CR 2003/20 (translation)

CR 2003/20 (traduction)

Monday 28 April 2003 at 10 a.m.

Lundi 28 avril 2003 à 10 heures

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui, en application du paragraphe 3 de l'article 74 du Règlement de la Cour, pour entendre les Parties en leurs observations sur la demande en indication de mesure conservatoire soumise par la République du Congo en l'affaire relative à *Certaines procédures pénales engagées en France (République du Congo c. France)*.

Avant de rappeler les principales étapes de la procédure en l'espèce, il échet de parachever la composition de la Cour.

La Cour ne comptant sur le siège en l'espèce aucun juge de la nationalité de la République du Congo, cette Partie a usé de la faculté qui lui est conférée par le paragraphe 2 de l'article 31 du Statut de désigner un juge *ad hoc* pour siéger en l'affaire, et a, à cet effet, désigné M. Jean-Yves Cara.

L'article 20 du Statut de la Cour dispose que «[t]out membre de la Cour doit, avant d'entrer en fonction, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». Ainsi qu'il est précisé au paragraphe 6 de l'article 31 du Statut, cette disposition s'applique aux juges *ad hoc*.

Je vais à présent brièvement évoquer la carrière et les qualifications du juge de Cara, avant de l'inviter à faire sa déclaration solennelle.

M. Jean-Yves de Cara, de nationalité française, est agrégé des facultés de droit (droit public), professeur de droit international public à la faculté de droit de l'Université Jean Moulin (Lyon III) et professeur à l'Institut d'études politiques d'Aix-en-Provence. Il est également coordinateur et professeur au Pallas Consortium de l'Université de Nimègue (Pays-Bas), et a enseigné en qualité de professeur invité au Royaume-Uni, aux Etats-Unis et en Allemagne. M. de Cara est avocat au barreau de Lyon et membre de la *Littleton Chambers* de Londres. Il est également avocat spécialisé en droit commercial.

Je vais maintenant inviter M. de Cara à prendre l'engagement solennel prescrit par le Statut et je demande à toutes les personnes présentes à l'audience de bien vouloir se lever. Monsieur de Cara.

Le juge de CARA : “I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

Le PRESIDENT : Veuillez vous asseoir. Je prend acte de la déclaration solennelle faite par M. de Cara et le déclare dûment installé comme juge *ad hoc* en l’affaire relative à *Certaines procédures pénales engagées en France (République du Congo c. France).*

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L’instance a été introduite en l’espèce le 9 décembre 2002 par le dépôt au Greffe de la Cour d’une requête et d’une demande en indication de mesure conservatoire par la République du Congo contre la République française. Dans sa requête, le Gouvernement de la République du Congo s’est référé au paragraphe 5 de l’article 38 du Règlement de la Cour et a mentionné, comme base de compétence de la Cour, «le consentement que ne manquera pas de donner la République française».

Le paragraphe 5 de l’article 38 du Règlement de la Cour dispose comme suit :

> «Lorsque le demandeur entend fonder la compétence de la Cour sur un consentement non encore donné ou manifesté par l’Etat contre lequel la requête est formée, la requête est transmise à cet Etat. Toutefois elle n’est pas inscrite au rôle général de la Cour et aucun acte de procédure n’est effectué tant que l’Etat contre lequel la requête est formée n’a pas accepté la compétence de la Cour aux fins de l’affaire.»

En application de cette disposition, dès réception de la requête, le greffier en a transmis un exemplaire au Gouvernement français, et a informé l’une et l’autre Parties que, conformément à la disposition en question du Règlement, l’affaire ne serait pas inscrite au rôle général, et qu’aucun acte de procédure ne serait effectué, tant que l’Etat contre lequel la requête est formée n’aurait pas accepté la compétence de la Cour aux fins de l’affaire.

Par lettre datée du 8 avril 2003 et reçue au Greffe le 11 avril 2003, le ministre des affaires étrangères de la République française a informé la Cour que «la République française accept[ait] la compétence de la Cour pour connaître de la requête en application de l’article 38, paragraphe 5», du Règlement de la Cour, ce qui a permis l’inscription de l’affaire au rôle général de la Cour.

A la suite de l'acceptation de la compétence de la Cour par la France, la suspension de tout acte de procédure imposée par application du paragraphe 5 de l'article 38 du Règlement de la Cour se trouve levée; et, de ce fait, conformément au paragraphe 2 de l'article 74 du Règlement de la Cour, celle-ci a été convoquée pour statuer d'urgence sur la demande en indication de mesure conservatoire.

La demande de la République du Congo, que celle-ci a exposée dans sa requête, a trait au dépôt entre les mains du procureur de la République près le tribunal de grande instance de Paris d'une

> «plainte pour crimes contre l'humanité et tortures prétendument commis au Congo sur des personnes de nationalité congolaise, visant nommément S. Exc. M. Denis Sassou Nguesso, président de la République du Congo, S. Exc. le général Pierre Oba, ministre de l'intérieur, de la sécurité publique et de l'administration du territoire, le général Norbert Dabira, inspecteur général des forces armées congolaises, et le général Blaise Adoua, commandant la garde présidentielle».

