## DISSENTING OPINION OF JUDGE DE CARA

*[Translation]*

*Distinctiveness of case — Rights to be preserved — Division of jurisdiction — Immunity from jurisdiction — Inviolability — Dignity of Head of State — Risk of prejudice — Irreparability — Urgency — Risk of aggravation of dispute — Statements by a party at hearings — Good faith — Obligation to inform judicial authority.*

The case before the Court concerns an African State. That gives it a distinctive dimension. Not only does it concern a country marked by constant upheavals and repeated crises since it gained independence in 1960, it also pits that country against the former colonial power. It involves, in particular, the Head of State and in Africa the Head of State embodies the nation itself.

A "country without unity", the Republic of the Congo exhibits a geographical diversity matched by the heterogeneity of its people, brought together, at a certain point in time, by the railway and by colonial integration into French Equatorial Africa, centred on Brazzaville[1].

Decolonization was followed by a time of upheaval when, withdrawing into itself after a period of uncertainty starting with the *"Trois Glorieuses"* uprising (1963), the country came under a Marxist military régime, which failed over a period of more than 20 years to put an end to the instability and killings. In 1991, the country claimed back its name, its flag, its national anthem and its symbols, as first adopted on independence. The country was subsequently torn asunder by economic crisis, despite its mineral resources, and by civil war. Having little experience of democratic institutions, the Congo once again fractured along ethnic and geographical lines: fierce clashes occurred between the Zoulou, Ninja and Cobra militias and the army, whilst foreign nationals fled the country, especially after 1997. Thousands were massacred or disappeared during the confrontations, in particular in 1999 at the river port of Brazzaville. The fighting has subsided as each week has brought surrenders by militia elements, but sustained rivalries and opposition remain and the conflict is being pursued, through propaganda and covertly, at the political level.

These tragic circumstances, together with the instability of the country, where peace is slowly being restored, explain why the Government of the Republic of the Congo seised the Court in response to certain criminal proceedings initiated in France.

The case is also distinctive in that this is the first time that the Court has been seised of a case in which the respondent has expressly con-

[1] Yves Lacoste, *Dictionnaire de géopolitique*, 1997.

sented, under Article 38, paragraph 5, of the Rules of Court, to jurisdiction in respect of an application (here, that of the Congo), and there has been no need to consider the prima facie jurisdiction of the Court. Its distinctiveness also lies in the close relationship between the proceedings on provisional measures and the proceedings on the merits. The Parties' respective rights to be protected by the Court are, on the one hand, the Congo's claim to territorial and personal jurisdiction and the immunity of the Congolese personalities involved — in particular, but not exclusively, that of the Head of State — and, on the other, the claim to universal jurisdiction based on international custom. It is thus necessary at this stage to consider all the consequences that may arise from the alleged violation of the Congo's rights. The distinctive nature of the case lies lastly in the contrast between the relevant French law as it now stands and the inappropriate measures taken or capable of being taken by the French prosecutors and judges.

The Application on the merits is accompanied by a request for the indication of a provisional measure whereby the Congo "seeks an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux *Tribunal de grande instance*"[2].

Under Article 41, paragraph 1, of the Court's Statute, the Court has "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

Article 75 of the Rules of Court provides that:

> "1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.
>
> 2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request."

These provisions show that the indication of provisional measures falls within the Court's power of discretion, which it exercises according to the *circumstances* of each particular case, and the Court may exercise this discretion, which is basically unfettered[3], *proprio motu*. The essential point is that the Court must not prejudge the merits of the case and must leave "unaffected the right of the Respondent to submit arguments"[4].

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[2] Application of the Republic of the Congo, p. 17.

[3] B. Ajibola, separate opinion appended to the Order of 10 January 1996 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), I.C.J. Reports 1996 (I)*, p. 35.

[4] *Anglo-Iranian Oil Co., Provisional Measures, Order of 5 July 1951, I.C.J. Reports 1951*, p. 93.

The objective is to preserve the parties' rights as subsequently determined by the decision of the Court and to do so in the interests of both parties equally[5]. It is moreover necessary for "the alleged rights sought to be made the subject of provisional measures" to be "the subject of the proceedings before the Court on the merits of the case"[6].

However, jurisprudence has clarified the conditions for the indication of provisional measures, summed up by language now regularly inserted into the Court's orders, as it is in paragraph 22 of the present Order[7].

The Court has accordingly supplemented the text of the Statute, which simply grants it discretion depending on the *circumstances*[8]. Well-established case law thus calls for a determination in each case as to whether there is a serious risk of irreparable prejudice being caused to the rights of the parties and in particular of the applicant, in this case the Republic of the Congo, and whether there is an urgent need for the indication of provisional measures. The Court nevertheless enjoys considerable leeway in the exercise of its judicial function with respect to provisional measures: it may take the view that ordering such measures would be pointless owing to the conduct or statements of the parties; on the other hand, it may decide on measures other than those requested or even indicate measures *proprio motu*.

The Court did not see fit to uphold the Congo's request for the indication of a provisional measure and I regret that I was unable to vote in favour of the decision because I consider the crux of the case — the cornerstone of the proceeding in question, the *réquisitoire* (prosecutor's application for judicial investigation) of 23 January 2002 — to have been

[5] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, p. 544.

[6] Case concerning the *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, I.C.J. Reports 1990*, p. 70.

[7] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), I.C.J. Reports 2000*, p. 201, para. 69; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), I.C.J. Reports 2000*, p. 127, para. 39; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), I.C.J. Reports 1998*, p. 257, para. 35.

Judge Oda summed up as follows the conditions defined by the jurisprudence:

> "the rights in question are those to be confronted at the merits stage of the case, and which constitute or are directly engaged by the subject of the application. The urgency of the relevant action or inhibition is a prerequisite. The anticipated or actual breach of the rights to be preserved ought to be one that could not be erased by the payment of reparation or compensation to be ordered in a later judgment on the merits, and this irreparable prejudice must be imminent." (*Essays in Honour of Sir Robert Jennings*, p. 551.)

[8] In his dissenting opinion appended to the Order of 2 March 1990, Judge Hubert Thierry even contends that "if the circumstances actually require such measures, they [the provisional measures] *'ought'* to be taken (Art. 41)" (*Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, I.C.J. Reports 1990*, p. 79).

disregarded. That prosecutorial act is the basis for and governs all the criminal proceedings pending in France[9] and it constitutes the Gordian knot of the Parties' dispute before the Court. At the provisional measures stage it represents the source of the risk of irreparable prejudice, given that the rights to be protected will be the subject of the proceedings on the merits. I am inclined to believe, however, with all due respect, that the Court's formal approach has led it to rely on the general terms of French law and not on this key factor which needed to be considered at the provisional measures stage. I am thus unable, contrary though that may be to my wishes, to support either the reasoning or the *dispositif* of the present Order for the following reasons.

