

**CASE CONCERNING CERTAIN CRIMINAL PROCEEDINGS IN FRANCE
(Congo v France)
REQUEST FOR INDICATION OF A PROVISIONAL MEASURE¹**

I. BACKGROUND²

France had claimed that the President and other authorities from the Congo who were on a state visit to France would have to give evidence to an investigating French judge in relation to their acts in the Congo. France had alleged that those acts had breached French law and international law. Under the French Criminal Procedure Code:³

any person who has committed, outside the territory of the Republic, any of the offences enumerated [in the Code] may be prosecuted and tried by the French courts if that person is present in France.

On 9 December 2002, the Congo instituted proceedings against France alleging that France had:

1. violated the principle that a state could not, in breach of the principle of sovereign equality among all members of the United Nations, as laid down in Article 2(1) of the Charter of the United Nations, exercise its authority on the territory of another State by:
 - (a) unilaterally attributing to itself universal jurisdiction in criminal matters, and
 - (b) 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 own state; and
2. violated the criminal immunity of a foreign a foreign Head of State – an international customary rule recognised by the Court's jurisprudence.

¹ For the Order of Court see the Court's website at <www.icj-cij.org/>; see also International Court of Justice, Press Release 2003/20, 17 June 2003.

² Ibid.

³ Order of Court para 12.

Consequently, the Congo requested the Court to:

1. declare that France should annul 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 their investigating judges;
2. urgently decide the request for a provisional measure after receiving France's consent to its jurisdiction;
3. indicate a provisional measure to preserve the Congo's rights as indicated in the application on the merits; and
4. order the immediate suspension of the proceedings being conducted by the investigating judge of the *Meaux*.

In support, the Congo submitted as follows:⁴

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.

II. THE FACTS⁵

On 5 December 2001, certain human rights organisations (the complainants) filed with the *Procureur de la République of the Paris Tribunal de grande instance* a complaint concerning "crimes against humanity and torture" allegedly committed by authorities in the Congo against Congolese nationals. The authorities named were Nguesso (President of the Congo), Oba (Minister of the Interior), Dabira (Inspector-General of the Armed Forces) and Adoua (Commander of

⁴ Ibid para 26.

⁵ Ibid paras 10-19.

the Presidential Guard). The complainants argued that the French courts had jurisdiction because:

1. customary international law provided universal jurisdiction for crimes against humanity; and
2. Articles 689-1 and 689-2 of the French Code of Criminal Procedure provided jurisdiction for the crime of torture.

The *Procureur de la République* of the *Paris Tribunal de grande instance* transmitted the complaint to the *Procureur de la République* of the *Meaux Tribunal de grande instance*, who in turn ordered a preliminary inquiry. On 23 January 2002, the *Meaux* issued an application for a judicial investigation of the *réquisitoire* (alleged offences), which led its investigating judge to investigate both crimes based on Article 689-1 for jurisdiction. The complaint was referred to the *parquet* of the *Tribunal de grande instance of Meaux* because Inspector-General Dabira, one of the named authorities, resided in an area within that court's jurisdiction. However, the investigation itself did not name any of the authorities but a non-identifiable person.

On 23 May 2002, judicial police officers placed Inspector-General Dabira in custody following his testimony. On 8 July 2002, his testimony was obtained again, this time by the investigating judge as a *témoin assisté*.⁶ On 16 September 2002, the investigating judge issued a *mandat d'amener* (warrant for immediate appearance) against him who had returned to the Congo by then. According to French law, although the *mandat* was enforceable against him if he returned to France, it could not be executed outside French territory.

The Congo stated in its application that when President Nguesso was on a state visit to France, the investigating judge had issued a *commission rogatoire* (warrant) to judicial police officers instructing them to take the President's testimony. However, the Congo could not produce such *commission rogatoire* as evidence. Further, President Nguesso was never "*mis en examen* nor called as a *témoin assisté*". Although France did not dispute this, it contended that the President's

⁶ Under the criminal procedure of France, a *témoin assisté* is a legally represented witness who to some extent is also a suspect. For this reason, a *témoin assisté* therefore enjoys certain procedural rights not conferred on ordinary witnesses, such as access to counsel and the case file.

evidence was obtained under Article 656 of the Code of Criminal Procedure. In general, this provision applied where evidence was sought from a “representative of a foreign power” through diplomatic channels.

Finally, both parties had agreed that there were no acts of investigation (instruction) against Minister Oba or Commander Adoua, and there was no application to question them as witnesses under French criminal proceedings.

III. JURISDICTION⁷

Since the International Court should have a *prima facie* basis of jurisdiction before it can indicate provisional measures, the Congo had argued this jurisdiction based on France’s future consent pursuant to Article 38(5) of the Rules of Court. On 8 April 2003, France gave this consent by letter to the Court, which was the first time in the Court’s history that this provision was used to found such jurisdiction.

IV. THE COURT⁸

By 14:1 votes,⁹ the Court rejected the Congo’s application for the indication of provisional measures under Article 41 of the Court’s Statute to prevent the aggravation or extension of the dispute between the parties.¹⁰ The following traces the Court’s reasoning.

