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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING *CERTAIN CRIMINAL PROCEEDINGS IN FRANCE*
(REPUBLIC OF THE CONGO* v. *FRANCE)

MEMORIAL OF THE REPUBLIC OF THE CONGO

[Translation by the Registry]

INTERNATIONAL COURT OF JUSTICE

1

Case concerning *Certain Criminal Proceedings in France*
(Republic of the Congo* v. *France)

Memorial

For: The Republic of the Congo

having as its Agent His Excellency Mr. Jacques Obia, Ambassador Extraordinary and Plenipotentiary of the Republic of the Congo to the European Union, to His Majesty the King of the Belgians, to Her Majesty the Queen of the Netherlands and to His Royal Highness the Grand Duke of Luxembourg,

residing at 16, Avenue Franklin Roosevelt, 1050 Brussels

against: The French Republic

I. Statement of the facts

1. The denunciations characterized as "complaints" that led to the disputed criminal proceedings

On 7 December 2001, three organizations which describe their constitutional purpose as the defence of human rights, that is to say the International Federation for Human Rights (FIDH), the Congolese Human Rights Observatory (OCDH) and the Ligue française pour la défense des droits de l'homme (the League), instructed the same lawyer, Maître Henri Leclerc, to file with the *Procureur de la République* of the Paris *Tribunal de grande instance* documents which they described as "complaints", alleging crimes against humanity and torture said to have been committed in the Congo.

2

(a) *Nature and scope of the denunciations of 7 December 2001*

Before undertaking any analysis of the documents in question, it is important to consider their nature and scope in terms of French criminal procedure.

The main function of the *ministère public*, which is represented before the *Tribunal de grande instance* by the *Procureur de la République* (public prosecutor), is to commence a prosecution, in other words to bring criminal proceedings on behalf of the State, by referring a case to a criminal court, more specifically to an investigating judge, and then to pursue those proceedings subsequently. To set the prosecution in motion, the prosecutor relies on the findings of investigations by judicial police officers, who transmit the information to him in reports. He also relies on information (notice of offence) received from "constituted authorities", public officers or officials who obtain knowledge of an indictable offence (*crime* or *délit*) in the performance of their duties, or from individuals. Information submitted by individuals who claim to have suffered harm as a result of an offence is referred to as a complaint, or more precisely an ordinary complaint *(plainte simple)*, and that submitted by third parties is a denunciation *(dénonciation)*. The prosecutor decides what kind of action to take on such information in the light both of the legal basis and of the propriety of prosecution (Article 40 of the Code of Criminal Procedure). In other words, he has a discretionary power to decide whether or not to refer the matter to a criminal court.

A party which claims to have personally suffered harm as a direct result of an offence has the right, in parallel to the power enjoyed by the prosecutor, to initiate a public prosecution. When such a party refers the matter to an investigating judge, its complaint is accompanied by what is known as a civil-party application *(constitution de partie civile)*. Such a complaint also requires the prosecutor himself to seise the investigating judge unless the prosecution would be unlawful (proceedings inadmissible or time-barred, inadmissibility of the civil-party application in the absence of direct, personal harm caused by the alleged offence, acts complained of not constituting a criminal offence).

In the present case, the "complaints" by the above-mentioned organizations were not accompanied by civil-party applications, for the very good reason that the organizations were obviously unable to claim that they had suffered direct harm as a result of the alleged crimes, and such applications would thus have been declared inadmissible. Moreover, as the so-called "complainant" organizations were unable to show they had suffered any harm, even indirectly, as a result of the alleged crimes they described, the documents in question were not
3 even ordinary complaints but denunciations. It follows that the documents did not directly set a prosecution in motion but merely consisted in allegations submitted to the prosecutor, and it was left to him to take full responsibility for pursuing the matter further, if necessary after directing judicial police officers to conduct preliminary enquiries.

The prosecutor nevertheless admitted the denunciations as if they were ordinary complaints.

(b) ***Analysis of the denunciations***

The denunciations were presented in the form of two documents with annexes.

1. The first document, on letter-headed paper of the law firm Henri Leclerc & Associés, was a letter addressed to the *Procureur de la République* of the *Paris Tribunal de grande instance*, bearing the reference "FIDH *v.* Sassou Nguesso and Others HL . . .".