## I. There Is a Serious Risk of Irreparable Prejudice Being Caused to the Rights of a Party

The rights which the Republic of the Congo sought to protect from the risk of irreparable prejudice raised by the opening of certain criminal proceedings in France are apparent from its Application and oral argument.

### *A. The Rights to Be Protected*

During the oral proceedings, frequent reference was made to the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*. However, the situation was different in that case because the disputed measure was an international arrest warrant issued against the Minister for Foreign Affairs, capable of causing prejudice to the person concerned not by virtue of its circulation but only upon potential execution by a third State. By contrast, the present case concerns acts initiating judicial proceedings: preliminary police enquiry, judicial investigation on the application of the prosecutor, police custody and examination as *témoin assisté* (legally represented witness) of General Dabira, and an application to question the Head of State as witness, without regard for the judicial investigation opened by the *Tribunal de grande instance* of Brazzaville.

Some of those measures, which may appear preliminary, are in fact acts of prosecution which — although this is not to prejudge the merits — interfere both with the jurisdiction of the Republic of the Congo and with the international standing of the Congolese authorities involved.

(1) To begin with, the first right invoked by the Congo stems from the principle of the "sovereign equality" of States, which, according to the

[9] "The investigating judge can only investigate by virtue of a *réquisitoire* issued by the *Procureur de la République*" (Art. 80 of the French Code of Criminal Procedure).

Applicant, prohibits a State from "unilaterally attributing to itself universal jurisdiction in criminal matters". It is apparent that the French judicial measures are capable of contravening the division of jurisdiction between criminal courts under international law.

First, while it is true that French law recognizes universal jurisdiction under limited conditions that were recalled during the hearings[10], the disagreement between the Parties in the present case hinges on the *réquisitoire* of 23 January 2002, which lets the French judge found his investigation on universal jurisdiction arising from international custom. The complaint of 5 December 2001, transmitted with the prosecutor's originating application, states that

> "[d]omestic courts are therefore entitled to look to international custom as the source of their right to exercise jurisdiction to prosecute the perpetrators of a crime against humanity alleged to have been committed outside France where neither the perpetrator nor the victim is a French national"[11].

This is reiterated in the complaint of 7 December:

> "Notwithstanding that the facts occurred on the territory of the Republic of the Congo, the French courts have jurisdiction in respect of crimes against humanity by virtue of international custom . . ."[12]

By appending the complaints to his originating application of 23 January 2001, the *Procureur de la République* at the Meaux *Tribunal de grande instance* adopted that basis of jurisdiction. However, with respect to acts of torture, it will be recalled that Article 5 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984, implies that universal jurisdiction is subsidiary to territorial jurisdiction and to jurisdiction under the active nationality or passive personality principles. Article 5, paragraph 1, of that Convention obliges States parties to establish their territorial jurisdiction and their jurisdiction under the active nationality principle, whilst also allowing them to establish jurisdiction under the passive personality principle. Paragraph 2 requires each State party to take such measures as may be necessary to establish its jurisdiction over the offences covered by the Convention where the alleged offender is present in any territory under its jurisdiction and it does not extradite

[10] The Agent of the French Government pointed out that in France universal jurisdiction is subject to two conditions: "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 . . . the person suspected must be on French territory" (CR 2003/21, p. 9).

[11] Letter from the International Federation of Human Rights Leagues to the *Procureur de la République* at the Paris *Tribunal de grande instance*, dated 5 December 2001, p. 25.

[12] Document D1/2 of 7 December 2001, appended to the letter from the International Federation of Human Rights Leagues to the *Procureur de la République* at the Paris *Tribunal de grande instance*, p. 2.

him. Universal jurisdiction here is thus simply an application of the maxim *aut dedere aut punire*. This principle prevails *a fortiori* in a situation of *lis alibi pendens*: territorial or personal jurisdiction takes priority over universal jurisdiction.

Secondly, the record shows that proceedings were already pending in the Congo and that the intervention of the French courts is, according to the Republic of the Congo, liable to violate the principle *non bis in idem*.

Judicial investigation *(instruction)* proceedings were initiated in the Congo in respect of the same events. Further to the originating application of the Brazzaville prosecutor, dated 29 August 2000, supplemented by an application for an extension of the investigation, dated 11 November 2002, the senior investigating judge of the Brazzaville *Tribunal de grande instance* sent a *commission rogatoire* (letter of request for judicial assistance) to the investigating judge of Kinshasa, concerning *inter alia* the enforced disappearance of more than 350 individuals and crimes against humanity and torture, for which responsibility is attributed to "the President of the Republic of the Congo, the Minister of the Interior, Mr. Norbert Dabira, Inspector General of the Armed Forces, and General Blaise Adoua, Commander of the Republican Guard"[13].

The principle *non bis in idem* is in fact susceptible of two interpretations. It can mean — as the Agent of France pointed out — that no further proceedings can be brought in respect of acts on which a final judgment has already been rendered. This principle is a manifestation of the doctrine of *res judicata*, which operates not only to safeguard the rights of the person tried but also to preserve the authority of judicial rulings. The doctrine is enshrined in the French Code of Criminal Procedure (Arts. 6, 368 and 692), in the United Nations Covenant and in Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It applies where the decision of a trial court has become final and the subsequent action relates to the same acts and is brought against the same party who was tried in the first proceedings.

But in international law the operation of the principle *non bis in idem* can also indicate the existence of *lis alibi pendens*, precluding the exercise of jurisdiction by a court subsequently seised of the same matter. The scope and nature of that rule in international law may well be subject to debate, but the least that can be said is that it would have been more prudent for the French prosecutor to have refrained from prosecuting in this case.

At the same time, as the Agent of the Republic of the Congo stated in his introductory observations, there has been a violation of the indepen-

[13] Document D1/2 appended to the 5 December 2001 letter from the International Federation of Human Rights Leagues to the *Procureur de la République* at the Paris *Tribunal de grande instance*, p. 2.

dence and sovereignty of the Congolese State. The *réquisitoire* of 23 January 2002 constitutes *per se* an act of prosecution. In seising the investigating judge of the offences alleged in the complaints and mentioned in the reports of the preliminary police enquiry, the *réquisitoire* characterizes the facts, advances as its own the claims of the complainant associations and alleges the existence of crimes against humanity and torture. This constitutes interference by the French judiciary in the domestic affairs of the Congo and encroaches upon the sovereignty of that State.