Le 23 janvier 2002, le procureur de la République près le tribunal de grande instance de Meaux a décerné un réquisitoire à fin d'informer du chef des prétendus crimes dénoncés, et le juge d'instruction «commençait à informer. Il entend[it] le général Norbert Dabira (que les officiers de police judiciaire avaient antérieurement placé en garde à vue) comme témoin assisté.»

La République du Congo affirme en outre que le juge d'instruction

> «rest[a] sourd à une lettre officielle du procureur de la République près le tribunal de grande instance de Brazzaville, en date du 9 septembre 2002, qui lui signalait qu'une information relative aux mêmes faits était suivie par le juge d'instruction de ce tribunal à la suite d'un réquisitoire introductif du 29 août 2000… [et que] S. Exc. M. Denis Sassou Nguesso était en visite d'Etat en France, il délivrait à des officiers de police judiciaire une commission rogatoire leur ordonnant de l'entendre comme témoin.»

Sur la base de ces faits, la République du Congo soutient que,

> «en s'attribuant unilatéralement une compétence universelle en matière pénale et en s'arrogeant le pouvoir de faire poursuivre et juger le ministre de l'intérieur d'un Etat étranger à raison de prétendues infractions qu'il aurait commises à l'occasion de l'exercice de ses attributions relatives au maintien de l'ordre public dans son pays»,

la France a violé «le principe selon lequel un Etat ne peut exercer son pouvoir sur le territoire d'un autre Etat».

Elle soutient par ailleurs qu'en décernant une commission rogatoire ordonnant aux officiers de police judiciaire délégués d'entendre comme témoin le président de la République du Congo, la

France a violé le principe fondamental du droit international qui reconnaît une immunité à un chef d'Etat étranger.

Je demande à présent au greffier de donner lecture du passage de la requête qui contient la mesure demandée.

The REGISTRAR: "The Court is requested to declare that the French Republic shall cause to be annulled the measures of investigation and prosecution taken by the procureur de la République of the Paris tribunal de grande instance, the procureur de la République of the Meaux tribunal de grande instance and the investigating judges of those courts."

Le PRESIDENT : Le texte de la requête du 9 décembre 2002 contient également une demande en indication de mesure conservatoire, en application du paragraphe 1 de l'article 41 du Statut de la Cour. Dans sa demande, la République du Congo déclare que

> «l'information en cause trouble les relations internationales de la République du Congo par la publicité que reçoivent, au mépris des dispositions de la loi française sur le secret de l'instruction, les actes accomplis par le magistrat instructeur, lesquels portent atteinte à l'honneur et à considération du chef de l'Etat, du ministre de l'intérieur et de l'inspecteur général de l'armée et, par là, au crédit international du Congo. De plus elle altère les relations traditionnelles d'amitié franco-congolaise. Si cette procédure délétère devait se poursuivre, le dommage deviendrait irréparable.»

Je vais demander au greffier de donner lecture du passage de la demande où se trouve précisée la mesure conservatoire que le Gouvernement de la République du Congo prie la Cour d'indiquer.

The REGISTRAR: "That request seeks an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux tribunal de grande instance."

Le PRESIDENT : La demande en indication de mesure conservatoire se trouve incorporée dans la requête, dont une copie certifiée conforme a été transmise au Gouvernement français dès son dépôt, conformément au paragraphe 5 de l'article 38 du Règlement de la Cour. Lorsque, à la suite de la lettre en date du 8 avril 2003 du ministre français des affaires étrangères, la suspension de la procédure découlant de ladite disposition a été levée, le greffier a notifié la requête au Secrétaire général des Nations Unies.

A compter de cette date, conformément à l'article 74 du Règlement de la Cour, la requête en indication de mesure conservatoire a eu priorité sur toutes autres affaires, et la date de l'audience a été fixée pour permettre aux Parties de s'y faire représenter. Les Parties ont, en conséquence, été informées le 14 avril 2003 que la date d'ouverture de la procédure orale, au cours de laquelle elles pourraient exposer leurs observations sur la demande en indication de mesure conservatoire, a été fixée au 28 avril 2003.

Je note la présence à l'audience des agents, conseils et avocats des deux Parties. La Cour entendra tout d'abord ce matin jusqu'à 12 heures, en son premier tour de plaidoirie, la République du Congo, qui est l'Etat demandeur au fond et celui qui a soumis la requête en indication de mesure conservatoire. La France prendra la parole cet après-midi à partir de 16 heures. Aux fins du premier tour de plaidoirie, chacune des Parties disposera d'une séance de deux heures. La République du Congo reprendra la parole le mardi 29 avril à 9 h 30, et la France reprendra la parole à 12 heures. Chaque Partie disposera d'un temps de parole d'une heure et demi maximum ce jour là pour sa réplique orale.

Je donne maintenant la parole à S. Exc. M. Jacques Obia, agent de la République du Congo.

