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8 The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the first round of oral observations on behalf of Senegal. I will now give the floor to His Excellency Mr. Cheikh Tidiane Thiam, Agent of the Republic of Senegal.

Mr. THIAM:

1. Mr. President, Members of the Court, allow me to say what an honour it is to represent the Government of Senegal before your august institution, an institution which, like all members of the international community, my country holds in great respect and esteem. To Belgium, Senegal wishes to express its gratitude before the Court for the glowing assessment by its Agent, Director General of Legal Affairs, Mr. Rietjens, of the excellent relations steadily developed over such a long time between Senegal and Belgium, and the mutual assistance not to say active support the two countries have shown one another in such prestigious and noteworthy areas as human rights and the progressive development of international law.

2. Mr. President, it is not the first time that Senegal has appeared before the International Court of Justice. In the case concerning the *Arbitral Award of 31 July 1989*, which lasted from 1989 to 1991, the Court decided to reject a request for the indication of provisional measures filed by Guinea Bissau and, basically, to oppose the presentation by that country seeking a declaration that the arbitral award delivered in Geneva on the delimitation of the maritime boundary between the two countries was null and void.

3. Today, Senegal notes, albeit with regret, that Belgium has seised the Court. This precipitate action can only impede the efforts Senegal has been making for some years now to meet its international obligations by organizing a just and impartial trial for Mr. Hissène Habré who has resided in Dakar for 19 years. Senegal's presence before the Court today, far from being justified solely by the need to defend its own rights, also stems from its firm conviction that it is acting in concert with the members of the international community to play its part in strengthening the principles and rules of international law as they have been constantly and authoritatively refined for almost a century by your Court and its predecessor. This case will therefore give Senegal an
9 opportunity to make its determination to remain a state of law which respects international law clearly known. In proclaiming the superiority of international law over national law, its

Constitution is in this respect a reflection of that choice enshrined since its accession to independence in 1960.

4. The Senegalese delegation is distinguished by the presence of the following members: Professor Sérigne Diop, Minister of State, and Mr. El Hadj Amadou Sall, Minister in the Government of the Republic of Senegal. Their presence is a mark of Senegal's respect for the principal judicial organ of the United Nations and international law and of the importance our country attaches to the rejection by the Court of the request for the indication of provisional measures submitted by Belgium.

5. Mr. President, Senegal's presentation to you today will turn solely on Belgium's Application instituting proceedings and on the request for the indication of provisional measures, together with the documents received by the Registry on Friday, 2 April 2009. We will endeavour to reply to this morning's presentation by Belgium next Wednesday.

6. With your permission, I will now briefly recall the principal relevant facts of the case, with particular emphasis on its international aspects.

I. THE FACTS

7. The statement of the facts made by Belgium, both in its Application and in its request for the indication of provisional measures, is regrettably inaccurate and wrong on many points and Senegal will make the necessary corrections during the hearings, only where necessary and relevant for the needs of the incidental proceedings.

8. On 1 December 1990, Mr. Hissène Habré was removed from power by a coalition of armed groups and fled to Senegal after passing through Cameroon.

9. In accordance with Senegal's tradition of offering asylum, from which another Nigerian head of state also ousted from power has benefited, Mr. Habré has resided in Dakar since 1990, on

10 the basis of the asylum granted to him, yet without enjoying the status of refugee under the applicable regulations. But first, what of the national aspects associated with the facts of the case?

(a) *National aspects associated with the facts of the case*

10. On 25 January 2000, as recalled this morning, Souleymane Guengueng and seven others, members of the Chadian Association of Victims of Political Repression and Crime (AVCRP),

founded in 1991, filed a complaint with civil-party application with the investigating judge of Dakar against Mr. Hissène Habré for crime against humanity and acts of torture, of which they were allegedly victims in Chad between June 1982 and December 1990.

11. This first judicial measure marked the opening, in Senegal, of protracted judicial proceedings which, would subsequently have repercussions both in Africa and internationally, the African Union, the European Union and the United Nations Committee Against Torture being involved.

12. On 3 February 2000, following the above-mentioned complaint of 25 January 2000, the senior judge in charge of investigations at the Dakar Special Regional Court (*Tribunal Hors classe*) charged Mr. Habré with complicity in crimes against humanity, acts of torture and barbarism, and placed him under house arrest.

13. On 18 February 2000, the accused, Hissène Habré, seised the *Chambre d'Accusation* of the Dakar Court of Appeal for an annulment of the decision indicting him, on the ground that the Senegalese courts lacked jurisdiction to hear the case owing to the failure to transpose and fully implement the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 10 December 1984 into Senegalese domestic law.

14. On 4 July 2000, by Judgment No. 135, the *Chambre d'Accusation* of the Dakar Court of Appeal upheld Mr. Habré's request, annulling the decision indicting him owing to the lack of jurisdiction of the court seised since "Senegalese courts cannot hear acts of torture committed by a foreigner outside Senegalese territory regardless of the nationalities of the victims, and since the wording of Article 669 of the Code of Criminal Procedure excludes this jurisdiction" *[Translation by the Registry]*..

11 15. The complainants, asserting that the Senegalese courts did indeed have jurisdiction to indict and try Mr. Habré by virtue of the principle of the universal jurisdiction which was said to exist in Senegalese law, referred the above-mentioned Judgment to the *Cour de Cassation*.

16. On 20 March 2001, the *Cour de Cassation* rejected their appeal on the ground that:

> "no procedural text recognizes that Senegalese courts have universal jurisdiction to prosecute and try the presumed perpetrators or accomplices — if they are found in the territory of the Republic — of the acts which fall within the provisions of Law 96-15 of 28 August 1996 adapting Senegalese legislation to the provisions of Article 4 of the

> Convention of 10 December 1984 against Torture, when those acts have been committed outside the territory by foreigners". *[Translation by the Registry.]*

17. On 19 September 2005, the investigating judge at the court of first instance in Brussels (Belgium), issued an international arrest warrant against Mr. Hissène Habré, charging him with acts of genocide, crimes against humanity, war crimes, torture and other serious violations of international humanitarian law and addressed a request for his extradition to the Senegalese authorities.

18. On 15 November 2005, following the Belgian request, Mr. Habré was arrested, detained awaiting detention and brought before the *Chambre d'Accusation* of the Dakar Court of Appeal, in accordance with the Senegalese law on extradition.

19. On 25 November 2005, the *Chambre d'Accusation* of the Dakar Court of Appeal, in its Judgment No. 138 — which may be set against the governmental authorities in application of the principle of the separation of powers — declared that it lacked jurisdiction owing to the status of head of State enjoyed by Mr. Habré when the acts of which he is accused were committed, inasmuch as that status confers jurisdictional immunity upon him such as to survive the cessation of his duties as President of the Republic. So much for the issues raised so far by the national aspects of the Hissène Habré case. Let us now consider the international aspects of the case which today has reached your august Court.

(b) ***International aspects***

20. Mr. President, Members of the Court, the international aspects of the case will now take us to the various African capitals where relevant meetings of the African Union have taken place, and of course also to Brussels — seat not only of the Belgian Government but also of the European
12 Union and lastly to the United Nations — since the United Nations Committee against Torture has been referred to and will be referred to again.

21. To give you some advance guidance in the statement of the facts set out below, let me state here and now that, at least since 2005, Senegal has clearly retained the option of trying Hissène Habré in its own courts. To do so, Senegal will seek African support from the African Union — and I do mean "support", as this is all it is about, as we will explain below. Belgium

wishes to know the fate of its extradition request. Hence, Senegal wishes to fulfil its obligations to try (*judicare)* while Belgium thinks only of extradition (*extradere*).

22. Belgium asks for details of the scope of the decision delivered by the *Chambre d'Accusation* of the Appeal Court, which was asked for an opinion on the Belgian extradition request. [SG 2228 of 30 November 2005, documents submitted by Belgium on 3 April 2009]. On 23 December 2005, Senegal, by transmitting to it a copy of Judgment No. 138 to which I have just referred, delivered by the *Chambre d'Accusation*, informed Belgium on the scope of the judgment relating to the extradition request. In this connection, it stated that it was a basic act of criminal procedure which put an end to the judicial phase of the extradition proceedings. We — either myself or my colleagues — will need to revert to this point later on.

23. Concerned by the seizin of the African Union, Belgium seeks support in the 1984 Convention in an attempt to set aside or ignore Senegal's initiative, relying on Article 30 of the Torture Convention, which provides for the opening of negotiations to find a solution to a dispute and which Belgium would use to refer once again to the fate of its extradition request, and this despite the consequences of the legal decision, namely, refusal by the competent court to deliver an opinion favourable to extradition. [Note Verbale No. 0084 of 11 January 2006.]

24. At its Sixth Ordinary Session, held in Khartoum, Sudan, the African Union, which Senegal had seized of the case — all will note that I use the term seisin, never transfer or appropriation or relinquishment — with a view to its involvement and support, adopted a resolution calling for the creation of a committee of eminent African jurists entrusted with the task of

13 examining all aspects and implications of the Hissène Habré trial (document No. 9 filed on 2 April 2009).

25. Senegal was therefore surprised to learn from Belgium on 9 March 2006 [Note Verbale No. 06/00491], that "the procedure for negotiation with regard to the extradition application . . . in application of Article 30 of the convention is under way".

26. On 4 May 2006, Belgium referred to the possibility of recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture for any unresolved dispute (Note Verbale No. J25011 (06)).

27. On 9 May 2006, Senegal made known — and this is very important for clarifying our position — its concerns about a trial in view of the legal impossibility of extradition which it faced. Belgium's insistence on a reply in keeping with its expectations thus spurns the legal realities surrounding this case and the efforts expended by Senegal to try Hissène Habré in conformity with its treaty obligations.

28. On 2 July 2006, the Heads of State and Government of the African Union, meeting at the Organization's Seventh Ordinary Summit held in Banjul (Gambia), called upon Senegal to prosecute and try Mr. Hissène Habré before the Senegalese courts. I would like, Mr. President, to draw the Court's attention to the basis and content of that decision.

29. As regards the basis, the Conference: "[o]bserves that, according to Articles 3 *(h)*, 4 *(h)* and 4 *(o)* of the Constitutive Act of the African Union, the crimes of which Hissène Habré is accused fall within the jurisdiction of the African Union" and urges that "the jurisdiction of the International Court of Justice in this case and the ratification by Senegal of the United Nations Convention Against Torture" be taken into consideration.

30. As regards the content of the African Union's decision, the Conference "[m]andates the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a
14 competent Senegalese court with guarantees for fair trial". Also it "[f]urther mandates the Chairperson of the Union, in consultation with the Chairperson of the Commission, to provide Senegal with the necessary assistance for the effective conduct of the trial".

31. The Conference concluded by asking "all the Member States to co-operate with the Senegalese Government . . ." and "call[ing] upon the international community to avail its support to the Government of Senegal". (Doc. Assembly/AU/3(VII).)

32. It is probably this decision by the African Union which prompted Belgium, on 20 June 2006 [Note Verbale No. 06/01203] to "point out that the attempted negotiation with Senegal, which started in November 2005, has not succeeded and, in accordance with Article 30.1 of the Torture Convention consequently asks Senegal to submit the dispute to arbitration under conditions to be agreed mutually".

