SEPARATE OPINION OF JUDGE *AD HOC* SUR

[Translation]

Agreement with the operative part of the Order — Points concerning the position of a judge ad hoc *— No analysis of the change in substance of Belgium's request for the indication of provisional measures — Need to respond to the Parties on their arguments — Method by which the Court examines the preconditions for the exercise of its power to indicate provisional measures — Article 41 of the Statute gives the Court an independent power not subject to a prerequisite showing of the parties' consent — Replace the affirmative demonstration of prima facie jurisdiction and admissibility required by current practice with a negative demonstration — Limited to a finding that the Court is not manifestly without jurisdiction and that the Application is not manifestly inadmissible — Disappearance of the subject of the dispute.*

1. I have voted in favour of the decision of the Court in the present Order, sharing in the conviction held by nearly all Members of the Court that there is no need, on the grounds set out in the reasoning in the Order, for the provisional measures sought by Belgium to guarantee that Mr. Habré remains under the surveillance and control of the Senegalese authorities. My purpose in this separate opinion is simply to make several points; these have to do, first, with the special position occupied by a judge *ad hoc*, then with the method followed by the Court in laying the groundwork for its decision and finally with the question of whether or not there is still a dispute between Belgium and Senegal in the present case.

THE POSITION OF A JUDGE *AD HOC*

2. A judge *ad hoc* is in every sense a judge, not the representative or advocate of the party having chosen him, but he is a judge for the occasion, not a permanent judge. As Judge *ad hoc* Lauterpacht pointed out in his separate opinion appended to the Court's Order of 13 September 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Serbia and Montenegro)*:

> "consistently with the duty of impartiality by which the *ad hoc* judge is bound, there is still something specific that distinguishes his role. He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected —

> though not necessarily accepted — in any separate or dissenting opinion that he may write." (*Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 409, para. 6.)

I subscribe to this analysis. I would only add my view that, for a judge *ad hoc* to ensure the proper hearing and appreciation of the arguments put forward by the party having chosen him, it is not enough for him merely to express his own opinion, be it separate or dissenting, since in this case the arguments are simply reflected in an opinion appended to the decision; he is also under a duty to do his utmost to ensure that they figure in the decision itself, even if they are not upheld. It is only insofar as he does not succeed in this that he should give voice personally to those arguments. Generally, a judge *ad hoc* is more naturally inclined to see things from the parties' perspective; he is in a position to appreciate more fully how a decision will affect the parties and how they will perceive it. Thus, he helps to ensure that, in keeping with the age-old maxim, justice is not only fair but also seen to be fair.

3. On this point, I have only one regret to express: that the Court did not consider it worthwhile to draw attention to the change in substance of Belgium's request for the indication of provisional measures and to note the significance of this. In replacing control by "Senegalese judicial authorities" with control by "Senegalese authorities", Belgium significantly changed the purport of its request. Under Senegalese law, placing Mr. Habré under judicial supervision would have been possible only if he had been criminally charged and such a charge would have been tantamount to granting Belgium the relief sought in one of its principal claims, i.e., Mr. Habré's prosecution by Senegal. Had this relief been awarded, Belgium would have secured by provisional measures what it is seeking on the merits, thereby prejudging any future decision on the merits, notwithstanding that the Court's decision on jurisdiction and the admissibility of the Application is no more than prima facie. The relief thus sought manifestly exceeded the permissible bounds of provisional measures and this argument, propounded by Senegal at the hearings, would appear to have prompted Belgium to amend the terms of its request to seek only "control [by] the Senegalese authorities", meaning administrative control and surveillance. Let it be added that the "Convention against Torture", invoked by Belgium as the basis for its request, provides only for the States parties to take "legal measures to ensure [the suspect's] presence", "as provided in the law" of those States, not for judicial control (Art. 6, para. 1). As Mr. Habré is already subject to administrative control, the final submission amounted to a request for such control to be made permanent, rather than for a new judicial measure required of Senegal.

