the 1984 U.N.

⁷⁰ Jean Améry, *Par-delà le crime et le châtement*, Arles, Babel/Actes Sud, 2005 [reed.], pp. 61, 83-84, 92 and 94-96; Jean Améry, *At the Mind’s Limits*, Bloomington, Indiana Univ. Press, 1980 [reed.], pp. 22, 34 and 38-40.

Convention against Torture, as well as the preventive inspections under the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Article 2). In this regard, I deemed it fit to point out, in my Concurring Opinion in the case of *Maritza Urrutia versus Guatemala* (IACtHR, Judgment of 27.11.2003), that such development has

“put an end to one of the remaining strongholds of State sovereignty, in permitting scrutiny of the sancta sanctorum of the State – its prisons and detention establishments, police stations, military prisons, detention centers for foreigners, psychiatric institutions, among others, - of its administrative practices and legislative measures, to determine their compatibility or not with the international standards of human rights. This has been achieved in the name of superior common values, consubstantiated in the prevalence of the fundamental rights inherent to the human person” (para. 11).

2. Fundamental Human Values Underlying that Prohibition

Human conscience has awoken to the pressing need for decisively putting an end to the scourges of arbitrary detention and torture. The general principles of the law, and the fundamental human values underlying them, play a quite significant and crucial role here. Such fundamental values have counted on judicial recognition in our times. Thus, the ECtHR, for example, asserted, in the *Soering versus the United Kingdom* case (Judgment of 07.07.1989), that the absolute prohibition of torture (even in times of war and other national emergencies) expresses one of the “fundamental values of [contemporary] democratic societies” (para. 88). Subsequently, in the *Kalashnikov versus Russia* case (Judgment of 15.07.2002), the ECtHR stated that Article 3 of the European Convention on Human Rights

“enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour” (para. 95).

In the *Selmouni versus France* case (Judgment of 28.07.1999), the ECtHR categorically reiterated that Article 3 of the European Convention

“enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols ns. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation (...)” (para. 95).

In that same Judgment, the European Court expressed its understanding that “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies” (para. 101)⁷¹.

Like the ECtHR, also the IACtHR singled out the fundamental human values underlying the absolute prohibition of torture. Thus, in the case of *Cantoral Benavides versus Peru* (merits, Judgment of 18.08.2000), pondered that certain acts which were formerly classified as inhuman or degrading treatment, should from now on be classified distinctly, as torture, given the “growing demands” for the protection of fundamental human rights (para. 99). This, in the understanding of the IACtHR, required a more vigorous response in facing “infractions to the basic values of democratic societies” (para. 99). In the *Cantoral Benavides* case, the IACtHR, with its reasoning, thus purported to address the consequences of the absolute prohibition of torture.

In effect, the practice of torture, in all its perversion, is not limited to the physical injuries inflicted on the victim; it seeks to annihilate the victim’s identity and integrity. It causes chronic psychological disturbances that continue indefinitely, making the victim unable to continue living normally as before. Expert opinions rendered before international tribunals consistently indicate that torture aggravates the victim’s vulnerability, causing nightmares, loss of trust in others, hypertension, and depression; a person tortured in prison or detention loses the spatial dimension and even that of time itself⁷².

As to the devastating consequences of the (prohibited) practice of torture, and the irreparable damage caused by it, I pondered, in my Separate Opinion in the case *Tibi versus Ecuador* (IACtHR, Judgment of 07.09.2004), that

“(...) [T]he practice of torture (whether to obtain a confession or information or to cause social fear) generates a disintegrating emotional burden that is transmitted to the next of kin of the victim, who in turn project it toward the persons they live with. The widespread practice of torture, even though it takes place within jails, ultimately contaminates all the social fabric. The practice of torture has sequels not only for its victims, but also for broad sectors

⁷¹ In the cas d’espèce, the ECtHR found the respondent State responsible for the torture inflicted on Selmouni (paras. 105-106). - A similar line of reasoning can be found, e.g., in the Judgment (of 07.09.2004) of the IACtHR in the case of *Tibi versus Ecuador* (para. 143), wherein it likewise found the respondent State responsible for the torture inflicted on the victim (para. 165).

⁷² IACtHR, case *Tibi versus Ecuador* (Judgment of 07.09.2004), Separate Opinion of Judge Cançado Trindade, para. 21.

of the social milieu affected by it. Torture generates psychosocial damage and, under certain circumstances, it can lead to actual social breakdown(...)

*The practice of torture is a hellish threat to civilization itself. One of the infallible criteria of civilization is precisely the treatment given by public authorities of any country to detainees or incarcerated persons. F.M. Dostoyevsky warned about this in his aforementioned *Memoirs from the House of the Dead* (1862); for him, the degree of civilization attained by any social milieu can be assessed by entering its jails and detention centers⁷³. Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim, undermining his or her physical or mental resistance; thus, it treats the victim as a “mere means” (in general to obtain a confession), flagrantly violating the basic principle of the dignity of the human person (which expresses the Kantian concept of the human being as an “end in himself”), degrading him, in a perverse and cruel manner⁷⁴, and causing him truly irreparable damage” (paras. 22 and 24).*

For its part, the ICTFY stated, in the aforementioned 1998 Judgment in the Furundzija case, that

“Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate” (para. 154).

Another pertinent decision of the ICTFY disclosing the close attention it dispensed to fundamental human values is its Judgment (Trial Chamber II, of 17.10.2002) in the *Simic* case, wherein, in singling out the “substantial gravity” of torture, it pondered that

“(…) The right not to be subjected to torture is recognized in customary and conventional international law and as a norm of

⁷³ Cf. F.M. Dostoyevski, *Souvenirs de la maison des morts* [1862], Paris, Gallimard, 1977 (reed.), pp. 35-416.

⁷⁴ J.L. de la Cuesta Arzamendi, *El Delito de Tortura*, Barcelona, Bosch, 1990, pp. 27-28 and 70.

jus cogens. It cannot be tolerated. It is an absolute assault on the personal human dignity, security and mental being of the victims. As noted in Krnojelac, torture `constitutes one of the most serious attacks upon a person's mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment'` (para. 34).

One decade ago, within the IACtHR, I upheld the view, which I reiterate herein, that *jus cogens* is not a closed juridical category, but rather one that evolves and expands⁷⁵. An ineluctable consequence of the assertion and the very existence of *peremptory* norms of International Law is their not being limited to the conventional norms, to the law of treaties, and their encompassing every and any juridical act, and extending themselves to general international law. *Jus cogens* being, in my understanding, an open category, it expands itself in response to the necessity to protect the rights inherent to each human being in every and any situation. The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the realm of the international *jus cogens*⁷⁶. It is in the domain of international responsibility that *jus cogens* reveals its wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence - even beyond that - on the very *foundations* of a truly universal international law⁷⁷.

The jurisprudence of distinct international tribunals is, thus, perfectly clear in stating the reaction of *ratione materiae* Law, regarding absolute prohibition of torture, in all its forms, under any and all circumstances, - a prohibition that, in our days, falls under international *jus cogens*, with all its juridical consequences for the States responsible. In rightly doing so, it has remained attentive to the underlying fundamental human values that have inspired and guided it. This is a development which cannot be overlooked, and is to continue, in our days.

IX. Obligations Erga Omnes Partes under the U.N. Convention against Torture

The CAT Convention sets forth the absolute prohibition of torture, belonging to the domain of *jus cogens* (*supra*). Obligations *erga omnes partes* ensue therefrom. Significantly, this has been expressly acknowledged by the two contending parties, Belgium and Senegal, in the proceedings before the Court. They have done so in response to a question I put to them, in the public sitting of the Court of 08.04.2009, at the earlier stage of provisional measures of protection in the *cas d'espèce*. The question I deemed it fit to put to both of them was as follows:

⁷⁵ IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, Concurring Opinion of Judge Cançado Trindade, paras. 65-73.

⁷⁶ *Ibid.*, paras. 68-69.

⁷⁷ *Ibid.*, para. 70.

“Dans ces audiences publiques il y a eu des références expresses de la part de deux délégations aux droits des Etats ainsi qu’aux droits des individus. J’ai alors une question à poser aux deux Parties. Je la poserai en anglais pour maintenir l’équilibre linguistique de la Cour. La question est la suivante: - For the purposes of a proper understanding of the rights to be preserved (under Article 41 of the Statute of the Court), are there rights corresponding to the obligations set forth in Article 7, paragraph 1, in combination with Article 5, paragraph 2, of the 1984 United Nations Convention Against Torture and, if so, what are their legal nature, content and effects? Who are the subjects of those rights, States having nationals affected, or all States Parties to the aforementioned Convention? Whom are such rights opposable to, only the States concerned in a concrete case, or any State Party to the aforementioned Convention?”⁷⁸.

In response to my question, Belgium began by recalling the obligation to prosecute or extradite, incumbent upon States Parties to the CAT Convention, under Articles 5(2) and 7(1), and pointing out that

“where there is an obligation of one State to other States, those States have a corresponding right to performance of that obligation”⁷⁹.

The obligation set out in Articles 5(2) and 7(1) “gives rise to a correlative right” (of States Parties) to secure compliance with it⁸⁰. This right, - Belgium proceeded, - has a “conventional character”, being founded on a treaty, and “[t]he rule *pacta sunt servanda* applies in this respect”⁸¹.

Thus, - it went on, - all States Parties to the CAT Convention are entitled to seek ensuring compliance with the conventional obligations, - in accordance with the rule *pacta sunt servanda*, - undertaken by each State Party in relation to *all* other States Parties to the CAT Convention⁸². Belgium then added:

“In the case Goiburú et al. versus Paraguay [2006], the Inter-American Court of Human Rights observed that all the States Parties to the American Convention on Human Rights should collaborate in good faith in the obligation to extradite or prosecute the perpetrators of crimes relating to human rights; it is interesting

⁷⁸ ICJ, document CR 2009/11, of 08.04.2009, p. 25.

⁷⁹ ICJ, Response of Belgium to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009, doc. BS 2009/15, of 15.04.2009, p. 2, paras. 4-5.