Mr. OBIA: Thank you, Mr. President, distinguished Members of the Court, Mr. Registrar, ladies and gentlemen of the French delegation, ladies and gentlemen of the Congolese delegation, I am bound to thank you for all that you have done to enable us to be here together today, but I must also tell you that, on accession to independence on 15 August 1960, the Congolese people and its leaders never thought that they were again going to have to fight for that same independence. And history shows that the struggles fought and victories gained are never consolidated without effort. Here we are again, face to face with history. The combat that our grandparents fought, we of our generation are carrying it on today, against our friend, against the country which worked together with us for so many long years of history. What is to be done if, within this system of States, there sometimes arise divergent concerns and interests which come to haunt politics and human dignity? But my speech today, far from being pure rhetoric, also expresses the feeling of an entire people, which, through the Cotonou Accord, sought to strengthen its relations with Europe, and particularly with France, and now feels itself bereft of its dignity. Bereft of its dignity, notwithstanding those

mechanisms — and I know of what I speak: I was one of those who negotiated at Cotonou — and I recall that in that Agreement there is an Article 94 which provides for consultations in affairs of this kind. But what can be done if a prosecutor and judge of a sovereign country decide, in all independence, to launch an attack on a State's sovereignty? In that case, there is nothing for it but to have recourse to that forum where it is for the international community to decide that it is incumbent upon all to remain within the confines of their boundaries.

And why do we ask for this? Because you know that today, with these doctrines of preventive war and others which, if we are not careful, will leave you as simple spectators as States such as ours become, as it were, putty, to be moulded by all and sundry in whatever way they choose. I would also make a point here. In violating the essential fundamental principles of international law, France has forgotten the independence which it accorded us as the fruit of negotiation with such illustrious figures as General de Gaulle, and now seeks to trample on the memory of those who gave us dignity. But today, ladies and gentlemen, we are lucky enough to have the assistance of counsel, and it is to them that I will give the floor, so that they can seek to explain to you the merits of this case. Do a people, an individual, a man, a violated woman, still have dignity? What is a State to think which sees its leaders summoned before judges, at a time when, in France, the judicial system does not allow the French Head of State to be heard as a witness — that same French judicial system which is perfectly willing to hear every other Head of State in the world, and in particular that of the Congo? That is unacceptable! Our parents spilt their blood for independence, we shall not stint in our efforts to defend that same independence. Mr. President, Members of the Court, I think I have come to the end of my speech. I may have occasion to take the floor again, but I will finish on a note of hope. The world has need of calm, the world has need of rulers and judges who lay down the law, dissociated from political considerations, from corrupt interests or a simple desire to settle political accounts. If one day the law were to become law, geometry would be truly a science. Thank you very much.

Le PRESIDENT : Merci Monsieur Obia. Je donne maintenant la parole à M^{e} Vergès,

Mr. VERGÈS: Mr. President, Madam, counsel, Members of the Court, may I begin by telling you what an emotional moment this is for me to appear before you for the second time. The

last time was also for an African State against the former metropole. You have recalled the facts, Mr. President; I should just like briefly to go over them again.

I. FACTS

1. On 5 December 2001, the International Federation of Human Rights Leagues (Fédération internationale des ligues des droits de l'homme (FIDH)), the Congolese Observatory of Human Rights (l'Observatoire congolais des droits de l'homme (OCDH)) and the Ligue française pour la défense des droits de l'homme et du citoyen (the League) filed with the procureur de la République of the Paris tribunal de grande instance a complaint for crimes against humanity and torture allegedly committed in the Congo against individuals having Congolese nationality, expressly naming H.E. Mr. Denis Sassou Nguesso, President of the Republic of the Congo, H.E. General Pierre Oba, Minister of the Interior, Public Security and Territory Administration, General Norbert Dabira, Inspector General of the Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard.

2. Instead of finding that the French courts lacked international jurisdiction and that the immunity of a foreign Head of State had accordingly been violated, on 7 December 2001 the procureur de la République transmitted that complaint to the procureur de la République of the Meaux tribunal de grande instance, "which (appeared) to have jurisdiction under Articles 689-1 and 693 of the Code of Criminal Procedure" *(sic)*.

Thus at a time when, in France, the highest courts, the Constitutional Council and Court of Cassation, were expressly stating that a French judge could not examine the head of the French State, even as a witness, the procureur de la République of the Paris tribunal de grande instance and the procureur of the Meaux tribunal de grande instance took the view that, by contrast, they were entitled to examine a foreign Head of State. What difference is there between the two? All that I can see is one of colour. The Meaux procureur accordingly ordered a preliminary enquiry and then on 23 January 2002, without further considering the compliance of his actions with international law, issued a request for an enquiry into the alleged offences.

Likewise failing to consider this issue in relation to the Congo, the investigating judge commenced an enquiry. He took testimony from General Norbert Dabira (who had previously been taken into custody by police officers) as a legally represented witness.

3. He ignored an official letter from the procureur de la République of the Brazzaville Tribunal de grande instance dated 9 September 2002, which informed him that an investigating judge of that court had already been conducting an enquiry into the same facts since the summer of 2000.

4. Finally, when H.E. Mr. Denis Sassou Nguesso was on a State visit to France, the judge issued a warrant to police officers instructing them to examine him as a witness.

5. This situation led the Congolese political authorities to draw the attention of their French counterparts to the violation of international law represented by this procedure, conducted on their own initiative by members of the French judiciary, and to ask them to do whatever was in their power to have the proceedings halted forthwith. The French political authorities, although convinced of the correctness of the Congolese request, considered themselves unable to intervene effectively in the case, given the independence of the French judiciary under French domestic law. However, given the statement in a letter signed by the *garde des sceaux* that this might be a case of a breach of the principle *non bis in idem*, since the Congolese judiciary had already been seised for almost a year of the complaint lodged in France, it is hard to understand how the French judiciary considered itself competent to hold — to say the least — that the Congolese judges were unworthy of any consideration and that the Congolese State is a sovereign State, but subject to limits which it is for French judges to determine.