33. Mr. President, I wish to make a number of remarks on this subject here:

— First, Belgium's reaction shows its concern to speed up the seisin of a judicial body after the twofold conclusion that (1) extradition could no longer be envisaged after 2005; and (2) Senegal had just found a means of fulfilling its obligations to try the accused under the Torture Convention by obtaining support from the African Union.

— Second confirmation: rather than genuinely co-operating with Senegal with a view to a trial held in that country, Belgium seems to have chosen to ignore the course adopted by Senegal, a course since reinforced by the support of the African Union, preferring extradition instead. And with a view to securing that extradition, it modifies the fulfilment of the procedural conditions necessary under the Convention against Torture to enable it to seise your august Court.

34. In any event, Senegal has not managed to find the Note Verbale of 20 June 2006 transmitted by Belgium to the Registry of your Court last Friday, 3 April 2009, in the archives of the Ministry of Foreign Affairs, and would be grateful to Belgium, with the Court's permission, if it would provide it with all the details testifying to the transmission of that Note to that Ministry.

15 35. With a view to the holding of the trial, Senegal gave Belgium an undertaking that it would regularly supply it with all the relevant information on the progress of preparations for that trial. [Note Verbale, Embassy of Senegal, 20 February 2007.]

36. Accordingly, on 21 February 2007, Senegal informed Belgium that, since the request of 2 July 2006 addressed by the Conference of Heads of State and Governments to Senegal that Mr. Hissène Habré be tried, consistent measures have been initiated with a view to holding the trial. [Note Verbale, Ministry of Foreign Affairs of 21 February 2007]. I shall omit the references to the Notes Verbales relating to the comments and dates, and also to events which I mention in passing, as all of this is contained in the written document submitted to the Registry of the Court.

— First, among these essential measures, the adoption by the National Assembly, on 31 January 2007, of the laws for the amendment of the Penal Code on the one hand, with the introduction of an Article 295-1 setting out the crime of torture by reference to Article 1 of the Convention against Torture of 10 December 1984, in accordance with the provisions of Article 4 of that same Convention and, also, of the Code of Criminal Procedure, in its

Article 669, now enabling Senegalese courts to hear crimes of international law, and the basis of which stems from the principles recognized by the international community;

— then, still among the organizational steps to be taken with a view to holding the trial, the setting up by Decree (No. 007993-2006) of 23 November 2006 by the Ministry of Justice, of a working group responsible for making relevant proposals for the smooth conduct of the trial;

— added to which are other measures, such as the presentation by Senegal of a preliminary report, to be followed by others, to the eighth session of the Conference of Heads of States and Government of the African Union, meeting from 29 to 30 January 2007, in Addis Ababa, pointing out, *inter alia*, the necessity to mobilize financial resources thanks to the support of the Member States of the Union, international partners and the international community as a whole;

16 — and also a further measure, the decision of the Conference of Heads of State and Government of the African Union (No. Assembly/AU/Dec 157) of 30 January 2007, by which the Organization congratulates and encourages the Senegalese Government on the work achieved, while inviting Member States of the Union, international partners and the international community as a whole to assist it in its task, in particular in mobilizing the resources necessary for the preparation and smooth conduct of the trial.

37. On 8 May 2007, Belgium persisted and as there had been no response from Senegal regarding the proposal for arbitration, reserved its rights on the basis of Article 30 of the Convention against Torture. [No number or date provided by Belgium.]

38. In connection with the organization of the Hissène Habré trial, on 5 October 2007, Senegal invited Belgium to attend a meeting of potential donors to finance the trial; that meeting was to be held on 1 October 2007 in Dakar (Note Verbale, Embassy of Senegal, No. 00421). On behalf of the European Union, of which Belgium is part, the Portuguese President of the European Union requested a report on the meeting to enable the European Union to study the report of a mission of experts it proposed to send to Senegal (Note Verbale from the Embassy of Portugal, No. 95, dated 10 October 2007).

39. Senegal thanked the European Union and its Member States for that initiative which it welcomed (Note Verbale 70751 of 15 October 2007), at the same time wishing to be informed of

the possible dates — which, it was hoped, would not be too far in the future — to which the meeting of donors could be rescheduled.

40. On 19 May 2008, the Ministry of Justice, Keeper of the Seals of Senegal, invited the European Union, the Commission of the African Union and Switzerland, the United States of America and Canada to attend an information meeting on 21 May on the positive developments which had taken place regarding the preparation of the Hissène Habré trial (Note Verbale, Ministry, No. 70971 of 19 May 2008).

41. On 2 December 2008, Belgium proposed that there be international judicial co-operation with Senegal to enable applicants of Belgian origin to assert their rights during the trial in Senegal. That, to make it short, was the long-awaited, final reply from Belgium, by which it would appear at long last to have embraced our option of trying Mr. Hissène Habré in Senegal.

17 42. Shortly thereafter, an interview with the President of the Republic of Senegal, Maître Abdoulaye Wade, given on 2 February 2009 to "Radio France International" was seized upon by Belgium as a reason or pretext to seise your Court.

43. Mr. President, Members of the Court, what does this interview tell us? That Senegal agreed to try Hissène Habré on behalf of Africa; that the reforms needed for holding the trial were carried out and that the trial would begin as soon as the funding was pledged. In its request for the indication of provisional measures, Belgium referred to this interview claiming that "Senegal could lift [the] house arrest [of Mr. H. Habré] if it fails to find the budget which it regards as necessary for the organization of the trial . . .". This interview would, therefore appear to be the ground for seizing the Court or to be one of the impediments having resulted in that decision. One has only to read the transcript of the interview — which Senegal transmitted to the Court in its written pleadings, on 2 April 2009, whereas the desire to contribute to the good administration of justice should have prompted Belgium to produce this transcript as early as 17 February, the date of the filing of its request for the indication of provisional measures — to clearly see the inaccuracy, haste and confusion — *pace* Belgium! — which characterized the use made of this document by our opponents.

44. From the interview, the Court will see — since it is one of the documents included in the case file — that the Senegalese Head of State explicitly stated having agreed to have Mr. Habré

tried, while reiterating his desire to meet his obligations under international law. Also, he said — and I quote the Senegalese Head of State: "I agree to it [referring to the trial] because I am against impunity". *[Translation by the Registry.]* In the same vein, he added that he had wished to bring pressure to bear on the providers of funds by threatening to "hand over the case" if the funding needed for the trial was not forthcoming. All of this is in the transcript of the interview, of which the Belgian delegation spoke this morning. The President concluded with the words: "Fine, but it was pushing a bit to speed things up".

45. The Court will appreciate that the Belgian Application and request are essentially based on a document whose letter and spirit are patently not what Belgium hastily decided they were.

18 46. To complete the picture, I would add that, on 7 January last, the President of Senegal brought the same pressure to bear on the African Union, in the person of the President of the Commission of that pan-African organization. In reply, on 29 January 2009, the latter — in other words Jean Ping, who presides over the destinies of the Commission of the African Union — reiterated "the wholehearted commitment of the African Union to providing [its] assistance — [to Senegal] in accordance with the decision [adopted] in July 2006". *[Translation by the Registry.]* He translated that undertaking into practice by deciding to dispatch an emissary to Senegal in order "to agree on the role the African Union could play in mobilizing" the funding needed to hold the trial.

47. The pressure brought to bear by the President of Senegal was conclusive, since the meeting of the Conference of Heads of State and Government of the African Union, initially to be held in Addis Ababa on 2 and 3 February 2009, was extended to 4 February at the urgent request of Senegal to enable consideration of the question of funding for the trial. At that meeting, which lasted very late into the night, it was also decided to launch a further "appeal to all member States of the African Union, to the European Union and to its member States and institutions for contributions to the cost of holding the trial, paying them directly to the Commission of the African Union" *[Translation by the Registry]* (document No. 1 filed by Senegal on 2 April 2009).

48. It was against this background, although nothing really suggested it might happen, that Belgium, fully aware of that decision now in the public domain, seized the Court on 16 February 2009 with an Application introducing proceedings against Senegal relating to an alleged dispute

over the interpretation and application of the United Nations Convention against Torture. That Application was accompanied, the following day, by a request to the Court to indicate the provisional measures requiring Senegal to "take all 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".

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II. General observations on the Belgium Application and Request

49. In conclusion, a few general remarks which it seems to us appropriate to make on the Belgian application and request.

50. Mr. President, Members of the Court, with your permission I would like to share with you just a few observations.

51. To Senegal, the Belgian approach seems mistaken to say the least. Some — in other circumstances — the setting would not be suitable — might even say fallacious, inappropriate, inopportune and baseless. It prejudges the merits of the case. Senegal is confident that the Court will consider that the circumstances in no way require any provisional measure of protection with respect to the law of either of the States be taken by your distinguished Court.

52. In our view, Belgium's request for the indication of provisional measures does not meet the conditions laid down by the Statute and Rules of Court.

53. In its request, Belgium relied on Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules in particular, with a view to safeguarding rights it held under custom and the 1984 Torture Convention. It glossed over Senegal's obligations, in this case to try Hissène Habré, and which are referred to all over, including in the texts by which the African Union, asked to give its support, allegedly called upon Senegal, in response, to deal seriously with the Hissène Habré case.

54. At the present stage in the proceedings, Belgium seeks to found the jurisdiction of the Court on the declarations of acceptance of the optional clause made by itself and Senegal and based on Article 36 (2), of the Statute, dated respectively 17 June 1958 and 2 December 1985 for Belgium and Senegal, that is. For Senegal, no real legal dispute on the interpretation or application of an international rule of law connected in particular with the Convention Against Torture exists

between the two countries. For Senegal, the absence of any dispute regarding the interpretation or application of the Convention cannot have been the origin of true negotiations since the two countries were speaking the same language. Belgium wanted Senegal to conduct a trial — or, failing that, to extradite — Senegal said to it: I cannot extradite but I am going to conduct a trial! And for the trial, I am going to seek funding. It is as simple as that. For Senegal, as we have just repeated, the absence of any dispute on the interpretation of the application of the Convention could not be the origin of true negotiations with the result that the procedural conditions required for that purpose could not be adequately satisfied for the Convention Against Torture to constitute a valid basis of jurisdiction.

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55. In any event, these instruments cannot prima facie constitute a basis of jurisdiction permitting the Court, if circumstances so require, to indicate provisional measures. Of course, Senegal reserves its rights to file or to raise preliminary objections to jurisdiction and admissibility as the Statute of the Court authorizes it to do, even if the Court considers that it had jurisdiction prima facie to entertain the case and to consider the request for the indication of provisional measures submitted by Belgium.

56. As regards the links between the rights of protection alleged by Belgium and the object of the case pending on the merits, Article 41 of the Statute gives the Court the "power" to indicate the provisional measures to safeguard the rights which the Judgment it might subsequently have to deliver might recognize as being those of the Applicant or the Respondent. Senegal notes that the rights Belgium relies on in its request for the indication of provisional measures, and which it is seeking to protect, prejudge the merits of the case brought before the Court. Senegal is meeting its obligations to prosecute Hissène Habré stemming from the Convention Against Torture, on which the African Union's decision is based. Consequently, there is no request for extradition which has to be met in this case. *Aut dedere aut judicare*: either one thing or the other. And above all, it is extradition if there can be no trial. When the extradition avenue is blocked, and the country pledges to conduct a trial, it is hard to see — in relation to the Convention Against Torture — where any dispute could lie on the application and interpretation of that Convention. A request for provisional measures which consisted of the Court reminding Senegal of its obligations could not endow those measures with any protective quality. Under cover of an invitation to ensure

compliance with international law, the purpose of the proceedings instituted by Belgium is to get the Court to order Senegal to extradite Hissène Habré as soon as possible so that he can be tried in Belgium in disregard of Senegal's rights and obligations under the Convention Against Torture and which task Senegal is tackling with unflagging determination.

