

JOINT DECLARATION OF JUDGES KOROMA  
AND YUSUF

*Obligation aut dedere aut judicare — The purpose of Belgium’s request for provisional measures — Senegal’s assurances serve the purpose of Belgium’s request — Impunity not allowed.*

1. We have voted in favour of the Order but nevertheless have decided to append this declaration given the importance of the matters raised in the Application and the legal principle involved at this stage of the proceedings.

2. The present case between Belgium and Senegal concerns Senegal’s obligation, under conventional and customary international law, to extradite or prosecute (*aut dedere aut judicare*) the former President of Chad, Mr. Hissène Habré, for crimes he is alleged to have committed or ordered while President in 1982, including

“murders, acts of torture, abductions, arbitrary arrests and the execution of a large number of Chadian civilians and military personnel, in particular on the grounds of their ethnicity” (International Arrest Warrant of 19 September 2005 issued by the Belgian investigating judge responsible for the case; Application instituting proceedings of 19 February 2009, Ann. 3, p. 29, para. 2.1).

3. The Assembly of the African Union, having considered Mr. Habré’s acts,

“[observed] that, according to the terms of 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 competence of the African Union” (Decision on the Hissène Habré Case and the African Union, AU Doc. Assembly/AU/Dec.127 (VII), Assembly of the African Union, Seventh Ordinary Session, 1-2 July 2006, Banjul, The Gambia).

4. Belgium claims that some of its nationals were injured by Habré’s acts:

“Between 30 November 2000 and 11 December 2001, a Belgian national of Chadian origin and Chadian nationals filed a series of criminal complaints with civil-party applications in the Belgian courts against the former President of Chad, Mr. Hissène Habré, for crimes under international humanitarian law.

As the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian

courts intend to exercise passive personal jurisdiction.” (Application instituting proceedings, 19 February 2009, p. 5, para. 3.)

5. Invoking the principle of *aut dedere aut judicare*, Belgium asks the Court

“to adjudge and declare that Senegal must prosecute Mr. H. Habré for . . . crimes of torture and crimes against humanity which are alleged against him, failing his extradition to Belgium, where the Belgian courts have brought proceedings against him on the same grounds as a result of complaints filed in particular by a Belgian victim of Chadian origin” (Request for indication of provisional measures submitted by the Government of Belgium, 17 February 2009 (summarizing the submissions in the Application instituting proceedings, 19 February 2009)).

6. The primary conventional authority cited by Belgium for this obligation to extradite or prosecute is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (“Torture Convention”). According to its Preamble, the object and purpose of the Torture Convention is to ensure the “inherent dignity of the human person” and “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”. With regard to the obligation *aut dedere aut judicare*, Article 7, paragraph 1, of the Convention against Torture provides:

“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 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.”

7. At this stage of the proceedings, the Court has addressed Belgium’s request, appended to its Application, that the Court indicate provisional measures, pending a final judgment on the merits,

“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” (Request for the indication of provisional measures submitted by the Government of Belgium, 17 February 2009).

8. The purpose of provisional measures is the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings. Belgium has stated that this corresponds to its motive in requesting the indication of provisional measures, specifically because “Senegal is at risk of causing irreparable

prejudice . . . to Belgium’s right for Mr. Hissène Habré to be brought to trial in Senegal or extradited to Belgium” (CR 2009/8, para. 27 (David)).

9. Senegal, however, on several occasions during the oral proceedings declared before the Court that it will not release Mr. Habré pending the resolution of the case. First, the Agent of Senegal stated:

“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.” (CR 2009/9, para. 57 (Thiam).)

Second, counsel for Senegal declared:

“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.” (CR 2009/9, para. 12 (Gaye).)

Third, Mr. Demba Kandji, Co-Agent of Senegal, made the following solemn declaration in the course of his presentation of Senegal’s final submissions in the oral pleadings:

“Senegal is of course prepared solemnly to confirm what it has already said:

‘By order of my Government, and as Co-Agent of Senegal, I hereby confirm what Senegal said last Monday, that is — and I shall say this in English to Judge Greenwood, who put the question — ‘Senegal will not allow Mr. Habré to leave Senegal while the present case is pending before the Court. Senegal has not the intention to allow Mr. Habré to leave the territory while the present case is pending before the Court’.” (CR 2009/11, para. 6 (Kandji).)

10. In our view, Senegal’s solemn declaration that it “will not allow Mr. Habré to leave Senegal while the present case is pending before the Court” (*ibid.*) preserves the rights of the Parties and ensures against the risk of irreparable prejudice in exactly the same way as would an order indicating provisional measures. Accordingly, the purpose of Belgium’s request for the indication of provisional measures having been served, there was no further need for the Court to examine the judicial measure requested by Belgium. In our view, the Court should simply have declared

that following the declaration by Senegal the request for the indication of provisional measures had ceased to have any object.

11. Moreover, it is our view that the Court should have more forcefully emphasized that both Parties, Belgium and Senegal, as well as the Assembly of the African Union — which has recognized that the case against Mr. Hissène Habré falls within its competence and mandated the Republic of Senegal to prosecute and ensure that Mr. Hissène Habré is tried, on behalf of Africa, by a Senegalese court with guarantees for a fair trial — have acknowledged that impunity is no longer allowed under international law, irrespective of the status of the individual and, in particular, that Senegal is making efforts to ensure that impunity is not allowed in this particular case.

*(Signed)* Abdul G. KOROMA.

*(Signed)* Abdulqawi Ahmed YUSUF.

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