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*CR 2023/20*

**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2023**

*Public sitting*

*held on Tuesday 10 October 2023, at 10 a.m., at the Peace Palace,*

*President Donoghue, presiding,*

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

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**VERBATIM RECORD**

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**ANNÉE 2023**

*Audience publique*

*tenue le mardi 10 octobre 2023, à 10 heures, au Palais de la Paix,*

*sous la présidence de M<sup>me</sup> Donoghue, présidente,*

*en l'affaire relative à l'Application de la convention contre la torture  
et autres peines ou traitements cruels, inhumains ou dégradants  
(Canada et Pays-Bas c. République arabe syrienne)*

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**COMPTE RENDU**

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*Present:*     President Donoghue  
              Vice-President Gevorgian  
              Judges Tomka  
                      Abraham  
                      Bennouna  
                      Yusuf  
                      Xue  
                      Sebutinde  
                      Bhandari  
                      Robinson  
                      Salam  
                      Iwasawa  
                      Nolte  
                      Charlesworth  
                      Brant  
  
              Registrar Gautier

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*Présents* : M<sup>me</sup> Donoghue, présidente  
M. Gevorgian, vice-président  
MM. Tomka  
Abraham  
Bennouna  
Yusuf  
M<sup>mes</sup> Xue  
Sebutinde  
MM. Bhandari  
Robinson  
Salam  
Iwasawa  
Nolte  
M<sup>me</sup> Charlesworth  
M. Brant, juges  
M. Gautier, greffier

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***The Government of Canada is represented by:***

Mr Alan H. Kessel, Assistant Deputy Minister, Legal Adviser, Global Affairs Canada,

*as Agent;*

Ms Teresa Crockett, Deputy Director, Accountability, Human Rights and United Nations Law Division, Global Affairs Canada,

*as Counsel and Advocate;*

Ms Cyndy Nelson, Global Affairs Canada,

*as Counsel;*

HE Mr Hugh Adsett, Ambassador of Canada to the Kingdom of the Netherlands,

Mr Simon Collard-Wexler, Embassy of Canada in the Kingdom of the Netherlands,

Mr Kristopher Yue, Embassy of Canada in the Kingdom of the Netherlands,

*as Members of the Delegation.*

***The Government of the Kingdom of the Netherlands is represented by:***

Mr René J. M. Lefeber, Legal Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

*as Agent;*

Ms Annemarieke Künzli, Legal Counsel, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

*as Co-Agent;*

Ms Marina Brillman, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Ms Else Riep, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Mr Floris Tan, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Ms Lotte Kagenaar, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

*as Counsel;*

Mr Gijs Gerlag, Special Envoy for Syria, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Ms Wendela Huisman, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Mr Mink Lambers, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Mr Hidde Richardson, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

*as Advisers.*

***Le Gouvernement du Canada est représenté par :***

M. Alan H. Kessel, sous-ministre adjoint et juriste, ministère des affaires mondiales du Canada,

*comme agent ;*

M<sup>me</sup> Teresa Crockett, directrice adjointe, direction de la responsabilisation, des droits de la personne et du droit onusien, ministère des affaires mondiales du Canada,

*comme conseil et avocate ;*

M<sup>me</sup> Cyndy Nelson, ministère des affaires mondiales du Canada,

*comme conseil ;*

S. Exc. M. Hugh Adsett, ambassadeur du Canada auprès du Royaume des Pays-Bas,

M. Simon Collard-Wexler, ambassadeur du Canada au Royaume des Pays-Bas,

M. Kristopher Yue, ambassadeur du Canada au Royaume des Pays-Bas,

*comme membres de la délégation.*

***Le Gouvernement du Royaume des Pays-Bas est représenté par :***

M. René J.M. Lefeber, conseiller juridique, ministère des affaires étrangères du Royaume des Pays-Bas,

*comme agent ;*

M<sup>me</sup> Annemarieke Künzli, conseil juridique, ministère des affaires étrangères du Royaume des Pays-Bas,

*comme coagente ;*

M<sup>me</sup> Marina Brillman, ministère des affaires étrangères du Royaume des Pays-Bas,

M<sup>me</sup> Else Riep, ministère des affaires étrangères du Royaume des Pays-Bas,

M. Floris Tan, ministère des affaires étrangères du Royaume des Pays-Bas,

M<sup>me</sup> Lotte Kagenaar, ministère des affaires étrangères du Royaume des Pays-Bas,

*comme conseils ;*

M. Gijs Gerlag, envoyé spécial pour la Syrie, ministère des affaires étrangères du Royaume des Pays-Bas,

M<sup>me</sup> Wendela Huisman, ministère des affaires étrangères du Royaume des Pays-Bas,

M. Mink Lambers, ministère des affaires étrangères du Royaume des Pays-Bas,

M. Hidde Richardson, ministère des affaires étrangères du Royaume des Pays-Bas,

*comme conseillers.*

The PRESIDENT: Please be seated. The sitting is open.

The Court meets this morning, under Article 74, paragraph 3, of the Rules of Court, to hear the oral argument of Canada and the Netherlands on their Request for the indication of provisional measures submitted in the case concerning *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*.

Immediately after the Application and the Request for indication of provisional measures were filed, the Registrar transmitted original copies thereof to the Government of the Syrian Arab Republic. The Court regrets the non-appearance of the Syrian Arab Republic in these oral proceedings.

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I shall now recall the principal steps of the procedure in the present case.

On 8 June 2023, the Governments of Canada and the Kingdom of the Netherlands filed in the Registry of the Court a joint 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. I shall refer to this Convention as the “Convention against Torture”. To found the jurisdiction of the Court, the Applicants invoke Article 36, paragraph 1, of the Convention against Torture. Together with their joint Application, Canada and the Netherlands also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court. According to the Applicants, the purpose of their Request is to “preserve and protect the rights owed to them under the Convention against Torture, which Syria continues to violate, and protect the lives and physical and mental integrity of individuals within Syria who are currently, or are at risk of, being subjected to torture and other cruel, inhuman or degrading treatment or punishment”.

The Registrar will now read out the passage from the Request specifying the provisional measures which the Governments of Canada and the Netherlands are asking the Court to indicate. You have the floor, Mr Registrar.

THE REGISTRAR: Thank you Madam President.

“[T]he Applicants, as States Parties to the Convention against Torture, respectfully request that the Court, as a matter of urgency, indicate the following provisional measures, which are directly linked to the rights that form the subject matter of the dispute, pending its determination of the case on the merits:

- (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 PRESIDENT: I thank the Registrar. As already mentioned, original copies of the Application and the Request were immediately transmitted to the Government of the Syrian Arab Republic by the Registrar. He also notified the Secretary-General of the United Nations.

According to Article 74, paragraph 1, of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases. Paragraph 2 of the same Article states that the Court shall proceed to a decision on the request as a matter of urgency. This imperative must be, however, balanced with the need to fix the date of oral proceedings in such a way as to afford the parties an opportunity of being represented at the hearings. The Court had decided that these oral proceedings would open on 19 July 2023. Following a request from the Syrian Arab Republic for a postponement and having ascertained the views of the Applicant States on that request, the Parties were informed that the Court had decided to postpone the date of the opening of the hearings to Tuesday 10 October 2023.

By a letter dated 9 October 2023, the chargé d'affaires of the Embassy of the Syrian Arab Republic in Brussels informed the Registrar of the Court that the Syrian Arab Republic would not participate in the present oral proceedings.

I would now like to welcome the delegations of Canada and the Netherlands, and I note the presence of the Agents and counsel of the Applicants.

For the purpose of this single round of oral argument, Canada and the Netherlands have available to them a two-hour sitting. In this sitting, the Applicants may, if required, avail themselves of a short extension beyond 12 noon today, in view of the time taken up by these introductory remarks.

Before giving the floor to the Agents of Canada and the Netherlands, I wish to call attention to Practice Direction XI, which states as follows:

“In the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

I now give the floor to the Agent of the Netherlands, Mr René Lefeber. You have the floor, Sir.



Mr LEFEBER:

### I. INTRODUCTION ON BEHALF OF THE APPLICANTS

1. Madam President, distinguished Members of the Court, it is an honour to address you today as Agent of the Kingdom of the Netherlands.

2. The circumstances that have brought Canada and the Netherlands before the Court — namely the torture and other cruel, inhuman or degrading treatment or punishment of tens of thousands of persons in Syria — are nothing short of tragic.

3. For well over a decade, the international community has repeatedly called out Syria for its flagrant breaches of international law, including its endemic use of torture and other ill-treatment. Syria has consistently denied wrongdoing despite irrefutable evidence demonstrating the sheer magnitude of its violations.

4. It was these compelling circumstances which led the Netherlands and Canada to invoke Syria's responsibility for breaches of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment<sup>1</sup>. Over the past three years, Canada and the Netherlands have pursued resolution of their dispute with Syria in accordance with the Convention, in particular through good-faith attempts at negotiation.

5. Throughout this period, Syria has actively continued to torture and mistreat its people<sup>2</sup>. The genuine attempts by the Applicants to resolve the dispute were met with continued denials by Syria that it had violated its obligations under the Convention.

6. Since Canada and the Netherlands instituted proceedings before the Court and requested the indication of provisional measures on 8 June 2023, the number of victims of torture and other ill-treatment has continued to rise. The Independent International Commission of Inquiry on the Syrian Arab Republic, which was established by the United Nations Human Rights Council in 2011 to

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<sup>1</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, *Treaty Series (UNTS)*, Vol. 1465, p. 85, entered into force 26 June 1987 (hereinafter "Convention against Torture"), Application of Canada and the Netherlands (ACNL), Ann.1.1, judges' folder, tab 1.

<sup>2</sup> UN Human Rights Council, "*No End in Sight*": *Torture and ill-treatment in the Syrian Arab Republic 2020-2023*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 53rd Sess., UN doc. A/HRC/53/CRP.5 (2023) (hereinafter "COI, *No End in Sight*"), online: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coisyria/A-HRC-53-CRP5-Syria-Torture.pdf>, judges' folder, tab 2.

investigate human rights violations in Syria, aptly captured the ongoing nature of Syria's violations in the title of its 10 July 2023 report: *No End in Sight*<sup>3</sup>.

