

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

**Order of 28 May 2009**

On 28 May 2009, the International Court of Justice delivered its Order regarding request for the indication of provisional measures submitted by Belgium in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. The Court found that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to indicate provisional measures.

The Court was composed as follows: President Owada; Judges Shi, Koroma, Al-Khasawneh, Simma, Abraham, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judges *ad hoc* Kirsch, Sur; Registrar Couvreur.

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The operative paragraph (para. 76) of the Order reads as follows:

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The Court,

By thirteen votes to one,

*Finds* that the circumstances, as they now present themselves to the Court,

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

IN FAVOUR: President Owada; Judges Shi, Koroma, Al-Khasawneh, Simma, Abraham, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood; Judges *ad hoc* Sur, Kirsch;  
AGAINST: Judge Cançado Trindade.”

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Judges Koroma and Yusuf appended a joint declaration to the Order of the Court; Judges Al-Khasawneh and Skotnikov appended a joint separate opinion to the Order of the Court; Judge Cançado Trindade appended a dissenting opinion to the Order of the Court; Judge *ad hoc* Sur appended a separate opinion to the Order of the Court.

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*Application and request for the indication of provisional measures*

The Court recalls that, on 19 February 2009, the Kingdom of Belgium (hereinafter “Belgium”) filed an Application instituting proceedings against the Republic of Senegal (hereinafter “Senegal”) in respect of a dispute concerning “Senegal’s compliance with its obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad, or to extradite him to Belgium for the purposes of criminal proceedings”. Belgium bases its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment of 10 December 1984 (hereinafter “the Convention against Torture”), as well as on customary international law.

The Court observes that, in its Application, as a basis for the jurisdiction of the Court, Belgium refers to the declarations made under Article 36, paragraph 2, of the Statute, by Belgium on 17 June 1958 and by Senegal on 2 December 1985, and to Article 30, paragraph 1, of the Convention against Torture, which provides that: any dispute between two or more States parties concerning the interpretation or application of the Convention “which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

Belgium maintains that Senegal, where Mr. Habré has resided since 1990, has taken no action on its repeated requests to see the former President of Chad prosecuted in Senegal, failing his extradition to Belgium, for acts characterized as including crimes of torture and crimes against humanity, allegedly perpetrated during his presidency between 7 June 1982 and 1 December 1990. Belgium refers to complaints filed in Senegal in 2000 against Mr. Habré by seven natural persons and one legal person, to complaints filed with the Belgian judicial authorities between 30 November 2000 and 11 December 2001 by a Belgian national of Chadian origin and by Chadian nationals, and to an international arrest warrant issued against Mr. Habré by the Belgian investigating judge responsible for the case. Belgium notes that the complaints filed in Senegal were dismissed by the *Chambre d'accusation* of the Dakar Court of Appeal on 4 July 2000 on the grounds that “crimes against humanity” did not form part of Senegalese criminal law and, with regard to the crime of torture, that Senegalese law did not allow a Senegalese court to exercise jurisdiction in respect of acts committed abroad by an alien.

At the end of its Application, Belgium requests the Court to adjudge and declare that:

- “– the Court has jurisdiction to entertain the dispute between the Kingdom of Belgium and the Republic of Senegal regarding Senegal’s compliance with its obligation to prosecute Mr. H. Habré or to extradite him to Belgium for the purposes of criminal proceedings;
- Belgium’s claim is admissible;
- the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice;
- failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts”;

and reserves the right to revise or supplement the terms of the Application.

The Court recalls that, on 19 February 2009, having filed its Application, Belgium submitted a Request for the indication of provisional measures, invoking Article 41 of the Statute

of the Court and Articles 73 to 75 of the Rules of Court. In the Request, Belgium refers to the same bases of jurisdiction of the Court relied on in its Application and asks the Court “to indicate, pending a final judgment on the merits, provisional measures requiring Senegal to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied”.

Belgium states that “[a]t present, Mr. H. Habré is under house arrest in Dakar, but it transpires from an interview which the President of Senegal, A. Wade, gave to *Radio France Internationale* that Senegal could lift his house arrest if it fails to find the budget which it regards as necessary in order to hold the trial of Mr. H. Habré”. According to Belgium, in such an event, it would be easy for Mr. Habré to leave Senegal and avoid any prosecution, thereby causing irreparable prejudice to the right conferred on Belgium by international law to bring criminal proceedings against him. It further maintains that this would violate Senegal’s obligation to prosecute Mr. Habré for the crimes under international law which are alleged against him, failing his extradition.

