CR 2003/21 (translation)

CR 2003/21 (traduction)

Monday 28 April 2003 at 4 p.m.

Lundi 28 avril 2003 à 16 heures

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. Avant que la Cour n'entende le premier tour de plaidoiries au nom de la République française, je voudrais appeler l'attention des délégations de la République du Congo et de la République française sur le fait que les audiences portant sur des mesures conservatoires ont pour fonction de montrer à la Cour que, compte tenu de l'urgence, des mesures conservatoires sont nécessaires pour sauvegarder les droits respectifs de chacune des parties. J'espère que les délégations sauront se concentrer sur ces questions.

Je donne maintenant la parole à Son Excellence Monsieur Ronny Abraham, agent de la République française.

Mr. ABRAHAM:

1. Mr. President, Members of the Court, it is a great honour for me to appear today before this Court on behalf of the French Republic. It is also an important and exceptional moment for my country, since for the first time for many years France appears before the principal judicial organ of the United Nations after having accepted its jurisdiction with a view to the settlement of an international legal dispute between itself and another State.

2. This dispute has been brought before the Court by the Republic of the Congo, which charges France — quite wrongly as we shall amply demonstrate later — with violating "the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations, exercise its authority on the territory of another State", and with violating "the criminal immunity of a foreign Head of State".

3. The Congo submitted its Application to the Court in awareness of the fact that France is not bound by a declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute. The Applicant State nevertheless indicated that the Court's jurisdiction could be based on Article 38, paragraph 5, of the Rules of Court in the event of France giving its consent, and those were the terms upon which the Application was communicated to the French authorities.

4. Upon consideration, the French authorities decided to consent to the jurisdiction of the Court in the present case and made that known in a letter to the Registrar from the Minister for

Foreign Affairs dated 8 April last. As far as I know, this is also the first example of a respondent State accepting the jurisdiction of the Court through the operation of Article 38, paragraph 5, of the Rules of Court.

5. The reason why my country has thus consented to the Court hearing the dispute whose object is defined in the Application is first and foremost in order to solemnly manifest the importance which it attaches to the scrupulous observance of international law, in every field and in all circumstances; to the principle of good faith in international relations; and to the need for seeking to every possible extent the most appropriate peaceful means of settlement of disputes between States.

6. Another reason, it must be said, is to testify to the respect and confidence which France has in this Court, and to the manner in which it discharges its august task of stating the law, of defining by illuminating jurisprudence the scope of the rules which are incumbent upon States as the protagonists of international society. In this respect the present case raises interesting and important issues, some of which are still controversial, and which it will be for the Court to elucidate with the incomparable discernment, objectivity and authority which are its attributes. In giving its consent, France is glad to provide you with the opportunity to do so.

7. Finally, it is scarcely necessary to add that another reason why France appears voluntarily before the Court today is because it is convinced that neither the rules which it applies in its legal order in criminal matters nor the acts done by its judicial authorities in the case which has been referred to you are in the least in contradiction with the requirements of international law. It is therefore with total confidence that France comes before you today in the certainty that it has right on its side.

8. But this, as you well know, is not the object of the present hearing, in the course of which what has to be and will be debated is not the substance of the dispute, contrary to the impression one might have had on occasions this morning, but solely the request for the indication of provisional measures which the Republic of the Congo has included in its Application; the purpose of this request, as we have been reminded, is to seek “an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux tribunal de grande instance”.

9. Since, therefore, the dispute originated in proceedings before a French court, I need to begin, Mr President, Members of the Court, with a review of the pertinent rules applicable under French law, namely the rules governing the jurisdiction of the criminal courts and the conduct of criminal proceedings and those relating to the immunities accorded to foreign Heads of State. I shall then summarize the facts which underlie the present case with a view to their clarification. After that, Professor Alain Pellet and Professor Pierre-Marie Dupuy, counsel for France, will show that the conditions required by your jurisprudence for the indication of provisional measures are in no manner fulfilled in the present case.

I. RULES OF FRENCH LAW WHICH ARE RELEVANT TO THE PRESENT CASE

A. Rules applicable in regard to the jurisdiction of French criminal courts

10. Mr. President, Members of the Court, allow me therefore to begin by reviewing the rules applicable in regard to the jurisdiction of the French criminal courts. They are simple. When analysed, as they will be in a moment, they show that the jurisdiction of the French courts is always subject to the verification of a link with France whose operation is circumscribed by conditions strictly laid down by law.

11. The principle is unambiguous: normally, the French courts have jurisdiction to prosecute offences punishable under French criminal law where those offences have been committed on French territory. French criminal law is dominated by the principle of territoriality, since its principal purpose is to provide for the punishment of offences committed on French territory, the situation being that an offence is deemed to be committed on French territory if one of the elements constituting the offence took place there. It is therefore only exceptionally that French law recognizes, and only within certain limits, that French courts have jurisdiction in respect of offences committed outside French territory.

12. In the first place, French courts may have jurisdiction because of the French nationality of the offender — in which case we speak of active personal jurisdiction — or of one or more of the victims — passive personal jurisdiction. But the exercise by the French courts of their personal jurisdiction is subject by law to certain conditions. For while French law is applicable to crimes, that is to say, to the more serious offences, committed by a French national outside French

territory, it is not applicable to less serious offences *(délits)* committed under the same circumstances unless the acts are also punishable under the legislation of the State in which they were committed. And where the victim is of French nationality, French law is only applicable, and consequently French courts only have jurisdiction, in the case of crimes and less serious offences committed abroad that are punishable with imprisonment (Article 113-7 of the Criminal Code). Moreover, proceedings may not be brought before French courts where the person concerned has already been the subject of an unappealable trial decision in respect of the same acts, by virtue of the *non bis in idem* rule (laid down in Article 692 of the Code of Criminal Procedure). Lastly, in respect of offences committed abroad, criminal proceedings in respect of less serious offences may only be brought in French courts on the basis of personal jurisdiction by the public prosecutor, upon whom by law rests the duty of protecting public order, and not by victims themselves.

13. Also — and this is the heart of the matter — French law also confers jurisdiction on French courts in certain matters to prosecute and try principals or accessories in respect of offences committed outside French territory if the principals and the victims are foreigners. This is what is commonly known as "universal jurisdiction". But jurisdiction of this kind is provided for in French law solely within narrower limits than those laid down in the legislation of other countries, including — and I shall revert to this in a moment — that of Belgium. Such jurisdiction is in fact subject to two conditions. First, there must in principle be a treaty to which France is a party that provides for that universal jurisdiction and even requires it to be exercised; second, the person suspected must be on French territory. Those two conditions are laid down in Article 689-1 of the French Code of Criminal Procedure. In Articles 689-2 to 689-9 the Code of Criminal Procedure gives a limitative list of the international conventions on which such jurisdiction can be based.

14. One of those conventions, and without doubt the most important in practice, is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment dated 10 December 1984.

15. In conformity with that Convention, ratified by France in 1986[1], Article 689-2 of the Code of Criminal Procedure confers universal jurisdiction on the French courts in regard to torture,

[1]The instrument of ratification was deposited on 18 February 1986. It was dated 29 January.

but subordinates that jurisdiction to the presence of the suspect on national territory — a condition which, moreover, French law imposes systematically on the exercise of any universal jurisdiction, regardless of the treaty on which it is based. I should point out here that the fulfilment of that condition is assessed on at the time when proceedings are begun.

16. Mr. President, Members of the Court, it would therefore seem that, where universal jurisdiction, as it generally known, is concerned, the approach of French law is a restrictive one. For although the criminal jurisdiction of the French courts can extend to acts concerning which there is no verification of any of the criteria traditionally applied — neither the nationality of the victim nor that of the alleged defender, nor the location of an element constituting the offence — that extent is, as I said, and I repeat, subject to two conditions: first, it only applies to offences contemplated by a convention which has been incorporated into French domestic law; second, it can only apply if the suspect is on French territory at the time of the proceedings, which precludes any procedural steps being instituted in the absence of the person concerned. As you will appreciate, the situation presented to you in the present dispute is very different from the one which you examined in the case which resulted in your Judgment of 14 February 2002, the *Arrest Warrant* case between the Democratic Republic of the Congo and Belgium. For unlike French law, Belgian law embodies universal jurisdiction in its most extensive form, in that it confers jurisdiction on the criminal justice authorities to prosecute acts committed abroad by foreigners against foreigners *in absentia*, that is to say, in the absence of the suspect. This is not, I would emphasize, the case in France, where the exercise by the French courts of any universal jurisdiction is only possible pursuant to an international instrument and solely if the condition relating to the presence of the person concerned on national territory is met at the time when proceedings are commenced.