7. The persistent and recurring practice of torture in Syria only serves to underscore the pressing need for the Court to indicate provisional measures. The manifest threats to life and bodily and psychological integrity mean that every day counts. Persons in Syria who are currently detained, or at risk of being detained, cannot afford to wait any longer.

8. Madam President, distinguished Members of the Court, the prohibition against torture is a peremptory norm of international law. This signifies that we, as the international community, have determined that torture is unacceptable and unjustifiable. Like genocide and slavery, torture is recognized as one of the greatest evils that human beings can inflict upon one another.

9. Torture is an abhorrent denial of an individual's inherent dignity. Torturers deliberately deploy brutality to dominate their victims and maximize feelings of powerlessness and helplessness. In so doing, they perpetrate an egregious assault on the physical and psychological integrity of a human being.

10. The consequences of torture go far beyond the extreme physical and mental suffering inflicted on individual victims. The traumatizing effects are also experienced by their families and can last generations. Practices of widespread, pervasive and entrenched torture have a profound impact due to the fundamental breach of public trust by the State. Torture erodes the very fabric of communities.

11. In the words of United Nations Secretary-General António Guterres on the International Day in Support of Victims of Torture:

“Torture diminishes everyone and everything that it touches, including torturers and the systems and States where it occurs. Torturers must never be allowed to get away with their crimes, and systems that enable torture should be dismantled or transformed.”<sup>4</sup>

12. For the purposes of today's hearing — which focuses on our request for the indication of provisional measures and does not seek to establish the full facts of our case — we have elected not

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<sup>3</sup> *Ibid.*

<sup>4</sup> UN Secretary-General, Press Release, “Secretary-General Calls for Fresh Support to Voluntary Fund Assisting Victims of Torture, in Message on International Day”, 26 June 2020, SG/SM/20143, online: <https://press.un.org/en/2020/sgsm20143.doc.htm>, judges' folder, tab 3.

to show you images of victims of torture. Out of context, such imagery could unnecessarily sensationalize our request for provisional measures.

13. However, we would invite you to take a moment to visualize the horrific acts of torture and other ill-treatment that any Syrian could find themselves experiencing daily. Syria uses numerous standardized methods of torture across its facilities. One of these is the practice of *dulab*, which involves folding detainees into a car tyre, followed by a severe beating<sup>5</sup>. Imagine yourself, or a loved one, being contorted in a car tyre and beaten. For hours. It is for the sake of the countless Syrians that will find themselves victims of these practices that we are asking for the indication of provisional measures.

### **Circumstances requiring the indication of provisional measures**

14. Madam President, as set out in our Application instituting these proceedings, Syria has committed innumerable violations of the Convention against Torture on a mass scale since at least 2011. These violations, which began with Syria's violent repression of civilian demonstrations, have persisted during the past 12 years of conflict in Syria and continue to this day.

15. Detainees in Syria are subjected to abhorrent treatment and deplorable living conditions. One sixty year old man, detained for a three-month period in multiple detention centres in the Tartous Governorate, described conditions in a military intelligence branch facility as follows:

“We were 120 in a cell of 6x8m. We were all in our underwear because of the heat, sitting in lines of ten inside the cell. At night, as one after the other started to fall asleep, the bodies became like a spider net of body parts. We just slept on each other.”<sup>6</sup>

16. He added that his cellmates were tortured and returned to the cell untreated:

“Every day, cellmates were taken for 30 or 45 minutes of interrogation and came back with their faces bleeding, barely able to walk, and with open wounds that remained untreated and became infected.”<sup>7</sup>

17. Tens of thousands of Syrians have been subjected to enforced disappearance and incommunicado detention, with family members left uncertain as to the fate and whereabouts of their loved ones. In one case, documented by the Commission of Inquiry,

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<sup>5</sup> UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 46th Sess., UN doc. A/HRC/46/55 (2021) (hereinafter “COI Report A/HRC/46/55”), para. 20 (ACNL, Ann. 4).

<sup>6</sup> United Nations Office of the High Commissioner for Human Rights, *Open Wounds – Torture and ill-treatment in the Syrian Arab Republic*, United Nations, Human Rights (14 Apr. 2014), p. 5 (ACNL, Ann. 38), judges' folder, tab 4.

<sup>7</sup> *Ibid.*

“[t]he brother of a former Syrian Air Defence Force officer reported that after he decided to defect, in December 2011, his brother called his family expressing serious fears of being arrested or punished. This phone call was the last anyone heard of him.”<sup>8</sup>

18. Men, women, boys and girls have all been victims of sexual and gender-based violence used as a form of torture and other ill-treatment. These horrific acts not only involve rape but include the humiliation of individuals to inflict psychological harm. The Commission of Inquiry documented one incident as follows:

“[T]wo women detained at the Hama State Security Branch were raped next to one another by two officers, one of whom was a Lieutenant Colonel, on ten consecutive days. On one occasion, the same two officers raped the women in front of two naked male detainees, whose hands and feet were tied.”<sup>9</sup>

19. These are but a few illustrative examples of a practice of torture and other ill-treatment that is entrenched throughout the system of detention in Syria. This extensive network involves the security and intelligence apparatus including police and military forces, as well as elements of the judicial and healthcare systems. Torture and other ill-treatment are systematically used to obtain information and extract confessions, as well as to intimidate, coerce and punish persons perceived to be disloyal to the Government.

20. The institutionalized nature of the practice is evident in the sheer number of detainees who have been subjected to torture and other ill-treatment across Syria’s extensive network of detention facilities. The striking consistency of the methods of torture — no matter the location or government detaining authority — further speaks to the high levels of co-ordination and control. In view of the countrywide patterns of recurring torture and other ill-treatment, there can be no question that this practice extends from the highest levels of the Syrian Government.

21. As a result of Syria’s actions, victims have endured, and continue to endure, unimaginable physical and mental pain and suffering. The effects of torture and other ill-treatment are pervasive, long-lasting and, frequently, irreversible. Tens of thousands of people have died, or are presumed dead, because of their treatment within Syria’s detention apparatus.

22. The evidence of Syria’s widespread violations of the Convention against Torture is significant and has been methodically collected and documented by bodies established within the

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<sup>8</sup> COI Conference Room Paper, *Without a trace: enforced disappearances in Syria*, 19 Dec. 2013 (hereinafter “COI, *Without a Trace*”), para. 40 (ACNL, Ann. 49), judges’ folder, tab 5.

<sup>9</sup> UN Human Rights Council, *“I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic*, 37th Sess., UN doc. A/HRC/37/CRP.3 (2018), para. 39 (ACNL, Ann. 45), judges’ folder, tab 6.

United Nations system and other reputable international and non-governmental organizations. Yet, Syria has consistently denied responsibility. Instead, Syria continues to commit torture and other ill-treatment, and fails to take effective, ongoing measures to prevent and punish its occurrence. Rather than carrying out prompt and impartial investigations of allegations of torture and other ill-treatment, and taking steps to prosecute those responsible, Syria conceals evidence of wrongdoing and grants *de facto* immunity to security and intelligence personnel.

23. The Commission of Inquiry concluded in its 11 March 2021 report documenting a decade of detention in Syria that:

“The sheer volume, scale and consistency of government policies and acts that the Commission has found to amount to crimes against humanity have continued unabated for nearly 10 years, *without any sign that the Government intends to discontinue them.*”<sup>10</sup>

24. And indeed, there truly does not seem to be an end in sight to Syria’s abhorrent practices. The Commission of Inquiry has issued two reports subsequent to the Applicants’ request for the indication of provisional measures. In its most recent report, of 14 August 2023, the Commission maintained that Syria has

“continued to commit acts of torture and ill-treatment, including practices causing death in detention, arbitrary detention, including due to consistent violations of the rights to fair trial, and incommunicado detention and enforced disappearances”<sup>11</sup>.

25. Madam President, Canada and the Netherlands did not come to the decision to invoke Syria’s responsibility for breaches of the Convention against Torture lightly. Yet, when confronted with Syria’s gross and systematic failure to fulfil its obligations regarding the prohibition against torture and other ill-treatment, as well as the recognized link between impunity for such acts and their recurring commission, we were compelled to act.

26. We did so as States parties to the Convention against Torture, which all share a common interest to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world — the very object and purpose of the Convention.

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<sup>10</sup> COI Report A/HRC/46/55, *supra* note 5, para. 102 (ACNL, Ann. 4), judges’ folder, tab 7, emphasis added.

<sup>11</sup> UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 54th Sess., UN doc. A/HRC/54/58 (2023) (hereinafter “COI Report A/HRC/54/58”), para. 42, online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/155/49/PDF/G2315549.pdf?OpenElement> (judges’ folder, tab 8).

27. We did so in view of the common interest in ensuring that States parties respect the absolute prohibition of torture and take effective measures to prevent its commission, so that all persons are protected from being subjected to torture and other cruel, inhuman or degrading treatment or punishment.

28. We did so in keeping with the common interest of States parties to ensure that, when torture does occur, perpetrators are held to account, and victims can obtain redress and rehabilitation.

29. The Court's jurisprudence confirms our standing to bring this case under the Convention against Torture. In its own words, when considering obligations under the Convention against Torture in *Belgium v. Senegal*, this Court stated: "All the States parties 'have a legal interest' in the protections of the rights involved . . . These obligations may 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."<sup>12</sup>

30. Madam President, distinguished Members of the Court, today we appear before you with the immediate purpose of seeking Syria's compliance with its obligations owed *erga omnes partes*. The Applicants have requested the indication of provisional measures to address the ongoing torture and other ill-treatment in Syria, which will otherwise continue unabated. It is our sincere belief that the lives and well-being of Syrians are at stake and require the Court's urgent protection.

31. Given the importance of these proceedings, it is regrettable that Syria has chosen not to appear before the Court today. Instead, it has informed the Court that it will provide the details of its position in a separate letter. This follows Syria's extraordinary request for a three-month postponement of this hearing, which was granted by the Court for the very purpose of accommodating its presence. Syria's behaviour is emblematic of its conduct throughout the entire dispute resolution process, where it has delayed and obfuscated its position at every turn.