(2) Further, the Court also observed that the Congo invoked "the right to respect by France for the immunities conferred by international law on, . . . in particular, the Congolese Head of State". The criminal proceedings initiated in France raise a challenge not only to the *immunity from jurisdiction* of the personalities named but also to *their inviolability*, in so far as they may act or be present on the territory of France in their capacities as representatives of the Republic of the Congo. This is particularly true for the Head of State, whose immunity is invoked in the Application.

> "It is not disputed that the Head of State benefits from absolute criminal immunity before the courts of a foreign State. The absolute nature of the immunity precludes the application of any exception to that immunity, for example based on the nature of the offence of which he is accused." [14]

Immunity has the effect of rendering inadmissible any action brought against the person who invokes it. President Sassou Nguesso has admittedly visited France on two occasions since the start of the disputed proceedings, but the existence of the *réquisitoire* and the reference of the case to the investigating judge maintain a constant threat in respect of his travels to France or to other foreign countries. This is particularly significant for a State whose constitution establishes a presidential régime, entrusting the Head of State with most of the authority and responsibilities for the functioning of the Government.

(3) Lastly, and more generally, it is clear from the Application and the Congo's statements at the hearings that the French criminal proceedings impugn the *dignity of the State*, a quality vested in sovereign States. Anzilotti observed in his day that in relations between States "the honour and dignity of the State far outweigh material interests" and that "non-material damage takes on a far greater significance than in internal law" [15]. The notion remains rather vague but it does entail certain specific

[14] J. Verhoeven, Rapport à l'Institut de droit international "Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international", *Annuaire de l'Institut de droit international*, 2000-2001, Vol. 69, p. 516.

[15] *Cours de droit international*, 1929, Vol. I, p. 523.

legal consequences[16]. In addition to norms and customs of protocol and ceremonial, the dignity of diplomatic representatives finds protection in treaties[17] and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons acknowledges and enshrines the existence of an obligation under international law to take all appropriate measures to prevent attacks on the dignity of an internationally protected person (Art. 2, para. 3).

Furthermore, some traditional doctrine founded the immunity from jurisdiction enjoyed by the State and the Head of State on the principle of State dignity. The opinion delivered by Chief Justice Marshall in *The Schooner Exchange* v. *McFaddon* (1812) recalls the obligation of any sovereign "not to degrade the dignity of his nation" by submitting to the jurisdiction of another State; a Head of State or sovereign visiting another State is not "to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation"[18]. This justification is still invoked by some authors[19].

The dignity of the State, to which the Agent of the Congo referred[20] and to which relate the "reputation", "honour" and "international standing" of that country, and the dignity of the Head of State may be impugned whether or not the Head of State is present on the territory of the State where the injurious acts have been committed[21]. Such acts may be perpetrated through publications, press articles, insults, defamatory or offensive statements, etc. They often emanate from private parties and the authorities of the territory where such acts occur then have a duty to punish or make good the violation and to present apologies; such acts may also stem from inappropriate initiatives by local authori-

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[16] Sir Arthur Watts observes:

> "Dignity, whether of States or their Heads, is an elusive notion, although it is still a convenient label. Some of the consequences formerly attributed to the need to respect the dignity of Heads of States now survive, if they survive at all, in the realms of protocol and State ceremonial . . . Some aspects of the respect due to the dignity of Heads of States still, however, survive as a matter of international law." ("The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, p. 41.)

[17] Vienna Conventions of 1961 on Diplomatic Relations (Art. 29), of 1963 on Consular Relations (Art. 40), and of 1969 on Special Missions by a Head of State (Art. 29).

[18] *The Schooner Exchange* v. *McFaddon* (1812), 11 US 137-138; in English case law: *Mighell* v. *The Sultan of Johore* [1894] 1 QB 149.

[19] L. Cavaré, *Le droit international public positif*, 1969, Vol. II, p. 10; D. P. O'Connell, *International Law*, 2nd ed., 1970, Vol. II, p. 842. See also J. Verhoeven, *op. cit.*, p. 507.

[20] CR 2003/20, p. 11.

[21] *Oppenheim's International Law*, 9th ed., 1992, Vol. 1, p. 379.

ties, in particular lower courts. The insult to dignity is no less genuine in such cases.

*B. The Existence of Irreparable Prejudice*

The purpose of provisional measures is to prevent the occurrence of irreparable prejudice. If the prejudice has already come into existence, it is too late; on the other hand, the risk of irreparable prejudice is met by the indication of provisional measures. The difficulty in the present case lies in the fact that the risk for the Head of State of the Republic of the Congo has thus far appeared to be a potential or hypothetical one and was even described during the hearings as "chimerical", but the risk raised by the *réquisitoire* of 23 January is nonetheless established and the realization of that risk would indeed create irreparable prejudice. Publicity surrounding acts of torture or enforced disappearance has inevitably aroused suspicions already, given that the case involves the Head of an African State on the morrow of a series of vicious civil wars, whereas no credence would be attached to such allegations if they concerned the leaders of older nations.

*1. The risk of prejudice*

As illustrated by the jurisprudence, in assessing the risk of irreparable prejudice, the Court may be led to consider both the probability and the potential consequences of the occurrence of a fact or event. A future event does not have to be a certainty; it only needs to be probable.

In some cases, the event capable of causing the prejudice may already have occurred and the Court's work then consists simply in assessing whether, in the light of the facts, a provisional measure is necessary to prevent irreparable damage to the rights claimed. This is illustrated, for example, by the Orders of 8 April and 13 September 1993 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*. The Applicant produced the same evidence in support of its request for provisional measures as for its Application on the merits[22].

In other cases, the request for the indication of provisional measures has arisen from events occurring subsequent to the Application, such as the incidents between the armed forces of Burkina Faso and the Republic of Mali in the border region between the two countries in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case[23].

On other occasions, the Court may have to assess the possibility or likelihood of the prejudice. Thus, in the Orders concerning the *Nuclear*

[22] *I.C.J. Reports 1993*, p. 3 and p. 325.
[23] *Provisional Measures, Order of 10 January 1986, I.C.J Reports 1986*, p. 3.

*Tests* cases, the Court stated that its power under Article 41 of the Statute

> "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court"[24].

In those cases, the Court did not exclude the possibility of harm being caused to Australia and New Zealand by the radioactive fall-out of the nuclear tests in the atmosphere.

A similar pronouncement appears in the *Fisheries Jurisdiction* cases but the Court was more precise there because it added:

> "the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed . . . and affect the possibility of their full restoration in the event of a judgment in its favour"[25].

