

INTERNATIONAL COURT OF JUSTICE

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**CASE CONCERNING QUESTIONS RELATING TO THE OBLIGATION
TO PROSECUTE OR EXTRADITE**

(BELGIUM *v.* SENEGAL)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* OWADA; *Judges* SHI, KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Judges ad hoc* SUR, KIRSCH; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73 and 74 of the Rules of Court,

Makes the following Order:

1. Whereas, by an Application filed in the Registry of the Court on 19 February 2009, the Government of the Kingdom of Belgium (hereinafter “Belgium”) instituted proceedings against the Republic of Senegal (hereinafter “Senegal”) in respect of a dispute concerning “Senegal’s

compliance with its obligation to prosecute Mr. H. Habré [former President of Chad] or to extradite him to Belgium for the purposes of criminal proceedings”; whereas 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;

2. Whereas 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;

3. Whereas, in this Application, 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; and whereas it explains that, following the complaints filed in Senegal in 2000 against Mr. Habré by seven natural persons and one legal person, he was indicted for complicity in “crimes against humanity, acts of torture and barbarity” by the senior investigating judge of the Dakar *Tribunal régional hors classe* and placed under house arrest, but that those complaints 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;

4. Whereas in the said Application Belgium also states that, between 30 November 2000 and 11 December 2001, a Belgian national of Chadian origin and certain Chadian nationals filed criminal complaints with civil-party applications with the Belgian judicial authorities against Mr. Habré for crimes under international humanitarian law; and whereas it adds that, following the filing of those complaints, acting on the basis of passive personal jurisdiction as recognized by the Belgian courts, the investigating judge responsible for the case issued an international arrest warrant against Mr. Habré on 19 September 2005;

5. Whereas Belgium states that the said arrest warrant, in which specific reference is made to the lifting by Chad on 7 October 2002 of any immunities which Mr. Habré might have claimed, was transmitted to Senegal on 19 September 2005 with a view to obtaining his extradition; and whereas it further states that the *Chambre d'accusation* of the Dakar Court of Appeal found, on 25 November 2005, that it could not act on this warrant because it concerned acts committed by a Head of State “in the exercise of his functions”;

6. Whereas Belgium states moreover that the case was passed on to the African Union by Senegal on 7 December 2005; and whereas it adds that, following a decision taken at Banjul (Gambia) on 2 July 2006 by the Summit of African Union Heads of State and Government, Senegal amended its Penal Code to include the offences of genocide, war crimes and crimes against humanity and also its Code of Criminal Procedure to enable Senegalese courts to exercise universal jurisdiction;

7. Whereas Belgium complains that Senegal, referring to financial difficulties which prevent it from organizing the trial, has not brought any criminal proceedings against Mr. Habré;

8. Whereas Belgium, in its Application, contends that Senegal's failure to prosecute Mr. Habré, if he is not extradited to Belgium to answer for the acts of torture that are alleged against him, violates the Convention against Torture, in particular Article 5, paragraph 2, Article 7, paragraph 1, Article 8, paragraph 2, and Article 9, paragraph 1, of that instrument; and whereas it adds that this failure also violates the obligation under customary international law to punish crimes under international humanitarian law which is to be found in numerous acts emanating from international organizations and is established in treaty law;

9. Whereas Belgium maintains that a dispute thus exists between itself and Senegal over the interpretation and application of the Convention against Torture and of the customary law relating to the punishment of crimes against humanity;

10. Whereas, at the end of its Application, Belgium presents the following submissions:

“Belgium respectfully 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 whereas it reserves the right to revise or supplement the terms of the Application;

11. Whereas 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;

12. Whereas, in its Request for the indication of provisional measures, Belgium refers to the same bases of jurisdiction of the Court relied on in its Application (see paragraph 2 above);

13. Whereas, in this Request for the indication of provisional measures, 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”;

and whereas, according to Belgium, in such an event, it would be easy for Mr. Habré to leave Senegal and avoid any prosecution;

14. Whereas, in the said Request for the indication of provisional measures, Belgium argues that if Mr. Habré were to leave the territory of Senegal, that would cause irreparable prejudice to the right conferred on Belgium by international law to bring criminal proceedings against him; whereas 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;