32. It is in this context that the Applicants have highlighted that the provisional measures we are requesting are long overdue to the victims and survivors of torture and other ill-treatment by Syria, and to their families.

33. The conditions that guide the indication of provisional measures are well established by the Court:

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<sup>12</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II) (hereinafter *Belgium v. Senegal Judgment*), p. 449, para. 68 (ACNL, Ann. 2), judges' folder, tab 9.

- First, the Court must satisfy itself that it has *prima facie* jurisdiction over the dispute.
- Second, the Court must decide whether the rights claimed by the Applicants are “at least plausible” and are linked to the measures requested.
- Third, there must be a real and imminent risk of irreparable prejudice to the rights claimed requiring the Court’s urgent intervention.

34. Ms Annemarieke Künzli, Co-Agent for the Kingdom of the Netherlands, will address the first and second conditions of the Court’s *prima facie* jurisdiction and the plausibility of the rights claimed. Ms Teresa Crockett, Counsel and Advocate for Canada, will address the third condition of irreparable prejudice and urgency. Finally, Mr Alan Kessel, Agent for Canada, will address the specific provisional measures requested and why they are acutely needed.

35. Today’s oral observations supplement the written Request for the indication of provisional measures submitted by Canada and the Netherlands on 8 June 2023. Together, they demonstrate that the indication of provisional measures is necessary to preserve the rights owed to the Applicants *erga omnes partes* under the Convention against Torture, and in turn, protect persons in Syria from torture and other ill-treatment, now and in the foreseeable future.

36. I thank you for allowing me to address you, and now with your permission, I invite you to call the Co-Agent for the Netherlands, Ms Annemarieke Künzli, to the podium. Thank you for your attention.

The PRESIDENT: I thank the Agent of the Netherlands for his statement and I now invite Ms Annemarieke Künzli to take the floor. You have the floor, Madam.

M<sup>me</sup> KÜNZLI :

## **II. COMPÉTENCE *PRIMA FACIE***

1. Madame la présidente, distingués Membres de la Cour, c’est un honneur pour moi de m’adresser à vous aujourd’hui en tant que coagente du Royaume des Pays-Bas, dans le différend qui oppose le Canada et les Pays-Bas, les demandeurs, et la République arabe syrienne, la défenderesse.

2. L’agent des Pays-Bas qui a pris la parole avant moi a exposé les circonstances impérieuses qui nous amènent devant vous aujourd’hui. Vous avez entendu que les autorités syriennes continuent

d'avoir recours à des pratiques odieuses et généralisées de torture et à d'autres peines et traitements cruels, inhumains et dégradants auprès des personnes en détention. Ces pratiques sont profondément ancrées dans le système de détention syrien. Elles se poursuivent sans qu'il n'y soit remédié et font de nouvelles victimes tous les jours.

3. Maintenant, vous entendrez pourquoi la Cour est habilitée, et a le devoir, d'indiquer des mesures conservatoires. Je démontrerai d'abord comment la compétence de la Cour est établie, puis j'aborderai la façon dont les droits invoqués par le Canada et les Pays-Bas sont plausibles et sont liés aux mesures conservatoires demandées.

4. Madame la présidente, distingués Membres de la Cour, cette Cour a compétence *prima facie* en l'espèce.

5. Le Canada et les Pays-Bas ont invoqué la compétence de la Cour aux termes du paragraphe 1 de l'article 36 du Statut de la Cour et du paragraphe 1 de l'article 30 de la convention contre la torture. Les demandeurs et la Syrie sont des États Membres des Nations Unies, donc liés par le Statut de la Cour, et sont des États parties à la convention contre la torture. Aucune Partie au différend n'a formulé de réserve aux termes du paragraphe 2 de l'article 30, qui empêcherait son application dans la présente affaire.

6. Le paragraphe 1 de l'article 30 de la convention contre la torture prévoit :

« Tout différend entre deux ou plus des États parties concernant l'interprétation ou l'application de la présente Convention qui ne peut pas être réglé par voie de négociation est soumis à l'arbitrage à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de Justice en déposant une requête conformément au Statut de la Cour. »<sup>13</sup>

7. Le Canada, les Pays-Bas et la Syrie sont liés par cette clause compromissoire. La Cour a donc compétence *ratione personae*.

8. En outre, la Cour doit s'assurer que chacune des conditions suivantes, énoncées au paragraphe 1 de l'article 30, a été remplie, *prima facie* :

- Premièrement, il existe un différend entre chacun des demandeurs et la Syrie.
- Deuxièmement, le différend n'a pas pu être réglé par la négociation.

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<sup>13</sup> Nations Unies, convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, *Recueil des traités*, vol. 1465, p. 122 (annexe à la requête 1.1) (dossier des juges, onglet n° 1).



— Troisièmement, après qu'une demande d'arbitrage a été soumise, les parties n'ont pas été en mesure de se mettre d'accord sur l'organisation de l'arbitrage dans un délai de six mois.

9. Pour l'indication de mesures conservatoires, la Cour « n'a pas besoin de s'assurer de manière définitive qu'elle a compétence quant au fond de l'affaire »<sup>14</sup>. Il lui suffit de s'assurer que « les dispositions invoquées par le demandeur semblent *prima facie* constituer une base sur laquelle sa compétence pourrait être fondée »<sup>15</sup>. Madame la présidente, distingués Membres de la Cour, c'est le cas en l'occurrence. Toutes les conditions énoncées au paragraphe 1 de l'article 30 ont été remplies.

### **Existence d'un différend entre les demandeurs et la Syrie**

10. L'existence d'un différend entre les demandeurs et la Syrie concernant l'interprétation ou l'application de la convention contre la torture est irréfutable. Comme l'indique une décision antérieure de la présente Cour, « il existe un différend entre des États lorsque leurs points de vue quant à l'exécution ou à la non-exécution de certaines obligations internationales sont nettement opposés »<sup>16</sup>.

11. Pour déterminer l'existence d'un différend, la Cour « tient notamment compte de l'ensemble des déclarations ou documents échangés entre les Parties ..., ainsi que des échanges qui ont eu lieu dans des enceintes multilatérales »<sup>17</sup>. Un désaccord « ne doi[t] pas nécessairement être énoncé[ ] *expressis verbis*. Pour déterminer l'existence d'un différend, il est possible, comme en d'autres domaines, d'établir par inférence quelle est en réalité la position ou l'attitude d'une partie. »<sup>18</sup>

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<sup>14</sup> *Allégations de génocide au titre de la convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 16 mars 2022, par. 24 [ci-après Ukraine v. Russian Federation]* (dossier des juges, onglet n° 10).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. États-Unis d'Amérique), mesures conservatoires, ordonnance du 3 octobre 2018, C.I.J. Recueil 2018 (II), p. 631, par. 28* (dossier des juges, onglet n° 11).

<sup>17</sup> *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020, p. 12, par. 26, accessible à l'adresse suivante : 178-20200123-ORD-01-00-FR.pdf (icj-cij.org)* (dossier des juges, onglet n° 12).

<sup>18</sup> *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998, p. 315, par. 89, accessible à l'adresse suivante : 094-19980611-JUD-01-00-FR.pdf (icj-cij.org)* (dossier des juges, onglet n° 13).

12. Le 18 septembre 2020, les Pays-Bas ont officiellement informé la Syrie du différend qui les opposait et demandé la tenue de négociations au titre du paragraphe 1 de l'article 30 de la convention contre la torture, relativement au non-respect par la Syrie des dispositions de cette dernière<sup>19</sup>. Les Pays-Bas ont annoncé publiquement qu'ils avaient pris cette mesure<sup>20</sup> et, le lendemain, la Syrie a publiquement dénoncé les actions des Pays-Bas<sup>21</sup>.

13. Le 3 mars 2021, le Canada a présenté une demande similaire de négociations aux termes du paragraphe 1 de l'article 30 de la convention contre la torture, « à la lumière du différend de longue date entre le Gouvernement du Canada et la République arabe syrienne »<sup>22</sup>. Cette demande était également accompagnée d'une annonce publique<sup>23</sup>. Le 12 mars 2021, les demandeurs ont annoncé leur intention commune d'amener la Syrie à répondre de ces violations<sup>24</sup>. Les notes verbales envoyées par le Canada et les Pays-Bas énonçaient clairement le différend concernant la responsabilité de la Syrie de s'acquitter de ses obligations aux termes de la convention contre la torture.

14. En effet, depuis au moins 2011, le Canada et les Pays-Bas ainsi qu'une grande partie de la communauté internationale n'ont cessé d'exprimer leur profonde préoccupation concernant la situation des droits de la personne en Syrie et ont appelé à plusieurs reprises la Syrie à respecter ses obligations internationales en matière de droits de la personne.

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<sup>19</sup> Note verbale de la mission permanente du Royaume des Pays-Bas à Genève, en Suisse, à la mission permanente de la République arabe syrienne à Genève, en Suisse, 18 septembre 2020 (annexe 3 à la requête, NV 1).

<sup>20</sup> Gouvernement des Pays-Bas, communiqué, « The Netherlands holds Syria responsible for gross human rights violations », 18 septembre 2020, accessible à l'adresse suivante : [www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations](http://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations) (annexe 12 à la requête).

<sup>21</sup> L'Agence arabe syrienne d'informations, « Foreign Ministry: Government of the Netherlands is the last one who has the right to talk about the Human rights », le 19 septembre 2020, accessible à l'adresse suivante : <https://sana.sy/en/?p=203611> (annexe 13 à la requête).

<sup>22</sup> Note verbale de la mission permanente du Canada auprès des Nations Unies et de l'Organisation mondiale du commerce à Genève à la mission permanente de la République arabe syrienne auprès des Nations Unies à Genève, 3 mars 2021 (annexe 3 à la requête, NV 6).

<sup>23</sup> Gouvernement du Canada, communiqué de presse, « Le ministre des Affaires étrangères prend des mesures contre les violations des droits de la personne en Syrie », 4 mars 2021, accessible à l'adresse suivante : <https://www.canada.ca/fr/affaires-mondiales/nouvelles/2021/03/le-ministre-des-affaires-etrangees-prend-des-mesures-contre-les-violations-des-droits-de-la-personne-en-syrie.html> (annexe 14 à la requête).