4. The Court has confined itself to implicitly acknowledging this change in the introductory paragraphs of its reasoning (paragraphs 15 and 34 of the Order), wherein it sets out the Parties' positions, and to considering only Belgium's final submission, saying nothing at all in its own analysis (paragraphs 56 to 73 of the Order) about the existence and significance of this change. However, the statement of reasoning should do more than just restate and organize the conflicting positions expressed in the written and oral proceedings; it should also set out the steps in the Court's logic and respond to the Parties on the arguments they have put forward. Thus, the arguments Senegal propounded on the initial request in the hearings — although Belgium has offered no explanation on the subject, those arguments in all likelihood led it to amend that request — have from all appearances been ignored. This is to be regretted inasmuch as it is important, vis-à-vis the Parties' perception of the soundness of the Court's decisions, for those decisions to lay out the positions of the Parties fully and objectively and to offer assurance that the Parties' views have been given thorough consideration. This is especially important in the present case, in which the Parties' positions on other points evolved during the hearings and these other changes are reflected in the decision. In my view, to achieve this desirable result it would have been sufficient for the Court to note in paragraph 60 or paragraph 61 : that as a result of Belgium's modification of its request in the course of the hearings, it was no longer a question of forcing Senegal to take a new approach to Mr. Habré, but instead simply of making it mandatory under international law for Senegal to maintain its present approach; that Belgium was at liberty to amend the terms of its request; and that the Court ruled on the request as thus amended. As the Court determines its jurisdiction as of the filing of the Application and assesses a request for provisional measures as of the time of deliberation, it would have been helpful to draw attention to this difference.

The Method Followed by the Court

5. This is especially important given the increasing number of requests for the indication of provisional measures; regardless of their content, these often betoken a litigation strategy aimed at enabling a party whose request for provisional measures is granted to secure an advantage — at least a psychological one — in later proceedings. This fact moreover leads the Court to weigh very carefully those circumstances under which it will grant such measures, whose binding force has by now been firmly established (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). Fortunately, the work of rationalizing the granting of provisional measures through the jurisprudence in response to the growing number of requests facing the Court, a task begun a number of years and decisions ago, has by now been accomplished and the method followed in the present Order illustrates it. The

Court has been particularly attentive to the manner in which it has set out its chain of reasoning and has exercised the utmost care and vigilance in its choice of words to describe the steps to be followed in the exercise of its power to indicate provisional measures, as established in Article 41 of the Statute of the Court. It has elaborated more on what it considers to be the essential preconditions for the exercise of the power than on the power itself. Thus, 22 paragraphs are devoted to the conditions and 12 to the exercise of the power in the present circumstances.

6. The Court has thereby made clear its concern to take the greatest possible account of State consent to its jurisdiction by carefully considering its jurisdiction and the admissibility of the Application, even prima facie. It considers it particularly important to do so, given that the binding force of provisional measures is now beyond doubt and the Court feels itself duty-bound to ascertain that the exercise of its power to indicate provisional measures is founded on bases which are plausible at the outset. Yet it might be asked whether the Court is not overcautious on this point and whether this cautiousness may not actually lead to outcomes that can subsequently be seen as adversely affecting how its decisions are perceived.

7. Before turning to that question, a preliminary one: may a judge *ad hoc* issue an opinion on points concerning the jurisprudence and extending beyond the scope of the specific case before the Court? Should he not confine himself to the case for which he has been chosen without venturing into broader issues? He undoubtedly may do so, since he is a judge and since the entirety of the case before the Court and the Court's method in addressing it are of full concern to him. It is especially clear that he may, since his duty is not to represent the party which chose him but to don the mantle of independence and objectivity borne by all judges, even though he may be subjectively inclined, no doubt unintentionally, to have a particular interest in seeing that the positions of that party are given fair consideration. He may even be freer in the general opinions he expresses than a permanent judge, as he is less constrained by the settled jurisprudence and freer to explore alternative paths.

