



INTERNATIONAL COURT OF JUSTICE

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Summary

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Case concerning certain criminal proceedings in France (Republic of the Congo v. France)

Request for the indication of a provisional measure

Summary of the Order of 17 June 2003

Application and request for a provisional measure (paras. 1-4, 22-24)

By Application filed in the Registry of the Court on 9 December 2002, the Republic of the Congo (hereinafter “the Congo”) sought to institute proceedings against the French Republic (hereinafter “France”) on the grounds, first, of alleged

“violation of the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, exercise its authority on the territory of another State,

by unilaterally attributing to itself universal jurisdiction in criminal matters

and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country”,

and second, alleged “violation of the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court”.

By the Application the Congo requested the Court

“to declare that the French Republic shall cause to be annulled the measures of investigation and prosecution taken by the Procureur de la République of the Paris Tribunal de grande instance, the Procureur de la République of the Meaux Tribunal de grande instance and the investigating judges of those courts”.

The Application further contained a “Request for the indication of a provisional measure”, directed to the preservation of the rights of the Congo under both of the categories mentioned above, and seeking “an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux Tribunal de grande instance”; upon receipt of the consent of France to the jurisdiction, the Court was convened for the purpose of proceeding to a decision on

the request for the indication of a provisional measure as a matter of urgency; and that public hearings on the request were held on 28 and 29 April 2003.

Factual background (paras. 10-19)

The Order outlines as follows the factual background of the case, as stated in the Application or by the Parties at the hearings:

A complaint was filed on 5 December 2001, on behalf of certain human rights organizations, with the Procureur de la République of the Paris Tribunal de grande instance “for crimes against humanity and torture allegedly committed in the Congo against individuals having Congolese nationality, expressly naming H.E. Mr. Denis Sassou Nguesso, President of the Republic of the Congo, H.E. General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration, General Norbert Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard”.

The Procureur de la République of the Paris Tribunal de grande instance transmitted that complaint to the Procureur de la République of the Meaux Tribunal de grande instance, who ordered a preliminary enquiry and then on 23 January 2002 issued a réquisitoire (application for a judicial investigation of the alleged offences), and the investigating judge of Meaux initiated an investigation.

It was argued by the complainants that the French courts had jurisdiction, as regards crimes against humanity, by virtue of a principle of international customary law providing for universal jurisdiction over such crimes, and as regards the crime of torture, on the basis of Articles 689-1 and 689-2 of the French Code of Criminal Procedure.

The Procureur de la République of the Tribunal de grande instance of Meaux, in his réquisitoire of 23 January 2002, requested investigation both of crimes against humanity and of torture, without mentioning any jurisdictional basis other than Article 689-1 of that Code.

The complaint was referred to the parquet of the Tribunal de grande instance of Meaux taking into account that General Norbert Dabira possessed a residence in the area of that court’s jurisdiction; however, the investigation was initiated against a non-identified person, not against any of the Congolese personalities named in the complaint.

The testimony of General Dabira was first taken on 23 May 2002 by judicial police officers who had taken him into custody, and then on 8 July 2002 by the investigating judge, as a témoin assisté (legally represented witness). (It has been explained by France that a témoin assisté in French criminal procedure is a person who is not merely a witness, but to some extent a suspect, and who therefore enjoys certain procedural rights (assistance of counsel, access to the case file) not conferred on ordinary witnesses). On 16 September 2002 the investigating judge issued against General Dabira, who had by then returned to the Congo, a mandat d’amener (warrant for immediate appearance), which, it was explained by France at the hearing, could be enforced against him should he return to France, but is not capable of being executed outside French territory.

The Application states that when the President of the Republic of the Congo, H.E. Mr. Denis Sassou Nguesso “was on a State visit to France, the investigating judge issued a commission rogatoire (warrant) to judicial police officers instructing them to take testimony from him”. However no such commission rogatoire has been produced, and France has informed the Court that no commission rogatoire was issued against President Sassou Nguesso, but that the investigating judge sought to obtain evidence from him under Article 656 of the Code of Criminal Procedure, applicable where evidence is sought through the diplomatic channel from a

“representative of a foreign power”; the Congo acknowledged in its Application that President Sassou Nguesso was never “mis en examen, nor called as a témoign assisté”.

