JOINT SEPARATE OPINION OF JUDGES AL-KHASAWNEH AND SKOTNIKOV

1. We have voted in favour of the Court's decision not to indicate the provisional measures requested by Belgium. Regrettably, however, we cannot concur with the Court's finding to the effect that the conditions required for the purposes of the indication of provisional measures, in terms of establishing prima facie jurisdiction or assessing whether the Application has become moot, have been met.

2. Belgium stated that the alleged dispute between itself and Senegal concerned two elements. Firstly, in the view of Belgium, "Senegal considers that its decision to transmit the case to the African Union . . . somehow fulfils Article 7 [of the Convention against Torture]" (CR 2009/10, p. 20, para. 13). Secondly, "Senegal's present commitment to move, albeit slowly, towards a criminal trial derives in its view from the African Union 'mandate', not directly from its obligations under the Torture Convention" *(ibid.)*.

3. For its part, Senegal, while stressing that "[t]he backdrop of the trial for which preparations are now being made is indeed one of co-operation across Africa — and even beyond" (CR 2009/11, p. 18, para. 11), sought

> "to make clear once and for all, so as to dispel for good all ambiguity and misunderstanding, that as a State it is bound by the 1984 Convention [against Torture]. The fact that an organization like the African Union may be involved in organizing the Habré trial in no way lessens Senegal's duties and rights as a party to the Convention. Indeed, it is as a party to the Convention, not pursuant to a mandate from the African Union, that the Republic of Senegal is fulfilling its obligations." *(Ibid.)*

Furthermore, Senegal reaffirmed "its will to pursue the ongoing process, in which it assumes in full its obligations as a State Party to the 1984 Convention" (*ibid.*, p. 21, para. 27).

4. The Court accepted the fact that the dispute, as framed by Belgium, in the light of the explanations given by the Parties as to their respective positions, does not continue to exist, even on a prima facie basis (Order, para. 48).

5. In the light of those same explanations, the Court's finding in the preceding paragraph of the Order that "it appears prima facie that a dispute as to the interpretation and application of the Convention existed

between the Parties on the date the Application was filed" (Order, para. 47) does not seem to be well founded.

6. These explanations, at the very least, should have lead the Court to make a finding that its prima facie jurisdiction to pronounce on the merits of the case could not be established, since there are very serious doubts as to the existence of a dispute at the time of the filing of the Application. This finding would have allowed the case brought by Belgium to continue.

7. Alternatively, and even more convincingly, the Court could have concluded that, given the explanation by the Parties, no dispute exists and therefore the Application has been rendered moot.

8. Instead, the Court came to what is, in our view, an implausible conclusion that "the Parties nonetheless seem to continue to differ on other questions relating to the interpretation or application of the Convention against Torture" (*ibid.*, para. 48) and went on to offer three such "other questions" which have never been identified by Belgium as forming part of a dispute and which consequently have never been addressed as such by Senegal.

9. In the *South West Africa* cases, the Court commented on the existence of a dispute as follows:

> "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.)

At the provisional measures stage of proceedings, it is sufficient to show such "positive opposition" on a prima facie basis. No attempt to do so was made by the Court in the present case.

10. The first two questions on which the Parties, in the view of the Court, continue to be in dispute are

> "that of the time frame within which the obligations provided for in Article 7 [of the Convention] must be fulfilled or that of the circumstances (financial, legal or other difficulties) which might be relevant in considering whether or not a failure to fulfil those obligations has occurred" (Order, para. 48).

11. First, Belgium has never asked the Court to pronounce on these issues. Second, the Court has had no opportunity to assess whether the views of the Parties are positively opposed on these issues, since they

have not been discussed by the Parties as contentious questions to be resolved by the Court.

12. As to "the time-frame", it may well be that it takes a somewhat long time to bring the case of Mr. Habré to trial. But this issue is not in dispute between the Parties. In fact, Senegal asserts that the pronouncements by its President, which Belgium was alarmed by, were aimed at speeding up the ongoing process of organizing Mr. Habré's trial in terms of acquiring the assistance which Senegal had been promised by the African Union to hold the trial on behalf of Africa. This explanation by Senegal has been taken into account by the Court in deciding not to indicate the provisional measures requested by Belgium (Order, para. 70). There is no dispute over "legal difficulties" either. Senegal — in a relatively short time — has adopted universal jurisdiction legislation allowing it to prosecute Mr. Habré. Financial issues concerning the organization of the trial are still outstanding. Belgium acknowledges that these issues are real and should be resolved, and asserts that it is working with the European Union to assist Senegal in resolving them, although it maintains that Senegal's assessment of the costs involved is too high. There is a problem to be solved, but there is no dispute which Belgium is asking the Court to settle. Understandably, we do not address unspecified "other difficulties" mentioned by the Court, since we do not know what these are.

13. As to whether the non-disputed issues of "the time-frame" or "the circumstances" addressed above might be "relevant in concluding whether or not a failure to fulfil those obligations [under Article 2 of the Convention] has occurred", it suffices to recall that Belgium itself acknowledges "Senegal's commitment to move, albeit slowly, towards a criminal trial", and perceives a problem in Senegal's alleged view that this commitment derives "from the African Union mandate and not directly from its obligations under the Torture Convention" (see para. 2 above). That allegation has been dispelled by Senegal and is not seen by the Court as forming part of a dispute (see paras. 3 and 4 above). Accordingly, the Court, in our view, inappropriately brings up a notion of the hypothetical failure of Senegal to comply with its obligations under the Torture Convention.

14. The third question on which, according to the Court, the Parties seem to continue to hold differing views is "how Senegal should fulfil its treaty obligations" (Order, para. 48). As a matter of principle, a dispute (that is "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11)) simply cannot be identified in such a non-specific way.

15. Granted, as the Court has had occasion to point out, "[w]hether there exists an international dispute is a matter for objective determina-

tion" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). Indeed, it is a duty of the Court to make such a determination. It is expected from the Court that in doing so, even on a prima facie basis, it will be diligent and precise. We do not think that the Court's determination in this case meets such an obvious requirement.

16. Finally, we would like to express our hope that the fact that this case remains before the Court will not deter possible contributors from providing assistance to Senegal in organizing Mr. Habré's trial.

(Signed) Awn Shawkat AL-KHASAWNEH.

(Signed) Leonid SKOTNIKOV.