More recently, in line with its decisions in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*[26] and in the *LaGrand* case *(Germany* v. *United States of America)*, the Court held even more explicitly in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*:

> "*in the circumstances*, the Court is of the opinion that persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable, and that *there is a serious risk that the rights at issue in this case*, as noted in paragraph 40 above [the Congo's rights to sovereignty, territorial integrity, integrity of its assets and natural resources and its rights to respect for the rules of international humanitarian law], *may suffer irreparable prejudice*"[27].

In the present case, it appears to me that the prejudice already exists and that a risk of further prejudice can be identified in two respects.

First, the prejudice arises from the transmission of the complaints by the Paris prosecutor to the Meaux prosecutor, who had an obligation to

[24] *Nuclear Tests (Australia* v. *France), Provisional Measures, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103, and *Nuclear Tests (New Zealand* v. *France), Provisional Measures, Order of 22 June 1973, I.C.J. Reports 1973*, p. 139.

[25] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972*, p. 16, para. 22; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972*, p. 34, para. 23.

[26] *I.C.J. Reports 1998*, p. 257, paras. 35-37.

[27] *Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43; emphasis added.

decline jurisdiction for two reasons: the complaints implicate foreign personalities whose immunity from jurisdiction is established or foreseeable; and there was no basis under French law for jurisdiction of the French judicial authorities. The only possibility open to the prosecutor was to assert the territorial jurisdiction of French courts in respect of General Dabira, by virtue of a residential connection with French territory, and to acknowledge that he otherwise lacked jurisdiction.

Failing to acknowledge the lack of jurisdiction or to make any reference to such effect, and asserting the jurisdiction of French courts in respect of acts committed abroad, the *réquisitoire* of 23 January 2002 flouts the international division of jurisdiction among courts and violates the immunity of the Head of State and potentially that of other Congolese personalities.

The *réquisitoire* thus is clearly null and void and the Government of the French Republic had an obligation towards the Republic of the Congo to apply to the competent court for a finding to such effect, without waiting for the investigating judge or the prosecutor himself to proceed with any other acts stemming from the *réquisitoire* that would further violate international law.

Secondly, the Agent and counsel of France claimed that the summons addressed to President Sassou Nguesso to give evidence was simply an invitation under Article 656 of the Code of Criminal Procedure.

In reality, this proves that the Head of State's immunity was violated by the *réquisitoire* of 23 January. Once President Sassou Nguesso had been expressly accused in the complaints appended to the *réquisitoire* and by a victim, or alleged victim, examined during the preliminary police enquiry, the deposition that the investigating judges expected to take from him could only have concerned acts of which they were seised and in respect of which he was named, along with the other personalities identified, as the principal perpetrator. Whilst any other person implicated could only have been examined as a *témoin assisté*, enjoying guarantees of procedural due process, the judges are here seeking a deposition from a foreign Head of State concerning accusations of which he does not even know the exact tenor because he has not been granted access to the case file. The investigating judges only considered themselves entitled to proceed in such a manner because they had been seised by the *réquisitoire* of, *inter alia*, offences attributed to the Congolese Head of State.

Even assuming that Article 656 of the Code of Criminal Procedure applies to Heads of State — which is debatable[28] —, the President of the Congo, by deferring to the judge's invitation, could find himself formally placed under judicial examination on the basis of the complaints appended to the prosecutor's originating application of 23 January. But what

[28] J.-M. Gonnard, *Jurisclasseur de procédure pénale*, fasc. No. 23.

would be the purpose of such a deposition? To question the Head of State about events that occurred in his country? To induce him to make accusations against any of his fellow citizens? There is certainly a serious risk of prejudice here. The process would appear incongruous and, admittedly, the French Minister for Foreign Affairs has not transmitted the invitation to date, as the Court observed in the present Order. However, the failure to transmit that invitation to give evidence may be explained by reasons of expediency or legality; the French Minister for Foreign Affairs may have considered the Article 656 procedure inapplicable to a foreign Head of State. *Most importantly, as the invitation has* not been followed up, there is nothing to prevent the investigating judge from taking any other measures in respect of President Sassou Nguesso on the basis of the *réquisitoire*. It is therefore difficult to see how "the current proceedings . . . have not caused and cannot cause any damage to the Congo by way of breach of the immunities of President Sassou Nguesso".

The difficulty lies in the ongoing nature of the event capable of creating irreparable prejudice, stemming from the prosecutor's originating application of which the consequences have not yet all occurred but remain possible in the event of a decision by a less attentive, less scrupulous or more obstinate investigating judge. For as long as the defective procedural measure, the *réquisitoire*, remains in force, there will always be a risk. That risk is said to be "hypothetical" but "[a] risk is by definition a matter of chance, and it is dangerous to rely for a decision on the absence of a risk or on its improbability"[29].

*2. Irreparability of prejudice*

The notion of irreparable prejudice has evolved. In the narrow sense, following from the Permanent Court's interpretation in the case concerning *Denunciation of the Treaty of 2 November 1865 between China and Belgium*[30], prejudice is irreparable if it cannot "be made good simply by the payment of an indemnity or by compensation or restitution in some other material form".

Evidence of this narrow view was still to be found in the *Aegean Sea Continental Shelf* case, in which the Court rejected Greece's request on the ground that the right which it was seeking to protect (the right to acquire information concerning the natural resources of areas of continental shelf) was "one that might be capable of reparation by appropriate means"[31].

[29] Dissenting opinion of Judge Thierry appended to the Order of 2 March 1990, *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, I.C.J. Reports 1990*, p. 82.

[30] *P.C.I.J., Series A, No. 8*, p. 7.

[31] *I.C.J. Reports 1976*, p. 11, para. 33.

Recent case law betokens a broader conception of irreparability.

This has not — it would appear — been discussed at length in cases in which provisional measures have been indicated for obvious reasons, such as the cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, armed incidents occurring in the course of the *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986*, and *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, involving the impending execution of prisoners sentenced to the death penalty in the United States[32].

On the other hand, some light is shed on this question in certain cases in which the request for the indication of provisional measures has been rejected.