It is common ground between the parties that no acts of investigation (instruction) have been taken in the French criminal proceedings against the other Congolese personalities named in the Application (H.E. General Pierre Oba, Minister of the Interior, and General Blaise Adoua), nor in particular has any application been made to question them as witnesses.

Jurisdiction (paras. 20-21)

After recalling the need for a prima facie basis of jurisdiction in order for provisional measures to be indicated, the Court notes that in the Application the Congo proposed to found the jurisdiction of the Court upon a consent thereto yet to be given by France, as contemplated by Article 38, paragraph 5, of the Rules of the Court; and that by a letter dated 8 April 2003 from the Minister for Foreign Affairs of France, France consented explicitly to the jurisdiction of the Court to entertain the Application on the basis of that text.

Reasoning of the Court (paras. 22-40)

The Court takes note that the circumstances relied on by the Congo, which in its view require the indication of measures requiring suspension of the French proceedings, are set out as follows in the request:

“The proceedings in question are perturbing the international relations of the Republic of the Congo as a result of the publicity accorded, in flagrant breach of French law governing the secrecy of criminal investigations, to the actions of the investigating judge, which impugn the honour and reputation of the Head of State, of the Minister of the Interior and of the Inspector-General of the Armed Forces and, in consequence, the international standing of the Congo. Furthermore, those proceedings are damaging to the traditional links of Franco-Congolese friendship. If these injurious proceedings were to continue, that damage would become irreparable.”

It observes that at the hearings the Congo re-emphasized the irreparable prejudice which in its contention would result from the continuation of the French criminal proceedings before the Tribunal de grande instance of Meaux, in the same terms as in the request; and that the Congo further stated that the prejudice which would result if no provisional measures are indicated would be the continuation and exacerbation of the prejudice already caused to the honour and reputation of the highest authorities of the Congo, and to internal peace in the Congo, to the international standing of the Congo and to Franco-Congolese friendship.

The Court observes that the rights which, according to the Congo’s Application, are subsequently to be adjudged to belong to the Congo in the present case are, first, the right to require a State, in this case France, to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law, and second, the right to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State.

The Court further observes that the purpose of any provisional measures that the Court might indicate in this case should be to preserve those claimed rights; that the irreparable prejudice claimed by the Congo and summarized above would not be caused to those rights as such; that however this prejudice might, in the circumstances of the case, be regarded as such as to affect irreparably the rights asserted in the Application. The Court notes that in any event it has not been informed in what practical respect there has been any deterioration internally or in the international standing of the Congo, or in Franco-Congolese relations, since the institution of the French

criminal proceedings, nor has any evidence been placed before the Court of any serious prejudice or threat of prejudice of this nature.

The Court observes that the first question before it at the present stage of the case is thus whether the criminal proceedings currently pending in France entail a risk of irreparable prejudice to the right of the Congo to respect by France for the immunities of President Sassou Nguesso as Head of State, such as to require, as a matter of urgency, the indication of provisional measures.

The Court takes note of the statements made by the Parties as to the relevance of Article 656 of the French Code of Criminal Procedure (see above), and of a number of statements made by France as to the respect in French criminal law for the immunities of Heads of State. It then observes that it is not now called upon to determine the compatibility with the rights claimed by the Congo of the procedure so far followed in France, but only the risk or otherwise of the French criminal proceedings causing irreparable prejudice to such claimed rights. The Court finds, on the information before it, that, as regards President Sassou Nguesso, there is at the present time no risk of irreparable prejudice, so as to justify the indication of provisional measures as a matter of urgency; and neither is it established that any such risk exists as regards General Oba, Minister of the Interior of the Republic of the Congo, for whom the Congo also claims immunity in its Application.

The Court then considers, as a second question, the existence of a risk of irreparable prejudice in relation to the claim of the Congo that the unilateral assumption by a State of universal jurisdiction in criminal matters constitutes a violation of a principle of international law; the Court observes that in this respect the question before it is thus whether the proceedings before the Tribunal de grande instance of Meaux involve a threat of irreparable prejudice to the rights invoked by the Congo justifying, as a matter of urgency, the indication of provisional measures.