21 57. The Statute of the Court points out that the purpose of the power to indicate provisional measures is to avoid irreparable prejudice being caused to the rights of one of the parties in contention. Senegal does not envisage putting an end to the control and surveillance of Mr. Hissène Habré both before and after the funding pledged by the international community has been made available to it to cover the legal proceedings concerned.

58. Lastly, the Statute of the Court makes it clear that its power to indicate provisional measures can only be exercised in an emergency, in other words where there is a real risk of action being taken which is prejudicial to the rights of either of the parties before the Court has delivered a final decision on the merits. Senegal has never stated that it was not going to try Hissène Habré. Consequently, the urgency artificially conceived by Belgium does not exist.

59. Mr. President, Members of the Court, Senegal concludes that the circumstances of this case do not justify the indication of the provisional measures wrongly requested by Belgium, or even that it would be appropriate for the Court to indicate measures with respect to either of the two Parties.

III. ORDER OF ORAL ARGUMENTS

60. I should now like, with your permission, to indicate the order Senegal is going to follow in setting out its position in this case.

61. Following on from me, but at much shorter length, Mr. Demba Kandji, Co-Agent, with a view to providing further explanation, will set out to you the ins and outs of the legal proceedings initiated against Hissène Habré since February 2000 and also the efforts made by Senegal to try him, including the reforms to its legislation and its Constitution.

62. Professor Ndiaw Diouf, Dean of the Faculty of Legal and Political Sciences at the University of Sheikh Anta Diop in Dakar, will set out Senegal's position on the prima facie jurisdiction of the Court in relation to the request for the indication of provisional measures and

also on whether the procedural conditions laid down by Article 30 of the Convention against Torture have been met.

22 63. Mr. Abdulaye Dianko, *agent judiciare de l'Etat*, will speak with the permission of the President of the Court of course, to demonstrate that the provisional measures requested by Belgium do not comply with the Convention against Torture, that they prejudge the merits of the case and that they seek to deprive Senegal of its right to conduct a trial.

64. Mr. Alioune Sall, professor in the Faculty of Legal Sciences in the University of Sheikh Anta Diop in Dakar, will deal with the lack of urgency, which cannot therefore justify the indication of provisional measures requested by Belgium.

65. Mr. Oumar Gaye, lastly, will contend that Belgium has not demonstrated the existence of the irreparable prejudice it alleges.

66. With that statement, Senegal's presentation in the first round of oral argument will be closed.

67. Allow me, Mr. President, Members of the Court, to thank you for your patience and kind attention. May I now request you ask Mr. Kandji, Co-Agent of Senegal, to take the floor.

The PRESIDENT: Thank you, Ambassador Thiam, Agent of Senegal, for your statement. I now give the floor to Mr. Demba Kandji, Co-Agent of Senegal.

Mr. KANDJI: Thank you, Mr. President.

REVIEW OF THE FACTS; EFFORTS AND REFORMS UNDERTAKEN BY SENEGAL TO SAFEGUARD THE RIGHTS CLAIMED BY BELGIUM AND TO FULFIL ITS INTERNATIONAL OBLIGATIONS

1. Mr. President, Members of the Court, distinguished members of the Belgian delegation, it is a signal honour for me to appear today before this august Court to defend the sovereign interests of my country, Senegal. I am greatly moved in assuming the honour thus bestowed upon me. In fact, history is now catching up with me, for it was nine years ago that I myself took the first investigative step in the proceedings brought against Mr. Hissène Habré when I charged him and placed him under court supervision.

2. Today I find myself again deeply involved in this case, in my dual capacity as Co-Agent of the Republic of Senegal and Director of Criminal Affairs and Pardons, and responsible as such

for overseeing the implementation, definition and co-ordination of Senegal's policy in penal matters.

23 3. Acting on the Agent's instructions and with your leave, I have the duty to bear witness, Mr. President, Members of the Court, to bear witness on the subject of the Hissène Habré case, as experienced by Senegal, as experienced by Africa.

4. The story begins on 3 February 2000, when the investigating judge received a complaint with civil-party application filed by Chadian nationals, led by Mr. Suleymane Guengueng, accusing Mr. Hissène Habré of:

— crimes against humanity;

— acts of torture;

— acts of barbarity;

— discrimination;

— murders; and

— forced disappearances.

5. These Chadian nationals claimed that Mr. Hissène Habré was directly liable for the acts, when he was President of the Republic of Chad. He was indicted, regard being had to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984. For the courts, this Convention was already part of the Senegalese legal order as Senegal had ratified it in 1987 and Senegalese law already treated torture and murder, inter alia, as criminal offenses. As a result, Mr. Hissène Habré was charged with complicity in crimes against humanity and in acts of torture and was placed under judicial supervision, his supervision and monitoring being entrusted to a unit of the national police to oversee.

6. Mr. Hissène Habré exercised the due process rights accorded him by Senegalese procedural laws. He seised the *Chambre d'accusation* [Indictment Division] of the Court of Appeal of Dakar. This division is the appellate body responsible for determining the lawfulness of steps taken by the investigating judges under the jurisdiction of the Court of Appeal of Dakar. It also plays a role in monitoring the functioning of the investigating judges' chambers. Mr. Habré

moved this court to quash the indictment on the ground that the judges who had issued it were without jurisdiction.

24 7. Mr. President, as the Agent has already said, on 4 July 2000 the *Chambre d'accusation* by judgment No. 135 upheld Mr. Habré's motion by quashing his indictment. As you have already been told, it held that the Senegalese court was without jurisdiction, because the provisions of Article 669 of our Code of Criminal Procedure at the time did not allow for the prosecution of aliens who had committed actionable acts outside the national territory, regardless of the nationality of the victims of the acts.

8. The complainants then filed an appeal with the Court of Cassation, at the time the supreme Senegalese court in criminal matters. They maintained their contention that the Senegalese courts were in fact competent pursuant to the principle of universal jurisdiction.

9. While the Senegalese Court of Cassation still had the case under advisement, another complaint was filed, in Belgium, by another group of victims who were either Chadian or of Chadian descent, among whom Mr. Aganaye, who filed a complaint on 30 November 2000 with the Belgian investigating judge.

10. This was not the same group of victims as the one which had submitted the complaint in Dakar, but the two groups received support from the same sources.

11. At the time, the Belgian Law of 1993 conferred broad universal jurisdiction on Belgian courts, which could have cognizance over mass atrocities no matter where they had been committed.

12. In Senegal, the Court of Cassation — the forum serving as supreme court — on 20 March 2001 rejected the appeal brought by the Chadian victims in the Guengueng group. It held that there was no procedural provision conferring any universal jurisdiction on the Senegalese courts over the acts complained of on the basis of the 1984 Convention, not yet incorporated into domestic law.

13. On 18 April 2001, the group led by Mr. Souleymane Guengueng submitted a complaint to the United Nations Committee against Torture, established by Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 at New York. This Committee, should it need recalling, is the guardian of the

Convention: it watches over the effective implementation of the Convention in the legislation of the States parties.

25 14. Mr. President, Members of the Court, in an international letter rogatory dated 19 September 2001, Belgium asked Senegal to communicate to it the entire record in the proceedings, from the filing of the complaint to the Court of Cassation judgment. That was done on 22 November 2001 in keeping with a very long-standing Senegalese tradition of always co-operating in judicial matters, even where there is no formal framework for it.

15. Senegal, anxious to fulfil its obligations as a State governed by the rule of law, wished — all the same, despite the Court of Cassation judgment ruling that the State court had [no] jurisdiction — to find a solution to what had truly become the "Hissène Habré case".

16. It is thus, Mr. President, Members of the Court, that I come to Belgium's request for extradition and its repercussions in Senegal.

17. On 19 September 2005 the Belgian investigating judge responsible for the proceedings brought by certain victims in Brussels issued an international warrant for Mr. Hissène Habré's arrest.

18. The international arrest warrant serves as an extradition request by the Kingdom of Belgium. It cited the provisions of the 1984 Convention, among others.

19. Senegal immediately complied with the request for extradition: Mr. Hissène Habré was arrested on 15 November 2005 and placed in custody pending extradition, in other words held so as to be in a position to be extradited to Belgium. In accordance with the law, Hissène Habré remained in custody throughout the period required for consideration of the extradition request.

20. The *Chambre d'accusation* in Dakar, the court having jurisdiction over the extradition request, was once again seised. And, under the procedural law in force, the *Chambre* must give its opinion before any extradition decision may be taken.

21. As under other bodies of law, including specifically Belgian law, which like ours is part of the Roman-Germanic family, under Senegalese law if the *Chambre d'accusation* advises in favour, the Senegalese executive, in other words the Senegalese civil service, may then decide to extradite or not. On the other hand, if the *Chambre d'accusation* advises against, its opinion is binding on the executive.

22. Although it decides by way of advice, the *Chambre d'accusation* hands down judicial decisions in every sense of the term, since persons whose extradition is sought or principal
26 prosecutors with the Courts of Appeal can challenge the decisions by appeal to the Supreme Court if they feel that their rights are being violated.

23. By a judgment dated 25 November 2005, the *Chambre d'accusation* held that it was without jurisdiction over the request for Hissène Habré's extradition. It ruled that he enjoyed an exemption from jurisdiction by virtue of having been Head of State at the time of commission of the acts of which he stood accused. This exemption from jurisdiction continued even after he left office.

24. This *Chambre d'accusation* judgment finding against jurisdiction put an end to the extradition proceedings in Senegal.

25. Senegal immediately turned to the African Union, referring the "Hissène Habré case" to it.

26. Senegal informed Belgium on 23 December 2005 by notifying it that under the Senegalese rules of criminal procedure the *Chambre d'accusation* judgment had put an end to the judicial phase of extradition.

27. At its conference in Khartoum the African Union decided on 24 January 2006 to set up a "Committee of Eminent African Jurists" mandated "to consider all aspects and implications of the Hissène Habré [trial]".

28. By establishing this committee of eminent jurists, the pan-African organization wished:

— to examine ways and means to put an end to impunity;

— in compliance with fair trial standards;

— taking into consideration all victims and all witnesses involved in the acts of which Hissène Habré was accused;

— in so far as possible through an African judicial mechanism.

29. Senegal lost no time in co-operating with the Committee of Eminent African Jurists, which included a Senegalese representative.

30. While the Committee of Eminent African Jurists was busy with its work, the United Nations Committee against Torture rendered its decision on 17 May 2006 on the complaint

submitted by the first group of victims, the group led by Souleiman Guengueng, which had filed a complaint in Senegal in 2000.

27 31. Among other recommendations, the United Nations Committee against Torture asked Senegal to amend its legislation to bring it into conformity with the provisions of the 1984 Convention against Torture so as to render it suitable for punishing acts of torture.