15. Whereas, at the end of its Request for provisional measures, Belgium 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”;

16. Whereas on 19 February 2009, the date on which the Application and the Request for the indication of provisional measures were filed in the Registry, the Registrar informed the Senegalese Government of the filing of these documents and transmitted certified copies of them to it forthwith, in accordance with Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of this filing;

17. Whereas on 23 February 2009, the Registrar informed the Parties that the President of the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 6, 7 and 8 April 2009 as the dates for the oral proceedings on the Request for the indication of provisional measures;

18. Whereas, pending the notification provided for by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission of the printed bilingual text of the Application to the Members of the United Nations, the Registrar informed those States on 24 February 2009 of the filing of the Application and its subject, and of the filing of the Request for the indication of provisional measures;

19. Whereas, on 2 April 2009, Senegal transmitted to the Court the documents on which it wished to rely during the hearings; and whereas copies of those documents were immediately communicated to Belgium; whereas, on 3 April 2009, Belgium in turn transmitted to the Court the documents on which it wished to rely during the hearings; and whereas copies of those documents were immediately communicated to Senegal;

20. Whereas, since the Court includes upon the Bench no judge of the nationality of the Parties, each of them proceeded, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc* in the case; for this purpose Belgium chose Mr. Philippe Kirsch, and Senegal chose Mr. Serge Sur;

21. Whereas, at the public hearings held on 6, 7 and 8 April 2009, in accordance with Article 74, paragraph 3, of the Rules of Court, oral observations on the Request for the indication of provisional measures were presented by the following representatives of the Parties:

On behalf of Belgium: Mr. Paul Rietjens, *Agent*,
Mr. Gérard Dive, *Co-Agent*,
Mr. Eric David,
Sir Michael Wood;

On behalf of Senegal: H.E. Mr. Cheikh Tidiane Thiam, *Agent*,
Mr. Demba Kandji, *Co-Agent*,
Mr. Ndiaw Diouf,
Mr. Alioune Sall,
Mr. Oumar Gaye,
Mr. Abdoulaye Dianko;

and whereas, during the hearings, questions were put by certain Members of the Court, to which replies were given orally and in writing;

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22. Whereas, in its first round of oral observations, Belgium reiterated the arguments developed in its Application and its Request for the indication of provisional measures, and argued that the conditions necessary for the Court to indicate the requested measures had been fulfilled;

23. Whereas Belgium reaffirmed that, in respect of Mr. Habré, a dispute existed between itself and Senegal over the interpretation and application of the obligation to extradite or prosecute the perpetrators of crimes of torture and crimes against humanity, as set forth in conventional international law, in particular Article 7 of the Convention against Torture, and customary international law; whereas it contended that Senegal could not divest itself of the said obligation by handing Mr. Habré over to an international organization or to a State which had not sought his extradition for the purposes of prosecution;

24. Whereas Belgium also referred to certain recent statements made by Mr. Abdoulaye Wade, President of the Republic of Senegal, 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 the person in question, cease monitoring him or transfer him to another State; and whereas Belgium concluded that there was consequently a real and imminent risk of irreparable prejudice to the rights which formed the subject of its Application;

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25. Whereas, 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; whereas it 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; and whereas 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;

26. Whereas Senegal stated that, following Belgium's request for the extradition of Mr. Habré, the latter had been arrested and placed in custody on 15 November 2005 pending extradition; whereas it confirmed that, by a judgment dated 25 November 2005, 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 (see paragraph 5 above); and whereas Senegal stated that on 23 December 2005 it had informed Belgium of this decision, which put an end to the extradition proceedings;

27. Whereas Senegal explained that, in these circumstances, it had sought the support of the African Union, and seised it of the matter; whereas it confirmed 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; and whereas it also confirmed that subsequently it had taken a number of measures with a view to the holding of Mr. Habré's trial in Senegal, in particular the introduction of offences linked to international crimes into its criminal legislation, the broadening of the jurisdiction of the Senegalese courts and the search for the financial resources needed for the organization of such a trial (see paragraph 6 above);