17. That, Mr. President, brings me to the end of my consideration of the rules governing the jurisdiction of the French criminal courts. Permit me now to discuss briefly those which apply in regard to the procedural matters involved in the preparation and conduct of criminal proceedings. Three stages can be distinguished: the stage of the preliminary investigation *(enquête préliminaire)* under the authority of the public prosecutor, that of the judicial investigation *(instruction préparatoire)* and that of the trial; the first and second stages are obviously of particular

importance to us since the proceedings with which we are concerned in the present case have not gone beyond that point.

B. Rules governing the conduct of proceedings

18. A few words first of all about the first stage, the preliminary investigation (*enquête de police judiciaire*, also called *enquête préliminaire*). This is conducted by police officers under the direction of the public prosecutor. Its purpose is to enable the prosecutor to gather information permitting him to assess the seriousness of the facts referred to him, so that he can decide whether he is justified in opening a judicial investigation, that is to say, in seising an investigating judge, who is an independent judicial officer whose task is to carry out a detailed investigation into the facts, or where appropriate to commit the alleged offender directly to the correctional court *(tribunal correctionnel)* if the offence is a less serious one *(délit)*. This preliminary investigation may be opened by the public prosecutor on his own initiative or as a result of a complaint made to him. But here it is necessary to distinguish carefully between two kinds of complaints. In certain cases, it will be the victim who files the complaint by instituting proceedings as a civil complainant (*en se constituant partie civile* as we say). The advantage to the complainant is that the prosecutor is then under an obligation to seise an investigating judge (by what is known as opening a judicial investigation *(ouvrir une information judiciaire)*). In other cases, the complaint is brought by a third party and not by the victim, or else it is brought by the victim, but one who does not wish to institute proceedings as a civil complainant: in this situation (called a “simple” complaint), it will be entirely at the prosecutor's discretion as to whether or not a judicial investigation should be opened, and to what extent, after he has conducted his preliminary investigation.

19. In the instance with which we are concerned, the complaint originating the case is a simple complaint — which moreover is explainable logically by the fact that it is not the victims of the alleged offences who seised the public prosecutor. I shall come back to this in a moment when I discuss the facts of the case.

20. In the course of the preliminary investigation, police officers or gendarmes, acting, as I said, on the instructions of the prosecutor, may first carry out non-coercive acts such as ascertaining facts or hearing persons who agree to reply to questions. They may also issue a

summons to a person whom they consider it essential to question. That person is then under an obligation to appear, and if he fails to do so, moreover, the public prosecutor can use the services of the police to enforce his appearance (Art. 78 of the Code of Criminal Procedure).

21. The investigators may then, subject always to the needs of the investigation, decide to take a person into custody (*placer une personne en garde à vue*, as we say), i.e., decide to keep him on police or gendarmerie premises in order to question him. This possibility is nevertheless circumscribed by the law. First, only a person against whom there exist credible reasons to suspect that he has committed an offence can be held in custody (Art. 63 of the Code of Criminal Procedure). Second, that person cannot be detained for more than 48 hours (Art. 77).

22. When his investigation is complete, the public prosecutor, as I said, decides whether or not the proceedings should be pursued. If he decides they should not, he will then close the case without further action. If he decides otherwise, he can commit the alleged offender directly to the correctional court if the offence is a less serious one *(délit)*, or refer the matter to an investigating judge (and thus open "a judicial investigation"), which is always necessary for proceedings to be pursued if the offence is a crime *(crime)*, that is to say a serious offence.

23. We have thus reached the second stage of the proceedings which, if such is the case, is the judicial investigation *(instruction préparatoire)*. This is entrusted to an investigating judge, or in exceptional circumstances to a number of investigating judges acting jointly where the complexity of the case so justifies (Art. 83, Code of Criminal Procedure). The investigating judge can only pursue his investigation within the limits of the document from the public prosecutor seising him of the case, which is known as an "originating application" *(réquisitoire introductif)*. This document, the document by which the judge is seised of the case, must specify the offences which are the subject of the proceedings and, normally, the person or persons who are suspects (Art. 80, Code of Criminal Procedure). However, the investigating judge may also be seised by the prosecutor by means of an application against an unknown person (against "X" as we say) where the prosecutor has been unable to identify the perpetrators of the offence with sufficient probability by the end of his investigation. It will then be for the judge to identify them if possible.

24. The investigating judge is in a position of complete independence from the prosecutor. As stated in Article 81 of the Code of Criminal Procedure, he may, in the manner the law

prescribes, do any act which he considers useful for establishing the truth. It is in fact the investigating judge who will examine the evidence for or against a suspect. In order to carry out his task, he possesses powers of investigation, which he exercises either himself or through judicial police officers acting on his instructions, that is to say, by virtue of a warrant, which is called a *"commission rogatoire"*. What are these powers?

25. First, he can examine witnesses. But we must be careful here to make a clear distinction between two categories of witness: on the one hand there is the ordinary witness *(témoin simple)* whose examination is requested because he appears to have information useful to the judge; on the other hand, there is the represented witness *(témoin assisté)* — this expression will crop up again later — who is in fact more than a witness: he is already a suspect, because he is a person who has been specifically named in the prosecutor's originating application, or who has been implicated by the victim or by another witness, or again a person against whom the judge considers that certain evidence exists. That is why the represented witness is entitled, when he is examined by the judge, to be represented by a lawyer (hence the term), and to have access to the case file in order to defend himself.

26. The investigating judge may also carry out searches, have persons taken into custody and issue warrants for suspects to be detained and brought before him. Here again, a distinction must be drawn: we speak of an "arrest warrant" *(mandat d'arrêt)* where the person concerned has fled or where his address is unknown. We speak of an "appearance warrant" *(mandat d'amener)* — this expression too will crop up in a moment — where the person's address is known. The notion of an "appearance warrant" deserves a little attention. It is defined by the Code of Criminal Procedure as the "order given by the judge to the police to produce before him immediately the person against whom the warrant is issued" (Art. 122, Code of Criminal Procedure). Here again, the issue of such a warrant by the judge is subject to conditions; in particular, there must be evidence against the person named suggesting that he may have participated in the offence, and he must also have refused to appear in response to a summons from the judge. This arrest warrant is enforceable throughout the territory of the French Republic (Art. 124, Code of Criminal Procedure). But it only takes effect on national territory and is not intended to be circulated internationally through Interpol or at the European level through the Schengen system.

27. Lastly, still with a view to completing his investigation, the judge may place a person under formal investigation (this procedure was formerly known as indictment *(inculpation)*); that person may already, but not necessarily, have the status of a represented witness, where there is serious or concordant evidence making it likely — as the Code says — that he may have taken part, as a perpetrator or accomplice, in the commission of the offence of which the judge has been seised. In this case the judge must previously inform the person concerned of his intention to place him under formal investigation and afford him the opportunity to present his observations in defence. Placing a person under formal investigation may therefore be defined as the act by which the judge notifies an individual that he is officially the subject of a prosecution by reason of the evidence of guilt which exists against him. This step is obviously accompanied by recognition of the rights of defence of the person concerned, representation by a lawyer and access to the case file.

28. Upon completion of his investigation, the investigating judge decides whether sufficient evidence exists against the person placed under formal investigation for him to appear before a trial court. If, as often happens, he considers that there is insufficient evidence against the person concerned, or that the facts are not sufficiently well established, or again that the perpetrator of the acts has not been clearly identified, he will issue a dismissal order which closes the proceedings. If, on the contrary, he considers that sufficient evidence exists against the person who has been placed under formal investigation, he will commit him for trial to the assize court in the case of a crime, or to the correctional court in the case of a less serious offence. Thus at every stage of the proceedings — on completion of the preliminary investigation by the public prosecutor, first of all, and on completion of the judicial investigation by the judge subsequently — the possibility exists for the case to be closed because of lack of sufficient evidence. Moreover, if the investigating judge believes that there is reason for the person whom he suspects of having committed a crime to be committed to the assize court, that person may appeal against his decision, and the court of appeal will in turn decide whether the case displays sufficient evidence to justify a trial.

29. Only at that point will the third stage of the proceedings open, the *trial* stage. This, in the case of crimes, takes place before an assize court composed of judges, representing the professional element, and ordinary citizens, non-professional jurors, who represent society as a whole.