In its first round of oral observations, Belgium also referred to certain recent statements by President Wade which, according to Belgium, indicated that if Senegal did not have available to it the funds required to organize the trial of Mr. Habré, it could at any time abandon its prosecution of him, cease monitoring him or transfer him to another State.

The Court notes that, in its first round of oral observations, Senegal asserted that, since 2005, it had been willing, as declared by President Wade, to try Mr. Habré in the Senegalese courts and thus to comply with its obligations under international law. Senegal further maintained that, as the conditions required for the indication of provisional measures were not fulfilled in the present case, Belgium’s request for such measures to be indicated was unfounded. It added that the indication of the measures sought by Belgium would prejudice the merits and deprive Senegal of the rights it held under international rules, in particular the Convention against Torture.

The Respondent also stated that, following Belgium’s request for the extradition of Mr. Habré, he had been arrested and placed in custody on 15 November 2005 pending extradition, but that the *Chambre d’accusation* of the Dakar Court of Appeal had held that it was without jurisdiction over the request for Mr. Habré’s extradition, on the grounds that he enjoyed immunity from jurisdiction by virtue of having been Head of State at the time the acts occurred. Senegal stated that on 23 December 2005 it had informed Belgium of this decision, which put an end to the extradition proceedings. Senegal explained that, in these circumstances, it had sought the support of the African Union and seised it of the matter and that, on 2 July 2006, the Heads of State and Government of the African Union had given Senegal a mandate to prosecute and try Mr. Habré.

Senegal maintained that no legal dispute existed between the Parties on the interpretation or application of an international legal rule and, in particular, of the rules set forth in the Convention against Torture.

The Court observes that, in its second round of oral observations, Belgium stated that the dispute between itself and Senegal concerned, first, the question of whether the obligation to try Mr. Habré derived from the mandate given to Senegal by the African Union and, secondly, whether Senegal had already fulfilled its obligations under the provisions of the Convention against Torture by passing on the case to the African Union.

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

The Court notes that, in its second round of oral observations, Senegal maintained that its obligation to prosecute Mr. Habré derived from the provisions of the Convention against Torture, not from the mandate given by the African Union, and it concluded that the lack of a dispute between the Parties was therefore manifest. Senegal further pointed out that the statements made to the media by President Wade did not demonstrate the existence of any real or serious risk that Mr. Habré might evade Senegalese justice. In addition, in response to a question put by a Member of the Court at the hearings, the Respondent solemnly declared that it would not allow Mr. Habré to leave its territory while the present case was pending before the Court.

### *Reasoning of the Court*

#### *Prima facie jurisdiction*

The Court begins by recalling that, when dealing with a request for the indication of provisional measures, there is no need for it, before deciding whether or not to indicate such measures, to satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case, but that it may only indicate those measures if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded. Given that Belgium is seeking to found the jurisdiction of the Court on Article 30 of the Convention against Torture and on the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute, the Court deemed it necessary to endeavour to establish whether the compromissory clause under the Convention, or the declarations relied upon, did indeed confer upon it *prima facie* jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considered that the circumstances so required.

#### *- Dispute*

The Court observes that both Belgium and Senegal are parties to the Convention against Torture. Considering that the first condition required to be met in order for the Court's jurisdiction to be established on this basis is the existence of a "dispute between two or more States Parties concerning the interpretation or application of this Convention", it falls to the

Court at this stage in the proceedings first to establish whether prima facie such a dispute existed on the date the Application was filed.

The Court points out that, following the judgment of the Dakar Court of Appeal bringing to an end the proceedings on Mr. Habré's extradition to Belgium, Senegal seized the African Union and informed Belgium of this in a Note Verbale dated 23 December 2005, to which Belgium responded by Note Verbale dated 11 January 2006, disputing whether Senegal could comply with the obligations under the Convention against Torture by referring a matter covered by that Convention to an international organization. Belgium argued that Senegal was not fulfilling its obligations under the Convention against Torture, in particular Article 7, by failing to prosecute Mr. Habré, in default of extraditing him to Belgium, to answer for the acts of torture alleged against him. Senegal considered that it has taken measures in order to fulfill the said obligations and reaffirmed its will to continue the ongoing process so as to assume in full its obligations as a State party to the Convention against Torture. The Court finds in view of the foregoing that it appears prima facie that a dispute as to the interpretation and application of the Convention existed between the Parties on the date the Application was filed.