The Court notes that, as regards President Sassou Nguesso, the request for a written deposition made by the investigating judge on the basis of Article 656 of the French Code of Criminal Procedure has not been transmitted to the person concerned by the French Ministry of Foreign Affairs; that, as regards General Oba and General Adoua, they have not been the subject of any procedural measures by the investigating judge; and that no measures of this nature are threatened against these three persons. The Court concludes that therefore there is no urgent need for provisional measures to preserve the rights of the Congo in that respect.

As regards General Dabira, the Court notes that it is acknowledged by France that the criminal proceedings instituted before the Tribunal de grande instance of Meaux have had an impact upon his own legal position, inasmuch as he possesses a residence in France, and was present in France and heard as a témoïn assisté, and in particular because, having returned to the Congo, he declined to respond to a summons from the investigating judge, who thereupon issued a mandat d'amener against him. It points out, however, that the practical effect of a provisional measure of the kind requested would be to enable General Dabira to enter France without fear of any legal consequences. The Congo, in the Court's view, has not demonstrated the likelihood or even the possibility of any irreparable prejudice to the rights it claims resulting from the procedural measures taken in relation to General Dabira.

The Court finally sees no need for the indication of any measures of the kind directed to preventing the aggravation or extension of the dispute.

The full text of the final paragraph of the Order (para. 41) reads as follows:

“For these reasons,

The Court,

By fourteen votes to one,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge ad hoc de Cara.”

Joint separate opinion of Judges Koroma and Vereshchetin

Judges Koroma and Vereshchetin, in their joint separate opinion, expound the view that when considering a request for interim measures of protection, the Court should weigh all relevant aspects of the matter before it, including the extent of the possible harmful consequences of the violation of the claimed right. Therefore, they entertain some reservations in respect of the Court's having, in the circumstances of the present case, drawn a distinction between the harm to the rights which might subsequently be adjudged to belong to the Congo and the harm consequent upon the violation of those rights (Order, para. 29).

The harm attributable to the violation of the claimed rights may have much wider negative consequences and repercussions for legal and political interests of the State concerned, far transcending its adverse effect on the claimed rights as such. In these circumstances, the indication of provisional measures may become necessary not so much in view of the imminence of irreparable harm to the claimed rights, but rather because of the risk of grave consequences of their violation.

In the view of Judges Koroma and Vereshchetin, the Court appears not to have given sufficient weight to the risk of "irreparable harm", which could occur in the Congo as a result of the continuation of the criminal proceedings.

Dissenting opinion of Judge de Cara

In his dissenting opinion, Judge ad hoc de Cara emphasizes the distinctive features of the case before the Court. First, it is a case concerning Africa which implicates, in particular, the Head of State, who is the embodiment of the nation itself on that continent. Secondly, the current French law in such matters contrasts with the untimely measures taken or capable of being taken by the French prosecutors and judges. Lastly, it would seem that in this case, more than in others, there is a particularly close relationship between the proceedings on provisional measures and the proceedings on the merits; in making a distinction between the rights claimed to have been violated and the indirect prejudice that may be caused thereby, the Court appears to have adopted a formal approach which prevents the case from being considered as a whole. Article 41 of the Statute and Article 75 of the Rules of Court leave the Court considerable latitude to decide on provisional measures according to the circumstances of each case. In the present case, the Court did not see fit to grant the request for provisional measures and the judge ad hoc regrets that he was unable to vote in favour of the decision because he considers that the essential element of the case has been disregarded. At this stage it is not a matter of deciding whether, in abstract terms, French law guarantees the immunity of a foreign Head of State or whether it adopts a strict concept of universal jurisdiction, but of determining to what extent the réquisitoire (prosecutor's application for a judicial investigation) of 23 January 2002 derogates from such principles and violates the right to immunity, the attribution of criminal jurisdiction and the dignity of the Congolese President, thereby causing harm to the State itself. The réquisitoire and the annexed complaints, on the basis of which it was issued, govern the entire French criminal proceedings. As an act of prosecution, this réquisitoire already violates the immunity of the foreign Head of State and unduly seeks to substitute the jurisdiction of French courts for that of the Congolese courts already seised and having territorial jurisdiction by reason of the facts of the case and the individuals implicated. Prejudice has certainly been caused and there is a risk of additional prejudice, because at any time the French investigating judge may decide on any acts of judicial investigation, including the formal placing of suspects under examination (mise en examen), or on measures of detention,