(a) *Preservation of the Congo’s Rights*

The Court began by addressing the Congo’s submissions on the effects of France’s alleged wrongful acts on the Congo’s rights, namely:

1. the irreparable prejudice that would result from the continuation of the French criminal proceedings before the *Tribunal de grande instance of Meaux*;
2. the continuation and exacerbation of the prejudice already caused to the honour and reputation of the highest authorities of

⁷ Order of Court paras 20-21.

⁸ *Ibid* paras 22-40.

⁹ The only dissenting judge was de Cara J ad hoc.

¹⁰ For the operative part of the Order, see Order of Court para 41.

- the Congo, to internal peace in the Congo, to the international standing of the Congo, and to Franco-Congolese friendship;
3. the Congo's right to require France to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law; and
 4. the Congo's right to require France to respect the immunities international law had conferred, in particular on the Congolese Head of State.

Responding to the above submissions, the Court concluded as follows:

1. The purpose of any provisional measures should be to preserve the Congo's claimed rights.
2. The irreparable prejudice to those rights claimed by the Congo would not be caused. However, in the circumstances of the case, the prejudice could affect irreparably the rights asserted in the Congo's application.
3. It was not indicated how the French criminal proceedings had on the deterioration internally, in the Congo's international standing, or in Franco-Congolese relations, in a practical sense.
4. There was no evidence of serious prejudice or threat of prejudice as claimed by the Congo.
5. The first question to be asked should be whether the criminal proceedings pending in France risked irreparable prejudice to the Congo's right to respect by France for the immunities of President Nguesso as Head of State, such as to require that provisional measures be indicated urgently.

The Court referred to the parties' statements on the relevance of Article 656 of the French Code of Criminal Procedure and to a number of statements made by France on its criminal law on the immunities of Heads of State. The Court observed that it had not been asked to determine the compatibility of the procedure so far followed in France with the rights claimed by the Congo. Instead, the Court had to only determine the risk that the French criminal proceedings could end in irreparable prejudice to the rights claimed. As a result, the Court found that on the information the Congo had provided before it in relation to President Nguesso, there was no risk of irreparable prejudice at the time to justify the urgent indication of provisional measures. Also, the Congo did not show that Minister Oba had suffered a similar risk.

(b) Universal Jurisdiction in Criminal Matters

The Court had to consider whether a risk of irreparable prejudice existed when France unilaterally assumed universal jurisdiction in criminal matters constituting a violation of an international law principle. In this respect, the question the Court had to address was whether the proceedings before the *Tribunal de grande instance of Meaux* caused a threat of irreparable prejudice to the rights invoked by the Congo justifying the urgent indication of provisional measures.

In relation to President Nguesso, the Court noted that the French Ministry of Foreign Affairs had not yet transmitted the investigating judge's request to the President for a written deposition based on Article 656 of the French Code of Criminal Procedure. Also, in relation to Minister Oba and Commander Adoua, the investigating judge had not yet subjected them to any procedural measures. As a result, the Court concluded that since those measures had not eventuated to threaten any of them, there was no urgent need for provisional measures to preserve the rights the Congo claimed.

In relation to Inspector-General Dabira, the Court noted France's acknowledgment that the criminal proceedings instituted before the *Tribunal de grande instance of Meaux* had an impact on his legal position. This had occurred because Dabira:

1. possessed a residence in France;
2. was present in France;
3. testified as a *témoïn assisté*; and
4. refused to respond to a summons from the investigating judge after returning to the Congo, who thereupon issued a *mandat d'amener* against him.

The Court observed that the practical effect of a provisional measure of the kind requested would be to enable Inspector-General Dabira to enter France without fear of any legal consequences. However, the Court found that the Congo had failed to demonstrate the likelihood or even the possibility of any irreparable prejudice to Congolese rights resulting from the procedural measures taken against the Inspector-General.

Accordingly, the Court held that the Congo's application for the indication of a provisional measure should be denied.

V. JOINT SEPARATE OPINION OF KOROMA AND VERESHCHETIN JJ

Koroma and Vereshchetin JJ took the view that when considering a request for interim measures of protection, the Court should weigh all relevant aspects including the extent of possible harmful consequences if claimed right had been violated. As a result, they had some reservations concerning the Court's majority judgment after drawing a distinction between the harm to the rights that might subsequently be adjudged to belong to the Congo and the harm consequent upon the violation of those rights.¹¹ The harm attributable to the violation of the claimed rights could have wider negative consequences and repercussions for the Congo's legal and political interests far transcending the adverse effect on its claimed rights as such. In those circumstances, the indication of provisional measures could be necessary not so much in view of the imminence of irreparable harm to the claimed rights, but because of the risk of the grave consequences of their violation.

As a result, Koroma and Vereshchetin JJ felt that the Court did not appear to have given sufficient weight to the risk of "irreparable harm", which could occur to the Congo if the criminal proceedings continued.