The Court next turns to the question of whether the Application subsequently ceased to have any object as a result of the disappearance of the dispute which had existed at the time of filing, specifically in light of the fact that Senegal acknowledged in the course of the hearings that a State party to the Convention against Torture cannot fulfill the obligations there under by the mere act of referring the matter to an international organization. The Court observes that the Parties nevertheless seem to continue to differ on other questions relating to the interpretation or application of the Convention against Torture, such as that of the time frame within which the obligations under Article 7 must be fulfilled or that of the circumstances (financial, legal or other difficulties) which might be relevant in considering whether or not a failure to fulfill those obligations has occurred. The Court further observes that the Parties seem to continue to hold differing views as to how Senegal should fulfill its treaty obligations. It finds in consequence that it appears that prima facie a dispute of the kind contemplated by Article 30 of the Convention against Torture continues to exist between the Parties, even if the scope of that dispute may have changed since the Application was filed.

*- Procedural conditions*

The Court also points out that Article 30 of the Convention against Torture requires, first, that any dispute submitted to the Court should be such as "cannot be settled through negotiation". The Court considers that, at the stage of considering prima facie jurisdiction, it is sufficient for it to find that an attempt has been made by Belgium to negotiate. The Court is of the view that the diplomatic correspondence, in particular the Note Verbale of 11 January 2006, whereby Belgium wished to submit certain clarifications to the Government of Senegal "within the framework of the negotiation procedure covered by Article 30 of the Convention against Torture . . .", shows that Belgium attempted to resolve the said dispute by negotiation and that it cannot be concluded that the negotiations thus proposed had the effect of resolving the dispute. The Court thus concludes that the requirement that the dispute is one which "cannot be settled through negotiation" must be regarded as having been satisfied prima facie.

The Court next observes that the Convention provides, secondly, that a dispute between States parties which has not been settled through negotiation shall, at the request of one of them, be submitted to arbitration, and that it may be referred to the Court only if the parties are unable to agree on the organization of such arbitration within six months from the date when it was requested. The Court considers the Note Verbale of 20 June 2006 to contain an explicit offer from Belgium to Senegal to have recourse to arbitration, pursuant to Article 30, paragraph 1, of the Convention against Torture, in order to settle the dispute concerning the application of the Convention in the case of Mr. Habré. The Court points out that, at this stage of the proceedings, it is sufficient for it to note that, even supposing that the said Note Verbale never reached its addressee, Belgium's Note Verbale of 8 May 2007 explicitly refers to it and it has been confirmed that this second Note was communicated to Senegal and received by it more than six months before the date of referral to the Court, i.e., 19 February 2009.

The Court concludes from the foregoing that it has *prima facie* jurisdiction under Article 30 of the Convention against Torture to entertain the case, which it considers sufficient to enable it to indicate the provisional measures requested by Belgium, if the circumstances so require. The Court consequently finds that there is no need to ascertain, at this stage, whether the second basis of jurisdiction asserted by Belgium, the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute, might also, *prima facie*, afford a basis on which the Court's jurisdiction could be founded.

*Link between the right protected and the measures requested*

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending its decision and that it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent. It also recalls that a link must therefore be established between the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case. The Court further states that its power to indicate provisional measures should be exercised only if the rights asserted by a party appear at least plausible.

The Court observes that the provisional measures requested in the current proceedings are aimed at ensuring that Senegal takes all necessary measures in its power to keep Mr. Habré under the surveillance and control of the Senegalese authorities until the Court has given its final decision. It notes that the possible departure of Mr. Habré from Senegalese territory would be likely to affect the rights which might be adjudged to belong to Belgium on the merits.

Moreover, even though the Court does not need at this stage to establish definitively the existence of the rights claimed by Belgium or to consider Belgium's capacity to assert them, the Court observes that these rights are grounded in a possible interpretation of the Convention against Torture and therefore appear to be plausible. The Court concludes from the foregoing that, from this perspective as well, the provisional measures requested may be indicated if the circumstances so require.

*Risk of irreparable prejudice and urgency*

The Court recalls that its power to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision.