28. Whereas Senegal, in the light of the facts as thus restated, 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; whereas it contended that the Court's prima facie jurisdiction had consequently not been established; and whereas Senegal argued, moreover, that Belgium's Request was inadmissible since the procedural conditions laid down by Article 30 of the Convention against Torture had not been fulfilled;

29. Whereas Senegal also pointed out that the interview given to Radio France Internationale by President Wade on 2 February 2009, to which Belgium had referred, confirmed that Senegal was willing to pursue the process under way, that Mr. Habré was being kept under surveillance, a situation which Senegal did not envisage ending, and that the international negotiations aimed at obtaining the necessary support to organize his trial were following their course; whereas this led Senegal to conclude that no urgency existed which might justify the indication by the Court of the provisional measures requested by Belgium; and whereas Senegal further argued that Belgium had not identified the rights it wished to see protected, nor the irreparable prejudice which might be caused to those rights without the indication of provisional measures;

30. Whereas Senegal concluded from the foregoing that the Request for the indication of provisional measures submitted by Belgium should be rejected;

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31. Whereas, in its second round of oral observations, Belgium reaffirmed that Mr. Habré should be prosecuted and tried in Senegal, and that only if it failed to prosecute him should Senegal extradite Mr. Habré to Belgium to answer for the acts alleged against him;

32. Whereas 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; whereas Belgium also complained that Senegal was systematically bringing up financial reasons to justify its incapacity and failure to fulfil its conventional or customary obligations; and whereas Belgium added that the proceedings instituted in respect of Mr. Habré before the Court of Justice of the Economic Community of West African States (ECOWAS) and the African Court of Human Rights raised concerns that one of these regional courts might render an order liable to prejudice Belgium's rights in the current proceedings;

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

34. Whereas, at the end of its second round of oral argument, Belgium presented the following submissions:

“Belgium respectfully asks the Court to indicate the following provisional measures: the Republic of Senegal is requested to take all the steps within its power to keep Mr. Hissène Habré under the control and surveillance of the Senegalese authorities so that the rules of international law with which Belgium requests compliance may be correctly applied”;

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35. Whereas, in its second round of oral observations, Senegal reaffirmed that the judgment of the *Chambre d'accusation* of the Dakar Court of Appeal had put a definitive end to the extradition proceedings initiated by Belgium;

36. Whereas Senegal maintained that its obligation to prosecute Mr. Habré derived from the provisions of the Convention against Torture and that it had always referred to that Convention to justify the measures taken with a view to the trial; whereas Senegal stated that it had seised the African Union in order to obtain the financial support and mutual judicial assistance required for the organization of the trial, but that at no point had it based its obligation to prosecute Mr. Habré on a resolution of that organization; and whereas Senegal concluded that the lack of a dispute between the Parties was therefore manifest;

37. Whereas 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; and whereas it added that, in any event, any possible prejudice to Belgium's rights, despite the surveillance measures put in place by Senegal in respect of Mr. Habré, could not be described as irreparable since the obligation to extradite or prosecute was, according to Belgium, a customary norm and therefore enforceable by Belgium against any State where Mr. Habré might happen to be;

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

39. Whereas at the end of its second round of oral observations Senegal presented the following submissions: “Senegal respectfully asks the Court to reject the provisional measures requested by Belgium on 7 April 2009”;

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Prima facie jurisdiction

40. Whereas, when dealing with a request for the indication of provisional measures, there is no need for the Court, 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 whereas 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;

41. Whereas Belgium is seeking to found the jurisdiction of the Court on Article 30 of the Convention against Torture and on the basis of the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute; and whereas the Court must now endeavour to establish whether the compromissory clause under the convention, or the declarations relied upon do indeed confer upon it *prima facie* jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considers that the circumstances so require;

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42. Whereas Article 30, paragraph 1, of the Convention against Torture reads as follows:

“Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

43. Whereas both Belgium and Senegal are parties to the Convention against Torture; whereas Senegal ratified that Convention on 21 August 1986 without entering any reservation as to Article 30, paragraph 1; and whereas Belgium did likewise on 25 June 1999;

