



INTERNATIONAL COURT OF JUSTICE

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Press Release

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Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

Request for the indication of provisional measures

The Court finds that the circumstances, as they now present themselves to it, are not such as to require the exercise of its power to indicate provisional measures

THE HAGUE, 28 May 2009. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, today gave its decision on the 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).

In its Order, the Court finds by 13 votes to one that “the circumstances, as they now present themselves to [it], are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures”.

History of the proceedings

The history of the proceedings can be found in Press Release No. 2009/21 of 22 May 2009.

Reasoning of the Court

Prima facie jurisdiction

The Court first recalls that when dealing with a request for the indication of provisional measures, it is not required, 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; it is sufficient for it to ascertain that the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded.

— Dispute

The Court notes that both Belgium and Senegal are parties to the Convention against Torture, Article 30 of which is relied on by the Applicant to found the jurisdiction of the Court. Since the primary condition required 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”, the Court must begin, at the current stage of the proceedings, by establishing whether, prima facie, such a dispute existed on the date the Application was filed.

The Court observes that, 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 the fact. Belgium then indicated that by referring a matter covered by the Convention against Torture to an international organization, Senegal was not fulfilling its obligations under that Convention. Belgium further argued that Senegal was not fulfilling its obligations under the Convention against Torture 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, whereas Senegal considered that it has taken measures in order to fulfil the said obligations and 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. In view of the foregoing, the Court considers 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 then turns to the question of whether the Application was not subsequently deprived of its object by the removal of the dispute which existed at the time of filing, given for example that Senegal recognized during the hearings that a State party to the Convention against Torture cannot fulfil the obligations under that Convention by the mere act of referring the matter to an international organization. The Court nonetheless finds that the Parties 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 have to 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. It notes, moreover, that the Parties seem to continue to hold differing views as to how Senegal should fulfil its treaty obligations. In consequence, according to the Court, it appears that *prima facie* a dispute 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 further recalls 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". It takes the view that, 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. The Court considers that the diplomatic correspondence 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 notes 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. In the view of the Court, the Note Verbale from Belgium of 20 June 2006 contains an explicit offer to Senegal to have recourse to arbitration in order to settle the case of Mr. Habré. The Court points out that, even supposing that the said Note Verbale never reached its addressee, a subsequent Belgian Note Verbale of 8 May 2007 explicitly refers to it, and it has been confirmed that this second Note was received by Senegal more than six months before the date of referral to the Court.

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, if the circumstances so require, to indicate the provisional measures requested by Belgium. The Court therefore takes the view that it has no need to ascertain, at this stage, whether the second basis of jurisdiction invoked by Belgium, namely the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute of the Court, 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 its Statute has as its object the preservation of the respective rights of the parties pending its decision.

The Court notes that the provisional measures requested in the current proceedings are aimed at ensuring that Senegal takes all 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 observes 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, and although it 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 such rights before it, the Court notes 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 point of view also, the provisional measures requested may be indicated if the circumstances so require.

Risk of irreparable prejudice and urgency

The Court recalls further 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 refers to recent interviews given by the Senegalese President, Mr. Abdoulaye Wade, to Radio France Internationale, the Spanish newspaper Público, the French newspaper La Croix and Agence France Presse, in which he indicated in particular that he did not intend to keep Mr. Habré in Senegal indefinitely, if the funding needed for the organization of his trial was not provided by the international community. According to Belgium, Senegal could therefore lift the house arrest imposed on Mr. Habré.

The Court notes 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". It also observes that Senegal has asserted on several occasions 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. The Court points out in particular that the Co-Agent of Senegal solemnly declared, in response to a question put by a Member of the Court, that his Government "will not allow Mr. Habré to leave Senegal while the present case is pending before the Court".

The Court also points out 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.

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 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 emphasizes that this decision 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. It adds that the decision also leaves unaffected Belgium's right to submit in future a fresh request for the indication of provisional measures, based on new facts.

Composition of the Court

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.

Judges Koroma and Yusuf append a joint declaration to the Order. Judges Al-Khasawneh and Skotnikov append a joint separate opinion to the order. Judge Cançado Trindade appends a dissenting opinion to the Order. Judge ad hoc Sur appends a separate opinion to the Order.

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A summary of the Order appears in the document "Summary No. 2009/3". The present press release, the summary of the Order and the full text of the Order can be found on the Court's website (www.icj-cij.org) under "Cases".

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