⁸⁰ *Ibid.*, p. 2, para. 7.

⁸¹ *Ibid.*, p. 3, para. 8.

⁸² *Ibid.*, p. 3, para. 11.

to note that, in order to illustrate this obligation, the Court refers to the 1984 Convention (...):

The Court therefore deems it pertinent to declare that the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based on these principles, a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory [3]⁸³.

In sum, - as Belgium put it, - the rights set forth in the 1984 U.N. Convention against Torture “are therefore opposable to all the States Parties to that Convention”⁸⁴.

For its part, Senegal began its response to my question by likewise recalling the obligation to prosecute or extradite under Articles 5(2) and 7(1) of the CAT Convention⁸⁵, and added:

“The nature of the international obligation to prohibit torture has undergone a major change. From being a conventional obligation of relative effect, it has had an erga omnes effect attributed to it”⁸⁶.

Senegal then expressly acknowledged “the existence of indivisible obligations *erga omnes*”, as restated by the ICJ on a number of occasions from 1970 onwards⁸⁷. Next, Senegal reckoned that States Parties to the CAT Convention have “the right to secure compliance with the obligation” set forth in Articles 5(2) and 7(1)⁸⁸.

From the responses given by Belgium and Senegal to my question, it became clear that they both shared a proper understanding of the *nature* of the obligations incumbent upon them under the CAT Convention. Such obligations grow in importance in face of the *gravity* of breaches (*infra*) of the absolute prohibition

⁸³ [3] Inter-American Court of Human Rights, Judgment of 22.09.2006, para. 132, and in particular note n. 87, which provides a full list of the relevant universal instruments, including the 1984 Convention; cf. also the Separate Opinion of Judge Cançado Trindade, paras. 67-68.

⁸⁴ ICJ, Response of Belgium to the Question, op. cit. *supra* n. (81), p. 5, para. 14.

⁸⁵ ICJ, Response of Senegal to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009, doc. BS 2009/16, of 15.04.2009, p. 1, para. 1.

⁸⁶ *Ibid.*, p. 1, para. 2.

⁸⁷ *Ibid.*, p. 2, paras. 3-4.

⁸⁸ *Ibid.*, p. 2, paras. 5-6.

of torture. They conform the *collective guarantee* of the rights protected there under. If those breaches are followed by the perpetrators' impunity, this latter, instead of covering them up, adds further *gravity* to the wrongful situation: to the original breaches (the acts of torture), the subsequent victims' lack of access to justice (denial of justice) constitutes an additional violation of the protected rights. For years, within the IACtHR, I insisted on the jurisprudential construction of the material expansion of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their two dimensions, the horizontal (*vis-à-vis* the international community as a whole) as well as the vertical (projection into the domestic law regulation of relations mainly between the individuals and the public power of the State)⁸⁹; I then reiterated my position in the present case concerning *Questions Relating to the Obligation to Prosecute or Extradite*, decided by the ICJ in its recent Judgment of 20.07.2012.

X. The Gravity of the Human Rights Violations and the Compelling Struggle against Impunity

1. Human Cruelty at the Threshold of Gravity

In effect, in addition to its horizontal expansion, *jus cogens* also projects itself on a vertical dimension, i.e., that of the interaction between the international and national legal systems in the current domain of protection (*supra*). The effect of *jus cogens*, on this second (vertical) dimension, is to invalidate any and all legislative, administrative or judicial measures that, under the States' domestic law, attempt to authorize or tolerate torture⁹⁰. The absolute prohibition of torture, as a reaction of *ratione materiae* Law as here envisaged, in both the horizontal and the vertical dimensions, has implications regarding the longstanding struggle against impunity and the award of reparations due to the victims. As to the first (horizontal) dimension, in my understanding, the "*intérêt pour agir*" of States Parties to the CAT Convention grows in importance, in the light of the *gravity* of the breaches under that Convention. It would be a mistake to attempt to "bilateralize" contentious matters under the CAT Convention (like in traditional inter-State disputes), which propounds a distinct outlook of initiatives there under, to prevent torture and to struggle against it.

Even in a wider horizon, this trend was already discernible in the years following the adoption of the CAT Convention in 1984. Thus, in 1988, the Senegalese jurist Kéba Mbaye, in his thematic course at The Hague Academy of International Law, rightly observed that a State's "*intérêt pour agir*" goes beyond

⁸⁹ Cf., in this sense, IACtHR, case *La Cantuta versus Peru* (Judgment of 29.11.2006), Separate Opinion of Judge Cançado Trindade, paras. 51 and 60.

⁹⁰ Cf. E. de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law", 15 *European Journal of International Law* (2004) pp. 98-99.

a simple interest, in that it is a concept of procedural law. And, in the present stage of evolution of international law, it is widely reckoned that States can exercise their “*intérêt pour agir*” not only in pursuance of their own interests, but also of common and superior values, and, under some U.N. Conventions, in pursuance of shared fundamental values by means of an “objective control”⁹¹. This is what I refer to as the *collective guarantee* of human rights treaties, by the States Parties themselves. This is notably the case of the U.N. Convention against Torture; the “*intérêt pour agir*” there under is fully justified given the *gravity* of the breaches at issue, acts of torture in all its forms.

The cruelty of the systematic practice of torture cannot possibly be forgotten, neither by the victims and their next-of-kin, nor by their social *milieu* at large. In this connection, I have already reviewed the findings of the 1992 *Report* of the Chadian Commission of Inquiry⁹². The Truth Commission’s *Report* gives a sinister account of the methods of torture utilized during the Habré regime, with illustrations⁹³, in addition to pictures of the mass graves⁹⁴. The findings of the Chadian Truth Commission have been corroborated by humanitarian fact-finding by non-governmental organizations (NGOs). Although the *Association des Victimes de Crimes et Répressions Politiques au Tchad* (AVCRP) was established in N’ djamena on 12.12.1991, the files of the archives of the “political police” (the DDS) of the Habré regime were reported to have been discovered in N’Djaména only one decade later, in May 2001, by Human Rights Watch (HRW)⁹⁵.

In another report, of the same year 2001, Amnesty International (A.I.) stated that, in addition to the information contained in the Chadian Truth Commission’s *Report* (*supra*), most of the information in its own possession came from accounts of surviving victims of torture themselves, or from other detainees. According to such sources, the Chadian government of *Hissène Habré*

“applied a deliberate policy of terror in order to discourage opposition of any kind. and suspected opponents and their families were victims of serious violations of their rights. Civilian populations were the victims of extrajudicial executions, committed in retaliation for armed opposition groups’ actions on the basis of purely ethnic

⁹¹ Kéba Mbaye, “L’*intérêt pour agir* devant la Cour Internationale de Justice”, 209 *Recueil des Cours de l’Académie de Droit International de La Haye* (1988) pp. 257 and 271.

⁹² Cf. section II, *supra*.

⁹³ Cf. Ministère Tchadien de la Justice, Les crimes et détournements de l’ex-Président Habré et de ses complices - Rapport de la Commission d’enquête nationale..., *op. cit. supra*, n. (5), pp. 111-123, 137-146 and 148-149.

⁹⁴ Cf. *Ibid.*, pp. 150-154.

⁹⁵ Cf. UNHCR, “African Union: Press Senegal on Habré Trial”, www.unhcr.org/news, of 28.01.2009, p. 1; HRW, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, vol. 17, July 2005, n. 10(A), p. 5; and cf. S. Guengueng, *Prisonnier de Hissène Habré...*, *op. cit. infra* n. (102), pp. 135 and 153.

*or geographical criteria. Thousands of people suspected of not supporting the government were arrested and held in secret by the DDS. Thousands of people died on DDS premises - killed by torture, by the inhuman conditions in which they were detained or by a lack of food or medical care*⁹⁶.

The 2001 report by A.I. proceeded that, during the *Hissène Habré* regime in Chad,

“the practice of torture was, by all accounts, an ‘institutional practice’ used to extract confessions, to punish or to instil fear. (...) According to survivors, Hissèin Habré personally gave the order for certain people to be tortured. Other sources say that he was often present during torture sessions. (...) Political prisoners were interrogated as a rule by members of the security service at DDS headquarters in N’Djaména. In some cases, they were interrogated and held at the presidential palace after being tortured. (...)

According to survivors, some of the most common forms of torture were electric shocks, near-asphyxia, cigarette burns and having gas squirted into the eyes. Sometimes, the torturers would place the exhaust pipe of a vehicle in their victim’s mouth, then start the engine. Some detainees were placed in a room with decomposing bodies, others suspended by their hands or feet, others bound hand and foot. Two other common techniques consisted of gripping the victim’s head between two small sticks joined by cords, which were twisted progressively (...). Some prisoners were subjected to particularly brutal beatings during their interrogation. (...)”⁹⁷.

In a subsequent report, of 2006, A.I. added that many detainees were held at the prison of the *Camp des Martyrs*, not far from the so-called “*piscine*” (a former swimming pool that had been covered over with concrete and divided into several cells below ground level), wherein they were “subjected to torture”. A form of torture that became sadly well-known as practiced in the Habré regime in Chad was the “*arbatachar*”, which consisted of “choking the prisoner by tying his wrists to his ankles from behind”⁹⁸, up to a point of stopping the blood circulation and causing paralysis⁹⁹. Moreover, in the personal account of a surviving victim, - complainant before the U.N. Committee against Torture, - very recently published in 2012,

⁹⁶ A.I., [Report:] *The Habré Legacy*, AI Index AFR-20/004/2001, of October 2001, p. 10, and cf. p. 26.

⁹⁷ *Ibid.*, pp. 26-27.

⁹⁸ A.I., [Report:] *Chad: Voices of Habré’s Victims*, AI Index AFR-20/009/2006, of August 2006, p. 6.

⁹⁹ Cf. Ministère Tchadien de la Justice, *Les crimes et détournements de l’ex-Président Habré et de ses complices - Rapport de la Commission d’enquête nationale...*, op. cit. *supra*, n. (5), p. 42; S. Guengueng, *Prisonnier de Hissène Habré...*, op. cit. *infra* n. (102), p. 121.