44. Whereas Belgium contends that a dispute exists between the Parties on the interpretation and application of the said Convention, and that by failing to prosecute Mr. Habré, in default of extraditing him to Belgium to answer for the acts of torture that are alleged against him, Senegal has violated the Convention against Torture, in particular Article 5, paragraph 2, Article 7, paragraph 1, Article 8, paragraph 2, and Article 9, paragraph 1; whereas Belgium maintains that negotiations on this subject began between the Parties in 2005 and that those negotiations, in which Belgium expressly referred to the provisions of the Convention against Torture, did not allow the dispute to be settled, as it observed formally in its Note Verbale to Senegal of 20 June 2006; whereas Belgium further maintains that it suggested recourse to arbitration to Senegal the same day, a proposal to which the Senegalese authorities did not respond, either within six months or thereafter, while Belgium reiterated its proposal of recourse to arbitration in a Note Verbale dated

8 May 2007, and confirmed the continuation of the dispute by a Note Verbale of 2 December 2008; whereas Belgium concludes from the foregoing that the conditions to which Article 30 of the Convention against Torture subjects the jurisdiction of the Court have been fulfilled;

45. Whereas Senegal takes the view that there is manifestly no dispute over the interpretation or application of the Convention, since it follows from the terms of the Application that Belgium is requesting the Court to adjudge and declare that Senegal is under an obligation to prosecute Mr. Habré; whereas Senegal emphasizes that it has already taken appropriate steps to comply with that obligation; whereas Senegal further maintains that Belgium's Application is inadmissible because the procedural conditions specified in Article 30 of the Convention against Torture have not been fulfilled; whereas Senegal contends that Belgium merely requested information from the Senegalese authorities on the status of the proceedings, which cannot be regarded as real negotiations; and whereas it claims that the Note Verbale dated 20 June 2006 to which Belgium refers, and which is said to contain its offer of recourse to arbitration, cannot be found in Senegal's archives; whereas Senegal concludes from the foregoing that Article 30 of the Convention against Torture cannot found the jurisdiction of the Court in the present case;

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46. Whereas Article 30 of the Convention against Torture makes the Court's jurisdiction conditional on the existence of a "dispute between two or more States Parties concerning the interpretation or application of this Convention"; whereas, at this stage of the proceedings, the Court must begin by establishing whether, *prima facie*, such a dispute existed on the date the Application was filed, since, as a general rule, it is on that date, according to the Court's jurisprudence, that its jurisdiction must be considered (see *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 344; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 130, para. 43);

47. Whereas, following the judgment of the Dakar Court of Appeal bringing to an end the proceedings on Mr. Habré's extradition to Belgium, Senegal seised the African Union and informed Belgium of this in a Note Verbale dated 23 December 2005; whereas, in a Note Verbale of 11 January 2006, Belgium disputed whether Senegal could comply with the obligation set forth in Article 7 of the Convention against Torture by referring a matter covered by that Convention to an international organization; whereas Belgium argued that Senegal was not fulfilling its obligations under the Convention against Torture, in particular Article 7 thereof; whereas Senegal considered that it has taken measures in order to fulfill the said obligations and that it reaffirmed its will to continue the ongoing process, in which it intends to assume in full its obligations as a State party to the Convention against Torture; whereas, in view of the foregoing, 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;

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

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49. Whereas the Court will now consider whether the procedural conditions laid down by Article 30 of the said Convention have been fulfilled; whereas that provision requires, first, that any dispute submitted to the Court should be such as “cannot be settled through negotiation”; whereas Belgium maintains that, it had attempted unsuccessfully to resolve the dispute by negotiations with Senegal (see paragraph 44 above); whereas Senegal takes the view, on the contrary, that the diplomatic correspondence relied on by Belgium cannot be regarded as amounting to negotiations (see paragraph 45 above); and, further, that that correspondence does not justify the conclusion that the supposed negotiations had failed;

50. Whereas, at the stage of considering *prima facie* jurisdiction, it is sufficient for the Court to note that an attempt has been made by Belgium to negotiate; whereas, it considers 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; and whereas 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*;

