



# INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

[Website](#) [X](#) [YouTube](#) [LinkedIn](#)

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## Summary

Unofficial

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### *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*

#### Request for the indication of provisional measures

The Court begins by recalling that, on 8 June 2023, Canada and the Kingdom of the Netherlands filed in the Registry of the Court an Application instituting proceedings against the Syrian Arab Republic concerning alleged violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the “Convention against Torture” or the “Convention”), and that this Application was accompanied by a request for the Court to indicate the following provisional measures:

- “(a) Syria shall immediately take effective measures to cease and prevent all acts that amount to or contribute to torture and other cruel, inhuman or degrading treatment or punishment;
- (b) In light of the greatly enhanced risk for detainees of being subjected to torture and other cruel, inhuman or degrading treatment or punishment, Syria shall immediately:
- (i) cease arbitrary detention, and release all persons who are arbitrarily or unlawfully detained;
  - (ii) cease all forms of incommunicado detention;
  - (iii) allow access to all of its official and unofficial places of detention by independent monitoring mechanisms and medical personnel, and allow contact and visitations between detainees and their families and legal counsel; and
  - (iv) take urgent measures to improve the conditions of all of its official and unofficial detention facilities to ensure all detainees are treated with humanity and with respect for the inherent dignity of the human person in accordance with international standards;
- (c) Syria shall not destroy or render inaccessible any evidence related to the Application, including, without limitation, by destroying or rendering inaccessible medical or other records of injuries sustained as a result of torture or other cruel, inhuman or degrading treatment or punishment or the remains of any person who

was a victim of torture or other cruel, inhuman or degrading treatment or punishment;

- (d) Syria shall safeguard any information concerning the cause of death of any detainee who died while in detention or while hospitalised, including forensic examination of the human remains and places of burial, as well as afford the next of kin of any person who died as a result of torture or other cruel, inhuman or degrading treatment or punishment, following arrest, hospitalisation or detention with a death certificate, stating the true cause of death;
- (e) Syria shall disclose the location of the burial sites of persons who died as a result of torture or other cruel, inhuman or degrading treatment or punishment following arrest, hospitalisation or detention, to the next of kin;
- (f) Syria shall not take any action, and shall ensure that no action is taken, which may aggravate or extend the existing dispute that is the subject of the Application, or render it more difficult to resolve; and
- (g) Syria shall provide a report to the Court on all measures taken to give effect to its Order for provisional measures, beginning no later than six months from its issuance and every six months thereafter pending the resolution of the dispute.”

The Court mentions the fact that Syria informed it, by a letter dated 9 October 2023, that it had decided not to participate in the hearings due to open on 10 October 2023. The Court notes, however, that, by a letter dated 10 October 2023, the chargé d'affaires of the Embassy of Syria in Brussels communicated to the Court the position of his Government regarding the request for the indication of provisional measures submitted by Canada and the Netherlands. The Court also notes that, by a letter dated 13 October 2023, Syria informed it of the appointment of two Agents for the purposes of the case.

The Court regrets the decision taken by Syria not to participate in the oral proceedings on the request for the indication of provisional measures and recalls in this regard that the non-appearance of a party has a negative impact on the sound administration of justice, as it deprives the Court of assistance that a party could have provided to it. Nevertheless, the Court must proceed to discharge its judicial function at any phase of the case.

The Court notes that, though formally absent from the proceedings at a particular stage or at all stages of the case, non-appearing parties sometimes submit to the Court letters and documents by means not contemplated by its Rules. It being valuable for it to know the views of both parties in whatever form those views may have been expressed, the Court states that it will take account of the letter communicated by Syria, to the extent that the Court finds this appropriate in discharging its duties. Finally, the Court emphasizes that the non-appearance of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its decision.