“La DDS prenait plaisir à créer des situations pour rendre les prisonniers malades ou pour provoquer l’épidémie comme la malaria, l’oedème pulmonaire, etc., afin de faire mourir très vite, et à la fois beaucoup de prisonniers.

Selon mes constats, pendant les deux ans et cinq mois que j’ai eu à vivre dans les quatre différentes prisons de la DDS, cette police politique avait tous les moyens de sauver la vie aux détenus. Comme leur mission était de terroriser et d’exterminer le peuple tchadien, ils faisaient donc tout pour faire mourir les prisonniers. (...) Les responsables et tout comme les agents de la DDS, n’éprouvaient aucun sentiment humanitaire vis-à-vis des détenus”¹⁰⁰.

2. The Inadmissibility of Impunity of the Perpetrators

It is in no way surprising that the reparations due to victims in cases of torture have revealed a dimension that is both individual and collective or social. Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or handling with indifference the consequences of criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The practice of torture, aggravated by the impunity of the perpetrators, contaminates the whole social *milieu* wherein it took place.

As I deemed it fit to warn in the IACtHR, in my Separate Opinion in the case of the “*Street Children*” (*Villagrán Morales et al. versus Guatemala*, Reparations, Judgment of 26.05.2001),

“Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others” (para. 22).

The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered. This is still an evolving matter, but the right of those victims to fair and adequate reparation is addressed today on the basis of recognition of the central role of the integrity of said victims, of the human person. Realization of justice, with due reparations, helps to

¹⁰⁰ Souleymane Guengueng, Prisonnier de *Hissène Habré* - L’expérience d’un survivant des géôles tchadiennes et sa quête de justice, Paris, L’Harmattan, 2012, pp. 79-80.

reorganize human relations and restructure the psyche of victims. Realization of justice must take place from the standpoint of the integral nature of the personality of the victims. Reparations at least mitigate or soothe the suffering of the victims, in conveying to them the sense of the realization of justice.

Such reparations cannot be disrupted by undue invocations of State sovereignty or State immunity, as I have pointed out in two recent cases adjudicated by this Court¹⁰¹. Likewise, the struggle against impunity for grave violations of human rights and of International Humanitarian Law cannot be dismantled by undue invocations of State sovereignty or State immunity. The hope has been expressed of advances in this respect:

“(...) Progressivement, l'idée d'irresponsabilité, sous couvert de souveraineté ou d'immunité, recule, tout au moins pour une série d'actes atroces désormais qualifiés de 'crimes internationaux'. Cela constitue une source d'espoir considérable pour tous les mouvements citoyens et de défense des droits humains, pour tous les oubliés de la Terre”¹⁰².

In the case *Bulacio versus Argentina* (Judgment of 18.09.2003), the IACtHR held as “inadmissible” any measure of domestic law intended to hinder the investigation and sanction of those responsible for violations of human rights (para. 116), thus leading to impunity. In my Separate Opinion in the case *Bulacio*, I pondered *inter alia* that

“Reparatio does not put an end to what occurred, to the violation of human rights. The wrong was already committed¹⁰³; reparatio avoids the aggravation of its consequences (by the indifference of the social milieu, by the impunity, by the oblivion). (...) Reparatio disposes again, reestablishes order in the life of the surviving victims, but it cannot eliminate the pain that is already ineluctably incorporated into their daily existence. The loss is, from this angle, rigorously irreparable. (...) Reparatio is a reaction, in the realm of Law, to human cruelty, manifested in the most diverse forms: violence in dealing with fellow human beings, the impunity of those responsible on the part of the public power, the indifference and the oblivion

¹⁰¹ ICJ, case concerning the *Jurisdictional Immunities of States* (Germany versus Italy, Greece intervening; Judgment of 03.02.2012), Dissenting Opinion of Judge Cançado Trindade, paras. 1-316; ICJ, case *A.S. Diallo* (Guinea versus D.R. Congo, Reparations, Judgment of 19.06.2012), Separate Opinion of Judge Cançado Trindade, paras. 1-101.

¹⁰² L. Joinet (dir.), *Lutter contre l'impunité*, Paris, Éds. La Découverte, 2002, p. 125.

¹⁰³ Human capacity to promote good and to commit evil has not ceased to attract the attention of human thinking throughout the centuries; cf. F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Gedisa Edit., 1988, pp. 9-196; A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier, 1949, pp. 5-412.

of the social milieu. This reaction of the breached legal order (the substratum of which is precisely the observance of human rights) is ultimately moved by the spirit of human solidarity. This latter, in turn, teaches that the oblivion is inadmissible, by the absence it implies of any solidarity whatsoever of the living with their deceased. (...) Death has over centuries been linked to what is supposed to be the revelation of destiny, and it is especially in facing death that each person becomes aware of his or her individuality¹⁰⁴. (...) The rejection of the indifference and the oblivion, and the guarantee of non-repetition of the violations, are manifestations of the links of solidarity between those victimized and potential victims, in the violent world, empty of values, wherein we live. It is, ultimately, an eloquent expression of the links of solidarity that unite the living to their deceased¹⁰⁵. Or, more precisely, of the links of solidarity that unite the deceased to those who survive them (...)” (paras. 37-40).

As to the present case before this Court concerning *Questions Relating to the Obligation to Prosecute or Extradite*, the facts speak for themselves. As I deemed it fit to warn in my earlier Dissenting Opinion in the Court’s Order of 28.05.2009 (not indicating provisional measures of protection) in the *cas d’espèce*,

“The several years of impunity following the pattern of systematic State-planned crimes, perpetrated - according to the Chadian Truth Commission - by State agents in Chad in 1982-1990, render the situation, in my view, endowed with the elements of gravity and urgency (...). The passing of time with impunity renders the gravity of the situation even greater, and stresses more forcefully the urgency to make justice to prevail” (para. 60).

In the recent Judgment on the merits in the present case opposing Belgium to Senegal, the Court has recalled the *ratio legis* of the CAT Convention. After recalling the sixth preambular paragraph of the CAT Convention¹⁰⁶, the Court has stated 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

¹⁰⁴ Ph. Ariès, *Mourir en Occidente - desde la Edad Media hasta Nuestros Días*, Buenos Aires, A. Hidalgo Ed., 2000, pp. 87, 165, 199, 213, 217, 239 and 251.

¹⁰⁵ On these links of solidarity, cf. my Separate Opinions in the case *Bámaca Velásquez versus Guatemala* (IACtHR, Judgments on the merits, of 25.11.2000, and on reparations, of 22.02.2002).

¹⁰⁶ Which expresses the desire “to make more effective the struggle against torture (...) throughout the world”. Article 2(1) of the CAT Convention adds that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.

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” (para. 68).

The Court has here captured the *rationale* of the CAT Convention, with the latter’s denationalization of protection, and assertion of the principle of universal jurisdiction. Yet, in doing so, the Court did not resist the temptation to quote itself, rescuing its own language of years or decades ago, such as the invocation of “legal interest” (in the *célèbre obiter dictum* in the *Barcelona Traction* case of 1970), or “common interest” (expressions used in the past in different contexts). In order to reflect in an entirely faithful way the *rationale* of the CAT Convention, the Court, in my understanding, should have gone a bit further: more than a “common interest”, States Parties to the CAT Convention have a *common engagement* to give *effet utile* to the relevant provisions of the Convention; they have agreed to exercise its *collective guarantee*, in order to put an end to the impunity of the perpetrators of torture, so as to rid the world of this heinous crime. *We are here in the domain of obligations, rather than interests*. These obligations emanate from the *jus cogens* prohibition of torture.

In sum, as to this particular point, the development, in recent years, - acknowledged also in expert writing, - leading to the formation and consolidation of a true international legal regime against torture (cf. *supra*), has contributed to the growing awareness as to the pressing need and the compelling duty to put an end to impunity. In effect, the response to the diversification of sources of human rights violations, and the struggle against the impunity of its perpetrators¹⁰⁷, are challenges which call for the enhancement of the existing mechanisms of protection and the devising of new forms of protection. Impunity, besides being an evil which

¹⁰⁷ Cf. J.A. Carrillo Salcedo, *Dignidad frente a Barbarie - La Declaración Universal de Derechos Humanos Cincuenta Años Después*, Madrid, Ed. Trotta, 1999, pp. 105-145; N. Rodley, *The Treatment of Prisoners under International Law*, Paris/Oxford, UNESCO/Clarendon Press, 1987, pp. 17-143. Cf. also N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford, Oxford University Press, 1995, pp. 3-381; S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1997, pp. 3-303; Kai Ambos, *Impunidad y Derecho Penal Internacional*, Medellín, Found. K. Adenauer *et alii*, 1997, pp. 25-451; Y. Beigbeder, *International Justice against Impunity – Progress and New Challenges*, Leiden, Nijhoff, 2005, pp. 45-235; [Various Authors,] *Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 1-330; N.S. Rodley, “Impunity and Human Rights”, in *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* (Proceedings of the Siracusa Conference, September 1998, ed. C.C. Joyner), Ramonville St.-Agne, Érès, 1998, pp. 71-78.

corrodes the trust in public institutions, remains an obstacle which international supervisory organs have not yet succeeded to overcome fully.

However, some of the Truth Commissions, established in recent years in certain countries, with distinct mandates and varying *results* of investigations, have constituted a positive initiative in the struggle against that evil¹⁰⁸. Another positive initiative is represented by the recent endeavours, within the United Nations, towards the establishment of an international penal jurisdiction of permanent character; they have resulted in the creation (by the U.N. Security Council), in 1993 and 1994, of the two *ad hoc* international criminal tribunals, for ex-Yugoslavia and Rwanda, respectively, - followed by the adoption (by the U.N. Conference of Rome) of the 1998 Statute of the International Criminal Court (ICC), followed by the adoption of the first permanent international criminal jurisdiction. Attentions turn now to the evolving position of the individual victims before the ICC, opening up what appears to be a new chapter in the longstanding history of restorative justice¹⁰⁹.

