

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE RELATIVE À CERTAINES
PROCÉDURES PÉNALES ENGAGÉES
EN FRANCE**

(RÉPUBLIQUE DU CONGO c. FRANCE)

DEMANDE EN INDICATION DE MESURE
CONSERVATOIRE

ORDONNANCE DU 17 JUIN 2003

2003

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**CASE CONCERNING CERTAIN
CRIMINAL PROCEEDINGS
IN FRANCE**

(REPUBLIC OF THE CONGO v. FRANCE)

REQUEST FOR THE INDICATION OF A PROVISIONAL
MEASURE

ORDER OF 17 JUNE 2003

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No. 129CASE CONCERNING CERTAIN
CRIMINAL PROCEEDINGS
IN FRANCE

(REPUBLIC OF THE CONGO v. FRANCE)

REQUEST FOR THE INDICATION OF A PROVISIONAL
MEASURE

ORDER

Present: President SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOJIMANS, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA; *Judge ad hoc* DE CARA; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 38, paragraph 5, 73 and 74 of the Rules of Court,

Makes the following Order:

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

2. Whereas 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”;

3. Whereas in the Application the Congo indicated that it “proposes to found the Court’s jurisdiction, pursuant to Article 38, paragraph 5, of the Rules of Court, on the consent of the French Republic, which will certainly be given”;

4. Whereas the Application further contained a “Request for the indication of a provisional measure” whereby the Congo sought “an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux *Tribunal de grande instance*”;

5. Whereas upon receipt in the Registry of the Application, the Registrar, in accordance with Article 38, paragraph 5, of the Rules of Court, transmitted a copy of the Application to the Government of France, and informed both States that, in accordance with that provision, the case would not be entered in the General List, nor would any action be taken in the proceedings, unless and until the State against which the Application was made consented to the Court’s jurisdiction for the purposes of the case;

6. Whereas by a letter dated 8 April 2003 and received in the Registry on 11 April 2003, the Minister for Foreign Affairs of France informed the Court that “the French Republic consents to the jurisdiction of the Court to entertain the Application pursuant to Article 38, paragraph 5”, of the Rules of Court; whereas the Registrar immediately transmitted a copy of that letter to the Government of the Congo; whereas the case was thereupon entered in the General List; and whereas the Registrar notified the Secretary-General of the United Nations of the case;

7. Whereas furthermore 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, in accordance with Article 74, paragraph 2, of the Rules of Court; and whereas on 11 April 2003 the Registrar informed the Parties that the President of the Court had fixed 28 April 2003 as the date for opening of hearings on the request, in accordance with paragraph 3 of that Article;

8. Whereas, since the Court includes upon the Bench no judge of Congolese nationality, the Congo proceeded, in the exercise of the right conferred upon it by Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc* in the case; whereas the Congo chose for that purpose Mr. Jean-Yves de Cara;

9. Whereas, at four public hearings held on 28 and 29 April 2003, oral observations were submitted on the request for the indication of a provisional measure:

On behalf of the Congo:

by H.E.Mr. Jacques Obia, *Agent*,
Mr. Jacques Vergès,
Mr. André Decocq,
Mr. Charles Zorgbibe;

On behalf of France:

by Mr. Ronny Abraham, *Agent*,
Mr. Alain Pellet,
Mr. Pierre-Marie Dupuy;

* * *

10. Whereas in the Application the Congo refers to a complaint 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”;

whereas according to the Application, 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;

11. Whereas it appears, from the text of the complaint and the *réquisitoire*, supplied to the Court by the Congo, and from the further details of the proceedings supplied by France during the oral proceedings, and confirmed by the Congo, that 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; and whereas 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;

12. Whereas Article 689-1 of the French Code of Criminal Procedure provides that, pursuant to certain international conventions to which France is a party, referred to in the following Articles of the Code, “any person who has committed, outside the territory of the Republic, any of the offences enumerated in these Articles, may be prosecuted and tried by the French courts if that person is present in France”; whereas Article 689-2 refers to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