In the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, the irreparability of the prejudice was noted and expounded primarily by the dissenting judges. Had the Security Council not adopted a resolution altering the circumstances, they would have found the request for the indication of provisional measures to be justified. If Libya were compelled to surrender the suspects, it would as a result lose its right to try them itself under the Montreal Convention; conversely, if the Court did not intervene, there was a risk that Libya could find itself subject to coercion on the part of the respondent powers. The Respondents were disputing the Applicant's right to exercise its jurisdiction in the matter. Judge Ranjeva observed:

> "with respect to both its scope and its nature, the Applicant's right would have been under threat of disappearance had the contrary claim of the Respondent been acted upon. Here, on the contrary, under the Montreal Convention, the Respondents possess the power to prosecute the above-mentioned suspects. This collision of opposing rights, a clash centred upon a question of criminal responsibility, is the cause not only of what *may well be irreparable* prejudice, but above all of an aggravation of the dispute . . . [T]he Applicant has used a remedy open to every State wishing to request of the Court the legitimate protection of its right to pass judgment."[33]

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[32] For example, most recently the Order of 5 February 2003, in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, I.C.J. Reports 2003*, p. 91, para. 55.

[33] *I.C.J. Reports 1992*, p. 73, paras. 5 and 6; emphasis added.

Finally, in other cases there was merely a *diffuse* risk of prejudice[34].

Thus in the case concerning *Denunciation of the Treaty of 2 November 1865 between China and Belgium* in 1927, President Max Huber indicated provisional measures, finding that:

> "*in the event of an infraction* . . . of certain of the rights, which Belgium or her nationals would possess in China, if the Treaty of November 2nd, 1865, were recognized as still operative, such infraction could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form"[35].

The Order says nothing expressly about irreparable prejudice and lays down the principle that "the object of the provisional measures in question can only be the protection of *interests* which, without such measures, *would be in jeopardy of being irreparably compromised*".

In the case concerning the *Electricity Company of Sofia and Bulgaria*, the Permanent Court indicated provisional measures against Bulgaria, not to prevent irreparable prejudice but because the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given. In that case, the Belgian Government claimed that prejudice had been caused by acts of the State Administration of Mines putting into force a special artificially calculated tariff, by judgments of the District Court and of the Court of Appeal of Sofia, and by the 1938 judgment of the Court of Cassation . . . considering that they had occasioned grave prejudice to a Belgian national[36].

In the case concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, the risk of economic prejudice was diffuse and required an assessment of the consequences of the Icelandic regulations on the fishing industry in the United Kingdom (risk of unemployment, decommissioning of fishing vessels, etc.).

In the case concerning *Nuclear Tests (Australia* v. *France)*, the Applicants cited potential health effects of atomic radiation. Australia argued:

> "as the result of the French tests which have already taken place, [Australia] could have 1 case of thyroid cancer per year due to the isotope iodine-131 and 1 to 4 other cancer cases . . . Due to the same isotopes, Australia could have one mutation in every 10 years lead-

[34] Mathieu Bouah Bile, *Les mesures conservatoires indiquées par la Cour de La Haye de 1923 à nos jours*, Dissertation, 1986, Vol. I, pp. 109 *et seq.*

[35] *P.C.I.J., Series A, No. 8*, p. 7; emphasis added.

[36] *P.C.I.J., Series A/B, No. 79*, p. 199; *P.C.I.J., Series C, No. 88*, pp. 55-56.

ing to death or disability in the first generation, and up to 50-100 deaths or disabilities in all subsequent generations."[37]

Relying upon a scientific line of argument, the French Government contended that "to date no evidence has been adduced that such minimal doses as those resulting from the fall-out from the French tests are likely to have an effect . . .". Still, the Court held that there could be no doubt as to the irreparability of the prejudice.

Consequently, in the light of this jurisprudence the threat of coercive judicial measures raised by the *réquisitoire* of 23 January in the present case is such as to constitute a risk of irreparable prejudice.

First, the threat of a measure of constraint can, under the jurisprudence of the Court, constitute a risk of irreparable prejudice. In an old, but nonetheless significant, case before the Permanent Court of International Justice, the German Government requested the Court to indicate to the Polish Government, as an interim measure of protection pending the delivery of judgment on the Application, that it should abstain from any measure of constraint in respect of the property of the Prince von Pless, on account of income tax, because the carrying into effect of the measures of constraint would irremediably prejudice the right and interests forming the subject of the dispute. Ultimately, after the Court had convened, Poland transmitted declarations stating that: the summonses for payment had been sent to the Prince by oversight; the higher authorities in Poland having learned that measures of constraint had been taken in respect of the Prince, the Government had annulled them and undertook to suspend measures of constraint in respect of the Prince's income tax for another period and to refrain from collecting the disputed taxes until the Court had finally decided the dispute then pending before it. Finally, after agreement between the parties, the Court found in its Order of 11 May 1933 that, in consequence of the annulment, on the ground that an administrative error had occurred, of the measures of constraint against the Prince von Pless, the grounds for the German Government's request for the indication of provisional measures had ceased to exist[38].

There is indeed a risk in the present case that coercive measures will be taken against aliens, against Congolese nationals whether or not enjoying immunity from jurisdiction, in respect of acts committed in the Congo, such measures to be decided by French judicial authorities on the basis of a jurisdiction conjured up under international custom.

Further, in the case concerning the *United States Diplomatic and Consular Staff in Tehran*, the Court responded favourably to the United

[37] Request for the indication of provisional measures of Australia, *I.C.J. Pleadings, Nuclear Tests*, Vol. I, p. 55.
[38] *P.C.I.J., Series A/B, No. 54*, pp. 151-153.

States request, stating, after having noted that the power to indicate provisional measures presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute, that

> "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, . . . the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, . . ." [39].

The same is true *a fortiori* when State leaders are involved.

Finally, in the present proceedings, the Applicant stresses that account should be taken of

> "[the perturbation caused by the proceedings in question to] 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".

It is not only that Franco-Congolese relations will be damaged because proceedings concerning immunities are likely to affect relations between two States. Allegations of crimes against humanity or other State crimes can impair the international standing of a nation and the unprecedented proceedings initiated in France would be such as to harm the standing and even the honour of the Congo, owing to the publicity which will inevitably be accorded them.

In the international order the Head of State represents the State in all aspects of its international intercourse and this general authority, called the *jus repraesentationis omnimodae*, follows from international law as much as, or even more than, from national constitutional law. Sir Arthur Watts summarizes the position as follows: "It may be said generally that nowadays Heads of States through their office manifest the spirit and grandeur of their nations as a whole." [40]

True, the international order traditionally provides means for making good such an injury to the standing or honour of a State and a subsequent judgment by the Court would constitute adequate reparation for the damage caused to the Congo in its relations with other members of the international community.