The Court observes that Belgium makes reference to recent interviews given by the President of Senegal, Mr. Abdoulaye Wade, to *Radio France Internationale*, the Spanish newspaper *Público*, the French newspaper *La Croix* and *Agence France Presse*, in which the President indicated that he did not intend to keep Mr. Habré in Senegal indefinitely if the funding needed to organize his trial was not provided by the international community. According to Belgium, Senegal could therefore lift Mr. Habré's house arrest.

The Court notes that the statements concerning the possibility of Mr. Habré leaving Senegal were made by the Senegalese Head of State and could therefore have given rise to some concern on the part of Belgium. The Court further observes that the Co-Agent of Belgium asserted at the hearings, in response to the same question put by a Member of the Court, that a "clear and unconditional" solemn declaration given by the Agent of Senegal, in the name of his Government, could be sufficient for Belgium to consider that its Request for the indication of provisional measures no longer had any object.

The Court observes that, according to Senegal, the statement made by President Wade to *Radio France Internationale*, on the basis of which Belgium requests provisional measures, has been taken out of context and "has been attributed a meaning ... which it manifestly did not have".

The Court points out that Senegal has repeatedly affirmed that it has no intention of lifting the effective control and surveillance measures imposed on Mr. Habré and has stated in particular that Mr. Habré does not possess a valid travel document and that his surveillance is carried out by an elite unit of the Senegalese military forces and that the measures which it has already implemented are consistent with the provisions of the Convention and identical to the provisional measures requested by Belgium.

The Court recalls that Senegal has stated that the negotiations with the European Union and the African Union, aimed at obtaining the funds needed for the prosecution of Mr. Habré, are proceeding well. It notes that Senegal asserted on several occasions at the hearings that it was not contemplating lifting the surveillance and control imposed on the person of Mr. Habré either before or after the funds pledged by the international community were made available to it for the organization of the judicial proceedings. The Court quotes the Co-Agent of Senegal, who, at the end of the hearings, solemnly declared, in response to a question put by a Member of the Court, the following:

"Senegal will not allow Mr. Habré to leave Senegal while the present case is pending before the Court. Senegal has not the intention to allow Mr. Habré to leave the territory while the present case is pending before the Court."

### *Conclusion*

Taking note of the assurances given by Senegal, the Court finds that the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order and concludes from the foregoing that there does not exist, in the circumstances of the present case, any urgency to justify the indication of provisional measures by the Court.

Having rejected Belgium's Request for the indication of provisional measures, the Court makes clear that the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and that it leaves unaffected the right of the Governments of Belgium and Senegal to submit arguments in respect of those questions. It adds that the present decision also leaves unaffected Belgium's right to submit in future a fresh request for the indication of provisional measures, under Article 75, paragraph 3, of the Rules of Court, based on new facts.

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### **Joint declaration of Judges Koroma and Yusuf**

In their joint declaration, Judges Koroma and Yusuf make clear that, while they have voted in favour of the Order, they nevertheless decided to append a declaration to emphasize that both Parties have acknowledged that impunity is no longer allowed under international law, irrespective of the status of the individual, and that Senegal is making efforts to ensure that impunity does not prevail in this particular case. The judges also wish to draw attention to the efforts against impunity made by the African Union, which has recognized that the case against Mr. Hissène Habré falls within its competence.

The authors of the joint declaration note that the present case between Belgium and Senegal concerns Senegal's obligation, under conventional and customary international law, to extradite or prosecute (*aut dedere aut judicare*) the former President of Chad, Mr. Hissène Habré, for crimes he is alleged to have committed or ordered while President. They recall that the primary conventional authority cited by Belgium for this obligation is Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. They recall the terms of the relief sought by Belgium in its Request for the indication of provisional measures: that the Court, pending a final judgment on the merits, require Senegal "to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied".

Judges Koroma and Yusuf note that the purpose of provisional measures is to preserve the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice is not caused to rights which are the subject of dispute in judicial proceedings. They point out that Senegal, on several occasions during the oral proceedings, declared before the Court that it would not release Mr. Habré pending the resolution of the case. In the view of Judges Koroma and Yusuf, these declarations preserve the rights of the Parties and

ensure against the risk of irreparable prejudice in exactly the same way as would an order indicating provisional measures, and the purpose of Belgium's request has thus been served. They conclude that the Court should have simply acknowledged the declarations by Senegal and declared that, as a result, the request for the indication of provisional measures had ceased to have any object.