8. To return to the Court's possibly excessive cautiousness in respect of the conditions for exercising its power under Article 41, it will be observed that the Court's power under this Article is truly independent; as such, it is not subject to any prerequisite demonstration that the parties have consented to the Court's jurisdiction. In other words, this power derives from the Statute, not from the consent of the parties. In this respect it is similar to that conferred on the Court by Article 36, paragraph 6, of the Statute, i.e., the power to decide whether it has jurisdiction in the face of a challenge by one of the parties: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Along the same lines, all that Arti-

cle 41 demands of the Court is that it satisfy itself that the circumstances of the case require the indication of provisional measures to preserve the respective rights of either party. While the Court may of course include among these circumstances the likelihood that it has jurisdiction and that the Application is admissible, nothing strictly requires it to do so.

9. It would no doubt be pointless and even risky for the Court to indicate provisional measures when its jurisdiction is clearly lacking, because for example: there is no express basis for it, no unilateral declaration under Article 36, paragraph 2, recognizing the Court's jurisdiction; or a reservation clearly excludes it; or there is no compromissory clause in a treaty; or a party has rejected such a clause. The Court's lack of jurisdiction in these cases is manifest, as would be the inadmissibility of an application founded on a treaty not in force, or brought against a State that is not party to the treaty in question and has not assumed the obligations under it. But the Court could satisfy itself in other situations with a finding that it does not manifestly lack jurisdiction, because there is an express basis of jurisdiction which it can rely on, and that the Application is not manifestly inadmissible, to conclude that under these circumstances it is empowered to exercise its independent power, either at the request of a party or on its own motion. In such cases it would focus its examination of the need for provisional measures on the actual substance of the request and on the factors which may make such measures essential, that is to say, urgency, the importance of the rights to be preserved, and the risk of irreparable injury if no such measures are ordered.

10. The Court would thus replace the affirmative showing required by its current practice — that it has prima facie jurisdiction and the Application is prima facie admissible — with a negative showing — that it is not manifestly without jurisdiction and the Application is not manifestly inadmissible. This simplification would not appear to present any drawbacks in cases where the Court holds that provisional measures are not necessary, where, in other words, it rejects a request for them. But what about cases where it decides to order such measures, with the risk that it might later conclude that it lacks jurisdiction or that the Application is inadmissible? The situation would be no different from that now prevailing, because a prima facie examination leading to provisional findings in the affirmative may very well fail to be confirmed subsequently. The resulting drawback would however be less important here, because the Court would have committed itself to a lesser degree and would not run the risk of being seen to have taken inconsistent positions.

11. True, a prima facie examination does not prejudge subsequent questions, as the Court regularly points out – for example, in paragraph 74 of the present Order. But, first, it is not easy — and that much harder for non-specialists — to distinguish between matters within the scope of prima facie examination and those within the scope of in-depth examination. A perception may arise that the line between them is vague, shifting, and dependent on the circumstances, and a two-fold risk thereby

ensues: that in fact a presumption of jurisdiction or admissibility is created when these are found prima facie; and that there then arises a sense of inconsistency in the Court's case law if the Court, having found jurisdiction and admissibility prima facie, then goes on ultimately to deny them. This would be liable to produce, *mutatis mutandis*, the situation, unfortunate in all regards, in which the Court found itself after the Judgment in the *South West Africa* case in 1966 (*(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 292).

12. Were it to limit itself to a simple, summary analysis, rejecting the possibility of ordering provisional measures only if it deemed itself manifestly without jurisdiction or the Application manifestly inadmissible, the Court would also be able to devote more time and attention to all of the circumstances, legal and factual, which might make such measures essential, thereby fully meeting the requirements of Article 41; it would do so instead of conducting the initial examination of jurisdiction and admissibility, in respect of which the starting-point is clear but the end-point much less so. One might even venture to presuppose that an examination of manifest lack of jurisdiction and manifest inadmissibility would not necessarily differ much from current practice. Yet, by taking a negative instead of affirmative provisional position, the Court would ward off all criticism as to inconsistency in judgment, if not even reversal of position. It would moreover be acting more in keeping with Article 41 of the Statute, and the Rules of Court, which also say nothing about issues of jurisdiction and admissibility in connection with provisional measures (Arts. 73-78 of the Rules of Court). To reach this point, the Court's jurisprudence would have to evolve — but there have already been significant developments in the law of provisional measures against the backdrop of the growing role played by international courts.

