CR 2003/23 (translation)

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Tuesday 29 April 2003 at 12.15 p.m.

Mardi 29 avril 2003 à 12 h 15

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne maintenant la parole à S.Exc. M. Ronny Abraham, l'agent de la République française.

Mr. ABRAHAM: Mr. President, Members of the Court, I have the feeling at this stage of the debate that the Court has by now been amply enlightened on the sole issue which presently concerns it — whether the conditions required for the indication for provisional measures are satisfied in the present case and at the present time. The preceding discussion has adequately demonstrated that in fact none of those conditions is satisfied. It was for the Applicant, which is claiming provisional measures, to show that the conditions necessary for such measures are fulfilled. And you cannot fail to see that no such demonstration has been forthcoming. There is neither risk of irreparable harm to the rights of the Congolese State nor, *a fortiori*, any situation of urgency which might justify one measure or another aimed at preventing the imminent occurrence of any such irreparable damage.

This morning, it is true, counsel for the Congo attempted to flesh out somewhat their arguments on the subject. But it is all too apparent that on the one hand they have still largely argued the merits of the case, that is to say, argued on ground which is irrelevant at the present stage of the proceedings that are before you, and on the other — to the extent that they have sought to establish the existence of a serious and imminent danger to the rights of the Congo — they have done so in a highly speculative and hypothetical manner.

We heard a lot more phrases this morning such as "perhaps", "it is not out of the question that", "it might be that": nothing terribly objective, precise, rigorous, stringent. A lot of speculation, a great deal of supposition about what might possibly transpire in the future. One of Congo's counsel, I think it was Professor Decocq, having admitted that French law and the jurisprudence of the highest French courts, the Court of Cassation, confer upon foreign Heads of State absolute immunity in terms of criminal proceedings, felt that he needed to add that, this notwithstanding, it was not impossible that a French court, that a first, *première instance*, court, might not respect the law, because that has happened in the past. But once again this is purely in the realms of hypothesis and speculation.

Until the present moment it has not been challenged, and it is certainly not seriously challengeable, that all the steps taken by the French courts in this particular case have been strictly in conformity with French law. They have respected the limits of their jurisdiction and have respected the immunities enshrined in French law in conformity with international law. Can it be supposed that in the future our courts would move away from respecting the law they are required to apply? And on what basis? It would be a bad trial. Furthermore, let us recall that if a court hands down a decision which wrongly applies the law, which can happen in France of course — judges are not infallible — there are means of redress. The French legal system offers ample means of redress to overturn or reverse any errors that may have been made. And here, of course, I am using the conditional, because we have no examples of such errors in the particular case before us.

Frankly, Mr. President, distinguished Members of the Court, I do not think it is with arguments of this nature that anyone can usefully appear before your Court and request the indication of provisional measures whose exceptional character we have already underscored, and thus the need to base that request on objective and verifiable arguments. Similarly, we have heard vague and at the same time dramatic language about risks of destabilization to the Congolese State, attempts of a back-door *coup d'état* via the judicial system, a risk of civil law, disorder, etc. But how can it be argued that just because we have judicial proceedings under way in France, at the very early stage of judicial investigation, concerning only one single person — that is General Dabira, who apparently does not have any particular first-rank functions today in the Congolese State — this can affect the international situation of the Congo, the domestic situation of the Congo? I believe this again is speculative fear and anxiety, excessively so, and scarcely confirmed by the realities of the situation. Now I could stop there, Mr. President, but nonetheless I should like to respond precisely to a number of points which were raised this morning by counsel for the opposing Party, in order to redress certain errors and tendentious claims and presentations that were made.

Firstly, Professor Zorgbibe stressed that the Congolese Minister of the Interior was called upon frequently to make foreign trips. As a consequence of that the restrictions that might be imposed on his freedom of movement would affect the proper functioning of the Congolese

Government and justify your indicating provisional measures. But let me just say that no measure of prosecution has been undertaken in the French proceedings against the Interior Minister of the Congo. And let me recall that this cannot be otherwise, given that under French law the jurisdiction of the French courts in a case of our kind is conditional on the prior presence on French territory of the suspect. So here, once again, we are in the presence of pure speculation. And furthermore such an argument, let us recall, conflicts directly with the Order which you handed down with respect to the request for the indication of provisional measures in the *Yerodia* case, that is, the COBE case, because in order to refuse the indication of provisional measures requested of you, you refer in paragraph 72 of your Order to the fact that subsequent to the ministerial reshuffle, Mr. Yerodia was no longer Foreign Minister and had become Minister of National Education and thus far less exposed to the need for foreign travel (than, it was to be understood, the Foreign Minister), and that, as a consequence of that, it was not established that irreparable prejudice might be caused in the immediate future — immediate future — to the rights of the Congo.