<sup>24</sup> Gouvernement des Pays-Bas, déclaration diplomatique, « Joint statement of Canada and the Kingdom of the Netherlands regarding their cooperation in holding Syria to account », 12 mars 2021, accessible à l'adresse suivante : [www.government.nl/documents/diplomatic-statements/2021/03/12/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-their-cooperation-in-holding-syria-to-account](http://www.government.nl/documents/diplomatic-statements/2021/03/12/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-their-cooperation-in-holding-syria-to-account) (annexe 15 à la requête).

15. Dans divers contextes multilatéraux, les demandeurs ont expressément fait part de leur désaccord et de leur préoccupation à l'égard des pratiques persistantes de torture et autres peines ou traitements cruels, inhumains ou dégradants en Syrie. Chaque fois, la Syrie a soit gardé le silence, soit exprimé son désaccord.

16. Pour ne citer que deux exemples parmi tant d'autres, lorsqu'ils étaient membres du Conseil de sécurité des Nations Unies, les Pays-Bas ont abordé directement la question des détenus, des personnes disparues et de la torture en Syrie. Lors d'une réunion du Conseil en décembre 2018 sur « la situation au Moyen-Orient », le délégué des Pays-Bas, M. Van Oosterom, a abordé la situation des détentions en Syrie en déclarant ce qui suit :

« [En] ce qui concerne les détenus, les personnes disparues et la torture, nous sommes extrêmement préoccupés par l'absence de progrès sur le dossier des personnes détenues. Des centaines de milliers de civils ont été arrêtés, emprisonnés et/ou ont disparu entre les mains du régime d'Assad sans avoir bénéficié d'une procédure régulière. Nous sommes très préoccupés par la situation épouvantable qui règne dans les prisons, telle que décrite dans le dernier rapport de la Commission d'enquête internationale indépendante sur la République arabe syrienne, qui a fait état de cas de torture et de violences sexuelles.

Le Haut-Commissariat des Nations Unies aux droits de l'homme et le Comité international de la Croix-Rouge doivent avoir accès à ces prisons. Nous sommes horrifiés par les avis de décès des prisonniers que le régime envoie aux membres de leur famille, et nous défendons ardemment le soutien et l'accès de la famille aux informations concernant les prisonniers. Nous appelons les parties concernées à investir dans des mesures de confiance sur la question des détenus. Le régime syrien doit entamer un processus de libération de tous les prisonniers politiques. »<sup>25</sup>

17. De la même façon, lors de l'examen périodique universel de la Syrie par le Conseil des droits de l'homme en 2016, le Canada a formulé ses recommandations à l'intention de la Syrie pour l'exhorter

« [à m]ettre immédiatement un terme à la pratique de la disparition forcée, de l'arrestation et de la détention arbitraires et du recours systémique à la torture, et s'acquitte[] des obligations qui lui incombent en tant qu'État partie à la Convention contre la torture »<sup>26</sup>.

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<sup>25</sup> Nations Unies, procès-verbal du Conseil de sécurité, 8434<sup>e</sup> séance, 20 décembre 2018, doc. S/PV.8434, p. 11 (annexe 16 à la requête) (dossier des juges, onglet n° 15).

<sup>26</sup> Nations Unies, rapport du groupe de travail sur l'examen périodique universel – République arabe syrienne, Conseil des droits de l'homme, trente-quatrième session, 27 décembre 2016, doc. A/HRC/34/5, par. 109.155 (annexe 30 à la requête) (dossier des juges, onglet n° 16).

18. Cette recommandation s'est heurtée à une fin de non-recevoir de la part de la Syrie, comme toutes celles relatives aux mauvais traitements formulées par le Canada et les Pays-Bas lors des trois examens périodiques universels antérieurs en 2012, 2016 et 2022<sup>27</sup>.

19. Depuis 2011, la Syrie a, de façon répétée et constante, refusé d'admettre toute responsabilité pour ses atteintes à la convention contre la torture. En fait, malgré des preuves claires et convaincantes du contraire, et les appels répétés de la communauté internationale pour qu'elle mette fin aux actes flagrants de torture et aux autres mauvais traitements, la Syrie continue de nier l'usage même de la torture. Dans une entrevue avec la chaîne *Russia Today-UK TV* de novembre 2019, par exemple, le président Assad a expressément nié recourir à la torture : « Nous n'avons pas d'unités de torture. Nous n'avons pas de politique de torture en Syrie ... Nous n'avons jamais cru que la torture puisse améliorer la situation d'un État, bien simplement. Alors, nous n'y avons pas recours. »<sup>28</sup>

20. Les échanges entre les Parties, qui s'étendent sur plus d'une décennie, y compris les déclarations dans des enceintes multilatérales, les déclarations publiques ainsi que les notes verbales échangées montrent clairement qu'il existe un différend entre les demandeurs et la Syrie au sujet de l'interprétation et de l'application de la convention contre la torture.

### **Attempts to settle the dispute through negotiation**

21. Madam President, distinguished Members of the Court, the Applicants have made a genuine attempt to resolve the dispute through negotiations. The concerted efforts of the Applicants to advance good-faith negotiations are well documented in the exchange of 66 Notes Verbales between the Parties over a three-year period, and with the two in-person meetings held in the United Arab Emirates in April and October 2022<sup>29</sup>.

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<sup>27</sup> Voir par exemple, Nations Unies, rapport du groupe de travail sur l'examen périodique universel – République arabe syrienne, Conseil des droits de l'homme, dix-neuvième session, 24 janvier 2012, doc. HRC/19/11, p. 25, par. 104.17, accessible à l'adresse suivante : <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/102/34/PDF/G1210234.pdf?OpenElement> (annexe 29 à la requête) ; Nations Unies, rapport du groupe de travail sur l'examen périodique universel – République arabe syrienne, Conseil des droits de l'homme, trente-quatrième session, 13 mars 2017, doc. A/HRC/34/5/Add.1, p. 8, accessible à l'adresse suivante : <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/055/86/PDF/G1705586.pdf?OpenElement> (annexe 32 à la requête).

<sup>28</sup> L'Agence arabe syrienne d'informations, « President al-Assad in an interview with Russian RT-UK TV Channel: In spite of all aggression, majority of Syrian people support their Government, Russia helps Syria as terrorism and its ideology have no borders », 11 novembre 2019, accessible à l'adresse suivante : <https://sana.sy/en/?p=178031> (dossier des juges, onglet n° 17). [Traduit de l'anglais.]

<sup>29</sup> A full record of the Notes Verbales exchanged between the Parties to the dispute may be found in ACNL, Ann. 3.

22. In an effort to advance substantive discussions — while the Parties were attempting to agree on a mutually acceptable location and agenda for in-person meetings — the Applicants presented a written statement of facts and a statement of law to Syria on 9 August 2021<sup>30</sup>. The 11-page statement of facts and the 8-page statement of law included a description of facts, of the applicable law and of the relief sought by the Applicants.

23. In its 30 September 2021 reply, Syria not only did not respond to the statement of facts and the statement of law, it also rejected the Applicants' very characterization of the dispute. I quote from the Note Verbale:

“Your note verbale No. 149 dated 9/8/2021 also refers to a proposal for an agenda for the first meeting on what you called ‘international responsibility for the recent breaches of its obligations under the Convention against Torture’ and a statement of facts and another statement of law. We clarify, in this regard, that we reject, *in toto*, this formulation”<sup>31</sup>.

24. Despite subsequent requests by the Applicants, Syria never responded in writing to the substance of the statement of facts and the statement of law.

25. The Applicants had equally hoped, in good faith, to be able to discuss the facts, the law and the responsibility of Syria, with a view to finding solutions in order to resolve the dispute in the course of its face-to-face meetings with Syria. This was not to be.

26. By the close of the second in-person meeting of 5 to 6 October 2022, it was evident that the positions of the Parties remained diametrically opposed with regard to the facts presented by Canada and the Netherlands, the scope of the dispute, the interpretation and application of the Convention against Torture, and the possible settlement of the dispute.

27. After more than two years of concerted efforts, the position of the Parties had not evolved and no progress had been made towards resolution. In the words of this Court, as stated in *Belgium v. Senegal*, “it cannot be concluded that the negotiations thus proposed had the effect of resolving the

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<sup>30</sup> Note Verbale from the Permanent Mission of Canada to the United Nations in Geneva, Switzerland and the Permanent Mission of the Kingdom of the Netherlands to the United Nations in Geneva, Switzerland to the Permanent Mission of the Syrian Arab Republic to the United Nations in Geneva, Switzerland (9 Aug. 2021) (ACNL, Ann. 3, NV 13).

<sup>31</sup> Note Verbale from the Permanent Mission of the Syrian Arab Republic to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of the Kingdom of the Netherlands in Geneva (30 Sept. 2021) (ACNL, Ann. 3, NV 15) (judges' folder, tab 18), emphasis added.

dispute”<sup>32</sup>. The Applicants could only conclude that further negotiations could not lead to the settlement of the dispute. They thus informed Syria of their position that negotiations had become deadlocked or futile by Note Verbale on 17 October 2022<sup>33</sup>.

### **Attempts to organize arbitration**

28. The Parties to the dispute have additionally not reached agreement on the organization of arbitration. By Note Verbale dated 7 November 2022, the Applicants formally requested that the dispute be submitted to arbitration. They enclosed a proposal of elements to form the basis for an agreement on the organization of arbitration<sup>34</sup>. In the three Notes Verbales Syria sent subsequently, it did not acknowledge the Applicants’ formal request to submit the dispute to arbitration. More than six months actually passed from the date the Applicants formally requested arbitration, without agreement on the organization thereof. The precondition of attempting to agree to terms of arbitration required under Article 30, paragraph 1, of the Convention against Torture has thus been met.

### **Conclusion on jurisdiction**

29. Madam President, it is clear from the foregoing that there is an existing dispute between the Parties concerning the interpretation or application of the Convention against Torture.