Such opposition between the international law invoked by the Republic of the Congo and the domestic law relied on by the French Republic thus created a legal dispute between the two States.

II. INSTITUTION OF PROCEEDINGS BEFORE THE COURT

6. It was in these circumstances that the Republic of the Congo seised the Court of the dispute by an Application which, as you reminded us, Mr. President, was filed in the Registry on 9 December 2002.

That Application requests the Court to declare that the French Republic shall cause to be annulled the measures of investigation and prosecution taken by the procureur de la République of the Paris tribunal de grande instance, the procureur de la République of the Meaux tribunal de grande instance and the investigating judge of this latter court, which judicial officers, on the basis

of a complaint whereby associations describing themselves as humanitarian denounced to the French judiciary alleged crimes against humanity and instances of torture claimed to have been committed in the Congo, by Congolese, against victims said to be Congolese, which complaints expressly named H.E. Mr. Denis Sassou Nguesso, President of the Republic of the Congo and H.E. Mr. Pierre Oba, Minister of the Interior of the Republic of the Congo, together with other individuals, including General Norbert Dabira, Inspector General of the Congolese Armed Forces:

— as to the procureur de la République of the Paris tribunal de grande instance: he transmitted the complaint to the procureur de la République of the Meaux tribunal de grande instance purportedly having territorial jurisdiction (why Meaux?), failing thereby to take account of the French courts' lack of international jurisdiction or of the violation of the immunity attaching to the office of President of the Republic,

— as to the procureur de la République of the Meaux tribunal de grande instance: he ordered a preliminary enquiry into the acts complained of and then issued a request for the opening of a criminal investigation against X, in violation of the same principles of international law,

— as to the investigating judge of that same tribunal: he initiated an investigation on the basis of that request when he ought, *proprio motu*, to have declared himself to be without jurisdiction internationally, and to have refused to conduct an investigation against the Republic of the Congo; and, furthermore, he issued a warrant instructing police officers to examine H.E. President Denis Sassou Nguesso as a witness.

7. This Application is accompanied by a request for the indication of a provisional measure, namely the suspension of the proceedings being conducted by the Meaux investigating judge, that request being the subject of the present hearings.

8. Before showing that this request is well founded, we would recall that, since the French Republic no longer accepts the compulsory jurisdiction of the Court, the Republic of the Congo had called upon that friendly State — to which it is bound by a Treaty of Co-operation of 1 January 1974, Article 2 of which provides that "[h]aving due regard for their mutual sovereignty, independence and territorial integrity, each of the High Contracting Parties undertakes to settle its disputes with the other by peaceful means, in accordance with the Charter of the United

Nations" — to consent to the Court's jurisdiction pursuant to Article 38, paragraph 5, of the Rules of Court.

III. ACCEPTANCE BY THE FRENCH REPUBLIC OF THE COURT'S JURISDICTION

9. By letter of 8 April 2003, received in the Registry of the Court on 11 April, the French Republic accepted the Court's jurisdiction, subject to two qualifications — to which the Republic of the Congo fully subscribes — as to the restriction of that consent to the claims made in the Application and as to the scope of Article 2 of the Treaty of Co-operation in relation to the Court's jurisdiction.

The Republic of the Congo addresses its warmest thanks for that consent to President Jacques Chirac and to the Government of the French Republic. It hails the respect for international law and the attachment to the principles of the United Nations Charter manifested once again by their action in this regard.

IV. THE REQUEST FOR THE INDICATION OF A PROVISIONAL MEASURE IS JUSTIFIED

10. As to whether the request for the indication of a provisional measure is justified, I would say to the Court that the circumstances require that such a measure be indicated.

In the first place, the grounds of law relied on by the Republic of the Congo represent, to put it at its lowest, serious arguments.

Further, the proceedings under challenge, if not terminated as soon as possible, will cause irreparable harm to relations between two friendly States.

V. THE SOLIDITY OF THE LEGAL GROUNDS INVOKED BY THE APPLICATION

11. The other members of the delegation will expand on these points but I wish to state at present that those grounds are as follows:

(1) violation of the principle that a State may not exercise its authority on the territory of another State, in breach of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, by unilaterally attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes

allegedly committed by him in the exercise of his powers for the maintenance of public order in his country;

(2) violation of the criminal immunity of a foreign Head of State, an international customary rule recognized by the jurisprudence of the Court.

The other members of the delegation will now show that these are solid grounds. Thank you.

The PRESIDENT: Merci, Maître Vergès. Je donne maintenant la parole à M. Decocq.

Mr. DECOCQ: Mr. President, Members of the Court, please allow me also to express the emotion and pride I feel in appearing before you today. Nearly 51 years after having been sworn in as a lawyer, 43 years after having ceased to practice that profession, I find myself pleading for the first time before a court and indeed this court!

Mr. President, Members of the Court, it falls to my colleague Dean Zorgbibe and myself to make a brief showing of the solidity of the grounds invoked in this case by the Republic of the Congo. To begin, the first ground.