## **I. PRIMA FACIE JURISDICTION (PARAS. 20-47)**

### **1. General observations (paras. 20-23)**

The Court recalls that, in accordance with its jurisprudence, it has the power to indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded. However, it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, the Applicant States seek to found the Court's jurisdiction on Article 36, paragraph 1, of its Statute and on

Article 30, paragraph 1, of the Convention against Torture. The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case.

The Court notes that Canada, the Netherlands and Syria are all parties to the Convention against Torture and that none of the Parties has entered a reservation to Article 30 of the Convention.

## **2. Existence of a dispute relating to the interpretation or application of the Convention against Torture (paras. 24-33)**

The Court recalls that Article 30, paragraph 1, of the Convention against Torture makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. Since the Applicant States have invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether it appears that the acts complained of are capable of falling within the scope of that convention *ratione materiae*.

The Court recalls that, for the purposes of determining whether there was a dispute between the parties at the time of the filing of an application, it takes into account in particular any statements or documents exchanged between them, as well as any exchanges made in multilateral settings.

The Court then examines the statements made by the Parties on a bilateral basis. It notes in particular that the Netherlands and Canada each sent a diplomatic Note to Syria, dated 18 September 2020 and 3 March 2021 respectively, in which they alleged that Syria had failed to fulfil its obligations under the Convention against Torture. On 21 April 2021, the Applicants subsequently sent their first joint diplomatic Note, in which they recalled, *inter alia*, these individual diplomatic Notes. In a diplomatic Note dated 30 September 2021, Syria acknowledged that the Applicants had sent the "Statement of Facts" and "Statement of Law" on 9 August 2021 and stated that it rejected "in toto" the "formulation" by the Applicants which referred to its "international responsibility for breaches of its obligations under the Convention against Torture". The Court notes that the exchanges between the Parties prior to the filing of the Application indicate that they differ as to whether certain acts or omissions allegedly committed by Syria gave rise to violations of the latter's obligations under the Convention against Torture.

The Court recalls that, for the purposes of the present proceedings, it is not required to ascertain whether any alleged violations of Syria's obligations under the Convention against Torture have occurred, a finding that could only be made as part of the examination of the merits of the case. At the current stage, the Court's task is to establish whether the acts and omissions complained of by the Applicants appear to be capable of falling within the provisions of the Convention. The Court notes that, according to the Applicant States, Syria has violated its obligations under the Convention in various ways, namely through enforced disappearances, abhorrent treatment of detainees, inhumane conditions of detention, other acts committed in order to coerce, punish or terrorize the civilian population, and sexual and gender-based violence. In the Court's view, the acts and omissions alleged by the Applicants to have been committed by Syria appear to be capable of falling within the provisions of the Convention.

The Court therefore finds that there is a sufficient basis to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation or application of the Convention against Torture.

## **3. Procedural preconditions (paras. 34-46)**

The Court further recalls that Article 30, paragraph 1, of the Convention against Torture sets out procedural preconditions which must be met before a dispute may be referred to the Court. First,

the parties must attempt to settle any dispute “through negotiation”. Secondly, any such dispute, if it cannot be settled through negotiation, must, “at the request of one of [the parties], be submitted to arbitration”. Finally, the provision stipulates that the dispute may be submitted to the Court only if, “within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration”.

With regard to the first precondition, the Court states that, at this stage of the proceedings, it will examine whether it appears, *prima facie*, that the Applicants genuinely attempted to engage in negotiations with Syria with a view to resolving their dispute, and whether they pursued these negotiations as far as possible.

The Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or are deadlocked. In order to meet this precondition, the subject-matter of the negotiations must relate to the subject-matter of the dispute, which, in turn, must concern the substantive obligations contained in the treaty in question.

In this regard, the Court notes that, since the allegations that Syria violated its obligations under the Convention against Torture were formally raised by the Netherlands and Canada, the Parties have exchanged a series of diplomatic Notes over two years, and held in-person meetings on 26 April 2022 and on 5 and 6 October 2022 in an effort to negotiate a resolution of the dispute. However, it appears to the Court, from the content of the diplomatic Notes and the available information regarding the in-person meetings, that the positions of the Parties had not evolved and no substantive progress had been made in resolving their dispute during the period before the joint diplomatic Note of 7 November 2022, in which Canada and the Netherlands requested that the dispute be submitted to arbitration.