3. The Position of Chad against Impunity

There is another element to be here taken into account: the records of the present case concerning *Questions Relating to the Obligation to Prosecute or Extradite* give account of Chad's position against impunity. References in this regard include: a) official pronouncements by Chad concerning the trial of Mr. H. Habré, in connection with the right of victims to the realization of justice and the need to fight against impunity¹¹⁰; b) Chad's decision to lift Mr. H. Habré's immunity in 1993, as confirmed in 2002¹¹¹; c) claims that Chad joined in efforts to gather the financial resources for the trial of Mr. H. Habré in Senegal¹¹²; and d) Chad's recent statements in support of the extradition of Mr. H. Habré to Belgium¹¹³.

¹⁰⁸ Cf., inter alia, [Various Authors,] "Humanitarian Debate: Truth and Reconciliation Commissions", 88 *International Review of the Red Cross* (2006) n. 862, pp. 225-373; P.B. Hayner, *Unspeakable Truths - Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., N.Y./London, Routledge, 2011, pp. 1-337; A. Bisset, *Truth Commissions and Criminal Courts*, Cambridge, Cambridge University Press, 2012, pp. 1-199; P.B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", 16 *Human Rights Quarterly* (1994) pp. 598-634; [Various Authors,] *Truth Commissions: A Comparative Assessment* (Seminar of the Harvard Law School, of May 1996), Cambridge/Mass., Harvard Law School, 1997, pp. 16-81.

¹⁰⁹ Cf. section XV, *infra*.

¹¹⁰ Cf. ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43 (citing "*Communiqué de presse du Ministère des affaires étrangères du Tchad*", of 22.07.2011).

¹¹¹ Cf. *Memorial of Belgium*, of 01.07.2010, p. 10, para. 1.29, and p. 57, para. 4.44, and Annex C.5; ICJ, document CR 2012/2, of 12.03.2012, p. 23, para. 21; and ICJ, document CR 2012/3, of 13.03.2012, p. 21, para. 41.

¹¹² ICJ, document CR 2012/2, of 12.03.2012, pp. 47-48.

¹¹³ Given its view that a trial of Mr. H. Habré in Africa would seem difficult to realize; cf. ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43 (citing "*Communiqué de presse du Ministère des affaires étrangères du Tchad*", of 22.07.2011).

In this respect, Belgium has referred, in its *Memorial*, to the fact that, in 1993, Chad had, in so far as it was necessary, “lifted the immunities which Mr. Habré may have sought to claim”¹¹⁴. In the same vein, Belgium has submitted a letter addressed by the Minister of Justice of Chad to the Belgian *Judge d’instruction*, dated 07.10.2002, confirming the lifting of any immunity of Mr. H. Habré¹¹⁵. Furthermore, it stems from the records of the present case that Chad, among other States, reportedly agreed to assist financially Senegal in the trial of Mr. H. Habré¹¹⁶. Belgium has claimed, in this regard, that,

*“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”*¹¹⁷.

Moreover, as to Belgium’s request for extradition, and in light of Senegal’s failure to prosecute Mr. H. Habré so far, it also appears from the records of the present case that Chad has not opposed the extradition of Mr. H. Habré to Belgium¹¹⁸. In fact, on 22.07.2011, the Ministry of Foreign Affairs, African Integration and International Co-operation of Chad stated that:

*“Despite the many national, continental and international initiatives, it appears increasingly unlikely that the former dictator will be tried under the circumstances preferred by the AU [African Union]. Recent developments confirm this impression. It seems more difficult than ever to fulfill the conditions, in particular the legal conditions, for the trial of Mr. Hissène Habré to be held on African soil. In light of this situation, and given the victims’ legitimate right to justice and the principle of rejection of impunity enshrined in the Constitutive Act of the African Union, the Government of Chad requests that preference should be given to the option of extraditing Mr. Habré to Belgium for trial. This option, which was explicitly considered among others by the African Union, is the most suitable under the circumstances”*¹¹⁹.

In sum and conclusion, as it can be perceived from the aforementioned, the records of the present case demonstrate that Chad has been consistently supporting the imperative of the fight against impunity, in so far as the case of Mr. H. Habré

¹¹⁴ ICJ, *Memorial of Belgium*, of 01.07.2010, p. 10, para. 1.29.

¹¹⁵ Cf. *Ibid.*, Annex C.5.

¹¹⁶ ICJ, document CR 2012/2, of 12.03.2012, p. 47, para. 20.

¹¹⁷ Cf. *Ibid.*, p. 48, para. 21(3).

¹¹⁸ ICJ, document CR 2012/6, of 19.03.2012, pp. 24-25.

¹¹⁹ *Ibid.*, p. 25, para. 43.

is concerned. The records of the case make Chad's position clear, to the effect that Mr. H. Habré must be brought to justice, in Senegal or elsewhere¹²⁰. Last but not least, the position of Chad is further confirmed by its statement before the U.N. Human Rights Committee, - the supervisory organ of the U.N. Covenant on Civil and Political Rights, - on the occasion of the consideration of Chad's initial report on measures undertaken to implement the provisions of the Covenant. In responding to questions put to it, the Delegation of Chad, stressing its commitment to the struggle against impunity, declared, on 17.07.2009, that

*“sous le régime de Hissène Habré, rien n'a été fait pour rétablir l'état du droit, puisque c'était une dictature. (...) Toutefois, le gouvernement actuel veut faire avancer les choses, et surtout combattre l'impunité, à tous les niveaux (...). Lutter contre l'impunité politique est une entreprise de longue haleine, mais le Gouvernement travaille activement dans ce sens. Le Tchad demande haut et fort que Hissène Habré soit jugé, mais le Sénégal, à qui incombe cette tâche, invoque des difficultés financières. (...)”*¹²¹.

4. The Struggle against Impunity in the Law of the United Nations

The final document of the II World Conference of Human Rights (Vienna, 1993), - of which I keep vivid memories¹²², - the *Vienna Declaration and Programme of Action*, cared to include, in its part II, two paragraphs (60 and 91) on the compelling struggle against impunity (of perpetrators of torture), which read as follows:

“States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture, and prosecute such violations, thereby providing a firm basis for the rule of law. (...)”

The [II] World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue”.

¹²⁰ Cf., e.g., ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43.

¹²¹ U.N./Comité des Droits de l'Homme, 96ème. session - 2636e. séance (of 17.07.2009), document CCPR/C/SR.2636, of 25.09.2009, p. 5, paras. 15-16. And cf. also: U.N. Human Rights Committee, “Human Rights Committee Considers Report of Chad”, www.unog.ch/news, of 17.07.2009, p. 9.

¹²² A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2nd. ed., vol. I, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 1-640; A.A. Cançado Trindade, “Memória da Conferência Mundial de Direitos Humanos (Vienna, 1993)”, 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994) pp. 9-57.

In pursuance to the call of the 1993 World Conference of the United Nations, the [former] U.N. Commission on Human Rights, and its [former] Sub-Commission on the Promotion and Protection of Human Rights, engaged themselves in producing, in 1997, a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (restated by the Commission in 2005)¹²³. Later on, also in pursuance of the aforementioned call of the II World Conference on Human Rights, the [former] U.N. Commission on Human Rights adopted its resolution 2003/72, of 25.04.2003, wherein it deemed it fit to emphasize “the importance of combating impunity to the prevention of violations of international human rights and humanitarian law” as well as “the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law” (paras. 1-2). The resolution urged States to “give necessary attention” to the matter (para. 1), and recognized that “crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law, and (...) perpetrators of such crimes should be prosecuted or extradited by States (...)” (para. 10). The resolution further urged “all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes” (para. 10).

Moreover, the *dossier* of the present case before the ICJ contained other pertinent elements which could not have passed unnoticed herein. Belgium’s *Memorial*, for example, refers to numerous resolutions of the U.N. General Assembly and Security Council urging States to combat impunity in connection with grave violations of human rights¹²⁴, - a point reiterated in its oral arguments¹²⁵. The U.N. Human Rights Committee (supervisory organ of the U.N. Covenant on Civil and Political Rights), in its *general comment n. 31* (of 2004), asserted, in connection with violations of the Covenant rights, that

“States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant” (para. 18).

¹²³ Cf. U.N. document E/CN.4/Sub.2/1997/20/Rev.1, Annex II, of 02.10.1997, pp. 13-25; and cf. U.N./CHR, resolution 1998/53, of 17.04.1998. Cf., more recently, U.N./CHR, document E/CN.4/2005/102/Add.1, Annex, of 08.02.2005, pp. 5-19. And cf. also L. Joinet (*rapporteur*), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Civiles y Políticos) - Informe Final*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/20, of 26.06.1997, pp. 1-34; and, for the economic, social and cultural rights, cf. El Hadji Guissé (special *rapporteur*), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Económicos, Sociales y Culturales) - Informe Final*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/8, of 23.06.1997, pp. 1-43.

¹²⁴ ICJ, *Memorial of Belgium*, of 01.07.2010, vol. I, pp. 63-66, paras. 4.69-4.70.

¹²⁵ ICJ, document CR 2012/3, of 13.03.2012, pp. 24-26.

After singling out, as particularly grave violations, the crimes of torture, of summary and arbitrary executions, and enforced disappearances of persons, the Human Rights Committee warned that “the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations” (para. 18). The Committee further warned as to the need “to avoid continuing violations” (para. 19), and drew attention to the “special vulnerability of certain categories” of victims (para. 15).

XI. Obligations under Customary International Law: A Precision as to the Court’s Jurisdiction

I turn now to another issue, dealt with in the ICJ Judgment of 20.07.2012, in relation to which my reasoning has been distinct from that of the Court. May I begin by recalling the fundamental human values underlying the absolute prohibition of torture, which I have already referred to (cf. *supra*). May I add, at this stage, that such prohibition is one of both *conventional* as well as *customary* international law. And it could not be otherwise, being a prohibition of *jus cogens*. In this sense, the 2005 study on *Customary International Humanitarian Law* undertaken by the International Committee of the Red Cross (ICRC) sustains that:

“Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited” (Rule 90)¹²⁶.

And it goes on to summarize, on the basis of an extensive research, that

“State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts”¹²⁷.