13. Whereas from the information before the Court it appears further that 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, and that, of those named in the complaint, he appeared to be the only person likely to be present on the territory of France, as required by Article 689-1 of the Code of Criminal Procedure; whereas however the investigation was initiated against a non-identified person, not against any of the Congolese personalities named in the complaint;

14. Whereas it appears further that 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 *témoign assisté* (legally represented witness); whereas it has been explained by France that a *témoign 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;

15. Whereas according to the information supplied by France, General Dabira was summoned again on 11 September 2002 to be *mis en examen* (formally placed under judicial examination), but had by then returned to the Congo, and informed the French authorities that, on instructions from his superiors, he considered that he should not comply with the summons; whereas on 16 September 2002 the investigating judge issued against General Dabira a *mandat d’amener* (warrant for immedi-

ate 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;

16. Whereas the Application further 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”; whereas 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”; and whereas the Congo acknowledged in its Application that President Sassou Nguesso was never “*mis en examen*, nor called as a *témoin assisté*”;

17. Whereas 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;

18. Whereas on the basis of the facts set out in the Application the Congo seeks the annulment of the acts referred to in paragraph 2 above, and further requests the indication of the provisional measure indicated in paragraph 4 above;

19. Whereas according to the request for the indication of a provisional measure, and for the reasons there indicated, “the two essential preconditions for the indication of a provisional measure, according to the Court’s jurisprudence, namely urgency and irreparable prejudice, are manifestly satisfied in the present case”;

* *

20. Whereas on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established;

21. Whereas in the present case the Applicant did not in its Application invoke any provisions relied on as affording a basis on which the jurisdiction of the Court might be established, but 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 Court; whereas 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;

* *

22. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; whereas it follows that the Court must concern itself with the preservation by such measures of the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent; and whereas such measures are justified solely if there is urgency;

23. Whereas in its 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”;

whereas it contended that these measures involved, first,

“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, “violation of the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court” (see paragraphs 1 and 2 above);

24. Whereas the 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, is for “an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux *Tribunal de grande instance*” (see paragraph 4 above);

25. Whereas the Congo also referred at the hearings to the principle of criminal law *non bis in idem* as having been breached by the institution of criminal proceedings in France relating to the same matters as proceedings instituted in Brazzaville (the existence of which was, it is said, notified to the Meaux investigating judge in September 2002), and to a prin-

principle of "subsidiarity" which it contends is applicable to criminal proceedings having an international element; whereas however it does not appear that the Congo claims that those principles confer upon it specific rights which might be threatened in such a way as to justify their protection by the indication of provisional measures;

26. Whereas 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";

27. Whereas 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; whereas 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;

28. Whereas 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;

29. Whereas the purpose of any provisional measures that the Court might indicate in this case should be to preserve those claimed rights; whereas the irreparable prejudice claimed by the Congo and summarized in paragraph 27 above would not be caused to those rights as such; whereas however this prejudice might, in the circumstances of the case, be regarded as such as to affect irreparably the rights asserted in the Application; whereas in any event the Court notes that 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-Congo-

lese 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;

*

30. Whereas the first question before the Court at the present stage of the case is 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;

31. Whereas at the hearings France drew the Court's attention to Article 656 of the French Code of Criminal Procedure, which provides that "the written deposition of the representative of a foreign power is to be requested through the Minister for Foreign Affairs", and continues by providing for the procedure to be followed "if this request is accepted", i.e., accepted by the foreign power; whereas France contends that this is the only means whereby President Sassou Nguesso, who according to France is included in the category of a "representative of a foreign power", might be approached to give evidence in the pending criminal proceedings, that his evidence thus could not be taken without the express agreement of the Congo, that while a request for a written deposition from President Sassou Nguesso under Article 656 has been sent by the investigating judge to the French Ministry of Foreign Affairs, it has been retained by the Ministry, and that the current proceedings therefore have not caused and cannot cause any damage to the Congo by way of breach of the immunities of President Sassou Nguesso;