against any of the senior figures named but also against any Congolese citizen. The threat of coercion may well constitute irreparable prejudice, especially when it affects the inviolability of a Head of State. Furthermore, with the publicity that inevitably surrounds prosecution for crimes against humanity, the criminal proceedings initiated in violation of the Congo's rights are capable of causing harm not only to the honour of that country but to the stability of the government in a country marked by division after a long period of civil war. This is even more serious in Africa, a continent whose Heads of State occupy a special position in societies where ethnic solidarity prevails over inadequate national cohesion. The risk of the country being destabilized cannot be dismissed as a distinct prejudice from those directly related to the violation of the rights for which the Congo seeks protection. The Applicant has a legal interest which is worthy of preservation and which stems from a right to respect for its sovereignty.

Under these circumstances, the urgency remains for as long as the prosecutor's application is maintained, because there are no guarantees for the individuals named in the complaints, regardless of their status, and they have no right of appeal against that application unless they are formally placed under judicial examination. For the condition of urgency to be met, is it really necessary for the President of the Republic of the Congo to be formally placed under examination, held in police custody, imprisoned or brought before the Assize Court? But in any event, urgent protection can be justified by the fact of having to wait until the Court rules on the merits, since any subsequent reparation for prejudice caused by the continuation of the judicial proceedings against the personalities concerned would be quite illusory.

The Court is entitled to indicate provisional measures in order to prevent any aggravation of the dispute when the circumstances so require; it can thus maintain the status quo. The representatives of the French Republic rejected the Congo's proposal to ask the Court "formally to place on record the scope which they ascribe to the [prosecutor's] originating application". The Agent of France simply gave a statement of current French law and refused to make any promises with respect to the situation or to the individuals concerned. The Court took note of his declarations without commenting on their scope and they fail to provide any guarantee capable of counterbalancing the decision to dismiss the request for provisional measures. The Court's solution is thus somewhat ambiguous. Either those declarations by the Agent of France constitute a statement of law, thus entitling the Court not only to take note of them but also to hold that the indication of provisional measures was pointless because it had no doubt that the French Government would comply with its own law: such declarations can thus have the effect of "creating legal obligations" as recognized in the *Nuclear Tests* case (1974). Or otherwise those declarations were simply tantamount to question-begging for dramatic effect, without any practical consequences, thus obliging the Court to take the view that France had no intention of committing itself and to draw appropriate conclusions from France's reluctance to make any promises. The refusal by the French Government's Agent to make any commitment thus leaves a risk of aggravation of the dispute whilst the réquisitoire at issue remains in force. That refusal cannot be explained by considerations relating to the separation of powers, for under international law the government represents the State in all its aspects. France should thus have been reminded of its duty to ensure compliance with its own laws, in so far as they enshrine the rules and norms of international law. Domestic statutes are not immune to the effects of a judgment of the Court. A fortiori, the execution of a decision of the Court may require the government of a State to take an administrative measure. In the Advisory Opinion concerning the immunity from legal process of a Special Rapporteur of the Commission on Human Rights, the Court held that governmental authorities had the obligation to inform domestic courts of the status of the official concerned and in particular of his entitlement to immunity from legal process. Similarly, in the present case, it was incumbent upon the French Government to give instructions to the Procureur Général (Principal State Prosecutor) to annul the réquisitoire which threatens the immunity of the Head of State and which encroaches upon the jurisdiction of Congolese courts. Accordingly, in the absence

of any specific commitment by France with respect to the scope of that act of procedure, the suspension of the criminal proceedings currently pending would have precluded any aggravation of the dispute by maintaining the status quo, and without affecting the balance between the Parties' respective rights.