On the other hand, nothing could make good the loss of reputation and honour suffered by a Head of State in the eyes of his people, who

[39] *I.C.J. Reports 1979*, p. 19, para. 38.
[40] Watts, *op. cit.*, p. 32.

remain sensitive to press reports and propaganda disseminated by opponents. It is important to keep in mind that the present case involves an African Head of State. Owing to the civil wars and tragic events having marked the continent in recent years, rumours and accusations directed at one or another leader are easily given some credence, even though like accusations would raise a smile or be considered frivolous elsewhere. In Africa the Head of State occupies a very special position, for "the people have a stronger sense of ethnic solidarity than of national or State solidarity", as Raymond Aron observed; "lacking cohesion as a result of the multiplicity of tribes, African States are pre-national or sub-national, as it were, in that the State does not have before it a unified nation". He added that this new type of State

> "is territorial and national: territorial in that the sovereign is entitled to do as he pleases within its boundaries; national in that the sovereign sees himself not as the possessor of the land nor as the master of those occupying it but as the embodiment of a people"[41].

Accordingly, the Head of State identifies the group, he incarnates the national will, he performs a "rallying" function, he symbolizes the existence of the nation and any accusation against him or attempted harm to his person is perceived as an attack on the State he represents in the manifestation of a certain unanimism, even though that unanimism is fleeting. This has led one author to conclude:

> "An African Head of State who has been a leader and the first witness to the national ideal, to its sovereignty, who in tomorrow's Africa will assuredly be a soldier, has as his prime mission proving the existence of the State."[42]

Now, foreign criminal proceedings initiated under murky circumstances against political leaders who prevailed after years of civil war can contribute to destabilizing the Government. A court which lends itself, even unintentionally, to manipulation by public opinion in a foreign country interferes in the internal affairs of that State. This prejudice is irreparable, as it undermines the legitimacy and stability of the foreign governmental authority. The Court did not wish to take account of this situation. It draws an abstract, categorical distinction between the rights to be protected and the prejudice arising from the violation of those rights, taking the view that irreparable prejudice would not be caused to the rights as such claimed by the Congo but might be regarded as such as to affect irreparably the rights asserted in the Application. First, it appears to me that what is at issue is not the separateness or magnitude of the injury; the crux is whether a causal nexus between the injurious act and the damage can be established: the violation of the right or the act

[41] *Paix et guerre entre les nations*, 1962, pp. 394-396.
[42] Bernard Asso, *Le chef d'Etat africain*, 1976, p. 346.

giving rise to responsibility must be the cause of the prejudice. Once this nexus has been established, it suffices to find that there is prejudice or, for the indication of provisional measures, a risk of irreparable prejudice. Secondly, in the political order it is not possible to stop at a mechanical analysis isolating each injury or event with a view to connecting it with its *efficient* cause. In itself, the violation of the rights which the Congo seeks to protect creates prejudice, for example in the case of immunity; it can, however, also create other irreparable prejudice which may be observed in the future. That prejudice is difficult if not impossible to prove before it is suffered but it may be infinitely more serious, as in the case of the destabilization of the country. A formalistic approach confining itself to consideration of the asserted rights for which protection is sought disregards the fact that violation of one right can give rise to a series of injuries likely to affect other rights and, more generally, legal interests worthy of preservation. In this regard, there is nothing to prevent the Court, in assessing the *"circumstances"* calling for the indication of provisional measures, from taking account of the legitimate interests of a party. Further, the development of the law of civil liability, notably in France, shows the courts' desire that the right to compensation for an injury caused to "a right" should be extended to the prejudice impairing a "legitimate interest" of the victim[43]. The desire to preserve the internal stability of the country, under threat of being undermined as a result of the allegations of criminal conduct levelled at the country's leaders, is a legitimate legal interest of the Congo. This attack on national independence is clearly irreparable and once the Government has been shaken, a subsequent decision by the Court upholding the Congo's Application could come too late.

## II. There Is Urgency

Even if the Court has not always specifically said so (see, *inter alia*, *Anglo-Iranian Oil Co., Provisional Measures, Order of 5 July 1951*)[44], its orders leave no doubt that "such measures are only justified if there is urgency"[45].

The case law reveals three types.

First, the urgency may be patent (risk of death, armed action, threat of destruction of property, etc.) and the Court must then demonstrate

[43] Terré, Ph. Simler, Y. Lequette, *Droit civil: les obligations*, 8th ed., 2002, Nos. 704 *et seq.*, p. 684.

[44] *I.C.J. Reports 1951*, p. 93.

[45] Case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, pp. 21-22, para. 35.

diligence[46]. Situations where both parties seek provisional measures in similar terms revealing that urgency lies at the heart of the proceedings also fall into this category[47].

Secondly, in some cases, the circumstances of the urgency have to be assessed and this indicates that urgency is a contingent or relative notion. The Court thus defined urgency in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)* as follows:

> "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 rights of the other party *is likely to be* taken before such final decision is given"[48].

Thirdly, the distinction between likelihood and possibility is sometimes subtle and urgency may result not only from an actual imminent risk but even from a contingent one.

Thus in the case concerning *Nuclear Tests (Australia* v. *France), Provisional Measures, Order of 22 June 1973*, in which the Court's finding as to the urgency of the request was merely implicit, the Court stated: "these allegations give substance to the Australian Government's contention that there is an immediate *possibility* of a further atmospheric nuclear test being carried out by France in the Pacific"[49]. The same view is expressed in the *Fisheries Jurisdiction* cases as to the possibility of the immediate implementation of the new Icelandic Regulations[50].

In other cases, urgency has been assessed not by application of the criterion of likelihood but by reference to general considerations related to the circumstances of the case.

In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984*, the Applicant "claims that the urgent need for the requested measures is shown by the fact that 'the lives and property of Nicaraguan citizens, the sovereignty of the State and the

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[46] As in the cases concerning the *Trial of Pakistani Prisoners of War, Provisional Measures, Order of 13 July 1973*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*, *LaGrand (Germany* v. *United States of America)*, *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*.

[47] *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 3.

[48] *I.C.J. Reports 1991*, p. 17, para. 23; emphasis added.

[49] *I.C.J. Reports 1973*, p. 104, para. 26; emphasis added.

[50] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972*, p. 16; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972*, p. 34.

health and progress of the economy are all immediately at stake'"[51]. The risk that the Nicaraguan Government would be destabilized was potential not actual, as the "covert" activities of the United States in Nicaragua could have ceased at any moment.

In the case concerning *Passage through the Great Belt (Finland* v. *Denmark)*, the Court based its assessment on the timetable for the disputed project as seen in the light of the expected course of the proceedings; the Court stated:

> "placing on record the *assurances given by Denmark* that no physical obstruction of the East Channel will occur before the end of 1994, and considering that the proceedings on the merits in the present case would, in the normal course, be completed before that time, [the Court] finds that it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings"[52].