32. Obviously, the Committee of Eminent African Jurists took account of the recommendations made by the United Nations Committee against Torture in formulating its own conclusions for submission to the African Union.

33. Senegal accepted the recommendations of the United Nations Committee against Torture.

34. Subsequently, at its July 2006 conference in Banjul, the African Union, drawing on the recommendations made by the Committee of Eminent African Jurists, mandated Senegal to "prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial".

35. The African Union took account of its Constitutive Act, pursuant to which the crimes of which Hissène Habré stood accused, and which the African Union deemed grave, fell squarely within its competence, and of the fact that, at the time Senegal had referred the case to it, it had no continental judicial organ able to conduct the trial.

36. After taking into consideration the United Nations Convention against Torture, the conference of the African Union decided to consider the Hissène Habré matter to be one for the African Union and decided that the trial to open in Senegal . . .

The PRESIDENT: Mr. Kandji. Could you speak a bit more slowly.

Mr. KANDJI: I beg your pardon, Mr. President.

. . . is the African Union's trial of Hissène Habré. In doing this, it called upon the international community to offer Senegal its support in ensuring the trial's smooth conduct.

37. Mr. President, Members of the Court, Senegal therefore accepted the mandate from the African Union to fulfil its obligations under the Convention against Torture and immediately began to equip itself with all the necessary means for holding the trial.

28 38. Thus, Senegal without delay initiated or intensified substantive and procedural reform of its constitutional and criminal legislation.

39. It amended, repealed and introduced provisions in the Penal Code and the Code of Criminal Procedure, allowing for the introduction of new offences such as the international crimes of war crimes, crimes against humanity, and genocide, crimes which are moreover dealt with in the Rome Statute, which our country was the first State to ratify. It conferred broadened jurisdiction on its courts. For example, it has been provided in Article 669 that Senegalese courts may be competent in respect of international crimes committed abroad by an alien if the alien is apprehended in our territory or if the government succeeds in having him extradited. Thus, Senegalese courts have been endowed with universal jurisdiction.

40. Concurrently, and also with a view to fulfilling this obligation deriving from the African Union, Senegal reformed its Assize Court, the forum with jurisdiction over crimes, by establishing a two-tiered system. Previously, it must be said, the Assize Court rendered its decisions as the court of first and last instance, without possible appeal by defendants. The Court of Appeal's decision may now be challenged by appeal to another Assize Court designated by order of the First President of the Supreme Court. All of these reforms were aimed at guaranteeing defendants a fair and equitable trial.

41. As I said, Senegalese courts may assume jurisdiction over mass atrocities committed by an alien, regardless of the place of commission or the identity of the victims.

42. In addition to providing for judicial officials to take charge of the criminal proceedings and the investigation — among other reforms, the Penal Code and Code of Criminal Procedure were put in place —, provision was made for institutions, investigating judges, prosecutors, registrars, and a significant support staff to ensure the smooth start and conduct of the trial. As the Agent said a few moments ago, the Minister of Justice issued an order appointing a co-ordinator and a monitoring and information committee.

43. Mr. President, the scale of the reforms drew a reaction from Mr. Habré, whose lawyers took proceedings in the Court of Justice of the Economic Community of West African States (ECOWAS), alleging that the laws thus passed targeted him personally. Another of

29 Mr. Habré's supporters brought proceedings against Senegal in the African Court on Human Rights, asking the African Court to enjoin Senegal from trying Hissène Habré.

44. These trials are still pending and in them Senegal is elaborating arguments to enable itself to carry out the mandate from the African Union, in compliance with the recommendations by the United Nations Committee against Torture, and thus to fulfil its international obligations under the 1984 United Nations Convention against Torture.

45. Mr. President, on 15 March 2008 the European Union, of which Belgium is a member, took note of and welcomed the efforts made by Senegal to meet its international commitments. Similarly, Ms Louise Arbour, former United Nations High Commissioner for Human Rights, has praised Senegal's efforts and pointed to its leadership in the fight against impunity in Africa. In his report to the Human Rights Council (doc. A/HRC/4/33), Mr. Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, also spotlighted Senegal's commitment in respect of the Hissène Habré case, which, in his view, "may provide a positive example to other States which so far have been reluctant to exercise universal jurisdiction over alleged perpetrators of torture present on their territory" (document 7 filed by Senegal on 2 April 2009).

46. Most recently, in February 2009, the African Union at its conference in Addis Ababa commended Senegal's efforts and reiterated its undertakings to it.

47. The only impediment, Mr. President, Members of the Court, to the opening of Mr. Hissène Habré's trial in Senegal is a financial one. Senegal agreed to try Mr. Habré but at the very outset told the African Union that it would be unable to bear the costs of the trial by itself.

48. The budget prepared by Senegal totalling €27 400 000 (18,000,000,000 CFA francs) has been deemed inflated by some. However, those who criticize it fail to take account of the difficulties and costs to be faced in transporting, lodging and protecting hundreds of witnesses scattered across Africa.

30 49. For example, Mr. President, a flight between Dakar and N'Djamena, the capital of Chad, costs much more than comparable travel between Dakar and Paris or Kigali and Brussels.

50. It is impossible to compare the "Butare Four" trial, held up to Senegal as a benchmark, with the Hissène Habré trial now being prepared, which involves a far greater number of victims

and much more laborious evidence-gathering. The two trials are comparable in neither temporal nor spatial terms.

51. Mindful of its obligation to prosecute on behalf of all Africa, pursuant to its mandate from the African Union and by virtue of its ratification of the Convention against Torture, Senegal, out of concern for transparency in the management of property held in common, demands that management of the funds needed to finance the trial be entrusted, if necessary, to third parties and not involve any Senegalese official.

52. To our mind, one benefit of holding Hissène Habré's trial on African soil will be that all victims, all witnesses, will be able to attend without difficulty. That might not be the case if the trial venue were to be moved to another continent, one that restrictions of various types might render less accessible.

53. The fight against impunity must not overshadow the no-less-important duty on us all to afford the accused, no matter how serious the acts with which he is charged, a presumption of innocence until such time as he is convicted after a fair trial; and it is for that fair trial that Senegal is making the preparations.

54. It is for all of these reasons that Senegal has not yet begun the trial, fearing that it would be interrupted for long periods in which funds, hypothetical funds, would have to be sought. Accordingly, advance financing adequate to ensure uninterrupted proceedings all the way to the end in accordance with our domestic law is what is needed.

55. Even though by now, Mr. President, and I shall conclude with this, all the reforms necessary for a fair and equitable trial have been carried out, one has the feeling that Senegal is being subjected to harassment, harassment extending all the way to distorting statements made in various settings by its President.

31 56. I thank the Court for its patience and would ask you, Mr. President, to give the floor to Professor N'Diaw Diouf, unless you wish to announce a break. Thank you.

The PRESDENT: Thank you, Mr. Kandji, for your statement. This seems to me a suitable time for a coffee break. We shall continue Senegal's first round of oral argument after a ten-minute break.

The Court adjourned from 4.25 to 4.45 p.m.

The PRESIDENT: Please be seated. I now give the floor to Professor Ndiaw Diouf.

Mr. DIOUF:

PRIMA FACIE JURISDICTION AND ADMISSIBILITY

1. Mr. President, Members of the Court, it is a particular honour for me to take the floor before this renowned Court, at the request of the Agent of Senegal, to deal with the procedural requirements the Court has always imposed when it has before it a request by a party for the indication of provisional measures.

2. It is Senegal's position that the arguments relied on by the Kingdom of Belgium in support of its Application to obtain a judgment in the dispute which would allegedly result from the violation of the obligation to punish the crimes under international law of which Mr. Hissène Habré stands accused are without merit; it will have no difficulty proving this, if necessary, at a later date.

3. But Senegal is now asking the Court to find that those conditions to be met before the provisional measures sought by Belgium can be indicated are not satisfied. It is easily seen at first sight in the present case not only that there is no dispute between the Parties, which shows that the Court patently lacks jurisdiction, but also, and more importantly, that the Applicant has not fulfilled its obligation to put in motion the negotiation and arbitration procedure contemplated by the Convention before the Court may be seised, and this results in the inadmissibility of the Application.

32

I. THE PATENT ABSENCE OF ANY DISPUTE AS TO THE INTERPRETATION OR APPLICATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE OF 10 DECEMBER 1984

4. Mr. President, Members of the Court, I am going to centre my statement on two points: first, the clear absence of any dispute concerning the interpretation or application of the United Nations Convention against Torture of 10 December 1984; and, second, the inadmissibility of the Application. Your Court, Mr. President, and I am going to speak to you about the manifest lack of any dispute, has always wisely avoided being placed in a position in which it urgently indicates provisional measures when it might later have to find that it lacks jurisdiction to entertain the case on the merits. Indicating provisional measures in a case which the Court subsequently refrains from considering on the merits owing to a lack of jurisdiction can lead to an extremely ticklish situation. For confirmation of this, we need look no further than the case concerning *Anglo-Iranian Oil Co.*, in which the Court, after having indicated provisional measures, found in a Judgment on preliminary objections in 1952 that it had no jurisdiction, and it had to revoke the provisional measures (*I.C.J. Reports 1952*, p. 93).

5. For this reason, where it is clear that the case before it is not within its jurisdiction, which is true here, owing to the prima facie lack of any dispute between the Parties, the request to the Court to indicate provisional measures must be rejected *de plano*, as has occurred in a number of cases.

6. In the present case, Belgium founds the jurisdiction of the Court on the provisions of Article 30 of the United Nations Convention of 10 December 1984. According to Belgium,

> "The two States have been parties to the United Nations Convention against Torture of 10 December 1984 since 21 August 1986 (Senegal) and 25 June 1999 (Belgium). The Convention has been in force since 26 June 1987. Article 30 of the Convention provides that any dispute between two States parties concerning the interpretation or application of the Convention which it has not been possible to settle through negotiation or arbitration may be submitted to the ICJ by one of the States. In this instance, Belgium has been negotiating with Senegal since 2005 for the latter to prosecute Mr. H[issène] Habré directly, failing his extradition to Belgium. As Senegal has taken no action on these alternatives in practical terms, Belgium is now in a situation where the other party has declared itself unable, or refuses, to give way, thereby exhausting the obligation to settle the dispute by negotiation." (See para. 14, first subparagraph, of the Application instituting proceedings of 16 February 2009.)

7. In Senegal's view, an examination, even a superficial one, of the Application submitted by the Kingdom of Belgium shows that there is no actual legal dispute in this case. Thus, it can

clearly be seen from the terms of the Application that Belgium is asking the Court to adjudge and
33 declare that the Republic of Senegal is under an obligation to prosecute Mr. Hissène Habré. But Senegal has already taken all the appropriate steps to this end and the actions taken thus far demonstrate its clear intent to hold the trial.

8. In this undertaking Senegal will be able to count on all African countries which have committed themselves to assist in securing the funds necessary for the practical organization of the trial and to provide full support to Senegal in the way of mutual judicial assistance in carrying out those investigative measures required in their respective territories.

9. By now, Senegal has completed all the necessary legal reforms to secure for itself the means to hold a fair and equitable trial reasonably quickly. In this respect, amendments have been made not only to the substantive and procedural penal rules but also to the Constitution, so there is no longer any impediment of a legal nature preventing the pursuit of the prosecution.