### **Joint separate opinion of Judges Al-Khasawneh and Skotnikov**

Judge Al-Khasawneh and Judge Skotnikov have voted in favour of the Court's decision not to indicate the provisional measures requested by Belgium. However, they do not concur with the Court's finding to the effect that the conditions required for the purposes of the indication of provisional measures, in terms of establishing *prima facie* jurisdiction or assessing whether the Application has become moot, have been met. They point out that the Court accepted the fact that the dispute, as framed by Belgium, in the light of the explanations given by the Parties as to their respective positions, does not continue to exist, even on a *prima facie* basis (Order, paragraph 48). These explanations, at the very least, should have led the Court to make a finding that its *prima facie* jurisdiction to pronounce on the merits of the case could not be established, since there are very serious doubts as to the existence of a dispute at the time of the filing of the Application. This finding would have allowed the case brought by Belgium to continue. Alternatively, and even more convincingly, the Court could have concluded that, given the explanation by the Parties, no dispute exists and therefore the Application has been rendered moot. Instead, the Court came to what is, in the view of the two judges, an implausible conclusion that "the Parties nonetheless seem to continue to differ on other questions relating to the interpretation or application of the Convention against Torture" (Order, paragraph 48) and went on to offer such "other questions" which have never been identified by Belgium as forming part of a dispute and which consequently have never been addressed as such by Senegal.

Judge Al-Khasawneh and Judge Skotnikov recall that the Court has had occasion to point out, "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74*). Indeed, it is a duty of the Court to make such a determination. It is expected from the Court that in doing so, even on a *prima facie* basis, it will be diligent and precise. They do not think that the Court's determination in this case meets such an obvious requirement.

In conclusion, Judge Al-Khasawneh and Judge Skotnikov express their hope that the fact that this case remains before the Court will not deter possible contributors from providing assistance to Senegal in organizing Mr. Habré's trial.

### **Dissenting opinion of Judge Cançado Trindade**

Judge Cançado Trindade dissents from the decision of the majority of the Court, and sustains that the circumstances of the present case fully meet the preconditions for the indication by the Court of provisional measures, which should have been ordered. He points out, first of all, that precautionary measures were transposed onto the international legal procedure to safeguard the effectiveness of the jurisdictional function itself, particularly in face of an imminence of irreparable damage and in order to secure the realization of justice. Provisional measures, though

indicated on the basis of *prima facie*, rather than substantial, evidence, are necessarily binding. This is the first case brought before the ICJ on the basis of the United Nations Convention against Torture (Article 30), and the Court found that it had *prima facie* jurisdiction thereunder. However, the Order it issued, in his view, does not reflect all the points which are relevant to the proper consideration of the issues raised by the request.

He observes that the Court has lately been faced with situations, such as the one in the present case, illustrative of the overcoming of the strictly inter-State dimension in the acknowledgment of the rights to be preserved by means of provisional measures (e.g., orders indicated in order to avoid the aggravation of situations causing harm to the rights of the human person). The right herein invoked corresponds to the duties set for in the Convention against Torture, which find expression in the principle of universal jurisdiction (*aut dedere aut judicare*): the corresponding right to be preserved is the right to the realization of justice.

Judge Cançado Trindade recalls that, in the hearings, both Parties, Belgium and Senegal, saw it fit to recall the atrocities of the Habré régime (1982-1990) in Chad, with thousands of victims of grave violations of human rights and of international humanitarian law, — as reported by the Chadian Truth Commission in 1992 —, including the systematic practice of torture, in violation of an absolute prohibition of *jus cogens*. Although the inter-State case originated later, with legal actions pursued by the victims, in Senegal and Belgium, as from 2000, it cannot be disconnected from their origins disclosing the human tragedy which occurred in Chad during the Habré régime. In 2006, the United Nations Committee against Torture issued a provisional measure in a case brought by a group of those victims, and the African Union mandated Senegal to prosecute and try Mr. H. Habré “on behalf of Africa”, by a competent Senegalese court. To this effect, Senegal amended its Penal Code and its Code of Criminal Procedure, in early 2007. The case was also the object of attention before the United Nations Human Rights Council, and by the United Nations High Commissioner for Human Rights.