30. I must refer to a particular point which is extremely important in the present case, and one to which the Congo refers: the special rules laid down in the Code of Criminal Procedure in regard to the hearing as witnesses of foreign Heads of State and other official representatives of foreign Powers.

31. In this respect the Code of Criminal Procedure provides, by derogation from the ordinary law, that

> "The written deposition of a representative of a foreign Power shall be requested [by the investigating judge] through the Minister for Foreign Affairs. If the request is approved [i.e., accepted by the addressee], the deposition shall be taken by the first president of the court of appeal or by such magistrate as he delegates for the purpose." (Art. 656, Code of Criminal Procedure.)

This Article applies to every holder of a public office who represents a foreign State internationally (in particular, diplomats accredited in France or foreign Heads of State). Under French law, therefore, a foreign Head of State has no obligation to give testimony when asked to do so. He has no obligation in this respect. Consequently, his refusal to testify does not constitute an offence and cannot therefore give rise to the criminal sanction incurred as a general rule by a witness who refuses to appear (this sanction is provided for in Article 434-15-1 of the Criminal Code). Moreover, and in any event, the immunities enjoyed by foreign Heads of State would seem to preclude coercive measures being taken against them. This brings me now, Mr. President, to a discussion of the rules of French law which concern the immunities of foreign Heads of State.

C. French rules relating to the immunities accorded to foreign Heads of State

32. In conformity with international law, French law embodies the principle of the immunity of foreign Heads of State. This was in fact alluded to this morning by our opponents. 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. The clearest and most recent expression of this jurisprudence lies in the important judgment handed down on 13 March 2001 by the Criminal Chamber of the Court of Cassation in the *Khadafi* case, so called from the name of the Libyan Head of State. This judgment states that "international custom prohibits the prosecution of incumbent Heads of State, in the absence of any

contrary international provision binding on the parties, before the criminal courts of a foreign State" and it deduces from this that

> "under international law the offence alleged [the offence was, as was stated this morning, aiding and abating the destruction of a property in connection with terrorist activities], regardless of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State".

The Court of Cassation thus asserted a principle of immunity which is absolute since no exception to it exists on the basis of the nature of the crime (that is to say, of its degree of gravity: acts of torture, violation of humanitarian law, etc.). It is true, as I said, that the Court's judgment mentions exceptions. However, by the very terms of the judgment, these can only be exceptions arising from an "international provision binding on the parties". These in practice would be stipulations contained in international conventions to which France and the foreign State itself are parties, stipulations derogating from the principle of the immunity of Heads of State. That is precisely what Professor Decocq said this morning and he was right to say so.

33. Mr. President, this decision makes it perfectly clear that the French courts apply international custom and, in particular, the customary principle which confers immunity from jurisdiction and enforcement on foreign Heads of State. It is important to remember that the French Court of Cassation applied this customary principle even before your own Court made its solemn decision on the issue in the Judgment which it delivered on 14 February 2002 in the *Arrest Warrant* case, since the reasoning adopted by your Court in that case in connection with a Minister for Foreign Affairs applies *a fortiori* to a Head of State. It is therefore quite clear that the French courts, which have already recognized the principle of the immunity of foreign Heads of State, will apply it all the more firmly in the future for it having been forcefully reasserted by the International Court.

34. I apologize, Mr. President, Members of the Court, for having perhaps been somewhat lengthy in setting out the rules applicable in France to the commencement and conduct of criminal proceedings. I felt, though, that it was necessary to do so in order for the facts of the present case to be properly understood and I shall now endeavour to summarize them, but more briefly.

II. REMINDER OF THE FACTS

35. On 7 December 2001, three non-governmental organizations namely the International Federation of Human Rights (Fédération internationale des droits de l'homme), the Congolese Observatory of Human Rights (Observatoire Congolais des droits de l'homme) and the Ligue des droits de l'homme filed with the procureur de la République of Paris a complaint for crimes against humanity and torture against Messrs. Denis Sassou Nguesso, incumbent President of the Republic of the Congo, Pierre Oba, Minister of the Interior, Norbert Dabira, Inspector General of the Congolese armed forces and General Blaise Adoua, Commander of the Presidential Guard.

36. The complaint related to facts having occurred in 1999 concerning the massive disappearance of individuals who had fled during the 1998 civil war. In support of their complaint, the associations produced testimony and reports by the United Nations High Commission for Refugees, which attributed those abuses to members of the military organization set up in the Congo. According to the complainants, it was thus in their hierarchical capacities that the four above-mentioned persons should be attributed responsibility for the crimes committed by their subordinates.

37. Concerning General Dabira in particular, the complainants contended that in his capacity as Inspector General of the Armed Forces he could not have been unaware of the abuses committed by members of the Republican Guard, of the Central Directorate for Military Intelligence, and of the Military Security Directorate, and that he took no measures to put an end to such misconduct.

38. The associations went to the Paris procureur de la République to request him to initiate a judicial investigation under Article 6 of the 1984 United Nations Convention against Torture. I would recall that under Article 6:

> "Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State party in whose territory a person alleged to have committed any offence referred to in Article 4 is present shall take him into custody or take other legal measures to ensure his presence . . ."

The associations moreover relied on Article 689-1 of the French Code of Criminal Procedure which I mentioned just now and which, under certain circumstances, grants jurisdiction to French courts to prosecute and try the perpetrators or accomplices of offences committed outside France.

39. The Paris public prosecutor, to whom the complaint was addressed, transmitted that complaint to the public prosecutor in Meaux. Why? Because he observed that, among the persons

referred to by name in the complaint, the only one who may have been in France was, at first sight and according to the information at his disposal, General Dabira. The General owned a residence at Villeparisis, in the Paris region, where he apparently stayed regularly and for a certain duration. The municipality of Villeparisis is located within the judicial district not of the Paris tribunal de grande instance but that of Meaux and so the Paris public prosecutor transmitted the complaint to his colleague in Meaux, who was territorially competent to examine it. In a case such as this, the court of competent jurisdiction, according to French law, is that of the place where the suspect resides, that of his last known residence or that of the place where he is found (Art. 696 Code of Criminal Procedure).

40. The public prosecutor of Meaux initiated a preliminary police investigation during which, *inter alia*, he instructed the police to take testimony from a certain number of witnesses. On the basis of the evidence thus obtained, on 23 January 2002 he decided to request a judicial investigation, in other words, as we have already heard, he decided to seise the investigating judge of the tribunal. An important element should be noted here: even though the complaint by the three associations referred to persons by name — the four that I mentioned — the judicial investigation was requested by the public prosecutor against unnamed persons (persons unknown) without any name being given in his application. In reality, however, the judicial investigation, at that stage, could only be directed against General Dabira, because he alone appeared to fulfil the mandatory condition laid down by French law for the exercise of universal jurisdiction, that is to say — I repeat and stress — that the alleged offender has to be present on French soil. It was indeed for that very reason, as I have just said that the initial complaint was examined by the Meaux public prosecutor and not by that of Paris. It should moreover be pointed out that no proceedings were brought by organs of French jurisdiction against General Oba or General Adoua.

41. Several months later, on 16 May 2002, after taking testimony from a number of witnesses, the two investigating judges in Meaux entrusted with the case requested the Paris gendarmerie to stop and question General Dabira. On those instructions, the gendarmes took General Dabira into police custody, on 23 May, for nine and a half hours and questioned him.

42. At the end of his police custody, General Dabira was of course released. Some time later, he received a summons from the investigating judges to be examined by them as a legally

assisted witness *[témoin assisté]* on 8 July 2002. He complied with that summons and was examined in the presence of his lawyer.

43. Following that examination, the investigating judges informed General Dabira that he would be summoned again on 11 September 2002, two months later, this time to be formally placed under judicial examination *[mis en examen]*. But at that time, General Dabira, who was then in the Congo, did not respond to the summons and advised the *Chargé d'affaires* of the French Embassy in the Congo that further to instructions from his hierarchy he considered that he did not have to comply with the summons of the French investigating judges. In particular, the principle *non bis in idem* could, in his view, be invoked against that summons since the Congolese courts had simultaneously been seised of the same offences and were continuing their investigation. I will not discuss the merits of that allegation now.

44. On 16 September 2002, the investigating judges reacted to the situation by issuing against General Dabira a *mandat d'amener*, that is to say — as I said just now — a warrant instructing police officers to bring him before the investigating judges. The police officers entrusted with the enforcement of that warrant went to Villeparisis and obtained confirmation from the General's wife, who was staying there, that Mr. Dabira was no longer on French soil and had returned to Brazzaville.