10. Senegal has taken all these steps because, given the scope of their jurisdiction, its courts are the best placed in the current context to hold the contemplated trial.

11. Apart from the fact that Mr. Hissène Habré is in Senegalese territory, and this consideration is not unimportant if only because it averts the complications arising from an extradition request, Senegal's decision to opt for universal jurisdiction means that the Senegalese courts can assume jurisdiction over all the acts at issue, regardless of the nationality of the victims.

12. Belgium, it should be recalled, amended its legislation to condition its courts' jurisdiction over certain acts committed abroad on certain factors of connection, so that passive personal jurisdiction, the only possible basis for prosecution in the Belgian courts, severely limits the possibility of referral to those courts because they will be able to have cognizance only over acts carried out against persons of Belgian nationality.

13. If no judicial investigation has yet been opened, it is because Senegal wants to make sure that all the necessary conditions, in particular the financial conditions, are met so that the trial can take place reasonably quickly. It is Senegal's conviction that every individual is entitled, no matter
34 how serious the acts charged against him, to be tried within a reasonable time; this is why it cannot take the risk of starting a trial which might have to be interrupted because of insufficient resources. The proceedings, once begun, must be carried though to completion without more or less long

breaks to allow funds to be gathered to pay for it, as happens in some international courts or tribunals.

14. These arguments should persuade you that there is no actual legal dispute between the Parties, especially if reference is made to the jurisprudence of the Court, which considers a dispute to be "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

15. There is no need in the present instance to analyze the Applicant's contentions in detail to realize that there is no conflict between the Parties in respect of a claim asserted by one against the other and rejected by the latter.

16. Given that the Court will obviously not be able to rule on the merits, the request for the indication of provisional measures should be rejected without further ado.

17. In view of the foregoing, the Court could, in accordance with the case-law elaborated in the case concerning *Northern Cameroons* (*(Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15), find that it is impossible for it to render a judgment capable of effective application in the absence of a contested legal situation involving a conflict of legal interests between the Parties and that the clear impossibility of doing so prevents it from indicating the requested provisional measures.

18. Mr. President, Members of the Court, a decision of this type in the present case would be fully in line with the case-law on the subject handed down by this august body.

19. Under this case-law, when the Court's lack of jurisdiction can be determined without an in-depth examination of the situation of the parties, the Court will not join the objection to the merits and will conclude from the lack of jurisdiction that it does not have "the power" to indicate the requested provisional measures; in respect of this, no distinction is to be made based on

35 whether the Court is unable to find any basis for its prima facie jurisdiction in any text or whether the circumstances are such that jurisdiction is obviously lacking.

20. This minimum degree of review is necessary to prevent Belgium from achieving its ends, that is to say from obtaining, through the indication of provisional measures, an interlocutory judgment on the merits generally and on the Court's jurisdiction specifically.

21. But even if the Court were to believe it appropriate to proceed regardless and to find prima facie jurisdiction, the patent inadmissibility of the Application based on a violation of Article 30 of the Convention against Torture should lead to the rejection, without any examination on the merits, of the measures sought.

II. THE INADMISSIBILITY OF THE CLAIM OWING TO THE ABSENCE OF ANY NEGOTIATION OR ARBITRATION PROCEEDINGS

22. Mr. President, Members of the Court, to justify its action in this Court, and to maintain that the Court has jurisdiction to decide the present dispute, the Kingdom of Belgium relies on: the two unilateral declarations made under Article 36 of the Statute of the Court by the Parties to the proceedings; and the provisions of Article 30 of the United Nations Convention of 10 December 1984.

23. The first question to be answered by the Court is whether the Kingdom of Belgium, which brought the proceedings, has complied with Article 30. In other words, have the avenues first of diplomatic negotiation and then of arbitration been explored and exhausted?

24. In the document submitted to the Court, the Kingdom of Belgium cites, in reference to these "negotiations", the following actions it claims to have taken:

— 30 November 2005: it "asks" the Government of Senegal to explain "the implications" of a judgment by the *Chambre d'accusation* of the Dakar Court of Appeal in which it held that it was without jurisdiction. It should be noted that Senegal responded, through its ambassador in Brussels, to this request. In particular, the response shows that, notwithstanding the judicial decision, the Republic of Senegal intended to raise the "Habré question" during the African Union (AU) summit scheduled to take place a few months later in Banjul;

36 — 11 January 2006: according to Belgium, it "takes note" of the decision by the Senegalese authorities to raise the matter with the African Union and, it writes, "refers" to the negotiation procedure contemplated in Article 30 of the 1984 Convention against Torture;

— 9 March 2006: Belgium "points out" the negotiation procedure and "asks" Senegal whether the raising of the "Habré matter" means that Senegal will neither extradite Mr. Habré to Belgium nor try him. Senegal responded to this question as well. Its response was that, in raising the matter with the African Union, the Republic of Senegal did not seek to shirk its

obligation under the 1984 Convention (namely, to try or to extradite), but, on the contrary, intended to assume its duty to prosecute.

25. By Belgium's own admission, and as discerned from its description of the process leading up to the proceedings before the Court, those were the main stages said to have marked the negotiations which Article 30 of the 1984 Convention makes a precondition to any action before the International Court of Justice.

26. The Court will thus have the opportunity to observe the liberty taken by the Applicant in interpreting the obligation to negotiate. International negotiation presupposes a minimum number of contacts and a minimum amount of follow-up and definition of the terms of discussion and the Kingdom of Belgium has plainly paid these minima no heed in the present case. There has never been any true offer to negotiate, never any of the exchanges characteristic of diplomatic negotiations. The only approaches cited by Belgium in this regard consisted of addressing questions to the Senegalese authorities, questions simply calling for answers, and the Republic of Senegal always gave these. Moreover, why should negotiations have been held inasmuch as Senegal is fulfilling its obligations? Negotiations would be conceivable and welcomed by Senegal only if it were in breach, which is not the case, as Senegal has shown.

27. Thus, everything points to the Applicant wishing to move "by surprise" and to bring proceedings against the Republic of Senegal before the Court by retrospectively interpreting certain of its approaches as connected with a precondition imposed by the Convention against Torture.

28. Everything points to Belgium having had a preconceived intention to bring proceedings, the rest, that is to say its earlier *démarches*, being mere formalities or pretexts preliminary to judicial proceedings.

37 29. International negotiation is understood to require "transparency" and good faith on the part of States. It bars "surprises" and dissembling; and it must, so to speak, present itself as such. It is on this condition that it may be invoked against a State.

30. Never did the Kingdom of Belgium with true conviction express to the Republic of Senegal its intention to engage in negotiations. Moreover, how could it have done so inasmuch as Senegal was fulfilling its obligation? As Belgium itself says, it merely "pointed out" the precondition laid down by Article 30 of the Convention. Belgium's behaviour is not in strict

accordance with the requirements of good faith in inter-State relations. The Court itself has repeatedly established a link between the obligation to negotiate and good faith.

31. The relationship which the Court establishes among the obligation to negotiate, the principle of good faith and mutual trust is particularly apposite in the present case.

32. The Republic of Senegal considers not only that the duty to negotiate was not properly performed by the Applicant but also that the Applicant's action before the Court, and the sort of excessive haste accompanying it, reflect a clear form of distrust and abuse of the right to take proceedings for which there is neither any basis nor any justification in light of the measures the Republic of Senegal has by now taken to arrange for the trial of the former Chadian Head of State.

33. In the current context it must be recognized that there was no reason for the "negotiation" required by Article 30 of the Convention against Torture and none took place. When a party intends to enter into a process of discussion, it must clearly say so. More or less "general" questions aimed at eliciting factual information cannot suffice.

34. The Kingdom of Belgium will therefore be hard put to demonstrate the failure of a proposal to negotiate which was never really made. In order for judicial proceedings to be brought against a State party to the Convention, negotiations must have failed; all the avenues explored to reconcile the views must have proved to be dead ends. Yet the Kingdom of Belgium fails to demonstrate the existence of any such dead end; it cannot say that any efforts it supposedly made

38 ended in failure. If we go by Belgium's own presentation of the facts, we cannot help but observe how odd are the circumstances under which it claims to have exhausted its obligation to negotiate.

35. The second issue which arises in this case is whether there has been a failure of negotiations. The Court takes a very strict view of what constitutes the "failure of negotiations". In the case concerning *Mavrommatis Palestine Concessions, (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2)*, the Permanent Court of International Justice defined what was meant by the failure of a negotiation justifying recourse to litigation. The State relying on the failure of negotiations to take court proceedings can justify its position only "if [in the negotiation] a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot*

be settled by diplomatic negotiation" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 13; emphasis in the original).

36. Can it be said in the present case that the Government of the Republic of Senegal gave the slightest evidence of any such refusal? Were negotiations ever opened and, *a fortiori*, did they ever reach a deadlock like that which the Court defines as the test for the existence of a failure of talks?

37. The fact is that the Kingdom of Belgium has never entered into any real negotiations with the Government of the Republic of Senegal. Its only approach to the Senegalese authorities was through Notes Verbales consisting of queries as to the status of the proceedings or the Senegalese Government's plans in respect of the Habré affair. Answers were provided to all of these questions. The truth is that Belgium never wanted to see Mr. Hissène Habré tried in Senegal.

38. Not only did the Kingdom of Belgium not enter into any negotiations in the strict sense of the term with the Government of the Republic of Senegal, but also by its conduct it skirted round the other precondition laid down by Article 30 of the 1984 Convention. The only reference to any specific offer to go to arbitration is found in a statement by the Belgian Government dated 20 June 2006, which Belgium claims to have sent to the purported addressee, and that is evasive. As Belgium describes the facts, it "observes that the negotiations based on Article 30 of the Convention have failed; it notes that there is a dispute between the two States concerning the
39 interpretation of Article 7 of the Convention and asks Senegal to submit to the arbitration process contemplated by Article 30 of the Convention".

39. All three assertions lurking in this seemingly innocuous sentence are questionable:

— Belgium speaks of the "failure" of "negotiations" that never actually took place;

— it refers to the existence of a "dispute concerning the interpretation of Article 7", when nowhere in the Notes exchanged with the Republic of Senegal was there any discussion of or dispute over this provision of the Convention; on the contrary, Senegal's response of 9 May 2006, the only document in which it refers to this provision, clearly states that Senegal "is complying with the spirit of the rule *aut dedere aut punire* laid down in Article 7";

— finally, the invitation which Belgium claims to have addressed to Senegal to submit to the arbitration procedure was extended only once, and very furtively, in a statement whose main

subject was not this invitation (the statement of 20 June 2006) and which, by the way, the supposed addressee is still unable to find.

40. While the African Union has just taken charge of the Habré matter and referred to Senegal's obligations under the Convention against Torture, Belgium invites Senegal to negotiate.

41. As a fundamental precondition on actions before the International Court of Justice was involved, Senegal was entitled to expect a clearer, less evasive, proposal. Here too, the circumstances reflect Belgium's will to "expedite" as much as possible the formalities required by Article 30 so as to satisfy as quickly as possible the conditions to be met before the Court could be seised.

