

JOINT SEPARATE OPINION OF JUDGES KOROMA AND
VERESHCHETIN

Substance of Congo's request for provisional measure— Determining “circumstances” to be taken into consideration under Article 41 — How valid is distinction between the damage to the alleged claimed rights as such and the consequences of their violation — All aspects of the dispute to be considered.

1. We voted in favour of the Order despite our reservations, some of which are reflected hereunder.

2. In its Application, the Republic of the Congo claims that the institution of criminal proceedings against its officials responsible for public order, as well as its Head of State, violated its rights as a sovereign State and the immunity of a Head of State from criminal prosecution by a foreign State as recognized by international law and the jurisprudence of the Court.

3. The Congo not only seeks the annulment of those proceedings but also requested the Court to indicate a provisional measure ordering the immediate suspension of criminal proceedings by France. In this regard, the Congo argued that the continuation of those proceedings could result in irreparable harm in the form of a covert coup d'état, the destabilization of its internal institutions, and the return to war from which the country had recently emerged.

4. In our view, 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. Instead the Court limited itself to ruling that

“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 . . . 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” (Order, para. 35).

The Court further stated that “the irreparable prejudice claimed by the Congo . . . would not be caused to [the rights claimed in the Application] as such”, while at the same time acknowledging that “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 also noted, among other things, that it had not been informed in what practical respect the initiation of the criminal proceedings had occasioned any deterioration internally in the Congo (Order, para. 29). On these bases, the Court declined to indicate provisional measures.

5. This conclusion, in our view, would suggest that the Court has not given sufficient consideration to the "circumstances" as that term is used in Article 41 of the Statute, which requires the Court to consider all aspects, including the consequences that might occur if the interim Order is not granted.

6. Admittedly, both the spirit and letter of Article 41 of the Statute call for concern for the preservation of the rights which may be adjudged in the merits phase of the proceedings to be, as a rule, the guiding factor in taking a decision on provisional measures. This does not, however, mean that the harm attributable to the violation of those rights may not 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. We believe that these considerations, to a large extent, lay at the root of the Court's decisions in a number of cases where provisional measures were explicitly ordered with a view to preventing "aggravation", "extension" or "exacerbation" of harm already done to the claimed rights, even if the risk of immediate irreparable prejudice to the claimed rights was not always so obvious. Moreover, some recent cases in the Court's jurisprudence point to the fact that sometimes it is not easy to separate the harm caused by the consequences of the violation of claimed rights from the harm to the rights as such. This can be seen in the Orders on provisional measures which the Court indicated in the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *LaGrand (Germany v. United States of America)* and *Avena and Other Mexican Nationals (Mexico v. United States of America)* cases, where the lives of individuals were at stake.

7. For all the above-stated reasons, we 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). This is not to imply that the Court has erected an insurmountable barrier between these two categories of harm or damage for as the Court itself noted:

"this prejudice [that is damage 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' (Order, para. 27)] might, in the circumstances of the case, be regarded such as to affect irreparably the rights asserted in the Application" (Order, para. 29).

8. Our contention is that when considering a request for interim measures of protection, the Court should consider all relevant aspects of the matter before it, including the extent of the possible harmful consequences of the violation of the claimed right.

(Signed) Abdul G. KOROMA.

(Signed) Vladlen S. VERESHCHETIN.