30. Despite lengthy and genuine attempts on the part of the Applicants over the course of more than two years, the dispute could not be settled through negotiation. Furthermore, no agreement was reached on the organization of arbitration within six months and the dispute has not been resolved otherwise in the meantime.

31. The Court thus has *prima facie* jurisdiction pursuant to Article 36, paragraph 1, of the Statute and Article 30, paragraph 1, of the Convention against Torture to adjudicate the dispute

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<sup>32</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 150, para. 50, online: <https://www.icj-cij.org/sites/default/files/case-related/144/144-20090528-ORD-01-00-EN.pdf> (judges’ folder, tab 19).

<sup>33</sup> Note Verbale from the Permanent Mission of Canada to the United Nations in Geneva, Switzerland and the Permanent Mission of the Kingdom of the Netherlands to the United Nations in Geneva, Switzerland to the Permanent Mission of the Syrian Arab Republic to the United Nations in Geneva, Switzerland (17 Oct. 2022) (ACNL, Ann. 3, NV 60).

<sup>34</sup> Note Verbale from the Permanent Mission of Canada to the United Nations in Geneva, Switzerland and the Permanent Mission of the Kingdom of the Netherlands to the United Nations in Geneva, Switzerland to the Permanent Mission of the Syrian Arab Republic to the United Nations in Geneva, Switzerland (7 Nov. 2022) (ACNL, Ann. 3, NV 62).

between the Applicants and Syria. The first condition for the indication of provisional measures is thus fulfilled.

### III. PRESERVATION OF RIGHTS AT ISSUE IN THE CASE

32. Madam President, distinguished Members of the Court, I will now turn to the rights the Applicants seek to preserve through their request for the indication of provisional measures. Pursuant to Article 41 of the Statute, the Court has “the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party”.

33. The jurisprudence of the Court on this point is well established. At this stage, the Court need not determine definitively the existence of the rights claimed<sup>35</sup>. Rather, it need only decide whether the rights claimed, and for which protection is sought, are “plausible” and whether they are linked to the provisional measures being requested<sup>36</sup>.

34. The Convention against Torture imposes obligations on States parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture and to undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment. These obligations, outlined in Articles 2 and 16 of the Convention against Torture, comprise an obligation not to commit torture or other ill-treatment.

35. Articles 2 and 16 are complemented and reinforced by the additional obligations found in the Convention which seek to deter and prevent torture and other ill-treatment, combat impunity and ensure that victims have access to appropriate means of redress. For example, Articles 7, 12 and 13 set out the obligations to promptly and impartially investigate acts of torture and other ill-treatment and to take steps to prosecute perpetrators of torture. Articles 10 and 11 further outline obligations to, *inter alia*, educate officials, as well as review systematically methods and practices of

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<sup>35</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022*, p. 224, para. 51; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023*, para. 28, online: <https://www.icj-cij.org/sites/default/files/case-related/180/180-20230222-ORD-01-00-EN.pdf>.

<sup>36</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022*, p. 224, para. 51; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023*, para. 28.

interrogation and custody arrangements. Finally, Article 15 prohibits the use of torture-derived information as evidence in any proceedings.

36. The ten-page “Summary of the Facts” contained in our Application includes evidence that demonstrates Syria’s violations of each of these articles. The Agent for the Netherlands has also provided an overview and described several examples of these violations.

37. Madam President, distinguished Members of the Court, Canada and the Netherlands are seeking to protect their rights to secure compliance by Syria with its obligations set out in the Convention against Torture, which is owed to them *erga omnes partes*.

38. This Court has already had occasion to pronounce on the rights of States parties to seek compliance under the Convention against Torture in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. The Court held:

“The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . . and to bring that failure to an end.”<sup>37</sup>

39. The Court concluded that there is a legal entitlement of each State party to seek compliance by every other State party with their obligations under the Convention against Torture.

40. In addition to finding a common interest among States parties in compliance with the obligations under the Convention against Torture, the Court in *Belgium v. Senegal* also held that States parties 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”<sup>38</sup>. Canada and the Netherlands have invoked the responsibility of Syria for these very reasons. Syria has failed, and it continues to fail, to comply with its obligations *erga omnes partes*. These failures must be brought to an end.

41. There is a compelling evidentiary basis substantiating Syria’s violations of its obligations under the Convention against Torture. This has been extensively documented by bodies established

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<sup>37</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 450, para. 69 (ACNL, Ann. 2) (judges’ folder, tab 9).

<sup>38</sup> *Ibid.*, para. 68 (judges’ folder, tab 9).



within the United Nations system and other international and non-governmental organizations. Canada and the Netherlands' right to seek compliance in the present instance is therefore undoubtedly plausible.

42. Significantly, protecting the rights of the Applicants to seek Syria's compliance with its obligations under the Convention against Torture also protects persons in Syria who are currently being subjected to torture and other ill-treatment, or are at imminent risk thereof. It further accords with the object and purpose of the Convention against Torture to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world"<sup>39</sup>.

43. Furthermore, the provisional measures requested by the Applicants are directly linked to the rights which the Applicants seek to protect. As the Agent for Canada will address in more detail, the requested measures are aimed at ensuring compliance with Syria's obligations under the Convention against Torture, in particular its obligations not to commit torture and other ill-treatment, to take effective measures to prevent torture and other ill-treatment, and to fulfil the other specific obligations set out in the treaty. The Applicants are also seeking additional measures to protect the integrity of the proceedings before the Court, and to safeguard the right of the Applicants to have their claim fairly adjudicated.

44. Madam President, distinguished Members of the Court, this concludes my observations with regard to the Applicant's prima facie jurisdiction in the case, the plausibility of the rights for which we are seeking protection, and their link to the measures requested. I kindly ask that you now invite Ms Teresa Crockett to the podium.

The PRESIDENT: I thank Ms Künzli, and I now invite Ms Teresa Crockett to address the Court. You have the floor, Madam.

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<sup>39</sup> Convention against Torture, *supra* note 1, preamble, para. 6 (ACNL, Ann. 1.1), judges' folder, tab 1.

Ms CROCKETT:

#### IV. IRREPARABLE PREJUDICE AND URGENCY

1. Madam President, distinguished Members of the Court, it is a privilege to appear before you today on behalf of Canada. I will address the third condition required for the indication of provisional measures, namely demonstrating that there is an urgent need for the Court's intervention to prevent irreparable prejudice to the rights at issue in these proceedings.

2. Consistent with prior rulings, the Court has found that its power to indicate provisional measures arises “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”<sup>40</sup>.

3. This Court has also repeatedly explained that it will exercise this power “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”<sup>41</sup>.

4. In considering the condition of urgency, the Court has previously found it is met when “the acts susceptible of causing irreparable prejudice can ‘occur at any moment’ before the Court makes a final decision on the case”<sup>42</sup>.

5. There can be no question that the persistent and recurring breaches by Syria of the Convention against Torture are causing irreparable prejudice to the rights at issue, and that the circumstances require the Court's urgent intervention.

6. Each new act of torture and other ill-treatment committed by Syria constitutes — first and foremost — a reprehensible and irreparable harm with respect to each victim. Once torture is committed, it cannot be undone. Even after the acts of torture stop, the pain and suffering experienced by victims persist long after — and often indefinitely.

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<sup>40</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 385, para. 69 (judges' folder, tab 20); *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 645, para. 78 (judges' folder, tab 11).

<sup>41</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 385, para. 70 (judges' folder, tab 20).

<sup>42</sup> *Ibid.*, para. 60.

7. Furthermore, every day that passes without Syria having met its obligations under the treaty, is another day that exposes even more people in Syria to a serious risk of being subjected to torture and other ill-treatment, or facing impunity and a lack of access to redress for abuses that have already been committed against them.

8. In the context of this case, every new act of torture and every day without effective preventive measures also constitutes an exacerbation of an ongoing violation of the Convention against Torture and lays bare Syria's flagrant disregard of its obligations thereunder. The indication of provisional measures is therefore urgent to preserve the rights at issue and to protect the people in Syria whose lives and well-being are at risk.

9. In assessing the matter of urgency and irreparable harm, the Court has found it appropriate to indicate provisional measures in situations where a State has committed past violations and where it is "not inconceivable" that they might occur again<sup>43</sup>. Additionally, the Court has observed that "a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life"<sup>44</sup>. The Court has furthermore held that irreparable consequences of psychological distress may arise when individuals are subject to temporary, or potentially ongoing, separation from their families<sup>45</sup>.

10. As Canada and the Netherlands have set out in their Application and Request for provisional measures, Syria has systematically committed torture and subjected its population to other ill-treatment on a massive scale. Since 2011, tens of thousands of individuals have died while in Syrian custody<sup>46</sup>. There are thousands of documented cases of civilians being subjected to arbitrary detention, torture, rape and other forms of sexual violence, and being forcibly disappeared or killed in detention.

11. Madam President, distinguished Members of the Court, there are no signs that Syria intends to stop its actions or take the effective preventive measures that are required by its treaty

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<sup>43</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1169, para. 89.

<sup>44</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023*, para. 55 (judges' folder, tab 20).

<sup>45</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 431, para. 69.

<sup>46</sup> COI Report A/HRC/46/55, *supra* note 5, para. 23.

obligations. Just over a year ago, in its September 2022 report, the Commission of Inquiry observed that “[t]he risk of being detained, and subsequently ill-treated and tortured, remained pervasive for many Syrians”<sup>47</sup>.

12. Since the filing of our Application and Request for provisional measures, the Commission of Inquiry has issued a conference paper on 10 July 2023 confirming that indeed, Syria had continued unabated in its commission of torture against its populace during the period between 1 January 2020 and 30 April 2023. The Commission of Inquiry then noted that

“[t]orture and ill-treatment remain a significant risk for those who live within Government-controlled parts of Syria, including areas retaken in recent years, and for Syrian nationals abroad who return”<sup>48</sup>.

13. The July 2023 report updates and supplements its previous findings on detention in Syria covering the period from 2011 to 2020. Together, the reports document a continuous, unchecked pattern of torture and other ill-treatment attributable to Syria from 2011 onwards and confirm that — if left unchecked — Syria will continue its violations.