42. But most importantly, the desire on the part of the Kingdom of Belgium to bring the matter to litigation was thwarted because the Republic of Senegal had begun the process which should, in principle, lead to the trial of the former Chadian Head of State. The Applicant itself acknowledges soon afterwards that the constitutional and legislative reforms have been carried out to remove the obstacles barring jurisdiction on the part of the Senegalese courts, obstacles which had justified the findings against jurisdiction previously handed down by the national courts.

40 43. These circumstances together show that no doubt can be entertained as to the good faith of the Republic of Senegal. A detailed demonstration has already been made of the efforts and reforms the Republic of Senegal has carried out since receiving the mandate from the African Union with a view to trying Mr. Habré. Once it had been established in principle that the trial was to be held by the State of Senegal, it became necessary to take the measures called for by the trial, those measures being legislative, practical and financial in nature. It bears pointing out that, after obtaining critical support from the African Union, Senegal entered into discussions with the European Union, one of whose members is Belgium, which, incidentally, has never distinguished itself by offering the slightest financial contribution to the Senegalese State.

44. The Court will have no trouble appreciating the striking contrast between the attitude on the part of the Kingdom of Belgium, unquestionably in a hurry to try the case in its courts and, to that end, skipping required stages in the process, and the conduct of the State of Senegal, legitimately cautious to begin with but then sedulous once it became apparent that the possibility of trying Mr. Habré had become clear.

45. In conclusion, the Kingdom of Belgium has not satisfied the requirement laid down by Article 30 of the 1984 Convention, namely the exhaustion of the negotiation procedure and a proposal to submit to arbitration. For this reason, Mr. President, Members of the Court, Senegal is asking this distinguished Court to find that the procedural conditions laid down by Article 30 of the Convention against Torture have not been met and, accordingly, to declare Belgium's claim to be inadmissible.

46. But even in respect of the request for the indication of provisional measures, Belgium's Application does not stand up to analysis, as will now be shown by Mr. Dianko, whom I respectfully ask you, Mr. President, to call to the lectern. Thank you for your attention.

The PRESIDENT: Thank you, Professor Diouf, for your statement. I now give the floor to Mr. Abdoulaye Dianko.

41 Mr. DIANKO:

THE PROVISIONAL MEASURES REQUESTED ARE NOT IN ACCORDANCE WITH THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; THEY PREJUDGE THE MERITS OF THE CASE AND DEPRIVE SENEGAL OF ITS RIGHT TO TRY MR. HISSÈNE HABRÉ

1. Mr. President, Members of the Court, it is a great honour and a privilege for me to stand today before this distinguished Court to defend the interests of my country in these proceedings brought by Belgium.

2. The Agent of the Republic of Senegal has asked me to explain before the Court why the provisional measures requested by Belgium cannot be indicated. To this end, I will examine the following points.

— The measures requested would not be in accordance with the convention which Belgium requests the application of in the proceedings on the merits.

— The indication of the provisional measures requested by Belgium would constitute a prejudgment of the merits.

— I will endeavour to show that the indication of the provisional measures requested by Belgium would deprive Senegal of the rights which it holds under international rules, in particular those contained within the Convention against Torture.

I. THE PROVISIONAL MEASURES REQUESTED ARE NOT IN ACCORDANCE WITH THE CONVENTION AGAINST TORTURE

3. According to your settled jurisprudence, the power to indicate provisional measures which the Court holds under Article 41 of its Statute has as its object to preserve the respective rights of each Party, pending a decision by the Court, so that irreparable prejudice is not caused to rights which are the subject of dispute in judicial proceedings. It follows from this:

(i) first, 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;

(ii) second, it should not be obliged at this stage to rule on those rights.

4. Mr. President, Members of the Court, at this stage of proceedings, Belgium requests the Court:

42 "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".

5. Senegal would like to point out that if the measures which Belgium requests are indicated, it would be tantamount to disregarding the provisions of the Torture Convention of 1984, in particular those contained in its Article 6.

6. According to that article, when a State Party is informed that a person suspected of having committed or having attempted to commit acts of torture as the perpetrator, co-perpetrator or accomplice is located on its territory, it can take two types of measures: take him into custody or take the legal measures appropriate to keeping the suspected person on its territory. Such custody and other legal measures shall, however, be as provided in the law of the State concerned.

7. Belgium is aware that there exist two types of such legal measures in addition to custody: those which lie within the powers of the judicial authorities and those taken on the initiative of the administrative authorities.

8. Mr. President, Belgium cannot be requesting the indication of measures taken on the initiative of the Senegalese administrative authorities aimed at preventing Mr. Habré from leaving Senegal and avoiding prosecution. Such a request would be without object since it has already been fulfilled by Senegal by the police control measures taken with respect to him.

9. Indeed, Belgium itself acknowledges in its Application the effectiveness of the surveillance measures taken by Senegal and mentioned by those who have spoken before me. Those measures have made sure that Mr. Habré has remained on Senegalese territory without being able to leave it and have done so for 19 years now.

10. The probability of Mr. Habré leaving Senegal and avoiding prosecution is practically zero. The control and surveillance measures that have been taken with respect to him have proven particularly effective since 1990. If these measures had been insufficient, Mr. Hissène Habré would have left Senegal in 2000, when the complaints against him were filed; or again in 2005, when Belgium's request for extradition was being considered; or again in 2006 when the African Union mandated Senegal to try him under the Torture Convention of 1984 or, at the latest, after Senegal completed the changes to its legal arsenal making his trial now possible at any moment.

43 11. Mr. President, in reality what Belgium seeks to obtain from you is a judicial measure. It asks you to indicate that Senegal should obtain from its judicial authorities a measure restricting the freedom of Mr. Hissène Habré.

12. The implementation of such a measure would be inconsistent with the Convention against Torture of 1984.

13. The measure requested by Belgium can only be envisaged in the form of a request addressed to a court. Yet in our legal system the principle of the independence of the judiciary is fundamental. Judges are not subordinate to the executive. A judge is always entitled to refuse a request made by the executive. Thus, the implementation of the measure which Belgium requests the Court to indicate, if it is to be envisaged as a request that the executive authorities must address to the judiciary, would potentially prove ineffective.

14. To overcome the ineffectiveness of such a request, the independence of the Senegalese judiciary would have to be flouted to oblige it to implement the measures requested.

15. In that case, the implementation of such a measure would disregard Article 6 of the Convention, which requires that the measures taken restricting Mr. Habré's freedom be as provided in the law of Senegal. You now know that in Senegal, a State governed by the rule of law, it is not possible for the executive to compel a judicial authority to issue and maintain a control and surveillance measure with respect to a person without amending the Constitution and the legislation.

16. In view of the foregoing, I invite the Court to dismiss the request for the indication of provisional measures.

II. THE INDICATION OF THE PROVISIONAL MEASURES REQUESTED WOULD CONSTITUTE A PREJUDGMENT OF THE MERITS

17. Mr. President, Members of the Court, the request for the indication of provisional measures must also be rejected because acceding to it would prejudge the merits of the case as indicated in the Application instituting proceedings which the Registrar was kind enough to remind us of at the beginning of this morning's hearing.

18. In its request for the indication of provisional measures, Belgium asks the Court to indicate that Senegal should take measures in order to make a court impose a measure of judicial supervision (it is what Belgium calls surveillance and control in its request) on Mr. Hissène Habré.

44

19. Under Senegalese law, the implementation of such a measure by Senegal presupposes that Mr. Hissène Habré is being prosecuted as the perpetrator of, co-perpetrator of or accomplice in the crimes of torture and the crimes against humanity attributed to him and that a judicial investigation against him is being conducted. It also presupposes that he has been charged (or placed under investigation as they say in France).

20. Belgium thus requests, as a provisional measure, the indication of measures the object of which is the same as that of the decisions which it requests in the substantive case, that is to say the indictment of Habré. Consequently we can see that any decision by which the Court indicated provisional measures of this type would prejudge the proceedings on the merits. On that ground, it must be dismissed. The Court has always dismissed requests to obtain the indication of provisional measures having the same object as the claims advanced on the merits.

III. THE INDICATION OF THE PROVISIONAL MEASURES REQUESTED WOULD BE TANTAMOUNT TO DEPRIVING SENEGAL OF ITS RIGHT

21. Mr. President, Members of the Court, the request for the indication of provisional measures must also be dismissed because their indication would deprive Senegal of the right to try Mr. Hissène Habré which it holds under the Convention against Torture and would prevent it from implementing the mandate conferred on it by the African Union.

22. Belgium requests that Senegal applies the *aut tradere, aut judicare* rule laid down in Article 7 of the Torture Convention.

23. The implementation of the provisional measures requested by Belgium inevitably involves the immediate application of the *aut tradere, aut judicare* rule. It would compromise the right of Senegal to try Mr. Hissène Habré in accordance with its treaty obligation and in compliance with the mandate received from the African Union.

24. While it has not been shown in the slightest that the application of the provisional measures requested would undermine the right which Belgium seeks to preserve, that is to say extradition, the implementation of those measures would, however, destroy Senegal's right to try Mr. Hissène Habré, since it implies his immediate prosecution, which Senegal has undertaken to carry out.

25. Indeed, placing Mr. Hissène Habré under judicial supervision involves, as we have said, the immediate launch of legal proceedings against him. And once he has been prosecuted, the

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proceedings should not be interrupted, especially for reasons unconnected to the law, and should in fact be hastened by virtue of the right of Mr. Habré to be tried within a reasonable timescale.

26. At present, as the Co-Agent explained to you before, Senegal is engaged, with its partners, in the process of gathering funds and the timescale of that process is not entirely within its control. No trial of this sort can seriously be held without substantial material and financial resources. Without them, it will most definitely not be seen through to the end.

27. By requesting the indication of provisional measures designed to make the trial begin in the current circumstances, Belgium is in reality seeking to cause its failure.

28. In these conditions, the only alternative that the requested provisional measures would leave would be extradition to Belgium to sidestep the stumbling block of a reasonable timescale. That would mean that Senegal was deprived of the right it holds to try Mr. Hissène Habré under

international rules. It would also mean that Senegal would not implement the mandate of the African Union in violation of its obligations vis-à-vis the Constitutive Act of the pan-African organization.

29. In addition, the transfer of the trial of Mr. Hissène Habré to Belgium would also be to detriment of all of the victims regardless of their citizenship. As was shown by the Co-Agent, Senegal is better placed than Belgium to try Mr. Habré, as Belgium would only provide the opportunity to three or four Belgians of Chadian origin.

30. Under the cover of its substantive claim, Belgium, by way of the present request for the indication of provisional measures, asks the Court to order Senegal to extradite Mr. Hissène Habré, without regard to the right of Senegal to try him itself and without regard to the mandate expressly conferred on Senegal by the African Union.

31. That would be a real abuse of procedure.

32. In order to avoid it, the request for indication must be dismissed.

33. Mr. President, Members of the Court, I thank you for your patience and I ask you to give the floor to Mr. Alioune Sall. Thank you.

The PRESIDENT: I thank you for your presentation, Mr. Dianko. I now give the floor to Mr. Alioune Sall.

46 Mr. SALL:

THE LACK OF ANY URGENCY WHICH MIGHT JUSTIFY THE INDICATION OF PROVISIONAL MEASURES REQUESTED BY BELGIUM

1. Mr. President, Members of the Court, I am very honoured, as a citizen of the Republic of Senegal, as a lawyer and as a professor of law, to take the floor before the Court, to ensure, along with others, the defence of my country's interests in this case brought against it by Belgium.