45. Concerning President Sassou Nguesso, lastly it should be pointed out that no proceedings of any kind were brought against him. It is true that the investigating judges expressed a wish to examine him, not by a warrant *[commission rogatoire]* given to police officers, as it was mistakenly suggested this morning, but in the context of the special procedure under Article 656 of the Code of Criminal Procedure, which — as I indicated just now — provides in such cases that judges' requests be transmitted to their addressees by diplomatic channels. However, to date, that request has still not been served on its addressee and this fact, moreover, has not been contested by the Congo; in addition — it goes without saying — even if it is served, President Sassou Nguesso would respond as he sees fit.

46. Since 16 September 2002, no measures of investigation have been carried out against General Dabira who, as I have said, is the only person to date who falls under the jurisdiction of French courts in the present case. Those are the facts.

47. Mr. President, Members of the Court, as the case stands at present, is there really a situation of urgency that would justify an Order of provisional measures as sought by the Applicant? The basic statement of facts that I have just given clearly suggests that the answer is no. But that will now be shown at greater length by Professors Pellet and Dupuy. The conditions laid down by your case law for an Order of provisional measures are not met, neither with respect to the alleged violation of the principle of immunity of foreign Heads of State — as Professor Pellet will explain — nor with respect to the alleged violation of the principle of sovereign equality between States — as Professor Dupuy will demonstrate. With your permission, Mr. President, I will now hand over to Professor Alain Pellet.

Le PRESIDENT : Merci Monsieur Abraham. Je donne maintenant la parole au professeur Pellet.

Mr. PELLET:

1. Mr. President, Members of the Court, it is always an honour and a pleasure to appear before this Court, especially when one has the privilege of representing one's own country. I am honoured and I am pleased — but I am also perplexed: the Republic of the Congo saw fit to accompany its Application by a request for the indication of provisional measures. However, this morning, its counsel did not see fit to dwell on the conditions, which are nevertheless very strict, laid down by your Statute and your case law for the ordering of such measures, but instead they launched into pleadings on the merits, which may be interesting but are certainly premature.

2. "This request seeks", as it states, "an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux tribunal de grande instance" on the pretext that the judicial investigation complained of by the Applicant is "perturbing the international relations of the Republic of the Congo" and impugns its "international standing". "Furthermore", it adds, "those proceedings are damaging to the traditional relations of Franco-Congolese friendship". It then concludes: "If these injurious proceedings were to continue, that damage would become irreparable".

3. Mr. President, as the Permanent Court held, the request for the indication of provisional measures cannot be designed to "obtain an interim judgment in favour of a part of the claim"[2]. This obviously holds true *a fortiori* in cases such as this when the request is quite simply designed to prejudge the merits of the case as a whole, and the statements by Congo's counsel eloquently confirmed that this morning because they confined themselves to pleading exclusively on the merits of the case in support of the request for the indication of provisional measures. As far as we are concerned, it is not for us to demonstrate today that the Republic of the Congo's Application is not based on any legal foundation (contrary to the approach of Congo's counsel this morning) — that will be the subject-matter of the merits stage; today it is only a matter of establishing that the measures (albeit largely exaggerated) complained of by the Applicant do not constitute a threat to the rights that it requests the Court to recognize.

4. Furthermore and in any event, the Congolese Application does not meet either of the two substantive conditions for the indication of provisional measures pursuant to your established case law (I will not address the prima facie jurisdiction of the Court, which is obviously not an issue in the present case). The two substantive conditions that I have just mentioned are conspicuously ignored by the Applicant, judging from this morning's pleadings: in order for provisional measures to be appropriate, there must first be a risk of *irreparable* prejudice to the rights at issue and, secondly, the indication of such measures must be *urgent*.

5. Members of the Court, you recalled those two conditions when you dismissed the request for the indication of provisional measures submitted by the Democratic Republic of the Congo in the case concerning the *Arrest Warrant of 11 April 2000*, the *Yerodia* case, which in many ways constitutes a particularly enlightening precedent for the case before you today — even though the two cases also have significant differences as we will have the opportunity to see.

6. In your Order of 8 December 2000, you considered that

> "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

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[2] *Order of 21 November 1927, Factory at Chorzów, P.C.I.J., Series A, No. 12*, p. 10; see also *Order of 8 December 2000*, case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, para. 72.

> 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"[3].

It is that first condition of irreparable prejudice that you have always firmly maintained[4] and which dates back to the Permanent Court[5].

7. As for the second condition, that of the urgency of the measures, which is equally well-established in case law[6] you also restated it forcefully and clearly in the *Yerodia* case; in the Order of 8 December 2000 you refused to indicate provisional measures: "such measures" you said, "are justified solely if there is urgency"[7].

8. You once again recalled those two prerequisites in the most recent Order on the indication of provisional measures that you rendered on 5 February 2003 in the case concerning *Avena and Other Mexican Nationals*[8].

9. Members of the Court, the Congo cannot invoke any irreparable prejudice or any urgency to ask you to indicate any provisional measure whatsoever. Professor Dupuy will demonstrate this in conjunction with the Applicant's argument that the purported exercise of jurisdiction by French courts, which they allegedly arrogated to themselves wrongly, is claimed to have violated the principle of sovereign equality. My own demonstration now will concern the alleged violation of immunity as invoked by the Congo.

10. As you recalled just now, Mr. President, in the present proceedings, which are both exceptional and incidental, it is only a question of examining the substance of those two series of

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[3]Para. 69.

[4]See Orders for the indication of provisional measures of 17 August 1972, *Fisheries Jurisdiction, I.C.J. Reports 1972*, p. 16, para. 21 and p. 34, para. 22; of 22 June 1973, *Nuclear Tests, I.C.J. Reports 1973*, p. 103, para. 20 and p. 139, para. 21; of 11 September 1976, *Aegean Sea Continental Shelf, I.C.J. Reports 1976*, p. 9, para. 25 and p. 11, para. 32; of 15 December 1979, *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 19, para. 36; of 10 January 1986, *Frontier Dispute, I.C.J. Reports 1986*, p. 8, para. 13; of 29 July 1991, *Passage through the Great Belt (Finland* v. *Denmark), I.C.J. Reports 1991*, p. 16, para. 16; of 8 April 1993, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1993*, p. 19, para. 34; and of 13 September 1993, *ibid., I.C.J. Reports 1993*, p. 342, para. 35; of 15 March 1996, *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1996*, pp. 21-22, para. 35; of 9 April 1998, *Vienna Convention on Consular Relations (Breard), I.C.J. Reports 1998*, p. 257, paras. 35-36; of 3 March 1999, *LaGrand, I.C.J. Reports 1999*, pp. 14-15, paras. 22 and 23; or of 1 July 2000, *Armed Activities on the Territory of the Congo*, paras. 39 and 43.

[5]See *Order of 3 August 1932, Legal Status of the South-Eastern Territory of Greenland, P.C.I.J., Series A/B, No. 46*, p. 287; see also *Series E, No. 9*, pp. 110-111.

[6]See Orders of 29 July 1991, *Passage through the Great Belt, I.C.J. Reports 1991*, p. 17, para. 23; of 15 March 1996, *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1996*, pp. 21-22, para. 35; of 9 April 1998, *Vienna Convention on Consular Relations (Breard), I.C.J. Reports 1998*, p. 257, para. 35; of 3 March 1999, *LaGrand, I.C.J. Reports 1999*, p. 15, para. 22; or of 1 July 2000, *Armed Activities on the Territory of the Congo*, paras. 39 and 43; see also the *Order of 24 October 1957, Interhandel, I.C.J. Reports 1957*, p. 112.

[7]Para. 69.

[8]Paras. 49 and 50.

arguments, contrary to the position that our opponents have seen fit to adopt. Such arguments, however, will only be addressed and discussed before the Court at the merits stage. As this Court noted in its Order of 5 February last, citing its own jurisprudence, it "must be concerned to preserve . . . the rights which may subsequently be judged to belong either to the Applicant or to the Respondent . . ., without being obliged at this stage of the proceedings to rule on those rights"[9]. Accordingly, if I do mention the grounds invoked in the Application itself, it is purely and strictly because, with respect to an action designed to protect the disputed rights of the parties, that Application must be examined with reference to the possible damage that the Applicant is claiming or may claim — it is not really claiming any longer — to have caused irreparable harm to its rights.