Likewise, in its *general comment n. 2* (of 2008), focused on the implementation by States Parties of Article 2 of the CAT Convention¹²⁸, the U.N. Committee against Torture acknowledged the Convention’s absolute (*jus cogens*) prohibition of torture as being also one of customary international law. It ensues from the *jus cogens* character of this prohibition that States Parties are under the duty to remove any obstacles that impede the eradication of torture; they are bound to take “positive effective measures” to ensure that (para. 4), and “*no exceptional circumstances whatsoever* may be invoked” by them to attempt to justify acts of torture (para.

¹²⁶ ICRC, *Customary International Humanitarian Law* - vol. I: *Rules*, Cambridge, Cambridge University Press, 2005 [reprint 2009], p. 315.

¹²⁷ *Ibid.*, vol. I: *Rules*, p. 315, and cf. pp. 316-319; and cf. also ICRC, *Customary International Humanitarian Law* - vol. II: *Practice* - Part 1, Cambridge, Cambridge University Press, 2005, pp. 2106-2160.

¹²⁸ U.N. document CAT/C/GC/2, of 24.01.2008, pp. 1-8, paras. 1-27.

5). Stressing the CAT Convention's "overarching aim of preventing torture and ill-treatment" (para. 11), *general comment n. 2* of the Committee against Torture further stated that each State Party "should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control" (para. 15), and then drew attention to the needed protection for individuals and groups made vulnerable by discrimination or marginalization (paras. 20-24).

Having voted in favour of the conclusions reached by the Court in its Judgment of 20.07.2012 in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal)*, I have felt, however, obliged to lay down in my Separate Opinion appended thereto my understanding, distinct from the Court's reasoning, corresponding to operative paragraph (2) of the *dispositif* of that Judgment. I therein recalled, at first, that, in the *cas d'espèce*, Belgium had requested the Court to declare that Senegal breached an obligation under customary international law for its failure to bring criminal proceedings against Mr. H. Habré concerning core international crimes¹²⁹. In this respect, the Court concluded, in paragraph 55 of its Judgment, that

"at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium's claims related thereto".

The Court then went on to consider whether it had jurisdiction on the basis of Article 30(1) of the Convention against Torture (CAT Convention). In operative paragraph (2) of the *dispositif*, the Court found that it had "no jurisdiction" to entertain Belgium's claims relating to Senegal's "alleged breaches" of "obligations under customary international law". It is important to be clear as to why the Court did not entertain Belgium's claim that Senegal breached certain obligations under customary international law. The Court first proceeded to determine, on the basis of the facts of the *cas d'espèce*, whether there was a dispute between the contending parties concerning Senegal's alleged violations of customary international law obligations, - a question which turned on factual considerations.

The question pertained to whether, on the basis of the factual framework of the present case, a dispute existed between the parties, at the time of the filing of the application, concerning Senegal's obligation under customary international law to take action with regard to core international crimes¹³⁰. As the Court noted (para.

¹²⁹ Cf. *Memorial of Belgium*, of 01.07.2010, p. 83, Submission 1(b); *Final Submissions of Belgium*, of 19.03.2012, Submission 1(b).

¹³⁰ Its determination is based upon the consideration of the circumstances of the present case (and particularly on the fact that, in the diplomatic correspondence between the parties, Belgium did not refer to its claim that Senegal has an obligation under customary international law to prosecute those accused of the perpetration of core international crimes).

45 of its Judgment), “the existence of a dispute is a condition of its jurisdictions under both bases of jurisdiction invoked by Belgium”. It has long been established that “a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”¹³¹. In this context, the Court’s jurisprudence constante, as recalled in the Judgment of 20.07.2012, is to the effect that the Court’s determination of the existence of a dispute “must turn on an examination of the facts” (para. 46)¹³².

It became clear that, in the *cas d’espèce*, the Court’s determination of whether there was a dispute on this question, rested on purely factual considerations of the case at issue¹³³. This appeared, in my view, *distinct from an examination by the Court of whether there is a legal basis of jurisdiction* over claims of alleged breaches of customary international law obligations. The Court’s consideration of Belgium’s claim that Senegal allegedly breached obligations under customary international law, as well as its conclusion thereon, stood in stark contrast to its examination of whether it has jurisdiction under the terms of Article 30(1) of the CAT Convention. As to the latter, the Court has considered the *legal* conditions pursuant to Article 30(1) of the Convention in order to assess whether there was a *legal basis of jurisdiction* according to the terms of that provision.

Contrastingly, with regard to the claim of alleged breaches of customary international law obligations, the Court’s analysis has hinged on *factual* considerations of the present case (cf. para. 55). In my perception, paragraph 55 and operative paragraph (2) of the *dispositif* of the ICJ Judgment are not to be understood as meaning that the Court lacked jurisdiction to entertain claims of breaches of a State’s alleged obligations under customary international law (e.g., to prosecute perpetrators of core international crimes, such as raised in this case). As in the circumstances of the *cas d’espèce* the dispute between the Parties - at the time of the filing of the application - did not include claims of alleged breaches by Senegal of obligations under customary international law, the Court improperly stated that it did not have jurisdiction to dwell upon those alleged breaches.

¹³¹ PCIJ, *Mavrommatis Palestine Concessions* case, Judgment n. 2, Series A, 1924, p. 11.

¹³² The Court considers whether there is a dispute by examining, inter alia, the position of the contending parties (including their exchanges), as disclosed in the records of the case.

¹³³ The Court considered the facts (as they were presented to it) in order to decide whether there was a dispute between the contending parties concerning the claims that Senegal had breached obligations under customary international law. It found that the diplomatic exchanges between the parties, prior to Belgium’s institution of the present proceedings, disclosed that Belgium did not refer to Senegal’s alleged obligations under customary international law to take action against Mr. H. Habré for core international crimes. It followed that there could not have existed a disagreement (or a difference of opinion) between the parties, as to Senegal’s alleged obligations under customary international law in relation to the prosecution of Mr. H. Habré for the commission of core international crimes, at the time when Belgium filed the application.

The Court, in my view, did not express itself well. The proper understanding of paragraph 55, in combination with operative paragraph (2) of the *dispositif* of its Judgment, is, in my understanding, that the determination that the facts of the present case did not disclose a dispute between the parties as to Senegal's alleged breach of obligations under customary international law, is not the same as the finding that the Court presumably did not have jurisdiction to entertain the claims of alleged breaches of obligations under customary international law. What the Court really wished to say, in my perception, was that *there was no material object for the exercise of its jurisdiction* in respect of obligations under customary international law, rather than a lack of its own jurisdiction *per se*¹³⁴. The finding that, in the circumstances of the present case, a dispute did not exist between the contending parties as to the matter at issue, *does not necessarily mean that, as a matter of law, the Court would automatically lack jurisdiction*, to be exercised in relation to the determination of the existence of a dispute concerning breaches of alleged obligations under customary international law.

XII. A Recurring Issue: The Time of Human Justice and the Time of Human Beings

1. An Unfortunate Décalage to Be Bridged

Already in my earlier Dissenting Opinion in the Court's Order of 28.05.2009 (not indicating provisional measures of protection) in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal)*, I deemed it fit to address the *décalage* to be bridged between the brief time of human beings (*vita brevis*) and the often prolonged time of human justice (paras. 46-64). I stressed the crucial importance of the incidence of the time element, - to the effect of avoiding undue delays, - for the realization of justice in the present case (paras. 74-84). In this respect, in that Dissenting Opinion I deemed it fit to warn that

*"(...) As to the obligations corresponding to that right to be preserved, the segment aut judicare of the enunciation of the principle of universal jurisdiction, aut dedere aut judicare, forbids undue delays in the realization of justice. Such undue delays bring about an irreparable damage to those who seek justice in vain; furthermore, they frustrate and obstruct the fulfillment of the object and purpose of the U.N. Convention against Torture, to the point of conforming a breach of this latter*¹³⁵.

¹³⁴ As already pointed out, the Court's finding concerning Belgium's claim that Senegal breached certain obligations under customary international law was based on the specific factual background of the present case, and particularly on the fact that Belgium did not refer, in its diplomatic correspondence or otherwise, to such obligations.

¹³⁵ Cf., to this effect, A. Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement*, The Hague, Nijhoff, 1999, p. 227.

(...) *It is the gravity of human rights violations, of the crimes perpetrated, that admits no prolonged extension in time of the impunity of the perpetrators, so as to honour the memory of the fatal victims and to bring relief to the surviving ones and their relatives. In my understanding, even more significant than retribution is the judicial recognition of human suffering¹³⁶, and only the realization of justice can alleviate the suffering of the victims caused by the irreparable damage of torture. (...) [W]ith the persistence of impunity in the present case concerning Questions Relating to the Obligation to Prosecute or to Extradite, the passing of time will continue hurting people, much more than it normally does, in particular those victimized by the absence of human justice. The time of this latter is not the time of human beings.*

(...) *This is all the more serious in the light of the nature of the aforementioned obligations of the States Parties to the U.N. Convention against Torture. (...)”* (paras. 63, 75, 77 and 84).

The often prolonged delays in the operation of human justice seem to disclose an indifference to the brevity of human existence, to the time of human beings. But this is not the only means whereby the administration of human justice, in its handling of the time factor, seems to operate against the expectation of justice on the part of human beings. One example is found in the undue invocation of non-retroactivity in relation to *continuing* wrongful situations of obstruction of access to justice extending themselves in time (cf. *infra*). Another example is afforded by the undue invocation of prescription in situations of the kind. Whether we look forth, or else back in time, we are faced with injustice in the handling of the time factor, making abstraction of the *gravity* of the breaches of Law, to the detriment of victimized human beings.

In the present case concerning Mr. H. Habré, prescription has already been duly discarded by the 2006 *Report* of the A.U. Committee of Eminent African Jurists (para. 14). And, in my view, the invocation is likewise to be discarded in the present case, for the reasons that I lay down in section XIII, *infra*, of my Separate Opinion. One cannot lose sight of the fact that those who claim to have been victimized by the reported atrocities of the Habré regime in Chad (1982-1990) have been waiting for justice for over two decades, and it would add further injustice to them to prolong further their ordeal by raising new obstacles to be surmounted¹³⁷. One has to bridge the unfortunate *décalage* between the time of human justice and the time of human beings.