2. The Agent of the Government of Senegal has assigned me the task of addressing the question of urgency, which the Court regards as an essential condition which must be fulfilled by the party seeking provisional measures.

3. I propose to address this question by showing:

— first, that the Kingdom of Belgium, in basing itself on an extract from the statement by the Senegalese Head of State has effected a complete misrepresentation of that statement;

— second, that the process of international negotiations to obtain the support promised for the organization of the trial of Mr. Habré is ongoing and should soon see an outcome;

— third, that the conditions in which Mr. Habré is currently subject to surveillance in Dakar make the probability of him escaping from justice or the Senegalese authorities nonexistent;

— finally, that a comparison of the facts of the present case with your jurisprudence should prompt you to dismiss the Belgian request.

1. A false pretext for the request for the indication of provisional measures: the statement by President Wade

4. Mr. President, Members of the Court, on 17 February 2009 the Kingdom of Belgium submitted a request to the Court for it to indicate provisional measures in order that the Republic of Senegal be required to take "all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal".

5. That request was justified, in its own words, by a statement made by the President of the
47 Republic of Senegal aired by Radio France Internationale, according to which, as interpreted by Belgium, Senegal might put an end to Mr. Habré's stay in Dakar.

6. Mr. President, Members of the Court, may we first be permitted to note the peculiarity of the position of the applicant State, which, in order to justify a request for the indication of provisional measures, argues *solely* on the basis of comments made by the Head of State broadcast by Radio France Internationale. At least, that is what transpires from the request.

7. The fact should be emphasized that this statement which Belgium uses to request provisional measures has been completely taken out of context, and has been attributed a meaning by the applicant State which it manifestly did not have.

8. On the contrary, the President's statement placed great emphasis on Senegal's eagerness to pursue the process under way. It is the phrase in which the Senegalese President recalled the requirement of holding the trial which has been taken out of its context and put to the Court as a justification for the indication of provisional measures. That phrase is the following: "I said that if

I was not provided with the conditions, in other words funding for the trial, I would hand over the case" *[translation by the Registry]*.

9. Mr. President, Members of the Court, in exactly the same interview, the Senegalese Head of State also stated:

> "I authorize those NGOs to come to Senegal so that we can tell them exactly where we are . . . I accepted [that the trial be held] because I am against impunity. We have gone as far as to take the international texts and incorporate them into our own law in order to be able to try Hissène Habré. [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 pushing 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]*

10. Mr. President, Members of the Court, the overall tone of the President's comments is, of course, consonant with the prospect of a trial being held. An interpretation to the contrary would in fact be rather unfair.

2. The international negotiations held to organize the trial of Mr. Habré

11. Might I briefly recall that it was on the basis of this concern of the Senegalese authorities about holding the trial that negotiations were undertaken with the European Union and the African
48 Union, which committed themselves to supporting the Senegalese authorities for the actual holding of the trial. It was thus that:

— a delegation of the European Union visited Dakar in this context, made a report and, in a letter dated 15 March 2008, the delegation of the European Union "noted with satisfaction the determination of Senegal to see the process through" *[translation by the Registry]*. The European Union congratulated itself moreover "on excellent co-operation with the African Union which was particularly evident in the participation in this mission of the Special Representative for the Habré Trial of the Chairperson of the Commission of the African Union" *[translation by the Registry]*.

— On 29 January 2009, Mr. President, Members of the Court, in reply to a letter from the authorities of the Republic of Senegal, concerned about the lack of the necessary financial resources, the Chairperson of the Commission of the African Union wrote as follows, he recalled "the commitment of the African Union to provide assistance to Senegal. It is in this

context that I have asked my envoy/special representative to visit Senegal in order to discuss the issue with the Government of Senegal" *[translation by the Registry]*.

— The Assembly of the Heads of State and Government of the African Union, meeting on 3 February 2009, reiterated "its commendation of the Government of the Republic of Senegal for having taken constitutional, legal and regulatory measures".

— Finally, from 11 to 13 March 2009, not even a month ago, the envoy of the special representative of the Commission of the African Union carried out a mission to Senegal, in the course of which he met the Senegalese head of State for talks.

12. Mr. President, Members of the Court, having put the President's statement back into its context, I would now like to turn to the surveillance which is currently kept on Mr. Habré in Dakar and which makes the probability of him slipping out of the country practically nonexistent.

3. The surveillance kept on Mr. Habré and his entourage

13. Indeed, Mr. Habré and his family are kept under constant and tight surveillance.

14. The Court must first be aware, and this is an *essential* detail, that Mr. Habré does not at present possess a valid travel document (neither a passport or a safe-conduct) enabling him to travel.

49 15. Moreover, the surveillance of Mr. Habré is carried out by the Military Governor, who is responsible for the security of the *Palais de le République* (the presidential palace). The surveillance mission is also assigned to a *groupe d'intervention*, an elite unit of the Senegalese Gendarmerie, specially equipped, and trained and prepared for the protection of the authorities.

16. This close-range security mission also extends to the inner suburbs of Dakar (Ouakam), where Mr. Habré's two homes are located, thanks to another brigade of the Senegalese Gendarmerie.

17. Furthermore, in their concern for the effective application of the security directives, the officers of the group which I have just mentioned carry out regular patrols in order to clarify security issues with Mr. Habré.

18. The Court will thus have the leisure to note the singular nature of the case that has been put before it: the Applicant seeks measures which in reality have already been taken at present.

And every time an analogous or similar case has been brought to it, the Court has dismissed the request for the indication of provisional measures.

4. A comparison of the facts with the jurisprudence of the Court

19. In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (Order of 15 October 2008), the Court indicated that it only exercised its power to indicate provisional measures if there is urgency.

20. The party which requests provisional measures, be it in national law or in international law, must provide evidence that the passage of time entails a risk to his person, his right or his property.

21. The rather succinct nature of Article 41 of the Statute of the Court must not give rise to any illusions: the provisional measures mentioned therein must manifestly not be declared unless there is urgency.

22. The jurisprudence of the Court demonstrates that a request for the indication of provisional measures has no chance of success unless a serious probability of prejudice to a right exists.

50 23. That it what is said in the *Passage through the Great Belt* case, in which the Court recalled that "provisional measures . . . are therefore only justified if . . . action prejudicial to the rights of either party is *likely* to be taken . . ." (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23; emphasis added).

24. In the *Pulp Mills* case, in the Order of 27 January 2007, it recalled that the indication of provisional measures is tied to the existence of an *urgent necessity* to prevent irreparable prejudice being caused to one of the parties (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the Indication of Provisional Measures, Order of 23 January 2007, para. 32).

25. Mr. President, Members of the Court, a process is thus under way which clearly attests to the good faith of the Senegalese authorities regarding putting Mr. Habré on trial. Senegal continues to honour its obligations as a party to the 1984 Convention.

26. In your jurisprudence, the demand for the indication of provisional measures must appear to be an admission of failure or attest to the impossibility of reaching an agreement. While urgency is the characteristic feature of proceedings on provisional measures, they must necessarily be appreciated in terms of such deadlock. That means that the Court will not intervene or will show reluctance to do so if the inclinations displayed by at least one of the parties or the possibilities provided by a process that has yet to be exhausted seem capable of neutralising the risk alleged by the State requesting provisional measures.

27. The Court has stated this in a number of its decisions which I will not cite. In the *Passage through the Great Belt (Finland* v. *Denmark)* case (Order of 29 July 1991, pp. 12 *et seq.*). It also said so in *Certain Criminal Proceedings in France (Republic of the Congo* v. *France)* (Order of 17 June 2003, para. 38). Finally, it reiterated this in the *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* case (Order of 13 July 2006).

28. Mr. President, Members of the Court, the Court has always wagered upon the good faith of States when, before it, they have made undertakings or initiated measures to resolve, in fact or in law, the dispute which has been put before it.

51 29. That was the case in the *Aegean Sea Continental Shelf (Greece* v. *Turkey)* case, in which it ruled out the possibility of indicating provisional measures after it had taken note of the declarations of Turkey's Minister for Foreign Affairs.

30. Having begun the process which should enable it to try Mr. Habré and thus fulfil its international obligations, Senegal does not understand on the basis of what principles the exercise of its prerogatives related to a moderate conception of its sovereignty should be openly or latently challenged.

31. Every time that it has been asked to indicate provisional measures, the Court has always been careful not to cause prejudice to the rights of the parties. It is now clearly faced with a dilemma, which can probably be stated in simple terms: making a purely "potential" right prevail or preserving a "real" right, assuming the bad faith of States or taking note of the evidence of good faith put before it, lending weight to inaccurate claims of intent or attributing significance to the acts of States alone.

32. Finally, the Court will observe, Mr. President, Members of the Court, that the Kingdom of Belgium waited until the process which should lead to the trial was under way before bringing the case before you and that it refrained throughout the negotiations with the European Union from expressing any criticism or reservation as to Senegal's approach. Now that it is committed, legally if not morally, by the positions of the organization of which it is a member, Belgium suddenly feels the need "*to stand apart*" and to break with, so to speak, the European Union. There was never any question with the European Union of a *deadlock* in the negotiations.

33. In view of all of the foregoing, the Republic of Senegal is of the opinion that no urgency exists at present justifying the indication by the Court of the provisional measures requested. In addition, the request does not meet the other requirements implied by Article 41 as will be shown, if the Court so wishes, by my colleague shortly.

34. Mr. President, Members of the Court, I thank you for your attention.

52 The PRESIDENT: I thank you for your presentation, Mr. Sall. I now give the floor to Mr. Gaye.

Mr. GAYE:

BELGIUM HAS NOT DEMONSTRATED THE EXISTENCE OF THE IRREPARABLE PREJUDICE WHICH IT ALLEGES

1. Mr. President, Members of the Court, as a Senegalese citizen and legal counsel, I am honoured by my appointment by the Government of Senegal to defend its interests in this case brought by Belgium before your distinguished Court.

2. The Agent of Senegal has asked me to deal with the question of whether Belgium demonstrated irreparable prejudice which, as you know, is one of the conditions for the success of its claim.

3. My oral argument follows that of my colleague, Professor Sall, who dealt with the urgency at the heart of any procedure for the indication of provisional measures. I propose to round off that argument, your Court having ruled that a request for the indication of provisional measures can only be accepted — if the event alleged by Belgium occurred — if it caused *irreparable prejudice* to the *rights of the Applicant*. In other words, I am going to try to establish

that the request for the indication of provisional measures by Belgium but solely be concerned with protecting its rights which form the object of the Application instituting proceedings, provided the imminent danger demonstrated by the Applicant would cause irreparable prejudice to its interests.

THE POSITION OF THE COURT

4. Senegal's position is based on the jurisprudence of the Court. By way of illustration, let me quote your *dictums* in the following cases:

— In the case relating to the *Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, by Order of 17 June 2003 (p. 107, para. 22), you pointed out that: "The power of the Court to indicate provisional measures under Article 41 of the Statute of the Court . . . presupposes that irreparable prejudice should not be caused to the rights which are the subject of dispute".