11. On a preliminary basis, concerning the alleged violations of immunities, I note that the Applicant has limited this ground to the Congolese Head of State alone. However, even concerning him, as I will begin by demonstrating, no problem may reasonably be raised in this respect. And it is only for further legal considerations that I will then examine the position, with respect to the immunities accorded by international law, of the Minister of the Interior, General Oba, about whom the Applicant's observations have been somewhat ambiguous.

I. PRESIDENT SASSOU NGUESSO

12. Concerning President Sassou Nguesso, the Republic of the Congo accuses the French Republic of violating "the immunity of a foreign Head of State, as recognized by the jurisprudence of the Court"[10].

13. 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"[11]. Moreover, the French case law cited abundantly this morning both by Professor Decocq and by Recteur Zorgbibe, should be sufficient, if need be, to reassure the Congo

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[9]Order of 5 February 2003 in the case concerning *Avena and Other Mexican Nationals*, para. 48, citing the Order of 15 March 1996 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1996 (I)*, p. 22, para. 35.

[10]Application, p. 6, B.

[11]Judgment of 14 February 2002, case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), I.C.J. Reports 2000*, para. 51.

on that point. However, notwithstanding the Applicant's contentions, those immunities recognized by France have neither been violated nor threatened by the alleged measures in question.

14. In its Application, the Republic of the Congo expressly acknowledged that "His Excellency Mr. Denis Sassou Nguesso was neither expressly named in the . . . Application [of the procureur de la République], or formally placed under judicial examination, or called as a legally represented witness"[12]. The only measure that could have been directed against him was an invitation to give testimony which, moreover, as the Agent of France explained just now, has never been transmitted to him, which the Applicant does not contest[13]. But that is not the heart of the matter.

15. It should be recalled that under Article 656-1 of the French Code of Criminal Procedure, which the Agent of France has already read but which is sufficiently important for me to read again, it could only amount in any event to a simple *invitation*: "the written deposition of a representative of a foreign power shall be requested through the Minister for Foreign Affairs. *If the request is agreed to*, that deposition shall be received by the President of the court of appeal or by a judicial officer whom he will have delegated."[14]

16. It is evident that this provision precludes any possibility of violating the immunity of a foreign Head of State: as the highest representative "of a foreign power" he is entitled to decide, at his discretion, whether or not to agree to be examined and, as Mr. Abraham explained, it is clear that any judge who asks to take testimony under that provision through the Ministry of Foreign Affairs could only acquiesce in the event of refusal.

17. Accordingly, this cannot be referred to as an "act of authority" preventing President Sassou Nguesso from exercising his duties, as contended in the Congo's Application concerning the alleged summons for him to appear as a witness[15] and the picture painted this morning by Professor Decocq of a Head of State (French or foreign) being led in handcuffs before the judge is pure fantasy. Even if an invitation to give testimony were transmitted to Mr. Sassou Nguesso,

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[12]Application, p. 9 (provisional), point 2.

[13]*Ibid.*, and p. 6 (provisional) *in fine*.

[14]Emphasis added.

[15]Application, p. 9 (provisional).

there would be no violation of the immunity of jurisdiction which the French Republic, as I said, accords to him unreservedly. He could then, if he wishes, simply disregard it.

18. Article 656 basically contains its own inherent provisional measure: it gives the Congolese Head of State a prior guarantee that the immunities he enjoys will not be violated because the decision whether or not to give testimony lies with him and with him alone. The very purpose of that provision is precisely to ensure respect for immunity.

19. Under these circumstances, the Congo cannot fear the occurrence of any irreparable damage — or indeed any damage at all: the request to give testimony of which it complains cannot be followed up without the express acceptance of the Congolese Head of State.

20. Mr. President, France, out of respect towards this Court and out of courtesy towards the Republic of the Congo, consented to the Court's jurisdiction to entertain the present case and it cannot call that consent into question now. Nevertheless, as in any case brought before this Court, the Applicant's claims must have a minimum degree of likelihood, failing which not only should they be dismissed on the merits but also, at the outset, any provisional measures can only be refused. In the present case, the measure sought by the Congo could only be indicated if and to the extent that an alleged procedural measure is likely to cause it — the Congo — irreparable prejudice by threatening the enjoyment of internationally recognized immunities. However the Congo significantly confined itself to invoking a violation of such immunities with respect to President Sassou Nguesso and to him alone[16]. And amongst the figures implicated or capable of being implicated, he is indeed the only one to enjoy such immunities. But the immunities enjoyed by the Congolese Head of State which, as I have already said, France is in no way challenging, as the case law cited this morning by the Congo's counsel sufficiently established, cannot reasonably be considered as threatened by any procedural measure whatsoever: no such measure has been directed against President Sassou Nguesso and his immunities cannot be called into question by anyone in the future — that would be contrary to French law.

[16]See Application, p. 6 (provisional), B.

II. THE POSITION OF GENERAL OBA, MINISTER OF THE INTERIOR, AND GENERALS ADOUA AND DABIRA IN RESPECT OF IMMUNITY FROM JURISDICTION

21. Mr. President, as the Agent of the French Republic has shown (and, moreover, as the Republic of the Congo itself admits[17]) the disputed proceedings follow from a complaint directed at four individuals: President Sassou Nguesso, whose position in respect of immunity from jurisdiction I have just referred to, 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. It appears very clear *prima facie* that none of the latter three dignitaries I have mentioned enjoys any international immunity whatsoever by virtue of his office. The Applicant moreover appears to agree because it explicitly limits the object of the second ground of its Application to "the violation of the immunity of a *foreign Head of State*"[18], which excludes the other dignitaries in question.

22. However, the Congo somewhat ambiguously also invites the Court, at the end of its first ground — concerning the exercise of the French courts' jurisdiction — to recognize that "a Minister of the Interior, in regard to acts committed in connection with the exercise of his duties of maintaining public order, should enjoy an immunity similar to that accorded, for other reasons, to Ministers for Foreign Affairs"[19]. That is not at all the case. A Minister *of the Interior* is not a Minister *for Foreign Affairs*.

23. As the Court stated in its Judgment delivered on 14 February 2002 in the *Yerodia* case, the recognized immunities of Ministers for Foreign Affairs are accorded to them only "to ensure the effective performance of their functions on behalf of their respective States"; Professor Decocq moreover quoted that this morning. It is only because a Minister for Foreign Affairs "is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings" and because "[i]n the performance of these functions he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise"[20], it is only for those reasons, I said, that

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[17]See Application, p. 3.

[18]*Ibid.*, p. 5.B.

[19]*Ibid.*, p. 4.

[20]Para. 53.

the Court concluded "that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability"[21].

24. These considerations are of course not transposable to the case of a Minister *of the Interior*, whose duties are, by definition, essentially internal and, to quote once again your Order of 8 December 2000, "involv[e] less frequent foreign travel"[22]. It goes without saying that those duties in no way require that the individual be free to travel to any foreign country merely as he pleases.

25. It is moreover very significant that you, Members of the Court, firmly refused in the *Yerodia* case to uphold the request for the indication of a provisional measure submitted by the Democratic Republic of the Congo seeking "an Order for the immediate discharge of the disputed arrest warrant"[23].

26. In so deciding, you found it sufficient to observe that as a result of a Cabinet reshuffle, "Mr. Yerodia Ndombasi ceased to exercise the functions of Minister for Foreign Affairs and was charged with those of Minister of Education, involving less frequent foreign travel". Accordingly, you considered that it had "not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need to be protected by the indication of provisional measures"[24]. These considerations are valid in all respects in regard to a Minister of the Interior, General Oba in the present case.

27. *A fortiori*, they are valid in respect of General Adoua, Commander of the Presidential Guard, and General Dabira, Inspector-General of the Armed Forces.

28. By the way, I shall add that foreign travel by any of these three dignitaries, including General Dabira, the only one to have been the object of procedural measures, is not precluded. Unlike in the case of Mr. Yerodia[25], no international arrest warrant has been issued against

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[21]Para. 54.

[22]Para. 72.

[23]Para. 11.

[24]Para. 72.

[25]See the *Order of 8 December 2000*, case concerning the *Arrest Warrant of 11 April 2000*, para. 7 (quoting Section II of the Application of the Democratic Republic of the Congo); see also the dissenting opinion of Judge Rezek, para. 6.