¹³⁶ The right to be herein preserved, the right to justice, is inextricably linked to [non-pecuniary] reparation.

¹³⁷ HRW, *The Trial of Hissène Habré: Time is Running Out for the Victims*, vol. 19, January 2007, n. 2, pp. 1, 14 and 19.

The time factor cannot be handled in a way that leads to injustice. Certain conceptions, which took shape a long time ago in a historical context entirely distinct from the one with which we are confronted in the present case, cannot be mechanically applied herein. It should, moreover, be kept in mind that the passing of time does not heal the profound scars in human dignity inflicted by torture. Such scars can even be transmitted from one generation to another. Victims of such a grave breach of their inherent rights (as torture), who furthermore have no access to justice (*lato sensu*, i.e., no realization of justice), are victims also of a *continuing* violation (denial of justice), to be taken into account as a whole, - without the imposition of time-limits decharacterizing the continuing breach¹³⁸, - until that violation ceases.

The passing of time cannot lead to subsequent impunity either; oblivion cannot be imposed, even less so in face of such a grave breach of human rights and of International Humanitarian Law as torture. The imperative of the preservation of the integrity of human dignity stands well above pleas of non-retroactivity and/or prescription. It is high time to bridge the unfortunate *décalage* between the time of human justice and the time of human beings. Articles 5(2), 6(2) and 7(1) – interrelated as they are - of the CAT Convention forbid undue delays; if, despite the requirements contained therein, undue delays occur, there are breaches of those provisions of the CAT Convention. This is clearly what has happened in the present case, in so far as Articles 6(2) and 7(1) of the CAT Convention are concerned, as rightly upheld by the ICJ¹³⁹.

It has already been pointed out that, in its decision of 19.05.2006 in the *S. Guengueng et alii versus Senegal* case, the U.N. Committee against Torture found that the “reasonable time-frame” for the State concerned to take the necessary measures, in pursuance of the principle of universal jurisdiction, under Article 5(2) of the CAT Convention, had been, already by then, “considerably exceeded”. With such a prolonged delay, the same applied in respect of Article 6(2) of the CAT Convention, which expressly determines that the State Party concerned “shall *immediately*¹⁴⁰ make a preliminary inquiry into the facts”. This has not been done to date. And the same also applies to the measure, - submission of the case to the competent authorities for the purpose of prosecution, - also in pursuance of the principle of universal jurisdiction, under Article 7(1) of the CAT Convention. This has not been done to date either.

Although the breach of Article 5(2) ceased in 2007, with the adoption by Senegal of legislative reforms to bring its domestic law into conformity with Article 5(2)

¹³⁸ On the notion of “continuing situation” in international legal thinking, cf. ICJ, case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Counter-Claim, Order of 06.07.2010), Dissenting Opinion of Judge Cançado Trindade, paras. 55-94

¹³⁹ Operative paragraphs (4) and (5) of the *dispositif* of the present Judgment.

¹⁴⁰ [Emphasis added].

of the CAT Convention, the other continuing breaches of Articles 6(2) and 7(1) of the CAT Convention persist to date. These provisions of the CAT Convention are meant, - as I perceive them, - *to bridge the unfortunate gap between the time of human justice and the time of human beings*, by purporting to avoid, and not to allow, undue delays. Non-compliance with such provisions, as in the present case so far, perpetuates the unfortunate gap between the time of human justice and the time of human beings.

This is even more regrettable, bearing in mind that everyone lives within time, - the existential time of each one. The irreversible passing of time not only leaves its marks in the aging body, but also marks its flow in one's conscience. Each person is ineluctably linked more to her own existential time (which cannot be changed) than to the space where she lives (which can be changed). Each person lives inevitably within her own time, *conscious* that it will come to an end. If one's life-time is marked by injustice and impunity, one is left with the impression that, after the occurrence of all the atrocities, nothing seems to have happened at all¹⁴¹.

To live within time can thus at times be particularly painful, the more one is conscious of the brevity of one's lifetime. Even if nothing wrongful had happened, to live within one's time, and to accept the effect of its implacable passing upon oneself, up to the end of one's existence, is already difficult. To feel the existential time pass with injustice prevailing, and surrounded by indifference, is all the more painful; the passing of time in such circumstances is on the verge of becoming truly unbearable. Prolonged and definitive injustice may lead - and not seldom has led - victims of grave violations of human rights into despair. The graver the violation, the greater the likelihood of this to happen. Impunity is an additional violation of human rights.

2. Making Time Work Pro Victima

In the domain of the International Law of Human Rights, which is essentially victim-oriented, the time factor is to be made to operate *pro victima*. As to the principle *aut dedere aut judicare* set forth in Article 7(1), it has already been indicated that *aut judicare* is ineluctably associated with the requirement of absence of undue delays. For its part, extradition, largely dependent upon the existence of treaties and the interpretation given to them in the circumstances of each case, is bound to remain largely discretionary. What comes promptly into the fore in the *cas d'espèce* is the requirement of expeditious inquiry into the facts for the purpose of prosecution, - a duty incumbent upon States Parties to the CAT Convention. The duty of prosecution is further singled out by the requirement, under Article 4 of the CAT Convention, of criminalization of all acts of torture under domestic law,

¹⁴¹ Cf. Jean Améry, *Levantar la Mano sobre Uno Mismo - Discurso sobre la Muerte Voluntaria* [Hand an sich legen - Diskurs über den Freitod, 1976], Valencia, Pre-Textos, 2005 (reed.), pp. 67, 91-92 and 143.

taking into account “their grave nature”. Extradition comes into the picture only in case of the absence of prosecution.

In this connection, the recent Judgment (of 2010) of the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice) cannot be seen as an obstacle to Senegal’s compliance with its obligations under Article 7 of the CAT Convention. In fact, it can at first be argued, as Belgium has done¹⁴², that Senegal has been in non-compliance with its obligations under the CAT Convention (such as those under Article 7) for years, well before the Judgment of the ECOWAS Court was delivered in 2010¹⁴³. In this connection, I have found Senegal’s reiterated contentions (in its *Counter-Memorial*¹⁴⁴ and oral arguments¹⁴⁵) of alleged difficulties ensuing from the Judgment of the ECOWAS Court of Justice of 2010 unpersuasive. They do not - cannot - bear an impact on compliance with its obligations under the CAT Convention.

Likewise, they cannot be invoked in a way that generates further delays in the realization of justice. A supervening decision of an international tribunal (the ECOWAS Court of Justice) cannot encroach upon the current exercise of the judicial function of another international tribunal (the ICJ), performing its duty to pronounce on the interpretation and application of the CAT Convention, - one of the “core Conventions” of the United Nations in the domain of human rights, - in order to make sure that justice is done. As the ICJ has rightly stated in its Judgment of 20.07.2012,

¹⁴² ICJ, document CR 2012/3, of 13.03.2012, p. 17.

¹⁴³ Thus, from the start it did not seem reasonable to rely on this recent ECOWAS Judgment to attempt to justify that continuing non-compliance, largely predating the latter Judgment. Moreover, Senegal’s continuing non-compliance with the obligation *aut dedere aut judicare*, enshrined in Article 7 of the CAT Convention, has created a situation whereby Mr. H. Habré has been in house surveillance for an extended period of time, - according to the pleadings of the Parties since 2000; cf. ICJ, document CR 2012/4, of 15.03.2012, p. 21, para. 7. Cf. also ICJ, *Counter-Memorial of Senegal*, p. 3. - It may thus be argued that the delay in prosecuting (or extraditing) him, while still keeping him under house surveillance (amounting to a preventive detention), is contrary to his right to be tried without undue delay; furthermore, at present this calls into question whether Senegal has truly intended so far to prosecute Mr. H. Habré. In addition, arguments as to the question of non-retroactivity seem hardly convincing; for criticisms, cf., e.g., V. Spiga, “Non-Retroactivity of Criminal Law: A New Chapter in the *Hissène Habré* Saga”, 9 *Journal of International Criminal Justice* (2011) pp. 5-23; A.D. Olinga, “Les droits de l’homme peuvent-ils soustraire un ex-dictateur à la justice? L’affaire *Hissène Habré* devant la Cour de Justice de la CEDEAO”, 22 *Revue trimestrielle des droits de l’homme* (2011) n. 87, pp. 735-746; K. Neldjingaye, “The Trial of *Hissène Habré* in Senegal and Its Contribution to International Criminal Law”, in *Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 185-196.

¹⁴⁴ ICJ, *Counter-Memorial of Senegal*, vol. I, paras. 67-70, 77, 85, 115-119, 176 and 241. a

¹⁴⁵ ICJ, document CR 2012/4, of 15.03.2012, paras. 22, 42-43, 47, 51-53, 55-56, 58-59, 65, 69 and 71; ICJ, document CR 2012/5, of 16.03.2012, paras. 12.22, 16.16-18 and 20-21, and 27.11-12; ICJ, document CR 2012/7, of 21.03.2012, paras. 14.26, 17.8 and 24.25-26.

“The Court considers that Senegal’s duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice” (para. 111).

It is my view that coexisting international tribunals perform a *common mission* of imparting justice, of contributing to the common goal of the *realization of justice*. The decision of any international tribunal is to be properly regarded as contributing to that goal, and not as disseminating discord¹⁴⁶. There is here a convergence, rather than a divergence, of the *corpus juris* of the International Law of Human Rights and of International Criminal Law, for the correct interpretation and application by international tribunals.

XIII. The Time Factor: A Rebuttal of a Regressive Interpretation of the Convention against Torture

Paragraph 99 of the Court’s Judgment of 20.07.2012, expressly acknowledging that “the prohibition of torture is part of customary international law and has become a peremptory norm (*jus cogens*)”, is in my view one of the most significant passages of its recent Judgment. My satisfaction would have been greater if the Court had dwelt further upon it, and had developed its reasoning on this particular issue, as it could and should, thus fostering the progressive development of international law. The Court, however, promptly turned around in the following paragraph, and started treading on troubled waters, embarking - to my regret - on a regressive interpretation of the relevant provision (Article 7(1)) of the CAT Convention.