A. The first ground

12. This ground is based, as just stated, on a violation by the French Republic, through its judicial officers, of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among Members of the United Nations. The pretexts advanced for this infringement of Congolese sovereignty are, first, the claimed universal jurisdiction of the French courts in respect of crimes against humanity and also torture. A crime against humanity alleged by the public prosecutor acting on a complaint — it would be more accurate to say a report — by associations calling themselves humanitarian, which had no standing to lodge a criminal complaint as civil parties and thereby to initiate a prosecution themselves. A State cannot on its own authority arrogate this universal jurisdiction to itself by means of a domestic statute — that was the case of the Kingdom of Belgium. *A fortiori*, there is no such universal jurisdiction in the absence of any domestic statute — that is the case of the French Republic.

13. This lack of jurisdiction derives from the principle that a State cannot exercise its authority on the territory of another State. This principle is found in the Judgment handed down by the earlier incarnation of your Court, the Permanent Court of International Justice, in the well-known *"Lotus"* case (Judgment No. 9, 1927, *P.C.I.J., Series A, No. 10*), to which it would be pointless to return. Territoriality is a principle of international law; a State cannot prosecute acts committed outside its territory unless they somehow produced an effect within that territory.

This jurisprudential rule is now corroborated by the principle laid down in Article 2, paragraph 1, of the Charter: "The Organization is based on the principle of the sovereign equality of all its Members."

In the case in which your Court ruled on 14 February 2002 (General List No. 121, case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*) between the Democratic Republic of the Congo and the Kingdom of Belgium, it was asserted in the original Application that the Kingdom of Belgium lacked jurisdiction to deal with acts committed abroad by foreigners and against foreigners. During the proceedings, the Kingdom of Belgium abandoned this argument, for reasons which it would be pointless to consider. Nevertheless, President Gilbert Guillaume published a separate opinion in which he examined this question in detail and showed that the argument as to lack of jurisdiction would have been well-founded. Universal jurisdiction can only exist pursuant to a convention accepted and signed by the States concerned. There is no such convention generally concerning crimes against humanity. Universal jurisdiction in respect of crimes against humanity is not a general principle.

14. But, here, the above-mentioned principle that a State may not exercise its authority on the territory of another State has another consequence. The individuals to whom the complainants and the public prosecutor ascribe the acts complained of include, as has been seen, H.E. General Pierre Oba, Minister of the Interior of the Republic of the Congo.

He allegedly committed the acts of which he is accused in the exercise of his responsibilities for the maintenance of public order. A foreign State interfering in those acts thereby interferes in the exercise of the sovereignty of the State on whose territory the acts allegedly occurred. But, according to the complainants and the public prosecutor, who saw it fit to follow suit, the acts complained of also constituted acts of torture. And here French law, the Code of Criminal

Procedure, contains an article establishing universal jurisdiction of the French courts under certain conditions. Does this text apply? That is now for Dean Charles Zorgbibe to consider. I thank the Court.

Le PRESIDENT : Merci, M. le professeur. Je donne maintenant la parole à M. Zorgbibe.

Mr. ZORGBIBE:

15. Mr. President, Members of the Court. As Professor Decocq, citing President Guillaume, has just reminded us, universal jurisdiction can exist only if provided for by convention. And we must accordingly now turn to the New York Convention Against Torture, referred to in Article 689-2 of the French Code of Criminal Procedure. Thus, the question which we must consider may be stated in the following terms: under international law, do French criminal courts have jurisdiction to prosecute acts of torture alleged to have been committed abroad by foreigners against foreigners (jurisdiction pursuant to Article 689-2 of the French Code of Criminal Procedure)?

The general characteristics of the New York Convention against torture are perfectly familiar. Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of a public official for a particular purpose, such as obtaining a confession or information, punishing an act, intimidation, or even coercing a third person.

This definition reflects the three components identified at the regional level by the European Commission of Human Rights in the *Greek case* (in connection with the admissibility of Applications 3321/67 and 4448/70, submitted by the three Scandinavian States and also, in respect of the first Application, by the Netherlands): intensity of suffering, deliberate intention and specific purpose; it leaves aside the notions of inhuman or degrading treatment, which were regarded as less serious than torture; and it provides for an exception, namely pain and suffering arising from “legitimate” sanctions — something of a paradox this, perhaps, and a more subjective notion than the possibly more precise one of “lawful” sanctions contained in Article 7 of the Rome Treaty creating the Statute of the International Criminal Court.

First and foremost, the New York Convention lays down the obligations of the State party, which are of four kinds: prevention, criminalization and punishment, extradition or prosecution, and judicial protection of victims and reparation. And the Convention appears to base this legal power of a State party to prosecute the crime of torture, very traditionally, on the personal jurisdiction of the State over its nationals and on its territorial jurisdiction: under Article 5.1, the State party is required to establish its jurisdiction in three circumstances — when the offence is committed in its territory, or when the alleged offender is one of its nationals, or when the victim is one of its nationals. Article 5.2, however, extends the State party's jurisdiction to the case where the alleged offender is present in its territory, while Articles 6 and 7 specify the conditions for his identification, detention and trial. Thus from Article 5.2 onwards, one might say, the Convention appears to take no account of nationality as far as the application of its provisions is concerned: the State party is under an obligation to identify, take into custody and try any alleged perpetrator of the crime of torture who may be in its territory, regardless of his or the victim's nationality. This, then, is obviously the issue we have to consider. Did the draftsmen of the New York Convention thus seek to install a mechanism of universal jurisdiction, which might have been available to the French criminal courts?