It seems to me that what you said with respect to a Minister of Education surely would also apply to a Minister of the Interior. His functions and duties are essentially domestic in nature, obviously, and he is far less exposed to the need for foreign travel than a Foreign Minister. Public life though being as it is today, anybody with a ministerial portfolio may have at one time or another to go abroad. But that is not the real problem, it is not the question. Moreover, if you followed this argument which the other Party has put before you logically through to the end, given the circumstances of public office today, the conclusion would be that absolutely all the members of a government, all the senior officials of government, should henceforth benefit from immunities under international law. But that is not what your Judgment — on the merits — in the *Democratic Republic of the Congo* v. *Belgium* case suggests. I do not want to go into that because it concerns the merits and we are at the stage of provisional measures. I will say no more.

There is a second element on which I would like to clarify matters somewhat: Professor Decocq said that the application requesting a criminal investigation to be opened which was made by the Meaux prosecutor who seised the investigating judge seised the judge *in rem*, that is, seised him of the facts which had been complained of to the prosecutor, in such a way that this seisin enabled the investigating judge to place under formal investigation, charge, or even detain

any person whom that judge might feel was implicated in the facts. And we have been told that consequently the investigating judge could perfectly well accomplish such steps with respect to President Sassou Nguesso — why not? — or with respect to the Minister of the Interior or any Congolese dignitary, and that nothing limited the judge's powers once he had been seised by an application relating to certain facts and not restricting his jurisdiction in respect of the persons who might be implicated. Now, I feel that in that presentation there is some truth — certainly as regards the competence of Professor Decocq — but also some confusion. It is true that the prosecutor's application seises the judge of certain facts and that, within the limits of those facts, first of all the investigating judge has to establish their truth with precision, and then identify the people who are likely to have committed offences within the material framework defined by the seisin. That is true. But the investigating judge can only carry out investigatory steps, exercise his functions, within the limits of the jurisdiction of the French courts and the immunities which French law, in conformity with international law, recognize as attaching to foreign dignitaries. In other words, in seising the judge, the prosecutor certainly does not empower him to overstep the jurisdiction of the French courts as defined by the Code of Criminal Procedure, or to disregard the immunities which are accorded by French law to certain persons and especially foreign dignitaries. Otherwise, the conclusion would be that the mere seisin of an investigating judge by a prosecutor would enable the judge to place under formal investigation, to prosecute, foreign diplomats accredited to France. That would be absurd. That is obviously not the scope of the prosecutor's originating application. The application delimits the facts, it gives the investigating judge authority to investigate those facts, establish who is responsible for them, but quite obviously within the framework and the limits both of the rules of jurisdiction and the rules of immunity laid down by French law.

Let me recall rapidly what these limits are for this particular case. Firstly, the French judge has no jurisdiction over acts committed on foreign territory by foreign nationals against foreign victims unless the suspect is present on French territory at the moment proceedings are begun, i.e., on the date of the prosecutor's application, and no later, because otherwise you would need a new application from the prosecutor, as we explained yesterday. Secondly, as regards immunities French law is very clear about the absolute immunity which attaches to the person of a foreign Head of State, and it is certainly not the prosecutor's application which permits the investigating

judge to disregard that immunity. Furthermore, so far, all the steps taken in our case by the investigating judges have, it is clear, scrupulously respected the limits that I have just indicated. Only General Dabira has been the subject of a step which might be treated as prosecution given that he was the sole person to actually be present on French territory when proceedings were begun, and no coercive step has been taken against President Sassou Nguesso because no such step could have been taken legally. In other words, our investigating judges have scrupulously respected applicable law and we have heard that maybe they might do something different in the future on the pretext that the prosecutor might, in his application, entitle investigating judges to exceed the limits imposed on them. This cannot be serious. And it is certainly not the idea behind an application requesting a criminal investigation to be opened.