It read as follows:

"Sir,

I have the honour, on behalf of:

the International Federation for Human Rights (FIDH);

the Congolese Human Rights Observatory (OCDH) [Observatoire congolais des Droits de l'Homme];

the French Human Rights League [Ligue Française pour la Défense des Droits de l'Homme/Ligue des Droits de l'Homme]

To lodge with you a complaint against:

Mr. Denis Sassou Nguesso, President of the Republic of the Congo;

General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration;

General Norbert Dabira, Inspector-General of the Armed Forces;

General Blaise Adoua, Commander of the Republican Guard/Presidential Guard;

and all others.

4 *On account of crimes against humanity, disappearances and acts of torture, as set out in the attached complaint.*

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 and, in any event, in respect of acts of torture pursuant to Article 689-2 of the Code of Criminal Procedure and to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984.

I append to this complaint:

— *a report by the International Federation for Human Rights (FIDH report, June 1999);*

— *a report by the International Commission of Enquiry on Congo Brazzaville (FIDH report, April 2000);*

— *a report by* Médecins sans frontières *dated October 1999;*

— *a report by the United Nations High Commissioner for Refugees dated 21 May 1999;*

— *a statement by Mr. Linot Bardin Duval Tsieno, a survivor from Brazzaville Beach, giving an account of the facts witnessed by him.*

I shall be happy to provide any such further particulars as you may require.

Yours, etc.

Henri Leclerc."

The party making the denunciation added the following postscript:

"*P.S. May I draw your attention to the fact that General Dabira is currently in France, for what may be a short stay.*"

2. The second document was headed "International Federation for Human Rights" and was dated 5 December 2001. It was 27 pages long and referred to the same annexes as the first, except for the report by *Médecins sans frontières*.

5 It was presented as a "complaint" addressed to the same prosecutor by the three organizations mentioned in the first document, which named Maître Henri Leclerc as lawyer and gave his office as their address for service (which, incidentally, would only make sense if it were a civil-party application). This denunciation indicated as signatories Mr. Siki Kaba, President of FIDH, and Mr. Michel Tubiana, President of the French Human Rights League (LDH), but only the former had signed the document and appended the seal of his organization.

It stated in an opening passage:

"[The organizations calling themselves 'complainants'] *have the honour to depose the following information with a view to the opening of a judicial investigation and seeking any necessary measures for the commencement of proceedings against the following individuals, it being noted that General Norbert Dabira is currently present on French territory. They accordingly request you, pursuant to Article 6 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to take the necessary interim measures to ensure the detention of that individual or his presence on French territory.*

The persons against whom this claim is directed are the following:

Mr. Denis Sassou Nguesso,

President of the Republic of the Congo

Born in 1943 at Edou, Oyo District

Of Congolese nationality

Residing at Brazzaville, BP 2947

General Pierre Oba

Minister of the Interior, Public Security and Territorial Administration;

General Norbert Dabira

Inspector-General of the Armed Forces,

Residing at 54, Allée des Tilleuls

Bois Parisis

77240 Villeparisis

General Blaise Adoua

6 *Commander of the Republican Guard, known as the 'Presidential Guard';*

And all such other persons as the investigation may disclose."

Under the heading "Context", the denunciation then presumed to give an account of the three civil wars that took place in the Congo from 1993 to 1999, and proceeded to give details of alleged disappearances of individuals between 5 and 14 May 1999. According to the report, these were people who had taken refuge in the Pool region (a forested area south of Brazzaville) during the 1998 civil war and crossed over to the Democratic Republic of the Congo, on the other bank of the Congo River, and then returned to the Republic of the Congo through the river port of Brazzaville pursuant to a tripartite agreement concluded under the auspices of the Office of the United Nations High Commissioner for Refugees (UNHCR), which established a humanitarian corridor. The complainant organizations named some of these individuals, citing in support of their allegations certain testimony that they claimed to have obtained directly or indirectly. They intimated, basing themselves on the discovery of

two bodies, that the individuals whose disappearance they alleged could have been summarily executed.

The same passage of the denunciation reproduced, without the slightest critical analysis, statements of retired Gendarmerie Colonel Marcel Touanga, a notorious member of the Congolese opposition, concerning the arrest of his son, Gendarmerie Sergeant Narcisse Touanga, and the unsuccessful steps he allegedly took to trace him.

The authors of the denunciation relied finally on written statements appended thereto, reportedly received from a Mr. Tsieno, an alleged massacre survivor.

The authors accused the Brazzaville prosecutor's office of inertia in prosecuting the alleged offences.