The New York Convention is certainly an important text and a strong text. One of those texts which reflects the widespread and sometimes apparently unstoppable movement towards universal jurisdiction. A text which seems to transcend the traditional interpretation of international law as the regulator of juxtaposed sovereignties which serves the ends of national foreign policies, as a coded régime for relations between States, in order to express a normative ideal, to fashion a coercive system designed to embrace the international community as a whole. The clear originality of the New York Convention, like that of other instruments for the protection of human rights in specific fields, is to lay down law which is international in origin but domestic in object, and ultimately to envisage what might be thought of as a transnational community of individuals quite distinct from that society of nations which Voltaire famously called the "Republic of States". That takes us a little in the direction of Emmanuel Kant's celebrated "cosmopolitan law".

Finally, though, putting aside considerations of this kind, which as yet are no more than theoretical prospects — Kant spoke of the universal community in theoretical terms — we need to come back to the actual text of the Convention in order to define and develop the issue of the jurisdiction of French criminal courts under international law. I am inclined to put three fundamental questions:

(1) Can the New York Convention bind a third State, such as the Republic of the Congo, which lies outside the circle of States parties?

(2) If the Convention can bind a third State, do the conditions exist for the exercise of French jurisdiction?

(3) If the conditions do exist for its exercise, is that jurisdiction not frustrated by the somewhat monolithic concept of the criminal immunity of a Head of State?

(1) Can the New York Convention bind a third State, in the present instance the Republic of the Congo?

In reality this question obviously does not concern the provisions of Article 5.1 which, as we have seen, relate to the personal and territorial jurisdictions of States. It concerns above all Articles 5.2, 6 and 7, which circumvent personal jurisdiction and derogate from the principle of territorial sovereignty in criminal matters.

A reading of the Convention suggests that ultimately, within the text of the Convention itself, there is some kind of conflict between the dictates of sovereignty and those of interference. What we have is a collision, a quite original and particular conflict, between these sets of dictates within the text of the Convention.

In effect, if we take the words in their normal sense, since the alleged perpetrator of an act of torture who is present in the territory of a State party can be taken into custody and tried by that State, regardless of his nationality, and regardless of the territory on which the act was committed, one is obviously tempted to conclude that the nationals of a third State who claim to have been the victims of offences under the Convention can benefit from its provisions, even though those provisions do not bind their own State; that would then entitle them to invoke the Convention before the judicial organs of a State party.

But there is also the matter of the context, of the general economy of the text of the Convention, which, I think, justify a more cautious approach. For the Convention sets up a control mechanism subsequent to the act of torture, but one which remains totally subject at every stage to State acceptance. Thus the Convention establishes a "Committee against Torture" which is endowed with quite extensive powers — more extensive than in other conventions of the same kind: it can examine reports by States parties and complaints by States (Article 21) and individual communications (Article 22), and it can even cause investigations to be undertaken *proprio motu* (Article 20); however, the examination by the Committee of complaints by States and individual communications is only possible if the State directly concerned has made an optional declaration agreeing to that procedure.

One further limitation: investigations can only be followed up if the Committee "receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State Party"; moreover, when a State becomes a party to the Convention it is entitled to declare that it does not recognize the Committee's investigative competence as a whole.

We are thus clearly faced with the question: how can one admit that the Convention's system of review remains strictly controlled by the States parties but that suddenly, what I would be tempted to call the "long-arm" provisions of Articles 5-2, 6 and 7 make it much easier to implicate non-party States? It would obviously be paradoxical; likewise if we look at Article 31 which provides that a State party may denounce the Convention by written notification to the Secretary-General of the United Nations, etc. Such denunciation releases the State party from its obligations one year later. Here too, why should a State party be able to release itself from all constraint, by denouncing the Convention and leaving the group of States parties, when this is not the case for non-party States. This leads us to believe that the principle of the relative effect of treaties, which is unambiguously laid down by Article 34 of the Vienna Convention on the Law of Treaties, appears to prevail here: the exceptional jurisdiction arising from Articles 5-2, 6 and 7 of the New York Convention would only seem to be opposable to States parties to that Convention.

(2) If the New York Convention can bind a third State, do the conditions exist for the exercise of French jurisdiction?

I think we can answer this quickly. No, because the mechanism laid down by the New York Convention fits to some extent into the general trend introduced by the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, i.e., a mechanism providing for a form of jurisdiction that is mandatory but alternative.

Mandatory jurisdiction: the proceedings are no longer subordinate to the existence of jurisdiction, jurisdiction must be assumed for the proceedings to go ahead.

Alternative jurisdiction: the State on whose territory the offender is found must extradite him or initiate proceedings against him, but under the instrument as a whole the States the most directly concerned remain those which are enumerated in Article 5, paragraph 1 — I am tempted to speak of "paragraph 1 States" — namely the State of which the alleged offender is a national, the State of which the victim is a national and the State in which the offences have been committed. It is clear from the general spirit of the Convention that the State which detains the alleged offender is bound by a duty of mutual assistance and co-operation with those other States: custody may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted; the New York Convention further stipulates that it must immediately notify the "paragraph 1" States of the proceedings that it has initiated.