Mr. Dabira. And, if he does not wish to obey the summons by the French judiciary, he is free to avoid coming to France, where his presence is certainly not required by his duties, even though it may be unfortunate that he eludes (or is shielded from) investigations from which he claims to have nothing to fear.

29. As for Generals Adoua and Oba, they have to date not been the object of *any* concrete procedural measure and there is no indication that this will change in the future so that we are dealing with a completely hypothetical question. At this stage in the proceedings the Court cannot order France to refrain from taking purely hypothetical measures: such circumstances or rather such absence of concrete circumstances assuredly does not require the indication of provisional measures. As the Court clearly stated in the case concerning *Northern Cameroons*, "it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved"[26]. This consideration is all the more cogent where requests for the indication of provisional measures are concerned, proceedings whose "exceptional nature"[27] was underscored by the Permanent Court already in 1927. You have said on a number of occasions: "the possibility of . . . prejudice to rights in issue before the Court does not, by itself, suffice to justify recourse to its exceptional power under Article 41 of the Statute to indicate interim measures of protection"[28]. In any event, by definition the existence of a mere possibility, here one which is highly contingent, is incompatible with the very notion of urgency.

30. Moreover, if the situation were to change, it would always be possible for the Congo to submit a new request for the indication of provisional measures, as expressly provided for in Article 75, paragraph 3, of the Rules of Court, even though I am rather doubtful, for the reasons I have given, that the legal background could change significantly.

31. Yet the Court refused in the *Yerodia* case to indicate the provisional measures sought by the Democratic Republic of the Congo because, as I have noted, the fact that it was impossible to travel abroad as a result of an *international* arrest warrant issued against a former Minister for

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[26]Judgment of 2 December 1963, *I.C.J. Reports 1963*, p. 37; see also the Order of 11 September 1976, cited above.

[27]Order of 21 November 1927, *Factory at Chorzów, P.C.I.J., Series A, No. 12*, p. 10.

[28]Order of 11 September 1976, *Aegean Sea Continental Shelf, I.C.J. Reports 1976*, p. 11, para. 32; see also the Orders of 24 October 1957, *Interhandel, I.C.J. Reports 1957*, p. 112 or of 29 July 1991, *Passage through the Great Belt (Finland* v. *Denmark), I.C.J. Reports 1991*, p. 18, para. 27.

Foreign Affairs who had in the meantime become Minister of Education caused no irreparable and immediate prejudice to the rights of the Democratic Republic of the Congo and the request was not characterized by a degree of urgency calling for the imposition of measures of this type. *A fortiori* the same is also true in the present case:

— first, neither the duties of General Oba, Minister of the Interior, nor those of Generals Adoua and Dabira are essentially international in nature;

— second, these individuals are hardly, or not at all, required by their duties to engage in "frequent foreign travel";

— and, third, their offices confer on them no immunity in respect of France.

Furthermore,

— and, fourth, two of these individuals, Generals Adoua and Oba, have not been the subject of any investigative measure;

— and fifth, the warrant to bring in the third, General Dabira, has not been internationally circulated and cannot be.

32. Mr. President, Members of the Court, provisional measures are justified only to preserve *rights*, rights belonging to the applicant State — not rights or interests of one of its nationals. In the present case, the Congo cannot assert any right belonging to it. The Head of the Congolese State enjoys immunities from jurisdiction and enforcement — France is not calling these into question and does not intend to call them into question; moreover its "legal arsenal" does not, and would not, afford it the possibility of doing so. The other individuals in question, three generals holding positions oriented towards domestic affairs, do not enjoy such immunities in respect of France; only one of them has been the subject of actual judicial measures and, in any case, those measures, which might involve some private inconvenience to the person in question, do not infringe in the slightest way any right of the Congolese State and cannot therefore justify the indication of provisional measures by the Court.

Members of the Court, I thank you for your attention. And I would ask you, Mr. President, to give the floor to my colleague and friend Pierre-Marie Dupuy, who will show moreover that the possible exercise of their jurisdiction by the French courts cannot cause immediate, irreparable prejudice to any right of the Congolese State. Thank you very much.

Le PRESIDENT : Merci, M. le Professeur. Je donne maintenant la parole à M. Dupuy.

Mr. DUPUY:

THE EXERCISE OF THE JURISDICTION OF THE FRENCH COURTS AND THE REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES SUBMITTED BY THE REPUBLIC OF THE CONGO

1. It is with particular pleasure, Mr. President, Members of the Court, that I stand before you today, in the name of the French Republic. It has consented to your jurisdiction in a case in which it was invited to join by the Republic of the Congo on the highly unusual basis of Article 38, paragraph 5, of the Rules of Court. It is thus a signal honour for me to be part — and I thank the Government of the Republic for this — of proceedings manifesting my country's attachment to international justice in a most remarkable way.

2. As the Permanent Court of International Justice already stated, "the *exceptional* nature of the provisional measures procedure"[29] must never be forgotten.

Under the law governing these incidental proceedings, all depends on the *circumstances* of the case. Now, in the case between the Republic of the Congo and the French Republic, these circumstances, as set out in the Application, in no way require the ordering of provisional measures by the Court.

3. This is particularly true, as we have just seen, in respect of an utterly essential aspect of the Congo's Application: the contention that the French judicial proceedings challenged by the Applicant would violate the immunity of President Sassou Nguesso, the sitting Head of State.

As my friend Alain Pellet has just pointed out, nothing in the record suggests that the *procureur de la République* of Meaux or the investigating judges have forgotten that the office of an incumbent President of the Republic confers on him, under international law and under French law, immunities from jurisdiction. As he has not suffered any injury, nor is he likely to suffer any in the near or distant future so long as he holds his present office, it is impossible to see what would be the object of provisional measures concerning him. And because he cannot suffer any potential injury, no prejudice can impair, through his person, "the international standing of the Congo".

[29]Case concerning *Factory at Chorzów, Order of 21 November 1927, P.C.I.J., Series A, No. 12*, p. 10.

I shall therefore not examine any further the case of the President of the Republic of the Congo. I shall analyse only the cases of the other individuals named in the Application, in relation to the exercise by France of its jurisdiction. The Application next names three individuals: Messrs. Oba, Dabira and Adoua.

I. RELATIONSHIP OF THE TERMS OF THE MAIN APPLICATION AND OF THE REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

4. In the Application,

> "The Court is requested 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."[30]

5. If we now compare the terms of the Application to those of the request for the indication of provisional measures, we observe that the requesting State is seeking from the Court "an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux tribunal de grande instance".

6. Given the object assigned to them, provisional measures are tied, as my predecessor at this Bar has already adequately explained, to two substantive elements: first, to the creation of *irreparable* prejudice, and, second, to the *urgent* need to prevent such prejudice. Neither of those two conditions is met here.

However, before observing that, a preliminary clarification must be made: the Court enjoys unfettered freedom in this area, including in the determination of the measures which it may judge to be necessary; but whatever the case may be, the Court must begin with the actual terms of the request for the indication of provisional measures, even if only then to depart from them. But those terms are very vague, Mr. President, and this vagueness itself should be analysed, because it affects the very object of the request. We shall therefore begin with that examination, before returning to consideration of the injury which the Congo claims could affect it.

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[30] Application, p. 2.

II. THE CHARACTERISTICS OF THE REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES SUBMITTED BY THE REPUBLIC OF THE CONGO

7. One cannot help but be struck by the extremely general, if not vague and indefinite, nature of the prejudice alleged by the Applicant: "perturbance" of the international relations of the Republic of the Congo, "impugn[ment] [of] the honour of the Head of State, of the Minister of the Interior and of the Inspector-General of the Army and, in consequence, the international standing of the Congo"; and finally damage to the "traditional links of Franco-Congolese friendship".

8. Mr. President, Members of the Court, in my view one can legitimately question the merit, if not the seriousness, of such allegations. Indeed, they are based on at least two erroneous presumptions.

First, these allegations are explicitly based on a presupposition asserted without any evidence whatsoever: the "breach of French law governing the secrecy of criminal investigations"!

Serious confusion reigns here. The Congo's request is based in effect on an unjustifiable assimilation between, on the one hand, publicity (very minor moreover) given to judicial proceedings taken until now essentially against one Congolese citizen, General Dabira, and, on the other hand, something which has not occurred, but could have — the disclosure by the judicial authorities of facts which should have remained secret. But that is not at all the case. Some French media did admittedly report the information that human rights associations had brought proceedings on French territory against the perpetrators or parties allegedly responsible for acts having occurred in the Republic of the Congo. That however is a straightforward fact, moreover taken up by the media only to a limited extent, and is certainly not such as to create prejudice, let alone irreparable prejudice, for the Republic of the Congo. The judicial investigation in question is in progress and is being conducted in observance of the secrecy which must surround it, without there being any public stir or rumour.