Thirdly, Professor Decocq questioned whether Article 656 of the French Code of Criminal Procedure which we quoted would apply to a witness deposition by a foreign Head of State: according to him, it only applies to diplomats. Now I do not think this is absolutely correct. In fact, I know it is not correct. Let me simply quote Article 656 which does not refer to diplomats at all: "The written deposition of a representative of a foreign power is requested via the Foreign Ministry". If the request is accepted the deposition is received by the first president of the court of appeal. The text refers to the notion of a representative of a foreign power, which is much wider than that of an accredited diplomat. And in this particular case, it is on the basis of this very text and within the framework of these proceedings — as I said — that the investigating judges wish to take the written testimony of President Sassou Nguesso. And contrary to what the other side said yesterday, there was no warrant issued by the judge to the police to go and question the President of the Congolese Republic. There was a request, as yet not transmitted, on the basis of Article 656 inviting the Congolese Head of State if he wishes — because Article 656, I would remind you, presupposes the free agreement of the foreign Head of State — to make a deposition regarding the facts on which the judges might have questions to put to him. Here again there is no violation, no appearance of any violation, no risk of violation of the immunity attaching to a foreign Head of State.

Fourthly, this morning much was made of the fact that there were pending proceedings with respect to the same facts in the Congo before the Congolese courts. And the Congo said yesterday

and reiterated today, maintained that, because there were pending proceedings in the Congo, the conduct of the criminal proceedings begun in France on the same facts constituted an infringement first of the sovereignty of the Congo but also of the *non bis in idem* principle. And this morning Congolese counsel underscored the principle of subsidiarity, which they considered had been flouted by the simultaneity or concomitance of these two sets of proceedings on the same facts in two different States. Now, my first point is that this in any event is a substantive argument on the merits and we cannot see any clear link having been made between this discussion of the *non bis in idem* principle, or the principle of subsidiarity, and the question of provisional measures. But nevertheless, even though it is off-limits, I think I need to set the record straight, because I thought it was a rather approximative illustration, somewhat tendentious in other words. I am not going to talk about the existence and scope in international law of any subsidiarity principle of the kind touched upon in rather vague terms by our opponents. One may have doubts, but that would be a debate on the merits and we do not need to have that here today. Possibly we shall come to it later.

On the other hand, the *non bis in idem* principle is well-known in domestic law and well-known under international law too, because it appears in a number of international instruments. But it is not permissible to distort it as Counsel for the Congolese State did this morning.

The principle of *non bis in idem*: what does it mean and what is its scope? It is clearly defined, for example, in the United Nations International Covenant on Civil and Political Rights. I quote Article 14, paragraph 7: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." That is very much what we have in our Code of Criminal Procedure in Article 692, which provides for the situation where French courts have jurisdiction on the basis of what is called universal jurisdiction, thus in respect of acts committed abroad. In such a case, says Article 692, no proceedings can be brought against a person who proves that he has been finally tried abroad on the same acts, and either acquitted or convicted. So, finally tried abroad on the same acts and, if convicted, that his punishment has been served or ordered. In other words — I thought until just now that this was so well-known, I did not think it was worth making it explicit, but I am going to do so because it seems necessary — the principle of *non bis in idem* does not *per*

se conflict with the simultaneous conduct of two sets of proceedings with respect to the same facts before two different courts. This can easily happen: two different domestic courts in different States may well have jurisdiction to investigate the same facts, to prosecute individuals on the basis of the same facts. That can well happen, and the fact that the two sets of proceedings are simultaneous is in no way contrary to the *non bis in idem* principle.

What would conflict with the *non bis in idem* principle would be where someone was tried who had been tried previously and finally before another Court on the same facts. What would conflict with the *non bis in idem* principle under French law would be where someone accused of acts of which French investigating judges were at that time seised was made the subject of a procedural step and *a fortiori* of a sentence if that person had previously been finally tried on the same facts by another court, a foreign court, and in particular the Congolese judicial authorities. Now that is precisely the meaning of the letter from the Minister of Justice which Maître Vergès read out to us just now. The French Minister of Justice in no way implied that the fact that the current criminal proceedings were pending in France was contrary to the *non bis in idem* principle on the ground that proceedings were pending before the Congolese judicial authorities. He simply wrote as follows — I quote from memory because I have not got the letter before me, but Maître Vergès gave us the ending — "I would like to draw the attention of the competent *procureur de la République*, that of Meaux, to the existence of proceedings which are pending in the Congo, so that, should the case arise, he may make any such application as is necessary to ensure that the *non bis in idem* principle is respected". In other words, should the proceedings opened in the Congo result in a final judicial decision, either conviction or acquittal, in respect of persons prosecuted in France on the basis of the same facts, then in that case it would obviously be for both the *procureur de la République* and the investigating judge to act accordingly, that is to say, to immediately suspend the proceedings brought in France against those persons. That is strictly required by Article 692 of the French Code of Criminal Procedure without there being any need to see whether any requirement of international law is involved — I reserve that issue, which is perhaps not absolutely clear, but in any event French law is perfectly clear — Article 692: "there shall not and may not be any prosecution and *a fortiori* any trial if the person has been tried finally on the same facts in another State" and in particular in the case with which we are concerned, under

the Congolese legal system. Consequently, there is no risk of the *non bis in idem* principle being infringed in the present case.