It appears to me that this duty of mutual assistance and co-operation has been patently disregarded in the present case: as Maître Vergès said, the prosecutor of the Meaux *tribunal de grande instance* failed to take into account the proceedings initiated in the Congo in respect of the same offences, despite being notified by the prosecutor of the Brazzaville *tribunal de première instance* in a letter of 9 September 2002.

3. If the conditions do exist for its exercise, would not French jurisdiction be frustrated by the monolithic concept of the criminal immunity of a Head of State?

I will leave my colleague Professor Decocq to address the main points, but I would like to point out that we basically have here a number of observations that can be set out very quickly. First, from a historical standpoint, the criminal immunity of foreign Heads of State is one of the great undisputed principles of customary law which was built up throughout the nineteenth century by the converging practices of the Great Powers of the Concert of Europe — as it was called at the

time — founded on the sovereignty of States and the shared belief that there is no jurisdiction to judge equals, but we have to observe that this principle of sovereign equality between States, which one may have thought was related to the aristocratic system of the Concert of Powers in the nineteenth century, was actually strengthened by the appearance of new States after decolonization.

As a second observation I would note the extremely definitive manner in which French courts have always considered such immunity. One of the oldest cases is that of 1849 — when such rules were indeed just emerging — namely the *Lambège et Pujols [sic]* case before the French Court of Cassation which held on 21 July 1849 that as a result of the case a government may not be subject to the jurisdiction of a foreign State in respect of its undertakings; at the other extreme, I would be tempted to take the Judgment of 15 April 1986 by the Civil Division of the Court of Cassation, which emphasized that the disregard of immunity from jurisdiction by a French court was *ultra vires* and that the ground of immunity was "an objection to admissibility rather than an objection to jurisdiction", that is to say that immunity from jurisdiction concerns more the courts' capacity to adjudicate than their jurisdiction *per se*.

As a third observation, with regard to a case which has already been mentioned and will certainly be mentioned extensively today and tomorrow — I obviously refer to the Constitutional Council's declaration of 22 January 1999 — is it not paradoxical to guarantee the constitutional immunity of a Head of State within the legal order of his own territory but to accept, with respect to a foreign Head of State, a direct violation of his sovereignty, so to speak.

Thank you.

The PRESIDENT: Merci, M. Zorgbibe. Je donne maintenant la parole à M[e] Vergès.

M[e] VERGES: Mr. President, Members of the Court, I will be very brief in closing, because it is a matter of undeniable truth. I refer to the irreparable nature of the prejudice caused by the impugned proceedings of which we are complaining before this Court.

VI. THE IRREPARABLE HARM CAUSED BY THE IMPUGNED PROCEEDINGS

The proceedings in question are thus perturbing the international relations of the Republic of the Congo as a result of the publicity accorded, in flagrant breach of French law governing the

secrecy of judicial investigations, to the actions of the investigating judge, which impugn the honour and reputation of the Head of State, of the Minister of the Interior and of the Inspector-General of the Armed Forces and, in consequence, the international standing of the Congo. Furthermore, those proceedings are damaging to the traditional links of Franco-Congolese friendship.

If these injurious proceedings were to continue, that damage would become irreparable. This is not the place to read to you all the articles on that subject that have been published in the French press, in both daily and weekly publications; every time a measure is taken the problem arises that the press is immediately informed.

The Head of State of the Congo came to Paris for a conference on the invitation of the French Head of State. The daily press immediately reported as front-page news that he would have to account for crimes before the court of Meaux. Ridiculous as it may seem to mention this point, as it is so unexpected, that is nonetheless the situation. And that is why we are calling upon this Court to take an urgent decision, to put an end to a situation which is certainly intolerable. Thank you.

Le PRESIDENT: Merci, M[e] Vergès. Je donne maintenant la parole au professeur Decocq.

Mr. DECOCQ: Mr. President, Members of the Court, I wish to return briefly to the seriousness of the argument based on the violation of the immunity of H.E. President Sassou Nguesso. This principle of criminal immunity of foreign Heads of State was enshrined in the reasoning of your 14 February 2002 Judgment in the case of *Democratic Republic of the Congo* v. *Belgium* because you stated that certain holders of high-ranking office in a State, such as the Head of State, enjoy immunities from jurisdiction in other States, both civil and criminal. When this idea is considered in conjunction with the operative part of your Judgment, you justify the immunity of the Minister for Foreign Affairs by the fact that he holds, like the Head of State and the Head of Government, a position which renders him responsible for the conduct of the State's international relations. You then regarded that principle as self-evident, even though the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo was accused of crimes against humanity. After a careful examination of all the precedents and of all the

proceedings brought before international courts which you showed to be specialized in this matter, you irrefutably established that there was no exception to the criminal immunity of a Head of a State by virtue of a general principle, even when he is accused of crimes against humanity.