It therefore appears to the Court that the negotiation precondition set forth in Article 30, paragraph 1, of the Convention had been met as of the date of the filing of the Application.

Regarding the arbitration precondition contained in Article 30, paragraph 1, of the Convention against Torture, the Court considers that the diplomatic Note dated 7 November 2022 contains an explicit offer by the Applicant States to Syria to have recourse to arbitration in order to settle the dispute over alleged violations by Syria of that Convention. The Court further observes that Syria does not appear to have acknowledged or otherwise responded to this offer, and that more than six months have passed since it was made. It therefore appears to the Court that the procedural precondition relating to arbitration in Article 30, paragraph 1, of the Convention had been met as of the date of the filing of the Application.

Recalling that, at this stage of the proceedings, the Court need only decide whether, *prima facie*, it has jurisdiction, the Court finds that the procedural preconditions under Article 30, paragraph 1, of the Convention against Torture appear to have been met.

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The Court then turns to Syria’s argument that the Court has no jurisdiction to entertain the Application. According to Syria, the Applicants cannot institute proceedings before the Court on the basis of Article 30 of the Convention without first having submitted a communication to the Committee against Torture under Article 21, which they have not done. Syria also argues that it has made a declaration under Article 28, paragraph 1, of the Convention that it does not recognize the

competence of the Committee to take action under Article 20 and has never recognized its competence to receive and consider communications under Article 21 of the Convention.

In this regard, the Court observes that Article 30, paragraph 1, of the Convention against Torture does not appear to indicate that the Court's jurisdiction under this provision is subject to the procedures of the Committee against Torture. It moreover appears to the Court that the fact that Syria has declared that it does not recognize the competence of the Committee to act under Article 20 and has never recognized the Committee's competence to receive and consider communications under Article 21, has no bearing on the Court's jurisdiction under Article 30, paragraph 1, of the Convention.

#### **4. Conclusion as to prima facie jurisdiction (para. 47)**

In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article 30, paragraph 1, of the Convention against Torture to entertain the case to the extent that the dispute between the Parties relates to the interpretation or application of the Convention.

### **II. STANDING OF CANADA AND THE NETHERLANDS (PARAS. 48-51)**

The Court next examines the question of the standing of Canada and the Netherlands. It notes that, according to the Applicants, Syria's obligations under the Convention against Torture possess an *erga omnes partes* nature, and are thus owed to the Applicants, and indeed to all States parties to the Convention. The Court further notes that, in Syria's view, the obligations arising from the Convention against Torture are individual obligations of States and that the Applicants do not have the right to raise allegations about its responsibility under the Convention because they have not established that they have suffered any damage.

The Court begins by recalling that in the Judgment that it rendered on 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, it observed that the States parties to the Convention against Torture have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The Court also recalls that this common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. These obligations may thus be defined as obligations *erga omnes partes* in the sense that each State party has an interest in compliance with them in any given case. The Court goes on to state that it follows that any State party to the Convention against Torture may invoke the responsibility of another State party with a view to having the Court determine whether the State failed to comply with its obligations *erga omnes partes*, and to bring that failure to an end. The Court concludes that the Applicants have, prima facie, standing to submit to it the dispute with Syria concerning alleged violations of obligations under the Convention against Torture.

### **III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED (PARAS. 52-63)**

With regard to the rights whose protection is sought, the Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court notes that, in the present case, the Applicant States refer to their rights to secure compliance by Syria with its obligations under the Convention against Torture, in particular the obligations under Articles 2, 7, 10, 11, 12, 13, 15 and 16. They further submit that protecting their rights to seek Syria's compliance will also protect persons in Syria who, they argue, are currently, or are at imminent risk of, being subjected to torture and other cruel, inhuman or degrading treatment or punishment.