In short, Finland failed to obtain the provisional measures sought but it did obtain a guarantee in the form of assurances given by Denmark in response to Finland's request.

In the present case, the urgency remains for as long as the *réquisitoire* is maintained. That act of procedure creates the possibility of additional prejudice at any time because there are no guarantees for the individuals named in the complaints appended to the *réquisitoire*. Having regard to the complaints transmitted to him, the *Procureur de la République* should have ascertained whether he had jurisdiction and whether criminal proceedings were admissible, given the involvement of a foreign Head of State. Had he done so, he would have understood that he was not entitled to seek the opening of a judicial investigation and that he should take no further action on those complaints and should even refrain from ordering a preliminary police enquiry. As it was, the prosecutor's actions resulted in a *réquisitoire* which was vitiated by a lack of jurisdiction, was *ultra vires* and was therefore void. At the same time, he allowed the investigating judge, at any time, to take any measures, including measures of coercion, against the personalities in question and even against the Head of State. The appended complaints were drafted with care and are not neutral documents; by virtue of the *réquisitoire* which relied on them, they became the basis and framework for the exercise of the investigating judge's jurisdiction. The *réquisitoire* against person or persons unknown allows the judge to act, as and when he chooses, against the named individuals, but also against any other persons who may be connected with the acts referred to the judge. Moreover, there is currently no right of appeal against the *réquisitoire* of 23 January, except that which could be exercised by civil complainants, individuals formally placed under judicial

[51] *I.C.J. Reports 1984*, p. 182, para. 32.
[52] *I.C.J. Reports 1991*, p. 18, para. 27; emphasis added.

examination, the prosecutor if he receives such an order, or the investigating judge under Article 170 of the Code of Criminal Procedure. Individuals who have not been placed under judicial examination but who are named in complaints remain powerless. Accordingly, only the French Government, by instructions given to the *Procureur général*, would be able to terminate the deleterious effect of the *réquisitoire* of 23 January.

Is it really necessary for the President of the Republic of the Congo or any other senior Congolese figures or citizens of that State to be formally placed under judicial examination, held in police custody, imprisoned, committed to the Assize Court for trial or convicted, before the preservation of the Congo's rights can be regarded as urgent?

It moreover appears pointless to consider that the Congo could subsequently seise the Court of a new request for the indication of provisional measures if a further threshold were to be crossed in the French criminal proceedings. The prejudice already exists. It is urgent to forestall the possibility of that prejudice becoming irreparable.

More generally, urgency may also arise from the fact that it would otherwise be necessary to wait until the Court ruled on the merits, since any subsequent reparation of prejudice caused by the continuation of the judicial proceedings against the personalities concerned would be quite illusory.

As Sir Hersch Lauterpacht observed:

> "from the point of view of the plaintiff State, an Order indicating interim measures may be of such urgency that to postpone it until the Court has finally decided, in proceedings which may take a long time, upon the question of its jurisdiction on the merits may well render the remedy illusory as the result of the destruction of the object of the dispute or for other reasons" [53].

This consideration takes on added significance given the refusal by the Agent of the French Government to make any commitment, promise or even arrangement, despite the express suggestion by one of the Congo's counsel [54].

## III. There Is a Risk of Aggravation or Extension of the Dispute

By virtue of Article 41, the Court has the power to indicate provisional measures in order to prevent any aggravation or extension of the dispute when it considers that the circumstances so require [55].

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[53] *The Development of International Law by the International Court*, 1958, pp. 110-111.
[54] CR 2003/22, p. 13.
[55] *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18.

The Court can thus seek to prevent incidents or even to maintain the status quo.

In cases concerning an armed conflict or those that have already led to the loss of human life or material damage, the protection of the parties' rights includes the need to prevent any aggravation or extension of the dispute. But this has also been observed in other cases, for example the *Anglo-Iranian Oil Co.*, *Fisheries Jurisdiction*, *Nuclear Tests* and *United States Diplomatic and Consular Staff in Tehran* cases, in connection with the indication of specific provisional measures.

In the *Frontier Dispute* case, the Court went quite far because it considered that:

> "independently of the requests submitted by the Parties for the indication of provisional measures, the Court . . . possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that *circumstances so require*"[56],

which indicated a certain evolution from the strict position previously adopted in the *Aegean Sea Continental Shelf* case, when it had refused to settle that issue[57].

In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, in 1993, the Court ruled that the two parties "should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute"[58].

More generally, it may be suggested that the objective of non-aggravation and non-extension of the dispute, or even the maintaining of the status quo, is not only related to the protection of the parties' rights, but also constitutes a basis for the indication of provisional measures[59].

Accordingly, the Court seems inclined to take into account all the circumstances of the case and it would appear that minimal provisional measures were appropriate here, with a view to maintaining the status quo in the disputed proceedings initiated in France. In the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, the dissenting judges singled out this aspect of the Court's jurisprudence and considered that instead of focusing on a review of each prerequisite to the indication of provisional measures, the Court may give preference to an overall analysis of the circumstances of the case and "on that basis, [decide] to indicate [such]

[56] *I.C.J. Reports 1986*, p. 9, para. 18; emphasis added.
[57] *I.C.J. Reports 1976*, p. 13, para. 42.
[58] *I.C.J. Reports 1993*, p. 24, para. 52.
[59] See S. Oda, *op. cit.*

measures in the general terms of an exhortation to all the parties not to aggravate or extend the dispute" or "[call] on the Parties to avoid all escalation"[60].

In the present case, one episode in the proceedings before the Court should have led it to adopt such a solution. During the hearings, counsel for the Congo suggested that the representatives of the French Republic ask the Court "formally to place on record the scope which they ascribe to the *réquisitoire*"[61]. That proposition fell short of the request for the indication of provisional measures and would have been less demanding than the requested suspension of the proceedings. The Agent of France, however, rejected the offer and refused to make any promises, simply referring to "the state of French law", even though the issue in this case is not the state of French law in such matters or any abstract guarantees it may offer, but rather the existence and maintaining of the *réquisitoire* of 23 January 2002. The Court took note of the Agent's statements in its Order, but without stipulating their scope, and those statements fail to provide any guarantee capable of counterbalancing the decision to dismiss the request for the indication of provisional measures. The Court's solution is somewhat ambiguous because the statements by the Agent of France presented it with two alternatives. Either they were statements of law: French law prohibits the prosecution of a foreign Head of State; French law subjects the jurisdiction of French courts in respect of acts committed abroad to certain conditions which preclude the exercise of a universal jurisdiction purportedly founded on international custom. In the *Nuclear Tests* case, the Court held that

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."[62]

Under these circumstances, the Court was not only entitled to take note of the statements but also to hold that the indication of provisional measures was pointless because it could not doubt that the French Government would enforce its own law. The statements by the French Government's Agent thus had the effect of "creating legal obligations" and it was incumbent upon the French authorities to assume any practical consequences. Such a solution, capable of putting an end to the dispute, falls perfectly within the Court's mission because it is established jurisprudence that the judicial settlement of international disputes, with a view to

[60] *I.C.J. Reports 1992*, dissenting opinion of President Bedjaoui, p. 48, para. 32; dissenting opinion of Judge Ranjeva, p. 76, para. 12.
[61] CR 2003/22, p. 13.
[62] *I.C.J. Reports 1974*, p. 267, para. 43.

which the Court was established, is "simply an alternative to the direct and friendly settlement of such disputes between the Parties"[63].