51. Whereas Article 30 of the Convention against Torture 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; whereas Belgium has indicated that Senegal did not respond to the formal proposal for recourse to arbitration made in its Note Verbale of 20 June 2006, and pointed out that this proposal was reiterated in its Note Verbale of 8 May 2007; and whereas Senegal states that the Belgian Note Verbale of 20 June 2006 cannot be found and that the proposal allegedly reiterated was at the very least ambiguous;

52. Whereas, in the view of the Court, the Note Verbale of 20 June 2006 contains 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; whereas, at this stage of the proceedings, it is sufficient for the Court to note that, even supposing that the said Note Verbale never reached its addressee, the Note Verbale of 8 May 2007 explicitly refers to it; and whereas 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;

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53. Whereas, in the light of the foregoing, the Court considers that it has prima facie jurisdiction under Article 30 of the Convention against Torture to entertain the case;

54. Whereas, moreover, the prima facie jurisdiction which the Court derives from the Convention against Torture is sufficient to enable it, if the circumstances so require, to indicate the provisional measures requested by Belgium; and whereas consequently there is no need to ascertain, at this stage of the proceedings, whether the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute might also, prima facie, afford a basis on which the Court's jurisdiction could be founded;

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55. Whereas, in the light of the findings it has reached in paragraph 53 above, the Court may examine the Request for the indication of provisional measures;

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Link between the right protected and the measures requested

56. Whereas the power of the Court 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; whereas 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 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

(Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 19, para. 34; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I), p. 22, para. 35; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, para. 118); whereas 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;

57. Whereas the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible;

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58. Whereas Belgium points out that its request is intended to protect its right to see Senegal prosecute Mr. Habré directly or, failing that, the right to obtain his extradition; whereas Belgium maintains that the Convention against Torture confers upon all the States parties the right to obtain compliance by Senegal with the provisions of the Convention; and whereas Belgium states that its request for the extradition of Mr. Habré, resulting from the proceedings brought in Belgium by victims of Belgian nationality, confers a specific right upon it to see Senegal prosecute Mr. Habré or, failing that, to obtain his extradition in accordance with Article 7 of the said Convention;

59. Whereas Senegal argues that the only right which might be attributed to States parties to the Convention against Torture is the right to require another State party to try the perpetrator of an act of torture who is present in its territory or, failing that, to request his extradition; and that, consequently, if it is considered that Article 5, paragraph 2, and Article 7, paragraph 1, of the Convention create a right for a State party, it can only be the right to demand extradition, which cannot however prevail over the right of a State which takes on its obligation to hold a trial;

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60. Whereas at this stage of the proceedings the Court does not need to establish definitively the existence of the rights claimed by Belgium or to consider Belgium's capacity to assert such rights before the Court; and whereas the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible;

61. Whereas 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;

whereas 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, even as qualified by Senegal; whereas, therefore, in view of the subject-matter of the proceedings, the provisional measures requested may be indicated if the circumstances so require;

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Risk of irreparable prejudice and urgency

62. Whereas however the power of the Court 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 (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures*, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure*, Order of 17 June 2003, *I.C.J. Reports 2003*, p. 107, para. 22; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures*, Order of 23 January 2007, p. 11, para. 32; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Provisional Measures*, Order of 15 October 2008, para. 129); and whereas the Court must therefore consider whether such urgency exists in these proceedings;

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63. Whereas Belgium, in its Request for the indication of provisional measures, makes reference to an interview given on 2 February 2009 to Radio France Internationale by President Wade (see paragraph 13 above); whereas Belgium also referred at the hearings to interviews given by President Wade to the Spanish newspaper *Público*, the French newspaper *La Croix* and *Agence France Presse* on 14 October 2008, 18 December 2008 and 3 February 2009 respectively, in which the organization of the trial of Mr. Habré and its funding were discussed; whereas Belgium points out that at different junctures on these various occasions, the President of Senegal said that he was not going to keep Mr. Habré in Senegal indefinitely, that he would make the latter leave Senegal, even though he did not know where Mr. Habré would go, that he was willing to try him but that he had to be given the resources, and that, if the trial was not held, he would either send Mr. Habré back home or transfer him to the Chairperson of the African Union; whereas, according to Belgium, it follows from this that Senegal could lift the house arrest imposed on Mr. Habré if the funding needed for the organization of his trial were not provided;