The Court observes that the Convention against Torture imposes a number of obligations on States parties with regard to the prevention and punishment of acts of torture and other acts of cruel, inhuman or degrading treatment or punishment. It recalls having previously held that there is a correlation between respect for individual rights enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination, the obligations of States parties thereto and the right of States parties to seek compliance therewith. In the view of the Court, the same applies to the Convention against Torture. It considers that the Applicants have a plausible right to compliance by Syria with those obligations under the Convention which have an *erga omnes partes* character. Accordingly, the Court is of the opinion that the rights claimed by the Applicant States and for which they are seeking protection are plausible.

The Court then turns to the condition of the link between the rights claimed by Canada and the Netherlands and the provisional measures requested. In this regard, it considers that, by their very nature, some of the provisional measures sought by the Applicant States are aimed at preserving the rights they assert on the basis of the Convention against Torture in the present proceedings. This is the case, in particular, with regard to the requested measures requiring Syria to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment and to preserve evidence relating to any such acts.

The Court concludes that a link exists between the rights claimed by the Applicant States and some of the requested provisional measures.

#### **IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY (PARAS. 64-75)**

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision.

The Court considers that individuals subject to torture and other acts of cruel, inhuman or degrading treatment or punishment, which entail bodily harm and psychological distress, are at serious risk of irreparable prejudice. It observes that, in view of the relationship between the rights of such individuals and the rights of States parties to the Convention, it follows that there is also a risk of irreparable prejudice to the rights asserted by the Applicants.

In the present proceedings, the Court observes that the information placed before it includes various reports drawn up by the Independent International Commission of Inquiry on the Syrian Arab Republic, which was established by a resolution of the Human Rights Council in 2011. It notes that the Commission has established in several reports the systematic aspect of torture and other acts of cruel, inhuman or degrading treatment or punishment in detention facilities operated by the Syrian authorities, leading to extensive deaths in detention. The Court also notes that, in resolution 77/230 of 15 December 2022, the General Assembly “[d]eplor[ed] and condemn[ed] in the strongest terms the continued widespread and systematic gross violations and abuses of human rights and fundamental freedoms” in Syria, including “torture, systematic sexual and gender-based violence, including rape in detention, and ill-treatment, other violations and abuses of human rights, including

those of women and children”. The Court also takes note, *inter alia*, of the report of the Commission of Inquiry dated 10 July 2023, in which the Commission documented continuing torture and other acts of cruel, inhuman or degrading treatment or punishment in government detention facilities. The Court observes that, in its recent report of 14 August 2023, the Commission of Inquiry indicated that it “has reasonable grounds to believe that the Government continued to commit acts of torture and ill-treatment”.

The Court also notes that, in several reports, the Commission of Inquiry addressed sexual and gender-based violence and found that, both inside and outside of detention, sexual and gender-based violence against women, girls, men and boys has been a persistent issue in Syria since the uprising in 2011.

In light of the above, the Court concludes there is a real and imminent risk of irreparable prejudice to the rights invoked by the Applicant States before the Court gives its final decision.

#### **V. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 76-82)**

The Court concludes from all of the above considerations that the conditions for the indication of provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by the Applicant States. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested.

In the present case, having considered the terms of the provisional measures requested by the Applicant States and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested. The Court considers that, pending the final decision in the case, Syria must, in accordance with its obligations under the Convention against Torture, take all measures within its power to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment and ensure that its officials, as well as any organizations or persons which may be subject to its control, direction or influence, do not commit any acts of torture or other acts of cruel, inhuman or degrading treatment or punishment. The Court is further of the view that Syria must take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of the Convention against Torture, including medical and forensic reports or other records of injuries and deaths.