Not only do the current French proceedings, those begun before the Meaux judges, not obstruct those pending in the Congo — we are not too sure exactly how far they have got, but that is not the point; not only is there no impediment to the exercise by the Congo of its judicial powers, and therefore of its sovereignty, of its right to dispense justice on its territory, but also if you turn things around, you might say inversely that if final decisions were taken before the Congolese courts with respect to the same facts, it would be up to the French courts to draw the correct conclusions and to abstain from further prosecuting the same people on the grounds of the same facts.

One further comment, this will be the fifth and final one before my summing-up, as to an expression used by Maître Vergès this morning referring to the representatives of the Republic of France — of course, he was addressing the Court, but he was referring to what we had said. He said that he had heard many promises on the part of France, but he then implied that he was pretty sceptical about us respecting those promises. Now let me say in the clearest possible fashion that from our side of the Bar we have made no promises whatsoever, in any case we are not here before the Court to make promises. We have simply stated what French law is; we have promised nothing, we have said that French law does not allow the prosecution of a foreign Head of State; that is not a promise, it is a finding of law. And also that French law subordinates the jurisdiction of the French courts over acts committed abroad to certain conditions. That too is not a promise, it is a finding of law. At the very most, but it would be somewhat pointless to do so, we might promise that the French courts will respect French law. But I think this might be taken for granted, and if some particular judicial decision, of which we have no example right now in our present case, were to exceed the limits set down by the law there would of course be means of recourse to remedy any errors which might have been made.

Mr. President, distinguished Members of the Court, to sum up, let me say once again that there was no demonstration in this case that there would be any imminent risk of irreparable harm to the rights of the Congolese State at the current state of the proceedings pending before the French courts, especially taking into account the limits imposed by French law on the way in which

those proceedings are conducted. Let me also insist on the fact that these judicial proceedings in no way involve or affect the good relations between France and the Congo. These particular proceedings are not directed against the Congo as a State, they relate to particular facts, particular people, and it is certainly not the intention of the judicial authorities, who have no such task, nor French policy, to in any way call into question the good relations which persist between France and the Congo. And there is obviously no intention whatsoever on the part of France to infringe or violate the sovereignty of the Congo and its right freely to exercise its full powers on its own territory. The best proof that France is in no way acting in a negative fashion with respect to the Congo is the acceptance, the consent it gave to this Court's jurisdiction. And that is why we are here, that is why we have the representatives of France and the Congo — confronting one another yes, but side by side as well, because we came by common agreement in order to find a judicial settlement to our dispute in accordance with the law.

The moment has not yet come to settle this dispute on the merits. The time has come for the Court to rule on the indication of provisional measures, and I should like to say, Mr. President, distinguished Members of the Court, that on the grounds that we have already set out, we feel that there is no justification to indicate such provisional measures. Consequently France requests the Court to dismiss the request for the indication of provisional measures submitted by the Congo.

Thank you for your attention.

Le PRESIDENT : Je vous remercie, Monsieur Abraham. Voilà qui met fin à la présente série d'audiences.

A ce stade, je rappellerai aux deux Parties que la Cour compte recevoir cet après-midi les textes et documents qui ne lui ont pas encore été soumis !

A présent il me reste à remercier les représentants des deux Parties pour l'assistance qu'ils ont fournie à la Cour par leurs exposés oraux tout au long de ces quatre audiences.

Je leur souhaite un bon retour dans leur pays et, comme le veut la pratique, je prierai les agents de demeurer à la disposition de la Cour. Sous cette réserve, je déclare close la présente procédure orale.

La Cour rendra son ordonnance sur la demande en indication de mesure conservatoire dans les plus brefs délais. La date à laquelle l'ordonnance sera rendue en séance publique sera dûment communiquée aux agents des Parties.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 12 h 50.

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