In any case, up to now, the Court has not shown much familiarity with, nor strong disposition to, elaborate on *jus cogens*; it has taken more than six decades for it to acknowledge its existence *tout court*, in spite of its being one of the central features of contemporary international law. In effect, immediately after identifying

¹⁴⁶ Accordingly, it should not pass unnoticed, in this connection, that Mr. H. Habré has been in custody (under house surveillance) for some years (ICJ, document CR 2012/5, of 16.03.2012, p. 21). The submission of the case for purpose of prosecution without undue delay would thus avoid what amounts to a preventive detention for an excessively prolonged period of time, without trial; A. Boulesbaa, *The U.N. Convention on Torture...*, op. cit. *supra* n. (137), p. 225, and cf. pp. 226-227, on the question of pre-trial detention and its impact on the rights of the accused. In the present case, the undue delay in submitting the case to prosecution has thus also caused unreasonable delay in Mr. H. Habré’s preventive detention, and that is contrary to basic postulates proper to the International Law of Human Rights; cf., e.g., Article 14(3) of the U.N. Covenant on Civil and Political Rights, providing for the right “to be tried without undue delay”. - Moreover, the principle *aut dedere aut judicare* (in particular the obligation *aut judicare*), set forth in Article 7(1) of the CAT Convention, forbids undue delays, which would militate against the object and purpose of the Convention; cf., to this effect, J.H. Burgers and H. Danelius, *The United Nations Convention against Torture*, Dordrecht, Nijhoff, 1988, p. 137, and cf. also n. (137), *supra*.

the manifestation of *jus cogens* in the customary international law prohibition of torture (para. 99), the Court has indulged into a consideration, *sponte sua*, of non-retroactivity of treaty provisions. The Court has done so (paras. 100 to 104) adding an unnecessary - if not contradictory - element of confusion to its own reasoning.

It has done so, *sponte sua*, without having been asked to pronounce itself on this point, - alien to the CAT Convention, - neither by Belgium nor by Senegal. It has done so despite the fact that the CAT Convention, unlike other treaties, does not provide for, nor contains, any temporal limitation or express indication on non-retroactivity. It did so by picking out one older decision (of 1989) of the U.N. Committee against Torture that suited its argument, and at the same time overlooking or not properly valuing more recent decisions of the Committee *a contrario sensu*, wherein the Committee overruled its previous decision relied upon by the Court in its reasoning.

The Court has referred approvingly to (para. 101) an earlier decision of the Committee against Torture (of 23.11.1989) in the case *O.R. et al. versus Argentina*, whereby the Committee found that the CAT Convention did not apply to acts of torture allegedly committed before the entry into force of the Convention in Argentina¹⁴⁷. Yet, the Committee has, ever since, adopted a different approach, as illustrated in two subsequent cases. Thus, in 2003, in the case of *Bouabdallah Ltaief versus Tunisia*, the Committee considered allegations of acts of torture allegedly committed in 1987, notwithstanding the fact that the Convention entered into force for Tunisia in 1988¹⁴⁸. In other words, the Committee did not distinguish between acts allegedly committed before the entry into force of the CAT Convention for Tunisia and those allegedly perpetrated thereafter.

Similarly, more recently, in 2006, in the case of *Suleymane Guengueng et al. versus Senegal*¹⁴⁹, - which pertains to a similar factual background as the present case *before* this Court, - the Committee again did not make any distinction between the facts that are reported to have taken place before the entry into force of the Convention for Senegal and those alleged to have occurred *afterwards*. Thus, it can be considered that the more recent approach of the Committee, as illustrated by these two decisions of 2003 and of 2006, has been to apply the CAT Convention without distinguishing between acts alleged to have occurred *before* the Convention entered into force for the respondent State, and those alleged to have occurred *thereafter*.

¹⁴⁷ CAT, case *O.R. et al. versus Argentina*, communications ns. 1/1988, 2/1988 and 3/1988, Decision of 23.11.1989, para. 7.3, *Official Records of the General Assembly*, 45th Session, Supplement n. 44 (doc. A/45/44), Annex V, p. 108, paras. 7.2-7.4 and 8.

¹⁴⁸ CAT, case *Bouabdallah Ltaief versus Tunisia*, communication n. 189/2001, Decision of 14.11.2003, *Official Records of the General Assembly*, 59th Session, Supplement n. 44 (doc. A/59/44), Annex VII, p. 207, paras. 1.2, 2.1 and 10.1-10.9.

¹⁴⁹ CAT, case *Suleymane Guengueng et al. versus Senegal*, communication n. 181/2001, U.N. Convention against Torture - doc. C/36/D/181/2001, Decision of 19.05.2006). And cf. section III, *supra*.

The fact is that the more recent decisions of the Committee against Torture provide no support to the reasoning of the Court on this particular point. Moreover, the Court has overlooked, or not valued properly, the responses given by the contending parties to a question put to them from the bench, in a public sitting of the Court. In its response, Belgium recalled the object and purpose of the CAT Convention and the two more recent cases decided by the Committee against Torture (in the *B. Ltaief* and the *S. Guengueng* cases, *supra*), and contended, as to the procedural obligations under Article 7 of the CAT Convention, that

“There is nothing unusual in applying such procedural obligations to crimes that occurred before the procedural provisions came into effect. There is nothing in the text of the Convention, or in the rules of treaty interpretation, that would require that Article 7 not apply to alleged offenders who are present in the territory of a State Party after the entry into force of the Convention for that State, simply because the offences took place before that date. Such an interpretation would run counter to the object and purpose of the Convention. (...) [T]he procedural obligations owed by Senegal are not conditioned *ratione temporis* by the date of the alleged acts of torture. (...) That does not involve a retroactive application of the Convention to the omissions of Senegal. All these omissions took place after both States, Belgium and Senegal, became Parties to the Convention and became mutually bound by the procedural obligations contained therein”¹⁵⁰.

Likewise, in its response, Senegal, much to its credit, acknowledged the importance of the obligations, “binding on all States”, pertaining to the “punishment of serious crimes under International Humanitarian Law”, such as those in breach of the prohibition of torture. Turning to the procedural obligations under Article 7(1) of the CAT Convention, Senegal added that

*“it does not deny that the obligation provided for in the Convention can be applied to the offences allegedly committed before 26 June 1987, when the Convention entered into force for Senegal”*¹⁵¹.

The Court, notwithstanding, has proceeded to impose a temporal limitation *contra legem* to the obligation to prosecute under Article 7(1) of the CAT Convention (para. 100, *in fine*). There were other points overlooked by the Court in this respect. For example, it has not taken into account that occurrences of systematic practice

¹⁵⁰ ICJ, Questions Put to the Parties by Members of the Court at the Close of the Public Hearing Held on 16 March 2012: Compilation of the Oral and Written Replies and the Written Comments on Those Replies, doc. BS-2012/39, of 17.04.2012, pp. 50-52, paras. 49 and 52.

¹⁵¹ *Ibid.*, p. 52.

of torture conform *continuing situations* in breach of the CAT Convention¹⁵², to be considered as a whole, without temporal limitations decharacterizing it, until they cease. Nor has it taken into account the distinct approaches of domestic criminal law and contemporary international criminal law, with regard to pleas of non-retroactivity.

And nor has the Court taken into account that such pleas of non-retroactivity become a moot question wherever the crimes of torture had already been prohibited by customary international law (as in the present case) at the time of their repeated or systematic commission. Ultimately, - and summing up, - the Court has pursued, on this particular issue, a characteristic voluntarist reasoning, focused on the will of States within the confines of the strict and static inter-State dimension. But it so happens that the CAT Convention (the applicable law in the *cas d'espèce*) is rather focused on the victimized human beings, who stand in need of protection. It is further concerned to guarantee the non-repetition of crimes of torture, and to that end it enhances the struggle against impunity. Human conscience stands above the will of States.

The Court has pursued a negative or self-restricted approach to its jurisdiction. In respect of Article 5(2) of the CAT Convention, what does not exist here is the *object* of a dispute over which to exercise its jurisdiction; the Court, in my understanding, remains endowed with jurisdiction, with its authority or aptitude to say what the Law is (to do justice), to pronounce on the CAT Convention, and to determine, *inter alia*, that the dispute concerning Article 5(2) has ceased, but it will nevertheless take into account - as it has done (cf. para. 48) - its *effects* in relation to its determination of the breaches by the respondent State of Articles 6(2) and 7(1) of the CAT Convention. The three aforementioned provisions of the CAT Convention are ineluctably interrelated. By the same token, the Court retains its jurisdiction to pronounce upon the corresponding customary international law prohibition of torture. This is a point which requires clarification.

Accordingly, it would seem inconsistent with the object and purpose of the CAT Convention if alleged perpetrators of torture could escape its application when found in a State in respect of which the Convention entered into force only *after* the alleged criminal acts occurred (as a *result* of the temporal limitation which the Court regrettably beheld in Article 7(1)). Worse still, although the present Judgment rightly recognizes that the prohibition of torture has attained the status of *jus cogens* norm (para. 99), it promptly afterwards fails to draw the necessary consequences of its own finding, in unduly limiting the temporal scope of application of the CAT Convention. The Court has insisted on overlooking or ignoring the persistence of a *continuing situation* in breach of *jus cogens*.

¹⁵² On the notion of continuing situation in international legal thinking, cf. ICJ, case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy; counter-claim), Order of 06.07.2010, Dissenting Opinion of Judge Cançado Trindade, paras. 60-94.

XIV. A New Chapter in Restorative Justice?

This brings me to my remaining line of considerations. In our days, there is a growing awareness of, and a growing attention shifted to, the sufferings of victims of grave breaches of the rights inherent to them, as well as to the corresponding duty to provide reparation to them. This has at present become a legitimate concern of the international community, envisaging the individual victims as members of humankind as a whole. The International Law of Human Rights has much contributed to this growing consciousness. And contemporary International Criminal Law also draws further attention to the duty to provide reparation for those sufferings in the quest for the realization of justice.