32. Whereas the Congo questions whether Article 656 is applicable to a foreign Head of State, and also observes that if that procedure were followed to obtain the evidence of a person who would otherwise qualify to be cited as a *témoin assisté* (as is the case of President Sassou Nguesso, since he was mentioned in the complaint referred to in paragraph 10 above), the protection afforded by other Articles of the Code of Criminal Procedure to a *témoin assisté* would be lacking, with a consequent prejudice to the rights of the defence; whereas the Congo also emphasizes the fact that where a *réquisitoire* is made by the *Procureur de la République* against an unidentified person, as was the case in the proceedings now complained of, the investigating judge is free to interrogate any person whom he considers likely to be able to furnish evidence, and that therefore the possibility cannot be excluded that the judge might take the initiative to include President Sassou Nguesso in his investigation, particularly as President Sassou Nguesso is mentioned in the documentation upon which the *réquisitoire* was based;

33. Whereas the Court notes in this respect the following statements by the Agent and the counsel of France:

“In conformity with international law, French law embodies the principle of the immunity of foreign Heads of State . . . There are no written rules deriving from any legislation relating to the immunities of States and their representatives. It is the jurisprudence of the French courts which, referring to customary international law and applying it directly, have asserted clearly and forcefully the principle of these immunities.”

“One thing must be clear at the outset: France in no way denies that President Sassou Nguesso enjoys, as a foreign Head of State, ‘immunities from jurisdiction, both civil and criminal’.”

“Until the present moment it has not been challenged, and it is certainly not seriously challengeable, that all the steps taken by the French courts in this particular case have been strictly in conformity with French law. They have respected the limits of their jurisdiction and have respected the immunities enshrined in French law in conformity with international law. Can it be supposed that in the future our courts would move away from respecting the law they are required to apply?”

“We have simply stated what French law is; we have promised nothing, we have said that French law does not allow the prosecution of a foreign Head of State; that is not a promise, it is a statement of law. And also that French law subordinates the jurisdiction of the French courts over acts committed abroad to certain conditions. That too is not a promise, it is a statement of law. At the very most, but it would be somewhat pointless to do so, we might promise that the French courts will respect French law. But I think this might be taken for granted, and if some particular judicial decision, of which we have no example right now in our present case, were to exceed the limits set down by the law there would of course be means of recourse to remedy any errors which might have been made”;

34. Whereas the Court 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;

35. Whereas it appears to the Court, 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 whereas 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;

*

36. Whereas the Court will now, as a second question, consider 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; whereas in this respect the question before the Court is 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;

37. Whereas, 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 (see paragraph 31 above); whereas, as regards General Oba and General Adoua, they have not been the subject of any procedural measures by the investigating judge; whereas no measures of this nature are threatened against these three persons; whereas therefore there is no urgent need for provisional measures to preserve the rights of the Congo in that respect;

38. Whereas as regards General Dabira, 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; whereas however 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; whereas the Congo 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;

*

39. Whereas, independently of the requests for the indication of provisional measures submitted by the parties to preserve specific rights, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require (cf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996 (I)*, p. 22, para. 41; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Order of 10 January 1986*, *I.C.J. Reports 1986*, p. 9, para. 18); whereas however the Court does not in the circumstances of the present case see any need for measures of this kind to be indicated;

* *

40. Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves unaffected the right of the Governments of the Congo and France to submit arguments in respect of those questions;

* * *

41. 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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventeenth day of June, two thousand and three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of the Congo and the Government of the French Republic, respectively.

(*Signed*) SHI Jiuyong,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judges KOROMA and VERESHCHETIN append a joint separate opinion to the Order of the Court; Judge *ad hoc* DE CARA appends a dissenting opinion to the Order of the Court.

(*Initialled*) J.Y.S.

(*Initialled*) Ph.C.