Your case law on the international immunity of the Head of State is consonant, in the French legal order, with the case law both of the Constitutional Council and of the Court of Cassation in its highest formation, the Plenary Assembly, with respect to the immunity of the President of the French Republic. It is also consonant with the case law of the Criminal Division of the Court of Cassation with regard to the immunity from criminal jurisdiction of a foreign Head of State even when that foreign Head of State is accused of very serious crimes, i.e., the destruction of property caused by an explosive device involving the death of a third party — and without recalling the facts this refers to a bomb which exploded on a civil aircraft — and in connection with a terrorist undertaking. The Criminal Division, on 13 March 2001, thus quashed a judgment of the Indictments Chamber (then known as the *chambre d'accusation*) of the Paris Appeal Court which had seen fit to find that the investigating judge had jurisdiction in that case. The Court of Cassation held that by so ruling, whilst under international law as it stands a crime complained of, however serious, does not fall within the exceptions to the principle of immunity from jurisdiction of foreign Heads of State in office, the Indictments Chamber had failed to observe the principle of international law.

That judgment, as it has been observed, refers to exceptions to the principle of immunity. In the case which you ruled upon on 14 February 2002, the Kingdom of Belgium sought to contend academically — and I was going to say through a process of alchemy or an outright distortion of the terms of the French judgment — that the exceptions to which it was referring could be war crimes or crimes against humanity. That was obviously not the case. They were purely conventional exceptions, that is to say arising from treaties in force.

But in the present case it may perhaps be replied that whilst in the *Democratic Republic of the Congo* v. *Belgium* case an arrest warrant had been issued against the Minister for Foreign Affairs, in this case, after all, the proceedings against the Congolese Head of State only amount to a prosecutor's application in respect of an unnamed person, pursuant to a complaint which, for its part, named him expressly, and that there is nothing worse than a summons to appear as a witness.

That nevertheless constitutes a violation of his immunity. If you will allow me, I wish now to return to matters of French domestic law.

I mentioned just now the jurisprudence of the Constitutional Council and the Plenary Assembly of the Court of Cassation. The facts of our case, without wishing to overburden you with considerations of French internal law, must nonetheless be placed within a French domestic chronology. At the time when the Paris prosecutor was about to transmit the case to his Meaux counterpart, who appeared to him to have jurisdiction — a jurisdiction assumed on the basis of General Dabira's second home there — at that time, the prosecutor (who has since left office) was, if I dare so put it, possessed of an *"idée fixe"*: to instigate proceedings against the President of the Republic in office before the expiry of his term and possible re-election. This was also the position of a minister, whose gender and office I will, out of charity, not reveal, who declared — having doubtless opened mouth before engaging brain — "after all, the President of the Republic is subject to the law like everybody else". Might we not be excused for thinking that maybe it wasn't such a bad idea after all to launch proceedings against a foreign Head of State, which could then, by analogy, justify proceedings against the President of the Republic? That is, of course, pure speculation. On reflection, much too unkind, and scarcely credible. Yet the fact remains that this train of events ultimately led the Plenary Assembly of the Court of Cassation, in a formal judgment of 10 October 2001, precisely to define the scope of the immunity enjoyed by the President of the Republic in relation to all acts within the power of an investigating judge. What had happened was that an investigating judge had sent to 55, rue du Faubourg Saint Honoré — the official address, in case you didn't know, of the President of the Republic — a summons requiring one Chirac, Jacques, to appear before him as a witness. The President of the Republic did not answer to that summons. The same prosecutor who would transmit the case file to Meaux had, at the request of the investigating judge, prepared an opinion in which he stated that there was nothing to prevent the President of the Republic being called as a witness, even as a legally represented witness — which implied presumptions of charges against him. It is to all such practices that the judgment of the Plenary Assembly formally puts an end.

In its Judgment, the Court cited the French Constitution — the articles are unimportant, that is not our concern here. What does concern us here is that, in citing the Constitution, the Court

defined the office of the President of the Republic: "Being directly elected by the people in order, *inter alia*, to ensure the proper functioning of the public administration as well as the continuity of the State" — and this is the consequence:

> "the President of the Republic cannot, during his term of office, be heard as a legally represented witness, or be formally placed under judicial investigation, summoned to appear or committed for trial for any offence before an organ of jurisdiction under the ordinary criminal law; whereas neither can he be obliged to appear as a witness pursuant to Article 101 of the Code of Criminal Procedure, since, under Article 109 of the said Code, there attaches to that obligation a measure of publicly enforceable constraint and it is sanctioned by a criminal penalty".

"A measure of publicly enforceable constraint." In effect, an investigating judge has the power to have brought before him, in handcuffs if necessary, by the forces of law and order, any witness who refuses to appear. In terms of criminal sanction, a witness who does not appear may be fined 3,750 euros. That is a criminal penalty. There could be no question — and the Plenary Assembly said so very clearly — of a power to inflict such a sanction, or employ such measures, against the President of the Republic. But, Mr. President, Members of the Court, what applies to the President of the French Republic, does it not also apply to a foreign Head of State? That Head of State, is he too not responsible for ensuring the proper functioning of the public administration and continuity of a sovereign State?

It was not my intention to address the merits of this point. Dare I hope that I have persuaded you that it is a serious argument, which justifies our request for a provisional measure? I thank the Court for its attention.

Le PRESIDENT : Je vous remercie, M. le professeur Decocq. Puisque tous les intervenants, au nom de la délégation du Congo, se sont exprimés, la séance de cette matinée parvient à son terme.

Nous nous réunirons cet après-midi à 16 heures pour entendre le premier tour de plaidoiries de la République française.

La séance est levée.

L'audience est levée à 11 h 20.

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