#### **OPERATIVE CLAUSE (para. 83)**

The full text of the operative clause of the Order reads as follows:

“For these reasons,

THE COURT,

*Indicates* the following provisional measures:

(1) By thirteen votes to two,

The Syrian Arab Republic shall, in accordance with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, take all measures within its power to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment and ensure that its officials, as well as any organizations or persons which may be subject to its control, direction or influence, do not commit any acts of torture or other acts of cruel, inhuman or degrading treatment or punishment;

IN FAVOUR: *President Donoghue; Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant;*

AGAINST: *Vice-President Gevorgian; Judge Xue;*

(2) By thirteen votes to two,

The Syrian Arab Republic shall take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

IN FAVOUR: *President Donoghue; Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant;*

AGAINST: *Vice-President Gevorgian; Judge Xue.”*

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Vice-President Gevorgian appends a dissenting opinion to the Order of the Court; Judge Xue appends a declaration to the Order of the Court.

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### **Dissenting opinion of Vice-President Gevorgian**

Vice-President Gevorgian voted against the provisional measures indicated by the Court in today's Order. In his dissenting opinion, he explains that his vote is based on the Court's lack of *prima facie* jurisdiction over the Application filed by Canada and the Netherlands.

The Vice-President emphasizes that the Court must satisfy itself that all the other methods of settling the dispute set out in Article 30 (1) of the Convention against Torture have been exhausted before it can exercise its jurisdiction. In particular, the parties must have attempted, and failed, to settle the said dispute through negotiations. In the Vice-President's view, Canada and the Netherlands have not made a genuine attempt to negotiate with a view to settling the dispute, nor have they shown that there was "no reasonable probability . . . that further negotiations would lead to a settlement". The conduct and public statements of the Applicants reveal that their goal has always been to bring the case before the Court and that they never intended to engage in meaningful negotiations to solve their dispute with the Syrian Arab Republic. Therefore, the Vice-President concludes that the negotiation requirement of Article 30 (1) has not been fulfilled.

### **Declaration of Judge Xue**

1. With much regret for departing from the majority, Judge Xue explains the reasons for her vote.

2. At the outset, she makes clear that her vote does not mean that she has any reservations with regard to the measures indicated. She voted against the Order because of her consistent position on the question of standing in such so-called *actio popularis* cases.

3. In the present case, there is no jurisdictional link whatsoever between the Parties but "a common interest" claimed by Canada and the Netherlands in Syria's compliance with the obligations of the Convention against Torture. Judge Xue does not think this gives the two States the right to institute the current proceedings. In the individual opinions she appended to the Judgments in the *Belgium v. Senegal* and *The Gambia v. Myanmar* cases, she elaborated, to a great extent, the reasons for her position on the question of standing. In the present case, she highlights a few points that she considers to be imperative to the Court's integrity.

4. First, conferral of such standing is not consistent with the principle of consent. Whether the States parties accepted the jurisdiction of the Court for *actio popularis* cases is not determined by the Court's interpretation of Article 30 of the Convention, but by the *intention* of the States parties at the time when the Convention was negotiated and concluded. Should the jurisdiction *ratione personae* of the Court be unduly expanded, it may prompt States parties to restrict or withdraw their acceptance of the Court's jurisdiction, which is certainly not conducive to strengthening the Court's role in the peaceful settlement of international disputes.

5. Moreover, conferral of such standing, without necessary amendments to the Statute and Rules of Court, will pose challenges to the settled jurisprudence of the Court with regard to procedure, evidence and remedies. It remains to be seen to what extent such legal actions will promote the implementation of the Convention and what effect they may produce on the existing monitoring mechanisms under the Convention.

6. Lastly, conferral of such standing will likely give a policing role to the States parties in the implementation of the Convention against Torture. In the human rights field, such a role is often questioned and criticized for the selective and biased manner in which it is performed. Instead of promoting human rights and finding solutions to disputes, to allow such legal actions in the Court would likely weaken the function of the Court as a judicial organ for dispute settlement.

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