Much has been written on restorative justice, and it is not my intention to review herein the distinct trends of opinion on the matter. Yet, the issue cannot pass unnoticed here, and there is in my view one point to be made. In historical perspective, there are traces of restorative justice in the presence, from ancient to modern legal and cultural traditions, of the provision of compensation due to victims of wrongful acts, attentive to their rehabilitation but also to avoid reprisals or private revenge. As administration of justice was gradually brought under centralized State control (during the Middle Ages), there was a gradual shift from the provision of compensation into retributive justice, a tendency which came to prevail in the XVIIIth century, with the multiplication of criminal law codes, turning attention to the punishment of offenders rather than the redress to individual victims¹⁵³.

By then, restorative justice may have faded, but did not vanish. By the mid-XXth century (from the sixties onwards), with the emergence of victimology¹⁵⁴, restorative justice began again to attract greater attention and to gain in importance. Throughout the second half of the XXth century, the considerable evolution of the *corpus juris* of the International Law of Human Rights, being essentially *victim-oriented*, fostered the new stream of restorative justice, attentive to the needed rehabilitation of the victims (of torture). Its unprecedented projection nowadays into the domain of international criminal justice - in cases of core international crimes - makes us wonder whether we would be in face of the conformation of a new chapter in restorative justice.

If so, given the *gravity* of those core international crimes such as the one of torture, one would likely be facing, nowadays, a coexistence of elements proper to both restorative and retributive justice, in reaction to particularly grave and systematic violations of their rights suffered by the victims. The realization of justice appears, after all, as a form of reparation itself, rehabilitating - to the

¹⁵³ I. Bottiglierio, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 13-24, and cf. pp. 25, 27 and 35-38.

¹⁵⁴ Cf. IACtHR, case *Tibi versus Ecuador* (Judgment of 07.09.2004), Separate Opinion of Judge A.A. Cançado Trindade, paras. 16-17.

extent possible – victims (of torture). May I just point out that I do not conceive restorative justice as necessarily linked to reconciliation; this latter can hardly be imposed upon victims of torture, it can only come spontaneously from them¹⁵⁵, and each of them has a unique psyche, reacting differently from others. There is no room here for generalizations. I consider restorative justice as necessarily centred on the rehabilitation of the victims of torture, so as to render it possible to them to find bearable to keep on relating with fellow human beings, and, ultimately, to keep on living in this world.

Restorative justice grows in importance in cases of grave and systematic violations of human rights, of the integrity of human beings, such as the abominable practice of torture. Reparation to the victims naturally envisages their rehabilitation. The [former] U.N. Commission on Human Rights itself recognized, in its resolution 2003/72 (of 25.04.2003), that, for the victims of grave violations of human rights, “public knowledge of their suffering and the truth about the perpetrators” (including their accomplices) of those violations, are “essential steps” towards their rehabilitation (para. 8). It should be kept in mind that the restorative nature of redress to victims is nowadays acknowledged in the domain not only of the International Law of Human Rights, but also of contemporary International Criminal Law (the Rome Statute of the ICC). Yet, the matter at issue is susceptible of further development, bearing in mind the vulnerability of the victims and the *gravity* of the harm they suffered. In so far as the recent case adjudicated by the ICJ is concerned, the central position is that of the human person, the victimized one, rather than of the State.

XV. Concluding Reflections

The factual background of the present case discloses a considerable total of victims, - according to the fact-finding already undertaken, - among those murdered, or arbitrarily detained and tortured, during the Habré regime in Chad (1982-1990). The absolute prohibition of torture being one of *jus cogens*, - as reckoned by the ICJ itself in the recent Judgment of 20.07.2012, - the obligations under a “core human rights Convention” of the United Nations such as the Convention against Torture are not simple obligations of means or conduct: they are, in my understanding, obligations necessarily of *result*, as we are here in the domain of peremptory norms of international law, of *jus cogens*, generating obligations *erga omnes partes* under the Convention against Torture.

To the original *grave* violations of human rights, there follows an additional violation: the *continuing situation* of the alleged victims’ lack of access to justice

¹⁵⁵ A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, Annex II: “Responsabilidad, Perdón y Justicia como Manifestaciones de la Conciencia Jurídica Universal”, pp. 267-288.

and the impunity of the perpetrators of torture (and their accomplices). This wrongful continuing situation is in breach of the U.N. Convention against Torture as well as of the customary international law prohibition of torture. I dare to nourish the hope that the Judgment of the ICJ of 20.07.2012, establishing violations of Articles 6(2) and 7(1) of the Convention against Torture, and asserting the duty of prosecution thereunder, will contribute to bridge the unfortunate gap between the time of human justice and the time of human beings. It is about time that this should happen. Time is to be made to work *pro persona humana, pro victima*.

In this second decade of the XXIst century, - after a far too long a history, - the principle of universal jurisdiction, as set forth in the CAT Convention (Articles 5(2) and 7(1)), appears nourished by the ideal of a universal justice, without limits in time (past or future) or in space (being transfrontier). Furthermore, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole. There is nothing extraordinary in this, if we keep in mind that, in historical perspective, international law itself precedes the inter-State dimension, and even the States themselves. What stands above all is the imperative of universal justice. This is in line with jusnaturalist thinking¹⁵⁶. The contemporary understanding of the principle of universal jurisdiction discloses a new, wider horizon.

In it, we can behold the universalist international law, the new universal *jus gentium* of our times¹⁵⁷, - remindful of the *totus orbis* of Francisco de Vitoria and the *societas generis humani* of Hugo Grotius. *Jus cogens* marks its presence therein, in the absolute prohibition of torture. It is imperative to prosecute and judge cases of international crimes - like torture - that shock the conscience of mankind. Torture is, after all, reckoned in our times as a grave breach of International Human Rights Law and International Humanitarian Law, prohibited by conventional and customary international law; when systematically practiced, it is a crime against humanity. This transcends the old paradigm of State sovereignty: individual victims are kept in mind as belonging to humankind; this latter reacts, shocked by the perversity and inhumanity of torture.

The advent of the International Law of Human Rights has fostered the expansion of international legal personality and responsibility, and the evolution of the domain of reparations (in their distinct forms) due to the victims of human rights violations. I have addressed this significant development - which I refer to herein

¹⁵⁶ On the influence of natural law doctrines, cf., inter alia, e.g., M. Henzelin, *Le principe de l'universalité en droit pénal international - Droit et obligation pour les États de poursuivre et juger selon de principe de l'universalité*, Bâle/Genève/Munich/Bruxelles, Helbing & Lichtenhahn/Faculté de Droit de Genève/Bruylant, 2000, pp. 81-119, 349-350 and 450.

¹⁵⁷ Cf. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part I", 316 *Recueil des Cours de l'Académie de Droit International de La Haye* (2005) pp. 432-439.

- in my recent Separate Opinion (paras. 1-118) appended to the Court's Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (of 01.02.2012). This development has a direct bearing on reparations due to victims of torture.

Here, the suffering and the needs of those victims are to be kept in mind. The continuing situation of prevailing injustice, prolonged in time, leaves the victims of grave violations of their fundamental rights (such as torture) in a state of helplessness, if not hopelessness and despair. Only through their access to justice *lato sensu* (as a matter of *jus cogens*) are the victims likely to recover their faith in human justice¹⁵⁸. The realization of justice as a form of redress is, thus, essential to the rehabilitation of the victims. Such rehabilitation plays an important role here, bringing to the fore a renewed vision of restorative justice.

In effect, restorative justice, with its ancient roots (going back in time for some millennia, and having manifested itself in earlier legal and cultural traditions around the world), seems to have reflowered again in our times. This is due, in my perception, to the recognition that: a) a crime such as torture, systematically practiced, has profound effects not only on the victims and their next-of-kin, but also on the social *milieu* concerned; b) punishment of the perpetrators cannot be dissociated from rehabilitation of the victims; c) it becomes of the utmost importance to seek to heal the damage done to the victims; d) in the hierarchy of values, making good the harm done stands above punishment alone; and e) the central place in the juridical process is occupied by the victim, the human person, rather than by the State (with its monopoly of sanction).

We look here beyond the traditional inter-State outlook, ascribing a central position to the individual victims, rather than to their States. Had the inter-State dimension not been surmounted, not much development would have taken place in the present domain. The struggle against impunity is accompanied by the endeavours towards the rehabilitation of the victims. The realization of justice, with the judicial recognition of the sufferings of the victims, is a form of the reparation due to them. This is imperative, we have here moved from *jus dispositivum* to *jus cogens*.

Identified with general principles of law enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the International Law for humankind. In prohibiting torture in any circumstances whatsoever, *jus cogens* exists indeed to the benefit of human beings, and ultimately of humankind. Torture is absolutely prohibited in all its forms, whichever misleading and deleterious neologisms are invented and resorted to, to attempt to circumvent this prohibition.

¹⁵⁸ Cf. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236.

In the aforementioned move from *jus dispositivum* to *jus cogens*, this absolute prohibition knows no limits in time or space: it contains no temporal limitations (being a prohibition also of customary international law), and it ensues from a peremptory norm of a *universalist* international law. *Jus cogens* flourished and asserted itself, and has had its material content expanded, due to the awakening of the universal juridical conscience, and the firm support it has received from a lucid trend of international legal thinking. This latter has promptly discarded the limitations and shortsightedness (in space and time) of legal positivism, and has further dismissed the myopia and fallacy of so-called “realism”.

Last but not least, the emancipation of the individual from his own State is, in my understanding, the greatest legacy of the consolidation of the International Law of Human Rights - and indeed of international legal thinking - in the second half of the XXth century, amounting to a true and reassuring juridical revolution. Contemporary International Criminal Law takes that emancipation into account, focusing attention on the individuals (victimizers and their victims). Not only individual rights, but also the corresponding State duties (of protection, investigation, prosecution, sanction and reparation) emanate directly from international law. Of capital importance here are the *prima principia* (the general principles of law), amongst which the principles of humanity, and of respect for the inherent dignity of the human person. This latter is recalled by the U.N. Convention against Torture¹⁵⁹. An ethical content is thus rescued and at last ascribed to the *jus gentium* of our times.

¹⁵⁹ Second preambular paragraph.