Notwithstanding all that, — Judge Cançado Trindade adds —, impunity has prevailed to date, almost two decades after the reported occurrence of the facts. The surviving victims are still in search of justice, and many of them have passed away in the course of their search. The prerequisites for the indication of provisional measures, are clearly established in the present case. There is urgency, related to measures to be promptly taken to preserve, and comply with, the right to the realization of justice. And there is imminence of further irreparable harm; the ongoing and prolonged impunity amounts to a continuing situation of irreparable harm to those who have not found justice in their lifetime. *Aut judicare* forbids undue delays; justice delayed is justice denied.

To Judge Cançado Trindade, the Court’s decision not to indicate provisional measures can thus be severely questioned. Moreover, even if the ICJ was not satisfied with the arguments advanced by the Parties, it is not bound by them; as master of its own jurisdiction, it is entitled by its Rules (Article 75 (1) and (2)) to indicate provisional measures *motu proprio*, even if they are distinct from the ones requested. The home surveillance of Mr. H. Habré in Senegal is only one aspect of the case; there persist other aspects, deserving of closer attention by the Court, such as 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.

Judge Cançado Trindade concludes that the Court should thus have indicated provisional measures, requesting the Parties to report periodically to it on measures taken to bring promptly Mr. H. Habré to trial in Senegal. This would have been in keeping with the relevance and nature of the right to be preserved, — the right to the realization of justice —, and the corresponding obligations *erga omnes partes* under the Convention against Torture, which are obligations of result and not only of conduct or behaviour. Had the Court done so, it would have set up an important, if not historical, precedent, in support of the principle of universal jurisdiction, and would have taken upon itself the role of guarantor of the collective guarantee of the United Nations Convention against Torture.

### **Separate opinion of Judge *ad hoc* Sur**

In his separate opinion appended to the Order, Judge Sur recalls some fundamental principles regarding the position of a judge *ad hoc*. His duty is to attain the independence and objectivity of the other judges on the Bench. He must also ensure that the arguments of the Party which chose him are properly taken into consideration, even if they are not acted upon.

While expressing his agreement with the operative clause of the Order, Judge Sur regrets the fact that the Court did not analyse the shift in the content of Belgium's Request for the indication of provisional measures, whereby the control to be imposed by the "judicial authorities of Senegal" was replaced by that to be imposed by the "Senegalese authorities". Judicial control is only possible in Senegalese law on the basis of an indictment, whereas control by the "Senegalese authorities" means an administrative measure of control and surveillance. Thus Belgium's final request amounted to asking for the continuation of the administrative control already imposed on Mr. Habré, whereas the initial claim implied the need for Senegal to take a new judicial measure. Judge Sur is of the opinion that, on this point, the Parties should have been given a full account of the arguments which they used.

Judge Sur then considers the method used by the Court to examine the conditions necessary for the exercise of its power to indicate provisional measures. He notes that the Court carefully and cautiously considers its jurisdiction and the admissibility of the Request *prima facie* in order to take full account of the consent of States to its jurisdiction. But he wonders whether it would not be more satisfactory for the Court and Parties alike to replace the current practice, based on a positive demonstration of its *prima facie* jurisdiction and of *prima facie* admissibility, by a negative demonstration, whereby it is not manifestly lacking jurisdiction and the Request is not manifestly inadmissible. The Court could thus concentrate on assessing the circumstances requiring, or not, the indication of provisional measures, that is to say the urgency, the relevance of the rights to be preserved and the risk of irreparable prejudice. Such a change in its jurisprudence would even be more closely in line with Article 41 of the Statute of the Court which grants it the power to indicate independently provisional measures to preserve the rights of either Party should the circumstances so require.

Without touching on the merits, Judge Sur finally considers the question of the existence of a dispute between the Parties at the time of the decision concerning the Order. In his view, Belgium and Senegal agree that the Convention against Torture obliges the States which are parties to it to establish their criminal jurisdiction and prosecute persons accused of the offences for which it provides, or, failing that, to extradite them. Further, Belgium has obtained

satisfaction on its demands given the repeated declarations by Senegal that it will proceed as soon as possible with a trial of Mr. Habré for all the crimes alleged against him and the legal measures which it has taken to that end. Thus, at the date of this Order, there no longer exists any dispute between the Parties, and the Court should have dismissed Belgium's Request as groundless.

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