The Disappearance of the Subject of the Dispute

13. Without now entering into an in-depth examination of the issue of whether a dispute existed between Belgium and Senegal when the Application was filed, we can ask whether any such dispute still existed when the decision on the Order was made. It is appropriate here to reflect on the very concept of a justiciable dispute, which it is the Court's function, in the words of Article 38, paragraph 1, of the Statute, "to decide in accordance with international law" — that is to say, that the Court must concern itself with the actual dispute laid before it, not make general, abstract pronouncements of law, the scope of which would in any event be limited by the fact that the doctrine of *res judicata* restricts the binding force of a decision to the parties. In the present case, while Belgium maintains that Senegal has violated the Convention against Torture by failing to prosecute Mr. Habré, if not extradite him, or by excessively delaying the prosecution, it does not ask the Court in its Application to find this

alleged violation. The relief it seeks is declaratory in nature and aims at a statement by the Court that Senegal is under an obligation to prosecute Mr. Habré or, failing which, to extradite him. But it is clear that, assuming there to have been possible uncertainty on this subject when the Application was filed, the judicial debate has, in my opinion, shown that there was no dispute, or there is no longer any, between the Parties on these points.

14. I find the following statement in paragraph 48 of the Order to be inappropriate:

> "the Parties nonetheless seem to continue to differ on other questions relating to the interpretation or application of the Convention against Torture, such as that of the time frame within which the obligations provided for in Article 7 must be fulfilled or that of the circumstances (financial, legal or other difficulties) which might be relevant in considering whether or not a failure to fulfil those obligations has occurred; whereas, moreover, the Parties seem to continue to hold differing views as to how Senegal should fulfil its treaty obligations".

These differences are not the subject-matter of the claim presented by Belgium but merely elements of the grounds supporting its Application. While the view may no doubt be taken, in reliance on the seminal decision in the *Mavrommatis* case, that "[a] dispute is 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), deeper analysis of the jurisprudence points to a narrower meaning of "dispute", at least when seen from the judicial perspective. As Professor Jean Combacau has written in summarizing this analysis,

> "disagreements, conflicts . . . constitute disputes only if they emerge in connection with a claim asserted by one State against another and rejected by the second; neither abstract debates . . . nor even differing judgments as to the behaviour that should be adopted in a given situation fall within the category of international dispute: the concept of international dispute implies the assertion of conflicting claims, not just arguments; and a dispute arises only where one State demands certain conduct on the part of another and meets with a refusal" (Jean Combacau and Serge Sur, *Droit international public*, 8th ed., 2008, p. 556) *[translation by the Registry]*.

Thus, "[i]t must be shown that the claim of one party is positively opposed by the other" (case concerning *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

15. That being the case, it is difficult to see any dispute between Belgium and Senegal. The two States are in agreement that the "Convention against Torture" places the States party to it under an obligation to

establish their criminal jurisdiction and to prosecute persons accused of the crimes it covers or, failing that, to extradite them. Senegal has expressed its resolve to prosecute, as demanded of it by Belgium, whose Application does not refer to any specific time frame but rather to a decision in principle. The steps taken by Senegal in amending its constitution and legislation to establish its jurisdiction to conduct such a trial are concrete, have been taken without undue delay and give proof of its sincerity; it is clear to see what it has done, and continues to do, to obtain the assistance needed to hold the trial. Given this, and it being advisable to refrain in the present separate opinion from proceeding any further so as to avoid encroaching on substantive issues which may come before the Court later in the proceedings, it is apparent that the dispute, assuming it to have existed earlier, no longer exists as the present Order is being handed down, since Belgium's claims have been satisfied by Senegal's repeated statements that it will try Mr. Habré as soon as possible for all of the crimes of which he stands accused. In my view, the Court should have so found and inferred the consequences by declaring, as it did in the cases concerning *Nuclear Tests* (*(Australia* v. *France)* and *(New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 272), that, as the claim has by now ceased to have any object, there is no longer anything to be decided.

(Signed) Serge SUR.