53 — That decision was confirmed by your Order delivered on 15 October 2008 (para. 128) in the case concerning the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation).*

— Also, in the case concerning *Lagrand (Germany* v. *United States of America)*, you stated, in your Order of 3 March 1999 (para. 23), that: "[Your] Court will not order interim measures in the absence of 'irreparable prejudice . . . to rights which are the subject of dispute'".

BELGIUM'S ALLEGATIONS

5. In Senegal's view, Belgium does not demonstrate in its request for the indication of provisional measures that irreparable prejudice will result from the Court's non-acquiescence to the provisional measures requested. In that request, Belgium claims only that it might suffer irreparable prejudice "were" Mr. Hissène Habré's house arrest were to be lifted if Senegal failed to find the budget necessary to hold his trial, thus, according to Belgium, making it possible for him to leave Senegal and avoid any prosecution.

6. For Senegal, even supposing it were possible to consider that Belgium could meet its obligation to prove that there is a real and imminent risk of Mr. Hissène Habré's being released (which is far from likely, in view of the information given to you by my predecessor), Belgium

does not justify why such a risk would inevitably give rise to irreparable prejudice to one of its rights under the 1984 Convention.

7. Mr. President, Members of the Court, my statement will fall into two parts. In the first, I will deal with the absence of evidence of a risk of irreparable prejudice. And, in the second part, I will explain that Belgium has not identified its alleged right, which would be prejudiced by the refusal of your Court to grant it the provisional measures it requests.

1. LACK OF EVIDENCE OF A RISK OF IRREPARABLE PREJUDICE

8. On the first point, I would point out that the declaration made by the President of the Republic of Senegal on 2 February 2009, which, there is no doubt, was produced by Belgium and

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on the subject of which the Agent of Senegal has spoken to you, does not reveal the possible occurrence of any irreparable prejudice. In other words, Belgium must, in this case, according to your jurisprudence, meet the following additional condition: prevent irreparable prejudice and thus protect the rights of the Parties.

9. The Court itself, in its Order of 3 March 1999 for example, pointed out that: "The Order for the execution of Mr. Walter Lagrand was given for 3 March 1999; and that such an execution would cause irreparable harm to the rights claimed by Germany in the particular case" (*Lagrand (Germany* v. *United States of America)* Order of 3 March 1999 (para. 24)). In that case, your Court considered the right to life as a right inherent to the human person and that the execution of a person constituted irreparable harm, which is not the case here, Belgium not having demonstrated any such irreparable harm.

10. Similarly, you also decided in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, that "the Court has not found that at present there is an imminent risk of irreparable prejudice to the rights of Uruguay in dispute before it" (Order of 23 January 2007, para. 50).

Decision of the African Union

11. The question of irreparable prejudice in the provisional measures is in fact to prevent any change, to the detriment of either of the Parties, in the situation existing between them when the Court is seised of the dispute, since such change would create irreparable harm. Mr. Hissène Habré

has now been in Senegal for 19 years with no possibility of fleeing and avoiding any prosecution, as already pointed out by Professor Sall, the previous speaker.

12. In the light of the decision by the African Union, Senegal has never had and does not have now any intention to lift the control and surveillance measures taken with respect to Mr. Hissène Habré, hence, at present, no risk of irreparable prejudice exists, which might justify the request for the indication of provisional measures submitted by Belgium.

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Article 41 of the Statute of the Court

13. The jurisprudence of your Court lays down the requirement, for the exercise of its powers under Article 41 of its Statute, that the applicant should find itself facing a probable or imminent danger. On the basis of this settled case law, it may be stated without risk of contradiction that a request for the indication of provisional measures has no chance of succeeding if the harm it seeks to prevent is remote or hypothetical.

14. You already pointed this out in the case between the Republic of Congo and France (*Certain Criminal Proceedings in France*), in your Order of 17 June 2003 (para. 22).

The *effectivité* of the measures taken by Senegal to prevent Mr. Hissène Habré from leaving Senegal and evading any prosecution

15. Both in its Application instituting proceedings and in its request for the indication of provision measures, Belgium is patently not able to demonstrate that it risks suffering irreparable prejudice.

16. Since December 1990, the date when Mr. Hissène Habré arrived, Senegal has fully complied with all its obligations as a State party to the 1984 Convention.

17. Just as you did in the case concerning *Pulp Mills on the River Uruguay* (Order of 13 July 2006), you will surely here reject the request for the indication of provisional measures, since no risk of irreparable prejudice likely to jeoparadize any right of Belgium can be identified today, and my colleague, Professor Sall, has already discussed the prejudice suffered by Senegal with respect to Mr. Hissène Habré at length.

Conformity of the constitutional and legislative reforms with the provisions of the Convention

18. Furthermore, to date, all the legislative and constitutional reforms, of both form and substance, have already been made in order to give full effect to the provisions of the above-mentioned Convention and thus to create the ideal conditions for Mr. Hissène Habré's trial by the Senegalese courts, on a fair and equitable basis.

56 19. At no time before 2009 did Belgium ever request Senegal to take specific measures to prevent Mr. Hissène Habré from fleeing with a view to preserving its potential right of extradition.

Mr. President, with your permission, may I ask you to give me at least two or three minutes more to bring my oral argument to a close as I believe my time is almost up? Thank you.

2. BELGIUM DOES NOT STATE WHICH PARTICULAR RIGHT WOULD BE LIKELY TO BE AFFECTED FAILING THE PROVISIONAL MEASURES REQUESTED

20. As the previous speakers have already told you, the mere possibility of possible prejudice to rights in issue before the Court does not, by itself, suffice to justify recourse to its exceptional power under Article 41 of the Statute to indicate interim measures of protection.

21. Mr. President, Members of the Court, it would be an easy matter for you to ascertain that Belgium does not prove the existence of any right appertaining to it, which would be irremediably affected if the alleged risk were to become a reality.

22. Furthermore, the jurisprudence of your Court requires that the applicant specify the rights it seeks to protect by means of its request for the application of provisional measures. Take the case concerning *Armed Activities on the Territory of the Congo*, in which your Court stated "nor has the Congo specified which rights protected by that Convention [on Discrimination against Women] have allegedly been violated by Rwanda and should be the object of provisional measures" *(Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002,* p. 247, para. 79).

23. Belgium's act instituting proceedings is based on a set of provisions in the 1984 Convention against Torture, which are nevertheless referred to only in a vague, general way. And the request for the indication of provisional measures is even less explicit and more confused,

Belgium merely stating evasively, as it does, that "this dispute relates to the interpretation and application of the United Nations Convention against Torture of 10 December 1984".

57 24. Senegal also considers that none of the provisions of the 1984 Convention quoted in the act instituting proceedings — of which there are four — may be considered as forming the object of a threat or imminent risk. Senegal will consider each of these four provisions in turn.

No threat to the 1984 Convention

25. The first provision concerns Article 5 (2), of the Convention, which states that each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences consisting of acts of torture in cases where the alleged offender is present in any territory under its jurisdiction and where the State does not extradite him. The necessary amendments have been made, as previously described by the Agent and other counsel of Senegal. There is thus no threat which could be based on that Article.

26. The second provision referred to by Belgium relates to Article 7 (1), which provides that, in cases where a State Party in territory under whose jurisdiction the person alleged to have committed an act of torture is found, shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. But that is exactly what was done in the past, before the procedure was subsequently invalidated through the incompatibility of Senegalese criminal law with the exercise of universal jurisdiction. The adjustments which were needed to guarantee jurisdiction to hear such a prosecution have now been made and the resumption of the case is now only partly dependent on obtaining the necessary funding. Hence, no threat can be based on that Article.

27. The third provision relied upon by Belgium is based on Article 8 (2), but adds no substantive content with respect to the offences punished by the Convention and merely makes the provisions of the Convention applicable by default in the absence of a specific extradition treaty between the two States. This provision is referred to by Belgium only superficially and, in any event, no specific violation can be deduced from it. So no threat exists.

28. Lastly, Article 9 (1), the last provision referred to by Belgium, contemplates a broad measure of judicial co-operation in any criminal proceedings relating to the offences which are the

58 object of the Convention. Senegal and Belgium have already had favourable exchanges on this subject, concerning, in particular, offers to share information, and no specific offence is currently alleged in this connection. So no threat exists.

29. In the light of the foregoing, Senegal considers that, in the present circumstances, the indication of provisional measures cannot be acceded to by your Court, the conditions imposed by the provisions by Articles 41 of the Statute of the Court and 73 to 75 of the Rules of Court have not been met.

30. Mr. President, Members of the Court, this presentation closes the first round of Senegal's oral argument. The Agent has asked me to point out that Senegal's conclusion is that the request for the indication of provisional measures by Belgium should be rejected.

31. I thank you for your attention during the presentation of my oral argument and also the oral arguments of the speakers who preceded me on behalf of Senegal. Thank you.

The PRESIDENT: Thank you for your presentation and your co-operation, Mr. Gaye.

That concludes the first round of oral observations of Senegal. At this stage of the oral proceedings, in other words at the end of the oral observations of Belgium and Senegal, two of my colleagues would like to put questions to the Parties.

I shall first call Judge Simma, who now has the floor.

Judge SIMMA: Thank you, Mr. President. Ma question est la suivante : lors du premier tour de plaidoiries, la Belgique a souligné l'existence d'une obligation de juger ou d'extrader M. Habré incombant au Sénégal en vertu à la fois du droit international conventionnel et du droit international coutumier. Dans ses pièces, la Belgique a été relativement brève en ce qui concerne la nature et le fondement de son droit de voir le Sénégal satisfaire à l'obligation *aut tradere, aut judicare*, notamment sur la base du droit international coutumier. Lors du second tour de plaidoiries, et sans trop s'étendre sur le fond de l'affaire, la Belgique pourrait-elle apporter des précisions supplémentaires quant à la nature de ce droit, en particulier celui qu'elle fonde sur le droit international coutumier, et quant à la nature du préjudice qu'elle subirait ? La Belgique
59 cherche-t-elle, au regard de ce à quoi elle-même pourrait prétendre en vertu du droit international coutumier, à obtenir du Sénégal qu'il s'acquitte d'une obligation *erga omnes* ?

The PRESIDENT: Thank you, Judge Simma. I now give the floor to Judge Greenwood.

Judge GREENWOOD: Thank you, Mr. President. Ma question est la suivante : compte tenu de ce qui a été dit cet après-midi par ses éminents agent et conseil, le Sénégal a-t-il, d'abord, donné solennellement l'assurance à la Cour qu'il ne permettra pas à M. Habré de quitter le Sénégal alors que l'affaire est pendante devant la Cour ? Ensuite, si tel est le cas, pareille assurance constitue-t-elle pour la Belgique une garantie suffisante des droits qu'elle fait valoir dans la présente espèce ?

The PRESIDENT: Thank you, Judge Greenwood. I should like to make a slight correction to what I said a few moments ago: I said "at this stage of the oral proceedings, in other words at the end of the oral observations"; I ought to have said "at the end of the first round of oral observations of Belgium and Senegal". There will be an opportunity to put further questions at the end of the oral observations, on Wednesday. The texts of these questions will be communicated to the Parties in writing this evening and, since time is pressing, they are requested to reply to them orally during their second round of oral observations, in other words tomorrow and the day after. The Court will meet tomorrow at 4.30 p.m. to hear the second round of oral observations of Belgium. The sitting is closed.

The Court rose at 6.10 p.m.

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