Or the statements by the Agent of France were simply question-begging and intended for dramatic effect, thus obliging the Court to take the view that France had no "intention of becoming bound". But, if this was not a unilateral promise[64], the Court was entitled to consider the significance of France's reluctance to make any promises and entitled to draw the appropriate conclusions. The Parties are in fact essentially agreed on the general terms of French law on the subject but, with respect to the crux of the dispute, stemming from the prosecutor's actions, the French Government's refusal to make any commitment thus leaves a risk of aggravation of the dispute for so long as the impugned *réquisitoire* of 23 January 2002 remains in force. That reserve on the part of the French Government's Agent may perhaps be explained by constitutional considerations relating to the separation of powers and to the independence of the judiciary. However, in the international order, the Government represents the State in all its aspects and is entitled to bind any authority, including judicial bodies, *a fortiori* when the initiation of criminal proceedings is at issue. The International Law Commission thus observed:

> "the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State"[65].

The Court has already had occasion to take note of the breach by a Government which, in neglecting to enforce its own laws, failed to ensure compliance with international law. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, it observed that the Iranian Government had failed to take any measures to protect persons who enjoyed diplomatic and consular immunities. It recalled that a State is under an obligation to take all appropriate steps to prevent any attack on the person, freedom or dignity of agents under threat. The Court concluded that whilst the Iranian authorities were aware of their obligations, they failed to use the means which were at their disposal to comply with those obligations; in particular, the Court considered it "necessary . . . to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a

[63] *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A/B, No. 22*, p. 13.

[64] J.-P. Jacqué, "A propos de la promesse unilatérale", *Mélanges offerts à Paul Reuter*, 1981, p. 327.

[65] Article 4 of ILC Draft Articles on State Responsibility, Fifty-second Session (2000), A/CN.4/L.600; in the Advisory Opinion of 29 April 1999 concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* the Court cited a similar text corresponding to an earlier draft of that Article from the *Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.

grave breach by Iran of its obligations"[66]. *A fortiori*, when a State claims that its own law is in compliance with international law and when it considers that there is no reason to "[suppose] that in the future [its] courts would move away from respecting the law they are required to apply"[67], the international forum before which such statements are made need not confine itself to taking note of them but may also interpret them as a commitment by that State. In the dispute concerning *Filleting within the Gulf of Saint Lawrence*, among more innocuous comments concerning cod fishing, the Arbitration Tribunal stated:

> "Having regard to the circumstances in which it was made, the Tribunal is bound to consider that such a statement commits France to use all the means in its power to ensure, in conjunction with the Canadian authorities, that the commitment is respected."[68]

In the present case, France should thus have been reminded of its duty to ensure compliance with its own laws, inasmuch as they enshrine rules and principles of international law in its domestic order; the assurances given during the hearings as to the conformity of French law with international law would be vain unless accompanied by the appropriate decisions because

> "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation . . ."[69]

The jurisprudence shows that domestic statutes are not immune to the effects of a judgment of the Court and that a State may be obliged to strike down a domestic statute which is held to be in breach of its international obligations[70]. *A fortiori*, the execution of a decision of the Court may require the Government of a State to take an administrative measure, such as, in the present case, issuing instructions to the judicial authority. In its Advisory Opinion concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court held that the obligation to comply with the requirements relating to the immunities granted to experts was "an obli-

[66] *I.C.J. Reports 1980*, pp. 13, 30, 33, 37.

[67] Statement of the Agent of France, CR 2003/23, p. 7, cited in paragraph 33 of the Order.

[68] Arbitral Award of 17 July 1986, Canada-France Arbitration Tribunal, *International Law Reports*, Vol. 82, pp. 590 *et seq.*, p. 637, para. 63 (2).

[69] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46.

[70] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Merits, Judgment No. 7, 1926*; *Factory at Chorzów, Merits, Judgment No. 13, 1928*; case concerning *Rights of Nationals of the United States of America in Morocco, Judgment of 27 August 1952*; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment of 25 July 1974*; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment of 25 July 1974.*

gation of result and not of means to be employed in achieving that result". Malaysia contended that it had complied with its obligation by enacting the necessary legislation and that Malaysian courts had not yet come to a final decision concerning the right of the Special Rapporteur concerned, Mr. Cumaraswamy, to enjoy immunity from legal process. The Court rejected those arguments, concluding that governmental authorities had an obligation to inform the national courts concerned of the status of the official and in particular of his immunity from legal process, since the proper application by those courts of the Convention on the Privileges and Immunities of the United Nations was dependent on such information. Having failed to transmit that information to the competent courts, Malaysia had not complied with its international obligation[71].

Similarly, at the current stage of the proceedings, the French Government cannot simply abstain from acting. True, as the Permanent Court of International Justice recalled, there is a

> "principle universally accepted by international tribunals . . . to the effect that parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute"[72].

However, that duty of abstention does not guarantee that the Congo's rights will not continue to be violated during the criminal proceedings. It would thus be incumbent upon the French Government to give instructions to the *Procureur général* so that all judicial measures be taken with a view to annulling the impugned *réquisitoire*, which threatens the immunity of the Head of State and encroaches upon the jurisdiction of Congolese courts, in order to "remedy any errors"[73].

In the absence of any specific commitment by France with respect to the scope that it ascribes to that act of procedure, under the present circumstances, the suspension of the French procedural measures, which are currently confined essentially to the *réquisitoire* of 23 January 2002, would have been conducive to precluding any aggravation of the dispute, by maintaining the status quo without affecting the balance between the Parties' respective rights.

*(Signed)* Jean-Yves DE CARA.

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[71] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999 (I)*, pp. 86-88, paras. 57-65.

[72] *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199.

[73] Mr. Abraham, Agent of France, CR 2003/23, p. 14.