9. What is more — and this is the second instance of conceptual confusion in the incidental request which should be pointed out — a major distinction should now be re-established: the distinction which must be made in law between the possibility of injury to persons and the possibility of injury to a State.

One question is whether a particular Congolese national may suffer an inconvenience, an impediment or even personal prejudice from the proceedings in progress.

Another completely different question is whether the risk of such injury to individuals, assuming that that injury is established, affects the Congolese State itself, other than in the person of its nationals.

10. The fact that one or the other of Mr. Dabira, Mr. Oba or Mr. Adoua may have suffered, or may be about to suffer, an injury does not mean that that injury necessarily, by itself, affects the Republic of the Congo. There is no necessary or automatic link between injury to individuals and injury to the State of which they are nationals. The request for provisional measures concerns injury to the Congo, not necessarily to Congolese individuals.

Any prejudice which may be suffered by the latter would not also affect their State of nationality unless the functioning of the State was hindered by the proceedings involving those individuals.

As Alain Pellet noted a moment ago, neither the legal position nor the duties of the individuals named above require frequent travel abroad. Thus, the precedent established in the jurisprudence of the Court by the refusal to indicate provisional measures in respect of Mr. Yerodia because he personally no longer held an office requiring frequent travel outside his territory is perfectly transposable to the present case.

11. I call your attention, Mr. President, Members of the Court, to the following fact: at the beginning of the case cited above, the *Yerodia* case, that is to say at the time when the Applicant in that case requested the Court to indicate provisional measures, it had not yet removed from the Application on the merits one of the two grievances asserted against Belgium, i.e., the conduct by that country of judicial proceedings against Mr. Yerodia on the basis of universal jurisdiction.

At the time when the Democratic Republic of the Congo requested the Court to suspend the judicial proceedings then in progress in the Kingdom of Belgium, it was also attacking on the merits both the alleged violation of Mr. Yerodia's immunities and the exercise of jurisdiction by the Belgian courts against him.

12. It is on this basis that it may be observed that despite the important, even fundamental, differences between the two cases on the merits, it is entirely relevant, in respect of the preliminary question of the request for provisional measures, to note that the Court in no way ruled in the initial phase of the *Arrest Warrant* case that the conduct of judicial proceedings in Belgium *per se*

justified the indication of such measures. There is no reason why it should be any different today. While the *Yerodia* precedent has no relevance to the merits, it is fully relevant to the determination of the existence of reasons justifying the indication of provisional measures.

Let us, moreover, take a look at the situation in respect of the different proceedings, or more precisely the single proceedings in question. It will be seen that those proceedings are not such as to cause any injury of a type which justifies the ordering of provisional measures.

III. THE ALLEGEDLY "IRREPARABLE" NATURE OF THE HARM, ACTUAL OR POTENTIAL

A. The requirement that the harm must be truly irreparable

13. That is clear, for example, from the preliminary measures requested in cases such as the *Nuclear Tests (Australia* v. *France)*[31], *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*[32], *Breard*[33], *LaGrand*[34], or, most recently, *Avena*[35].

According to a jurisprudence dating back to the Permanent Court of International Justice, and never denied since, "irreparable" harm is harm "which could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form"[36]. This would be the case, for example, of an armed conflict liable to violate the independence or territorial integrity of a State[37] or exposing to grave danger persons, property and resources situated in the conflict zone[38].

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[31]*Order of* 2 *June 1973, I.C.J. Reports 1973*, p. 103.

[32]*Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34.

[33]*Order of 9 April 1998, I.C.J. Reports 1998*, p. 10, para. 36.

[34]*Order of 3 March 1999, I.C.J. Reports 1999*, p. 15, para. 23.

[35]*Order of 5 February 2003*, para. 49.

[36]*Orders of 8 January, 15 February and 18 June 1927* in the case concerning *Denunciation of the Treaty of 2 November 1865 between China and Belgium, P.C.I.J., Series A, No. 8*, p. 7.

[37]Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 10 May 1984, I.C.J. Reports 1984*, p. 11, para. 33; case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Order of 15 March 1996, I.C.J. Reports 1996*, p. 22, para. 42; case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Order of 8 April 1993, I.C.J. Reports 1993*, p. 1.

[38]Case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Order of 10 January 1986, I.C.J. Reports 1986*, p. 10, para. 21; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 1 July 2000*, para. 43.

14. In accordance with the same *ratio legis*, the Court likewise characterizes as irreparable harm arising out of acts of genocide or, as in the case concerning *United States Diplomatic and Consular Staff in Tehran*, other acts threatening the life of nationals of the applicant State[39]. We find further evidence of this in the cases of *Breard*[40], *LaGrand*[41] and *Avena*[42].

15. *The preceding examples suffice, however, to justify the following conclusion:* the Court freely assesses the circumstances specific to each case and consents to order provisional measures only where the likelihood of risk appears to be "serious"[43].

Moreover, the risk of harm must be a "grave" one. See, for example, your Order in the *Genocide* case, where you stated that there was "a grave risk of acts of genocide being committed"[44]. Thus the "gravity" required in order for the harm to justify provisional measures is — logically moreover — associated with its irreparable nature.

B. There is no risk here of "grave" harm

16. Are we, then, in the case before us today, facing a situation of "grave" harm or even just a "serious risk" of such harm? In other words, specifically, are we confronted, as in the examples given above, with a situation capable of putting human life or security at risk?

Are we seeking to prevent a genocide, an execution, or, as in the *Grand Belt* case, to forestall the risk of an obstacle to the right of innocent passage of hundreds of vessels through an international waterway?

17. Far from it! Given, in any event, that President Sassou Nguesso himself has not been named in any proceedings in France, let us now examine in turn, always bearing in mind the distinction between injury to persons and injury to the State, the cases of Generals Dabira and Oba, to which may be assimilated that of his colleague, General Adoua, whose name also appears in the Congolese Application.

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[39]*Order of 15 December 1979, I.C.J. Reports 1979*, p. 20, para. 42.

[40]*Order of 9 April 1998, I.C.J. Reports 1998*, p. 246.

[41]*Order of 3 March 1999, I.C.J. Reports 1999*, p. 7.

[42]*Order of 5 February 2003* (http//:www.icj-cij.org).

[43]Case concerning *United States Diplomatic and Consular Staff in Tehran, Order of 15 December 1979, I.C.J. Reports 1979*, p. 20, para. 42.

[44]*Order of 8 April 1993, I.C.J. Reports 1993*, paras. 45 and 48.

18. We would begin, and this is very important, by pointing out that France has taken no step capable of interfering with the course of the proceedings currently being conducted in the Republic of the Congo in regard to the same facts as those involved in the French proceedings. There has been no act by the French judicial authorities which has had any consequential effect on the territory of the Republic of the Congo. It follows that no proceeding currently being conducted before a French jurisdiction can be regarded as an obstacle to the free exercise of its judicial powers by the Congolese State; nor, of course, as a violation of the principle of sovereign equality enjoyed by that State like every other State. Moreover, contrary to what was said this morning, the conduct of two separate judicial proceedings, in two distinct legal orders, in no way constitutes a violation of the rule *non bis in idem*.

19. *As regards General Dabira*, who is ultimately the only individual concerned here, the facts to be considered have already been presented to you, so I will be brief.

On 23 January 2002, the Meaux procureur de la République, who was territorially competent, requested the opening of a judicial enquiry against an unnamed person (commonly called proceedings against X). Under Article 80 of the Code of Criminal Procedure, an investigating judge can only begin his enquiries in response to an originating request from the procureur de la République; and the latter is free to issue this either against X or against a named individual.

20. In the event, it was indeed against General Dabira, and against him alone, that the proceedings were directed. This was the result, in particular, of the fact that the Paris prosecutor's office, which had initially been seised of the case, withdrew in favour of the Meaux office, in view of the presence on national territory of General Dabira, who was visiting a home he possesses at Villeparisis.