14. Indeed, since Canada and the Netherlands submitted their Request for the indication of provisional measures on 8 June 2023, and during the three-month delay to this hearing requested by Syria, there have been at least 15 deaths documented due to torture committed by Syria<sup>49</sup>.

15. In one reported incident, a 34-year-old man from the city of Jasim was arrested on 7 July of this year by Syrian State security agents in Daraa Governorate. He was taken to a government detention facility where he was tortured to death. His body was returned to his family the next day, bearing visible signs of torture<sup>50</sup>.

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<sup>47</sup> UN Human Rights Council, Report of the Independent International Commission of Inquiry on Syrian Arab Republic, 51st Sess., UN doc. A/HRC/51/45 (2022) (hereinafter “COI A/HRC/51/45”), para. 15 (ACNL, Ann. 44), judges’ folder, tab 21.

<sup>48</sup> COI, “*No End in Sight*”, *supra* note 2, para. 5, judges’ folder, tab 2.

<sup>49</sup> Syrian Network for Human Rights (SNHR), “*501 Civilians, Including 71 Children, 42 Women, and 20 Individuals Who Died due to Torture Documented Killed in Syria, in the First Half of 2023*”, 2 July 2023, p. 15, online: <https://snhr.org/wp-content/uploads/2023/07/M230701E.pdf> (judges’ folder, tab 22); Syrian Network for Human Rights (SNHR), “*55 Civilians, Including 16 Children, Four Women, and Three Individuals Who Died due to Torture Documented Killed in July 2023 in Syria*”, 1 Aug. 2023 (hereinafter “SNHR July 2023”), p. 9, online: <https://snhr.org/wp-content/uploads/2023/08/M230801E-1.pdf> (judges’ folder, tab 23); Syrian Network for Human Rights (SNHR), “*97 Civilians, Including 22 Children, Three Women, and 10 Individuals Who Died due to Torture Documented Killed in August 2023 in Syria*”, 1 Sept. 2023, pp. 10-11, online: <https://snhr.org/blog/2023/09/01/97-civilians-including-22-children-three-women-and-10-individuals-who-died-due-to-torture-documented-killed-in-august-2023-in-syria/> (judges’ folder, tab 24); Syrian Network for Human Rights (SNHR), “*55 Civilians, Including 12 Children, 10 Women, and Two Individuals Who Died due to Torture Documented Killed in Syria in September 2023*”, 1 Oct. 2023, p. 11, online: <https://snhr.org/wp-content/uploads/2023/10/M231001E.pdf> (judges’ folder, tab 25).

<sup>50</sup> SNHR July 2023, *supra* note 49, p. 12.

16. In addition to deaths due to torture, many Syrians have continued to suffer the physical and psychological consequences of torture and other ill-treatment in the intervening period leading up to the convening of today's hearing.

17. The Commission of Inquiry has highlighted the irreparable nature of the harm caused by the impact of torture and other ill-treatment. The various forms of torture deployed by Syria result in a range of serious physical and mental harms<sup>51</sup>.

18. Documented physical harms have included impotency, miscarriages, chronic pain, broken teeth and scars<sup>52</sup>. Mental harms have included post-traumatic stress disorder, sleep disorders, problems focusing, substance abuse, flashbacks and fear of leaving the home<sup>53</sup>. Both have resulted in suicides among torture victims.

19. The irreparable harm resulting from sexual and gender-based violence is aggravated by the stigma associated with victims of these heinous acts, which can lead to them being ostracized within their communities. The stigma experienced by female victims and survivors is particularly severe and can affect them for life<sup>54</sup>.

20. While some of these harms have the potential to be addressed through long-term treatment and rehabilitation, this would require a substantial investment by Syria, which is simply not taking place. And unfortunately, the vast majority of these harms are indeed irreparable. For those that have lost their lives — whether as a direct result of torture and other ill-treatment, or as a result of the physical or mental trauma experienced — this constitutes the ultimate irreparable harm; one that Syria continues to cause to this day.

21. Syria also continues to cause irreparable harm in its use of the death penalty. While the use of the death penalty is not in and of itself prohibited under the Convention against Torture, some of the crimes for which detainees have been convicted on the basis of confessions made under torture are subject to the death penalty within Syria.

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<sup>51</sup> COI, “No End in Sight”, *supra* note 2, paras. 125-129.

<sup>52</sup> *Ibid.*, paras. 125 and 127.

<sup>53</sup> *Ibid.*, para. 128.

<sup>54</sup> *Ibid.*, para. 129.

22. In an extensive report documenting this practice, the Syrian Network for Human Rights, a non-governmental organization, has noted that accusations of crimes subject to the death penalty in Syria have

“been leveled in a widespread and indiscriminate manner by the regime’s security agencies against thousands of detainees and forcibly disappeared persons . . . with no grounds except for interrogation records containing ‘confessions’ extracted under the duress of torture”<sup>55</sup>.

23. The Commission of Inquiry also highlights this use of torture and other ill-treatment by Syria to extract confessions of detainees’ perceived opposition activities<sup>56</sup>. Detainees are routinely forced to sign or fingerprint written confessions of crimes, often without even having the opportunity to read them<sup>57</sup>. These extracted confessions have then been used to obtain convictions<sup>58</sup>.

24. The Syrian Network for Human Rights has gathered details of the public prosecution’s reliance on confessions extracted under torture, and has confirmation of dozens of detainees having been forced to appear in “grotesque ‘confession videos’”, which are also broadcast on official State media<sup>59</sup>.

25. One individual, identified only as “Abdul Rahman D.”, was arrested by Syrian officials and subsequently tortured. To escape the torture and daily beatings, he falsely confessed to killing government officers, and received a death sentence on the basis of this confession extracted under torture<sup>60</sup>.

26. It is urgent to ensure that the death penalty is not imposed when information has been obtained through torture. Persons who have received the death penalty due to false confessions obtained under torture could be subjected to the execution of their sentence at any moment between now and this Court’s decision on the merits of the case. There can be no question that the harm presented by the use of the death penalty is irreparable.

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<sup>55</sup> Syrian Network for Human Rights (SNHR), “*An Instrument of Death and Disappearance: How the Syrian Regime Uses Military Field Courts Against Activists and Dissidents*”, 12 Sept. 2023 (hereinafter “SNHR An Instrument of Death”), p. 16, online: <https://snhr.org/wp-content/pdf/english/R230904E.pdf> (judges’ folder, tab 26).

<sup>56</sup> COI Report A/HRC/46/55, *supra* note 5, para. 16.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*; see also COI A/HRC/51/45, *supra* note 47, para. 19.

<sup>59</sup> SNHR An Instrument of Death, *supra* note 55, p. 31.

<sup>60</sup> *Ibid.*, p. 40.

27. The Court has previously found it appropriate to indicate provisional measures in circumstances that are “unstable and could rapidly change” and when there is “ongoing tension” without any “overall settlement to the conflict”<sup>61</sup>. Similarly, it has granted provisional measures when “incidents have occurred on various occasions . . . leading to fatalities, injuries and the displacement of local inhabitants”<sup>62</sup>. All of these elements are present in the current situation in Syria, and indeed, the use of torture has been referred to by the Commission of Inquiry as “a hallmark of the conflict”<sup>63</sup>.

28. The ubiquitous and recurring violations of the Convention against Torture by Syria are, furthermore, taking place within the context of a protracted armed conflict that has endured for more than a decade. No real progress has been made towards the implementation of the roadmap outlined in United Nations Security Council resolution 2254, adopted in 2015, to end the conflict, nor towards a broader resolution to the situation in Syria, including the need for accountability. The Commission of Inquiry has repeatedly reported on the continued insecurity in Syria, including in its most recent report of August 2023<sup>64</sup>.

29. In its December 2021 indication of provisional measures in the case between Armenia and Azerbaijan, the Court considered it appropriate to order the parties to “protect from violence and bodily harm all persons captured in relation to [the conflict] who remain in detention, and ensure their security and equality before the law”<sup>65</sup>. The threat of violence and bodily harm present in those circumstances is no less real than that to persons who remain in detention in Syria and is equally as urgent.

30. Given the ongoing documentation of the nature of torture and other ill-treatment committed by Syria, and the circumstances that place individuals within Syria at increased risk of torture and

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<sup>61</sup> *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 143, online: <https://www.icj-cij.org/sites/default/files/case-related/140/140-20081015-ORD-01-00-EN.pdf> (judges’ folder, tab 27).

<sup>62</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 550, para. 53, online: <https://www.icj-cij.org/sites/default/files/case-related/151/151-20110718-ORD-01-00-EN.pdf> (judges’ folder, tab 28).

<sup>63</sup> COI Report A/HRC/46/55, *supra* note 5, para. 1.

<sup>64</sup> COI Report A/HRC/54/58, *supra* note 11, paras. 22-31 and 74-75.

<sup>65</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021* (hereinafter *Armenia v. Azerbaijan, Order of 7 December 2021*), p. 391, para. 92, online: <https://www.icj-cij.org/sites/default/files/case-related/180/180-20211207-ORD-01-00-EN.pdf> (judges’ folder, tab 29).

other ill-treatment, we have requested a series of specific provisional measures aimed at making the overall protection and preservation of rights as potentially effective as possible. To address this element, I would respectfully request that you invite the Agent for Canada, Mr Alan Kessel, to the podium.

The PRESIDENT: I thank Ms Crockett for her statement. I now invite the Agent of Canada, Mr Alan Kessel, to take the floor. You have the floor, Sir.

Mr KESSEL:

#### **V. PROVISIONAL MEASURES REQUESTED**

1. Madam President, distinguished Members of the Court, it is a privilege to appear before you today as Agent for Canada. I must first acknowledge the regrettable circumstances that bring us before you today.

2. Canada and the Netherlands initiated these proceedings to secure Syria's performance of its obligations under the Convention against Torture; obligations which it has flagrantly disregarded for far too long. We have done so with a view to ensuring the object and purpose of the Convention against Torture — as agreed to between all States parties to the Convention. We have done so in the interest of justice and accountability for the tens of thousands of victims who have been systematically subjected to heinous acts of torture and other ill-treatment at the hands of the Syrian Government.