VI. DISSENTING OPINION OF JUDGE *AD HOC* DE CARA

De Cara *J ad hoc* emphasised three distinctive features of the case:

1. it was a case concerning Africa which implicated, in particular, a Head of State, who was the embodiment of the nation itself on that continent;
2. the current French law in such matters contrasted with the untimely measures taken or capable of being taken by the French prosecutors and judges; and
3. in this case more than in others, there appeared to be an especially close relationship between the proceedings on provisional measures and on the merits.

¹¹ *Ibid* para 29.

In making a distinction between the rights claimed to have been violated and the indirect prejudice that could be caused thereby, de Cara J *ad hoc* stated that the majority of the Court appeared to have adopted a formal approach that prevented the case from being considered as a whole. Article 41 of the Court's Statute and Article 75 of the Rules of Court gave the Court considerable latitude to decide on provisional measures according to the circumstances of each case.

Consequently, de Cara J *ad hoc* could not vote with the majority because he considered that the essential element of the case had been disregarded. He felt that at this stage of the proceedings, it was not a matter of deciding whether, in abstract terms, French law guaranteed the immunity of a foreign Head of State or whether it adopted a strict concept of universal jurisdiction. On the other hand, one had to determine to what extent the *réquisitoire* of 23 January 2002 derogated from such principles and violated the right to immunity, the attribution of criminal jurisdiction, the dignity of the Congolese President, and the resulting harm caused to the state itself.

De Cara J *ad hoc* observed that the *réquisitoire* and the annexed complaints, on the basis of which they were issued, governed the entire French criminal proceedings. As an act of prosecution, it had violated the immunity of a foreign Head of State and it had sought to substitute the jurisdiction of French courts for that of Congolese courts already seised and having territorial jurisdiction by reason of the facts and the nature of the individuals implicated. In that context, prejudice had certainly resulted especially when there was also a risk of additional prejudice since the French investigating judge could at any time decide on any acts of judicial investigation, including the formal examination (*mise en examen*) of suspects or their detention. Moreover, this could occur against any senior figure named or any Congolese citizen. In such circumstances, the threat of coercion could constitute irreparable prejudice to the Congo particularly when it affected a Head of State.

De Cara J *ad hoc* also observed that given the inevitable publicity surrounding a prosecution for crimes against humanity, the criminal proceedings initiated in violation of the Congo's rights could cause harm not only to the honour of that state but also to the stability of the government of a state marked by division after a long civil war. This was even more serious in Africa, a continent where Heads of States

occupied a special position in societies where ethnic solidarity prevailed over inadequate national cohesion. The risk of the state being destabilised could not be dismissed as a distinct prejudice from those related directly to the violation of the rights for which the Congo had sought protection. As a result, the Congo had a legal interest that was worthy of preservation stemming from a right based on respect for its sovereignty.

In the above circumstances, the urgency remained as long as the prosecutor's application was maintained because there were no guarantees for the individuals named in the complaints, regardless of their status. Further, they had no right of appeal against the application of the *Meaux*, unless they had been formally placed under judicial examination. In any event, urgent protection was justifiable because the individuals involved had to wait until the Court had ruled on the merits and because any subsequent reparation for prejudice caused by the continuation of the judicial proceedings seemed illusory. Therefore, the Court could have indicated provisional measures to prevent any aggravation of the dispute because the circumstances supported this, and the maintenance of the *status quo* required this.

In the present case, France had 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". France had simply given a statement on current French law and refused to make any promises on the situation or on the individuals concerned. The Court had noted France's position without commenting on its scope and without counterbalancing the decision to dismiss the Congo's request. In other words, the Court did not make any declaration against France in this regard. This was despite France refusing to commit to withdrawing the *réquisitoire* and, in the process, risking aggravating the dispute as long as the *réquisitoire* remained in force. Further, its refusal could not be explained by considerations on the separation of powers because the government represented the state in all its aspects in international law.

De Cara J *ad hoc* referred to the Court's Advisory Opinion on *Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*¹² where it was held that government

¹² For the text of the Advisory Opinion see [1999] International Court of Justice

authorities are obliged to inform domestic courts of the status of the official concerned, in particular the official's entitlement to immunity from legal process. In the present case, France had a duty to similarly instruct the *Procureur Général* (Principal State Prosecutor) to annul the *réquisitoire* threatening the immunity of the Head of State and encroaching upon the jurisdiction of Congolese courts.

In conclusion, De Cara J *ad hoc* held that the Court should have framed a declaration reminding France of its duty to ensure compliance with its own laws in so far as they enshrine the rules and norms of international law. He added that declarations have the effect of "creating legal obligations" as recognised in *Nuclear Test Cases*.¹³ If not, declarations would simply beg the question without any practical consequences, without obliging the Court to hold that France had no intention of committing itself, and without appropriate conclusions from the reluctance to make any promises. Finally, since domestic statutes are not immune to the effects of a judgment of the Court, *a fortiori*, such a decision could require a state to take an administrative measure.

Reports at <<http://212.153.43.18/icjwww/idocket/inuma/inumaframe.htm>> (visited February 2004).

¹³ [1974] International Court of Justice Reports 253.