His rights were, moreover, fully respected, both in the course of his detention on 23 May 2002 and at his examination, as a legally represented witness, on 8 July 2002 before the investigating officers. Prior to that examination, his lawyer had access to the case file and he was present that day beside his client, in accordance with the provisions of Article 114 of the Code of Criminal Procedure. In the subsequent proceedings, the investigating officers were obliged to note General Dabira's refusal, on 16 September 2002, to answer to a new summons as a legally

represented witness. They accordingly issued a warrant requiring him to appear *[mandat d'amener]*. However, a warrant to appear cannot be circulated internationally, whether under the Schengen Agreement between European States[45] or by Interpol; only an arrest warrant can be so circulated.

21. It follows from all of this that, as the proceedings currently stand, it is only France that General Dabira might be encouraged to avoid by the proceedings being conducted against him. And even that is only relative. What in fact would happen if General Dabira decided to come to France? He would then be notified that he was formally under investigation. Yet that would not necessarily mean that he would be physically detained and to attempt to predict what he would do would be to indulge in pure speculation. Nor can we predict what action the judge would decide to take. Provisional measures are not indicated on the basis of pure speculation.

Let us also note, to finish with the case of General Dabira, that in any event he is certainly at no risk of being sent to France against his will. As I need hardly recall, the Congo does not extradite its nationals. That follows from Article 59 of the Franco-Congolese Convention on Judicial Co-operation, signed at Brazzaville on 1 January 1974.

22. Thus, without denying that General Dabira may regard the existence of the current proceedings as a source of inconvenience, it appears to the French Republic that an inconvenience arising from the fact that the General cannot visit France as freely as he might like cannot be regarded as serious and irreparable injury, comparable to the kind of thing which, as we saw above, appeared to the Court to be capable of justifying the indication of provisional measures. Moreover, even supposing that there was a risk of such injury, it would still be of a purely personal character.

23. *The case of General Pierre Oba*, Congolese Minister of the Interior, appears still less capable of justifying the indication of provisional measures. It is in fact quite distinct from that of General Dabira; neither General Oba nor General Adoua have been the subject of any measure of investigation by a French judicial officer. All we find is that General Oba's name is mentioned in a complaint presented by certain NGOs to the procureur de la République. On the other hand, his

[45]The Schengen agreements are in force between the following States: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden.

name does not appear either in the prosecutor's request for the institution of proceedings or in any act accomplished pursuant thereto by the investigating officers.

Moreover unlike General Dabira, Generals Adoua and Oba have no territorial link with France; in order for the French courts to be able to exercise jurisdiction, each of these two gentlemen would therefore need to be subject of a new request by the prosecutor, identifying him by name. And, of course, no such request could be issued unless there was already a finding that General Oba or General Adoua was present on the territory of the French Republic.

24. If that was the situation, General Oba or his colleague could then, as with General Dabira, either avoid any risk of injury by deciding not to visit France, or, if they did visit France, they might ultimately find themselves summoned to appear before the judge, or even placed under formal investigation. But again, let us not enter into the realm of speculation: there is no certainty that such an investigation would be instigated, and even if it were, that would not necessarily mean that the individual in question would be placed under detention.

Here again we see no grave and irreparable threat of harm hanging over General Oba, nor, *a fortiori*, the interests of the Republic of the Congo as such. The same argument applies of course to General Adoua.

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25. Generally, as far as either gentleman is concerned, one cannot see how the existence of proceedings before a French jurisdiction could cause genuinely "irreparable" injury to them, still less to the Congolese State.

In effect — and it is true that we risk stating the obvious here — as long as local remedies have not been exhausted, every judicial proceeding is subject to review; it may be reversed on appeal or quashed by the court of cassation, then reconsidered by a different court, and as long as local remedies have not been exhausted General Dabira or anyone else would be in a position, if there were found to have been an "error of justice", to be restored to his situation as it was *before* the institution of proceedings against him by the public prosecutor's office.

26. Furthermore, I would remind you, Members of the Court, no form of appeal has been undertaken, for the very good reason that we are still a long way from any decision at first instance!

Need I underline that "reversibility" and "irreparability" are in any event two radically opposed notions. If one exists, as is the case here, the other necessarily disappears.

And it is indeed because the requirement of the exhaustion of local remedies is far from satisfied that the Republic of the Congo would have no right whatever, as the case currently stands, to seise this Court of a diplomatic protection claim in respect of Generals Oba, Dabira or Adoua or of anyone else.

27. Given what I have just said as to the potential length of the proceedings, in particular where local remedies were implemented, it is likewise clear that another of the preconditions for the indication of provisional measures is absent, namely urgency.

IV. THE ALLEGED URGENCY OF PROVISIONAL MEASURES

28. As the Court again very recently had the occasion to state, in its Order in the *Avena* case, quoting its own jurisprudence on the provisional measures indicated in the *Great Belt* case:

> "provisional measures under Article 41 of the Statute are indicated 'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the right of either party is likely to be taken before such final decision is given".[46]

Here again, however, it suffices to compare the facts set out above with those which justified the Orders for provisional measures in, for example, the cases of *Breard*, *LaGrand* or *Avena*. In those three cases, as in this one, we were indeed dealing with criminal proceedings. But in those three cases, the proceedings had reached their final phase; it was — or still is, in the *Avena* case — a matter of preventing executions, one of which, in the *LaGrand* case, was scheduled for the actual day on which the measures were ordered by the Court.

29. On the contrary, in the "non-case" which concerns us today, we are dealing with proceedings which can be said to involve with certainty only one person, General Dabira. Proceedings, moreover, which in any event have not been the subject of any appeal or application for cassation. The proceedings are still in their initial phase, that of the preparatory investigation.

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[46] *Passage through the Great Belt (Finland* v. *Denmark), provisional measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23, quoted in the *Provisional Measures Order of 5 February 2003* in the case of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, para. 50.

They are thus not susceptible, at this very early stage, to any act to challenge the final decision, which does not yet exist.

It is accordingly clear that the condition of urgency required before provisional measures may be ordered is also quite simply non-existent.

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30. So, Mr. President, Members of the Court, to sum up, apart from the fact that no direct link has been shown between "the impugnment of the international standing of the Republic of the Congo", the express subject of the request for the indication of provisional measures, and any such injury as might be suffered by certain of its nationals, it follows from the foregoing remarks that there has been no "injury" to the person of President Sassou Nguesso; it is likewise clear that the threat of injury, even minor injury, is not even a potential one as regards Generals Oba and Adoua; finally, it is apparent that the harm to which General Dabira is exposed, which amounts at most to interference with his free movement in France, is in any event neither "grave", nor "irreparable"; still less does it qualify for the indication of urgent measures in the various senses given to these words by the International Court of Justice in its jurisprudence.

Moreover, even supposing that such harm were envisageable, it would only involve Congolese nationals whose duties in no sense normally require them to represent their country abroad; and I repeat, it is clear that a very remote risk of harm to certain individuals is not automatically reflected in prejudice to their State of nationality.

32. To conclude, Mr. President, I would recall, in order to rebut it, an argument put forward by the Applicant in order to justify its request for provisional measures. According to the Congo:

> "[t]he proceedings in question are perturbing the international relations of the Republic of the Congo as a result of the publicity accorded . . . 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"[47].

That argument, Members of the Court, is quite simply contradicted by the facts. Over the last eight months, that is to say over seven months since the commencement of proceedings before the

[47]Request appended to the Application, p. 12.

French judicial authorities, President Sassou Nguesso has visited the territory of the French Republic on at least two occasions.

The first time was from 18 to 24 September 2002. He was received by the President of the French Republic, the Minister for Foreign Affairs and the Minister of Co-operation.

The second occasion on which he visited France was from 19 to 21 February 2003, at the 22nd Africa-France Summit. On both occasions, France was happy to demonstrate to the President of the Republic of the Congo and to the State which he represents the high esteem and respect in which it holds them both.

It is thus apparent to France that the request by the Republic of the Congo seeking to have the Court take exceptional measures of this kind must be firmly rejected. That, Mr. President, ends the oral presentation of the French delegation for today. I thank you for your attention.

Le PRESIDENT : Merci, M. Dupuy. Cet exposé met fin à l'audience de cet après-midi.

Les Parties seront à nouveau entendues en réplique orale. La République du Congo prendra la parole demain matin à 9 h 30, et la République française à 12 heures. Chaque Partie disposera d'une heure au maximum pour sa réplique.

Avant de clôturer la séance, je voudrais informer la République du Congo que la Cour la prie de lui remettre tous les documents pertinents, émanant du bureau du procureur et du juge d'instruction, mentionnés à la page 2 de la requête.

Je vous remercie. L'audience est levée.

L'audience est levée à 18 h 5.

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