3. Today, we have an even more pressing purpose at hand — the protection of persons in Syria who remain subjected to torture and other ill-treatment, or who will become victim of such harms while this case is pending. My colleagues have addressed how the Applicants have met the well-established conditions for the Court's indication of provisional measures. I will now turn to the measures that we have respectfully requested and why they are necessary.

4. Canada and the Netherlands gave careful consideration to the selection and formulation of the seven provisional measures initially requested. We consulted Syrian victims and survivors and their families, in addition to materials issued by relevant international actors and experts, with a view



to formulating a request for clear and specific measures that will have the most meaningful impact and offer the greatest degree of protection to individuals in Syria, pending the outcome of this case.

5. The provisional measures requested are linked to the rights at issue in these proceedings. The Applicants are also requesting measures that aim at ensuring the integrity of the proceedings before the Court and the sound administration of justice.

**First provisional measure — cease and prevent torture and other ill-treatment**

6. The first provisional measure requested is for Syria to 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.

7. This measure directs Syria to do what it is fundamentally obligated to do under the Convention against Torture, but has consistently failed to do, and cannot be relied upon to do without this Court's intercession. In their Application and Request for provisional measures, the Applicants describe the acts that amount to or contribute to torture and other ill-treatment, which are carried out systematically by Syrian officials across its system of detention and include subjecting individuals to sexual and gender-based violence, enforced disappearance and inhuman conditions of detention.

**Second provisional measure — cease arbitrary and incommunicado detention; provide access to detainees and improve conditions of detention**

8. The second provisional measure outlines a series of four concrete actions to eliminate or mitigate the substantially enhanced risk posed to detainees of being subjected to torture and other cruel, inhuman or degrading treatment or punishment. They target circumstances of extreme vulnerability in detention, which are inherently conducive to torture and other ill-treatment. An order to perform these actions would require Syria to comply with its obligations to take effective measures to prevent torture and other ill-treatment.

9. The first specific action is for Syria to cease immediately its practice of arbitrary detention and release all persons who are arbitrarily or unlawfully detained. Arbitrary or unlawful detention occurs when an individual is arrested or detained without a sufficient legal basis for depriving them of their liberty, or without due process protections.

10. The practice of arbitrary detention is particularly pertinent in the present circumstances, as arbitrary detention increases the risk of further human rights violations, including torture and other ill-treatment. Within Syria, persons expressing dissenting views or who are otherwise perceived to oppose the Government, are habitually victims of arbitrary detention.

11. Arbitrary detention, together with torture and other ill-treatment, has been documented consistently by the Commission of Inquiry in its 12 years of investigating violations of international law in Syria<sup>66</sup>. The release of persons who are arbitrarily detained by Syrian officials, and halting of the practice altogether, will reduce substantially the risk to individuals of torture and other ill-treatment.

12. The second action targets Syria's use of incommunicado detention. This practice creates situations of unique vulnerability, engendering a sense of extreme powerlessness and helplessness, as victims are isolated from the outside world, often without knowing where or how long they will be held. It also has extremely harmful effects on the loved ones of incommunicado detainees.

13. Incommunicado detention and enforced disappearance markedly increases the danger that individuals will be subject to additional instances of torture and other ill-treatment, as victims are placed beyond the protection of the law. With no visitation or communication possible with those held incommunicado, no one is able to monitor, independently, the conditions of detention or the welfare of the detainees. Frequently, incommunicado detention amounts to ill-treatment or torture in and of itself given the harm and suffering inflicted on the victim and their loved ones. Ceasing incommunicado detention will thus halt the commission of certain instances of torture and other ill-treatment.

14. The third action requires Syria to provide access to places of detention by, in particular, international, independent, monitoring mechanisms and medical personnel, and to facilitate contact between detainees and their families and legal counsel. Regular contact with family members, legal counsel and medical personnel has positive implications for the physical and mental well-being of detainees. Recurring access to detention facilities by external actors also has a powerful deterrent effect on the practice of torture and other ill-treatment.

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<sup>66</sup> See for example, COI Report A/HRC/46/55, *supra* note 5, para. 9.

15. Although Syria has previously allowed some international monitors to visit places of detention, these have excluded facilities operated by Syrian intelligence and security services. Yet, it is precisely these facilities that are among the most notorious for torture and other ill-treatment. Accordingly, the Applicants' request specifies that independent monitoring mechanisms must be able to access all official and unofficial places of detention.

16. The fourth action is for Syria to immediately take urgent measures to improve the conditions of all its official and unofficial detention facilities, in accordance with international standards. As Canada and the Netherlands set out in their Application, the abhorrent conditions documented across Syria's system of detention amount to ill-treatment or even torture<sup>67</sup>. Inhumane and unhygienic conditions, marked by severe overcrowding, deprivation of food and potable water, and lack of access to medical care, place the lives of vast numbers of detainees in jeopardy<sup>68</sup>.

17. Disease, dehydration, malnourishment and denial of medical care in Syrian detention facilities have already claimed the lives of victims on a massive and alarming scale. The spread of illness and infection, including from easily preventable conditions, is rampant in many facilities. Detainees suffering physical and psychological injuries resulting from torture and other ill-treatment, as well as those in fragile health, are in urgent need of access to medical care.

18. The substandard state of Syrian detention facilities is not a question of lack of capacity of resources. To quote the report issued by the Commission of Inquiry on 10 July 2023:

“The fact that the conditions of detention are not as poor in civilian prisons according to the former detainees the Commission has interviewed shows that the State has the necessary capacity to provide for adequate conditions of detention but chooses not to in the intelligence directorate detention or in military prisons.”<sup>69</sup>

19. The conditions in Syrian detention facilities are so poor as to violate even the most fundamental baselines set out in international law for the humane detention of persons, and the prevention of torture and other ill-treatment.

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<sup>67</sup> COI Report A/HRC/46/55, *supra* note 5, para. 20.

<sup>68</sup> UN Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, 31<sup>st</sup> Sess., UN doc. A/HRC/31/CRP.1 (2016), paras. 26-31 (ACNL, Ann. 36).

<sup>69</sup> COI, “*No End in Sight*”, *supra* note 2, para. 42, judges' folder, tab 2.

### **Third provisional measure —preservation of evidence**

20. Madam President, with the third provisional measure, Canada and the Netherlands seek to preserve the evidentiary record of the case, by requesting that the Court direct Syria not to destroy, or render inaccessible, any evidence related to the Application. The request includes the preservation of— without limitation — medical or other records documenting injuries sustained due to torture or other ill-treatment, or the remains of any victim of torture or other ill-treatment. This third provisional measure, together with the sixth and seventh measures, which I will come to shortly, are requested with the intention of protecting the integrity of the proceedings pending the final decision of the Court.

21. The Court has recently issued a similar order for the preservation of evidence in the case of *The Gambia and Myanmar*.<sup>70</sup> As in those circumstances, where the acts complained of took place in the territory of the respondent State, the violations of the Convention against Torture have been committed in Syria, which has primary control over substantial first-hand evidence relevant to these proceedings. Similarly, the Applicants request the Court to direct Syria to preserve any relevant evidence to ensure that the Court is properly equipped to assess the merits of the case, as well as the fair adjudication of the Applicants' claim.

### **Fourth and fifth provisional measures — safeguard information related to detainees' cause of death; issue accurate death certificates and disclose burial sites to next-of-kin**

22. Madam President, I now turn to the fourth and fifth requested measures, which seek to address the devastating impact of missing persons in Syria. The fate or whereabouts of tens of thousands of detainees in Syria remains unknown. Some, at this moment, are being held incommunicado or are otherwise being subjected to torture or other ill-treatment. The immediacy of the need for Syria to cease this practice is reflected in the decision of the United Nations General Assembly to establish the Independent Institution on Missing Persons in the Syrian Arab Republic on 29 June 2023.

23. Thousands of individuals in Syria are believed to have died as a result of torture or other ill-treatment in custody. Despite keeping meticulous records on its detainee population<sup>71</sup>, Syria

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<sup>70</sup> *The Gambia v. Myanmar*, *supra* note 17, para. 86.

<sup>71</sup> COI Report A/HRC/46/55, *supra* note 5, para. 27.

chooses to prolong the suffering of the families and loved ones by withholding information<sup>72</sup> or obfuscating the truth about the circumstances of detainees' disappearance or death. Tens of thousands of families have been shattered and continue to suffer needlessly, not knowing whether their loved ones have died, and if so, how they perished, or what happened to their bodies. They can neither mourn, nor process their loss<sup>73</sup>. The commensurate fear and the mental anguish makes entire families the victims of enforced disappearances, and the resulting impact can itself constitute torture or other ill-treatment<sup>74</sup>.

24. The paralysing uncertainty for families also creates serious practical challenges. Without an official death certificate, next of kin cannot access social benefits or other government services<sup>75</sup>. Women are particularly disadvantaged and unable to effectively exercise land, property and inheritance rights<sup>76</sup>. When death certificates for victims are issued, Syrian officials attempt to conceal their brutality by falsely recording the cause of death as “heart attack”, “stroke” — or simply an unknown cause<sup>77</sup>.

25. For these reasons, Canada and the Netherlands request that the Court order Syria to safeguard any information concerning the custodial death of victims for the duration of these proceedings. This includes conserving forensic examination of human remains or the burial locations of victims. Not only does this information form part of the evidentiary record — which must be preserved to ensure the integrity of the present proceedings — but its retention is required for Syria to comply with its obligation to promptly and impartially investigate allegations of torture and other ill-treatment, including those resulting in custodial deaths.

26. Furthermore, we have requested that Syria be directed to provide next of kin with death certificates, which record the *true* cause of death of any victim who died in Syrian custody, and to disclose the location of the burial sites of persons who were victims of torture and other ill-treatment.

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<sup>72</sup> *Ibid.*, para. 104.

<sup>73</sup> COI, Without a Trace, *supra* note 8, para. 32.

<sup>74</sup> *Ibid.*, para. 44.

<sup>75</sup> Human Rights Council, Commission of Inquiry, *Death Notifications in the Syrian Arab Republic: Policy Paper*, 27 Nov. 2018 (hereinafter “COI, Death Notifications”), paras. 6-7 (ACNL, Ann. 51).