64. Whereas Belgium infers from this, in the first instance, that there is a real risk of Senegal causing irreparable prejudice to the rights of Belgium; whereas Belgium asserts that, should Mr. Habré receive permission to leave Senegalese territory, he might evade any prosecution and it would become impossible for Senegal to comply, in particular, with the obligations laid down by the Convention against Torture; and whereas it adds that the violation of the obligation to prosecute or extradite thus caused could not be redressed by other means, in particular by monetary compensation;

65. Whereas Belgium points out, moreover, that the statements concerning Mr. Habré leaving Senegalese territory were made recently by the highest State authority; whereas it infers from this that the risk of prejudice must be regarded as imminent;

66. Whereas Senegal argues that it does not follow from the comments by President Wade that irreparable prejudice might be caused to the rights which Belgium claims to hold under the Convention against Torture; whereas it affirms that it has no intention of lifting the effective control and surveillance measures imposed on Mr. Habré; whereas it states 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; whereas it further points out 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;

67. Whereas Senegal maintains, moreover, that 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”; whereas it contends that, on the contrary, the said statement demonstrates Senegal’s willingness to hold a trial, with regard to the funding of which President Wade specified the following:

“[After all the promises of support that were made], as it was taking a little too much time, I said ‘[the promised financial support] will actually have to be available . . . It was in order to push a bit to speed things up . . . As soon as we have the funding, the trial will begin. There is absolutely no doubt about it.’” *[Translation by the Registry]*;

whereas it states 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; whereas Senegal considers that the measures taken by the Senegalese authorities show that they are performing in good faith their obligations under the Convention against Torture; and whereas, according to Senegal, it follows from this that there is no imminent risk to justify the indication of provisional measures;

68. Whereas, as has been indicated above (see paragraphs 29 and 66), Senegal asserted on several occasions at the hearings that it is 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 are made available to it for the organization of the judicial proceedings; whereas the Co-Agent of Senegal, at the end of the hearings, solemnly declared, in response to a question put by a Member of the Court, the following:

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

69. Whereas the Co-Agent of Belgium, making clear that he spoke in the name of his Government, asserted at the hearings, in response to a question put by a Member of the Court, that such a solemn declaration given by the Agent of Senegal, in the name of his Government, to the effect that the latter would not allow Mr. Habré to leave Senegalese territory while the present case was pending before the Court, could be sufficient for Belgium to consider that its Request for the indication of provisional measures no longer had any object, provided that certain conditions were fulfilled (see paragraph 33 above);

* *

70. Whereas 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 as to Mr. Habré's possible departure; whereas the Court nonetheless observes that those statements, made in interviews given to the press, were clarified subsequently by other statements emanating from the Head of State (see paragraph 67 above);

71. Whereas the Court further notes that Senegal, both *proprio motu* and in response to a question put by a Member of the Court, gave a formal assurance on several occasions during the hearings that it will not allow Mr. Habré to leave its territory before the Court has given its final decision;

72. Whereas, as the Court has recalled above, the indication of provisional measures is only justified if there is urgency; whereas the Court, taking note of the assurances given by Senegal, finds that, the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order;

73. Whereas the Court 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;

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74. Whereas 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 whereas it leaves unaffected the right of the Governments of Belgium and Senegal to submit arguments in respect of those questions;

75. Whereas 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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76. For these reasons,

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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-eighth day of May, two thousand and nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and the Government of the Republic of Senegal, respectively.

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judges KOROMA and YUSUF append a joint declaration to the Order of the Court; Judges AL-KHASAWNEH and SKOTNIKOV append a joint separate opinion to the Order of the Court; Judge CANÇADO TRINDADE appends a dissenting opinion to the Order of the Court; Judge *ad hoc* SUR appends a separate opinion to the Order of the Court.

(Initialed) H. O.

(Initialed) Ph. C.