<sup>76</sup> UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 46<sup>th</sup> Sess., UN doc. A/HRC/46/54 (2021), paras. 62-65 (ACNL, Ann. 8).

<sup>77</sup> COI, Death Notifications, *supra* note 75, paras. 4-5.

According to Commission of Inquiry reporting, tens of thousands of individuals who have died in government custody are believed to be buried in mass graves in Syria<sup>78</sup>.

27. These measures, if ordered, would again require Syria to perform its obligations to take effective measures to prevent, as well as to investigate acts of torture and other ill-treatment, consistent with Articles 2 and 12 of the Convention against Torture. The families and loved ones of missing persons in Syria have been desperately seeking answers for far too long — at severe cost to their mental and physical well-being.

### **Sixième mesure conservatoire — non-aggravation ou prolongation du différend**

28. Madame la présidente, passons maintenant à la sixième mesure conservatoire, dans laquelle le Canada et les Pays-Bas demandent que la Cour enjoigne à la Syrie d'éviter de poser toute action qui pourrait aggraver ou prolonger le différend ou en compliquer la résolution.

29. Cette Cour a déjà formulé des directives comparables, notamment dans les affaires récentes *Arménie c. Azerbaïdjan* et *Ukraine c. Russie*, concernant la convention sur le génocide, où elle a ordonné aux parties de « s'abstenir de tout acte qui risquerait d'aggraver ou d'étendre le différend dont la Cour est saisie ou d'en rendre le règlement plus difficile »<sup>79</sup>.

30. La Syrie continue de commettre des actes de torture et autres traitement illicites, ce qui — de toute évidence — aggrave le différend dont la Cour est saisie. En effet, avec chacun de ces actes, la Syrie continue de violer ses obligations en vertu de la convention contre la torture, et le nombre de victimes qui subissent un préjudice irréparable ne cesse d'augmenter de manière inexcusable.

31. Ceci démontre non seulement l'urgence de la situation, mais aussi la nécessité de protéger l'intégrité de la procédure devant la Cour ainsi que le droit des requérants à ce que leur demande soit jugée équitablement.

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<sup>78</sup> COI Report A/HRC/46/55, *supra* note 5, paras. 23-24.

<sup>79</sup> *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c. Azerbaïdjan), mesures conservatoires, ordonnance du 7 décembre 2021, C.I.J. Recueil 2021, p. 393, par. 98 ; Allégations de génocide au titre de la convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 16 mars 2022, par. 86 (dossier des juges, onglet n° 10).*

### Septième mesure conservatoire — reddition de comptes régulière sur la mise en œuvre des mesures

32. En tant que septième mesure, le Canada et les Pays-Bas demandent à la Cour d'ordonner à la Syrie de lui faire rapport régulièrement sur toutes les mesures prises pour donner effet à son ordonnance en indication de mesures conservatoires.

33. L'article 78 du Règlement de la Cour prévoit que « [l]a Cour peut demander aux parties des renseignements sur toutes questions relatives à la mise en œuvre de mesures conservatoires indiquées par elle ». Récemment, dans l'affaire *Gambie c. Myanmar*<sup>80</sup>, cette Cour a jugé approprié d'ordonner des rapports réguliers assortis de délais clairement prescrits.

34. La nature continue des violations commises par la Syrie et le risque substantiel de violence et de lésions corporelles pour les personnes arrêtées, détenues ou emprisonnées justifient également une obligation claire et continue de faire rapport pour surveiller le respect par la Syrie de toute mesure conservatoire ordonnée par la Cour.

35. L'obligation de rendre compte est également nécessaire considérant le manque total de coopération de la Syrie avec les mécanismes des droits de la personne des Nations Unies. En outre, la Syrie ne s'est pas acquittée de ses obligations en matière de reddition de comptes au Comité contre la torture, l'organe conventionnel chargé de surveiller la mise en œuvre de la convention. La Syrie a également défié la demande formulée par le Comité en novembre 2011 de soumettre un rapport spécial répondant aux préoccupations concernant la répression brutale des manifestations par la Syrie.

36. Dans ses observations finales de 2012, publiées en l'absence d'un rapport spécial, le Comité s'est déclaré gravement préoccupé par :

« Le recours habituel à la torture et à des traitements cruels et inhumains comme moyen, qui semble être délibéré et relever de la politique de l'État, de semer la peur ainsi que d'intimider et de terroriser la population civile (art. 2 et 16), et le fait que les autorités de l'État partie ne tiennent aucun compte des appels à mettre fin à ces violations lancés par des organes et des experts internationaux faisant autorité (art. 2) »<sup>81</sup>.

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<sup>80</sup> *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020* p. 31, par. 86.

<sup>81</sup> Comité des Nations Unies contre la torture, *Examen par le Comité contre la torture de l'application de la Convention en République arabe syrienne en l'absence du rapport spécial demandé conformément au paragraphe 1, in fine, de l'article 19 de la Convention*, quarante-huitième session, Nations Unies, doc. CAT/C/SYR/CO/1/ADD.2 (2012), par. 20 b), accessible à l'adresse suivante : <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/440/88/pdf/G1244088.pdf?OpenElement> (dossier des juges, onglet n° 30).

37. Plus d'une décennie plus tard, l'observation du Comité demeure tout aussi valable.

38. La demande de reddition de comptes est donc compatible avec la préservation de l'intégrité de la présente procédure. La mesure a également pour effet pratique de prévenir le non-respect et la répétition de violations susceptibles d'aggraver la procédure. Compte tenu de l'intérêt commun de tous les États parties à la convention contre la torture en ce qui concerne le respect par la Syrie de ses obligations en vertu de celle-ci, il serait dans la bonne administration de la justice de rendre ces rapports publics. Nous demandons en outre un délai raisonnable pour répondre à ces rapports.

**Eighth provisional measure — steps to reduce risk of torture by Syria's officials and other personnel**

39. Madam President, honourable judges, as a new eighth measure, Canada and the Netherlands respectfully request that the Court require Syria to take several immediate steps to reduce the risk of torture being committed by its officials and others within the system of detention. This includes issuing instructions to all those involved in the detention system, checkpoints and hospitals to ensure that detainees are treated in accordance with their inherent human dignity. They should also receive information and training on the prohibition against torture in accordance with Syria's obligation under Article 10 of the Convention against Torture.

40. In addition, in order to prevent further commission of torture and other ill-treatment with the utmost urgency, Syria should immediately suspend all personnel suspected of having committed torture or other ill-treatment. This will have the important effect of preventing repeat offences by these officials, pending Syria's fulfilment of its obligation to conduct investigations into such wrongdoing.

41. Finally, the Court is requested to require Syria to lift *de facto* immunity granted for those of its officials who commit torture and to direct its officials not to use any statement obtained under torture as evidence in any proceedings, including and in particular for crimes for which the death penalty can be imposed.

42. Madam President, as the Agent for the Netherlands has noted, Syria's decision not to participate in today's proceedings does not shield it from the Court's directives. As the Court has previously found, orders on provisional measures under Article 41 of the Statute have a binding



effect and thus create international legal obligations for any party to whom the provisional measures are addressed<sup>82</sup>.

## VI. CONCLUSION ON BEHALF OF THE APPLICANTS

43. Madam President, distinguished Members of the Court, as the Commission of Inquiry has previously observed, Syria's treatment of detainees represents a national trauma that will affect Syrian society for decades to come<sup>83</sup>. Justice and accountability are crucial to breaking the cycle of violence and atrocities, and are important as a step towards building a sustainable peace in Syria. It is this imperative that brings Canada and the Netherlands before the Court today to seek the Court's indication of provisional measures to ensure Syria's compliance with its obligations under the Convention against Torture.

44. Detainees currently in custody in Syria are at imminent risk of death or severe physical or mental harm. Anyone in Syria who may be detained in future faces the same immediate risk.

45. Over a decade of inaction has shown that Syria cannot be relied on to refrain — on its own volition and without a binding order from the Court — from inflicting heinous acts of torture and other ill-treatment against its population.

46. This is why we have requested the Court to indicate provisional measures. Thousands of persons in Syria remain in custody and urgent action is needed to prevent further deaths and needless suffering.

47. The provisional measures requested by Canada and the Netherlands are practical, realistic and consistent with the protections offered by the Court in its previous orders indicating provisional measures. They are necessarily comprehensive in order to preserve the rights at issue in the case, which are quite literally a matter of life and death. It now rests with this Court to take action.

### Reading of the final submissions

48. Since Syria has chosen not to appear, we anticipate that this will be the last statement made by Canada and the Netherlands at this hearing. With your permission, Madam President, and in

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<sup>82</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022*, p. 230, para. 84.

<sup>83</sup> COI Report A/HRC/46/55, *supra* note 5, para. 105.

accordance with Article 60 of the Rules of Court, I shall now read out the Applicants' final submissions.

“The Applicants, as States Parties to the Convention against Torture, respectfully request that the Court, as a matter of urgency, indicate the following provisional measures, which are directly linked to the rights that form the subject matter of the dispute, pending its determination of the case on the merits:

- 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;

- 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; and
- h) Syria shall take immediate actions to reduce the risk of torture being committed by its officials and other personnel, including by issuing instructions to ensure that detainees are treated in accordance with their human dignity, suspending all personnel suspected of having committed torture or other ill-treatment pending investigation, lifting de facto immunity for those of its officials who commit torture, and ensuring that statements obtained under torture are not used as evidence in any proceedings.”

49. Madam President, distinguished Members of the Court, this concludes Canada and the Netherlands’ oral observations. On behalf of the Applicants, I wish to thank you for your kind consideration.

The PRESIDENT: I thank the Agent of Canada for his statement, which brings to a close this single sitting. Let me thank the Agents, counsel and advocates of the Applicants for their assistance in the course of this hearing.

In accordance with usual practice, I would ask the Agents of Canada and the Netherlands to remain at the Court’s disposal to provide any additional information the Court may require. The Court will render its Order on the request for the indication of provisional measures as soon as possible. The Parties will be advised in due course as to the date on which the Court will deliver its Order in a public sitting.

Since the Court has no other business before it today, the sitting is declared closed.

*The Court rose at 11.55 a.m.*

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