This presentation of the "context" was followed by a section entitled *"Attributability"*. The complainant organizations, having asserted that the four named individuals were responsible for the crimes allegedly committed in the Congo in their capacity as direct
7 superiors of the actual perpetrators of the crimes, set out to demonstrate, more specifically, the responsibility of H.E. President Denis Sassou Nguesso and of General Norbert Dabira.

In the case of the President of the Republic of the Congo, they purported to infer his responsibility from the authority he exercised as Head of State over the Presidential Guard and the "Cobra" militia, the alleged direct perpetrators of the offences in question.

Under the heading *"The immunity of Mr. Sassou Nguesso as Head of State"*, a passage in this section sought to argue that

> *"[i]t used generally to be held that a Head of State in office traditionally enjoyed immunity from jurisdiction and execution. However, in light of the practice in international relations over recent years, it would seem, on the basis of international instruments as well as of international custom, that those principles might be susceptible to change"*.

Invoking a hotchpotch of special provisions in a number of international instruments (ranging from the Treaty of Versailles to the Statute of the International Criminal Court and including the Statute of the Nuremberg International Military Tribunal and the International Criminal Tribunal for the former Yugoslavia), as well as the order of a Belgian judge concerning General Pinochet, the denouncers felt justified in concluding that *"Mr. Sassou Nguesso cannot benefit from the principle of immunity"*.

In the case of General Dabira, it failed to cite any specific act attributable to him and inferred solely from his office as Inspector-General of the armed forces that he *"could have played an important role in the prevention of arbitrary arrests and the ensuing disappearances"*. It is self-evident that the complainant organizations really only implicated him because he had a residence in France, which gave them a pretext, for the reasons set out below, for invoking the jurisdiction of the French courts.

The denunciation then contained, under the heading *"Applicable law"*, various arguments entitled *"Definition of the crime of disappearance"* (*A*), referring to a draft Convention on the Protection of all Persons from Enforced Disappearances, "*Disappearances constitute crimes of torture*" (*C* — read *B*), *"The universal nature of the crime of torture"* (*C*) and "*Enforced disappearances as a crime against humanity*" (*D*). The last head of argument concluded as follows:

8 *"The acts of torture, murder and forced disappearance, as well as of simple imprisonment or other form of serious deprivation of physical liberty, as alleged and established in the present complaint, thus constitute crimes against humanity by reason of the fact that they were committed for political and racial reasons, in pursuance of a concerted plan."*

The closing arguments dealt with the *"jurisdiction of the French courts"*.

The organizations contended in this section, first, that the offence of a crime against humanity, which was said to exist *"formally in customary international law"*, entails *"the universal jurisdiction of all States to prosecute such crimes"* and that *"even in the absence of express provisions in the domestic law of the prosecuting State enabling it to exercise jurisdiction, international law empowers domestic courts to exercise universal jurisdiction over crimes against humanity"*. They considered it justified to conclude:

"Domestic 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."

With regard to the charge of the crime of torture, they cited the provisions of Articles 689-1 and 689-2 of the French Criminal Code and those of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in New York on 10 December 1984, for the implementation of which (Article 6) the aforementioned Article 689-2 was enacted.

The denunciation referred again to the "presence" of General Dabira at his address in France and proceeded to draw the following general conclusion:

"The information contained in the present complaint testifying to the responsibility of the Congolese authorities for crimes against humanity, enforced disappearances and torture committed in the Republic of the Congo is sufficient to entitle FIDH, OCDH and LDH to request you as Procureur de la République*, acting under Article 6 of the aforementioned Convention and Article 659-1 of the Code of Criminal Procedure, to open a judicial investigation and take all such steps as are necessary to bring proceedings in light of the presence on French territory of the persons named in the present document and any such other persons as the investigation may disclose." [Translation by the Registry]*

9 **2. The initial reactions of the prosecutor to the denunciations**

(a) On 7 December 2001, the very day on which the denunciations were filed with the office of the prosecutor of the Paris *Tribunal de grande instance*, a senior assistant prosecutor *(premier substitut)*, head of section, acting on behalf of the latter, transmitted them to the prosecutor of the *Tribunal de grande instance* under cover of a document known as a *"soit transmis"* (transmittal order), worded as follows: *"Order of transmittal to the* Procureur de la République *in Meaux, who appears to have jurisdiction pursuant to the terms of Articles 689-1 and 693 of the Code of Criminal Procedure"*.

It should be noted in this connection that Article 689-1 of the Code of Criminal Procedure stipulates that *"[p]ursuant to the international conventions referred to in the following articles, a person who has committed, outside the territory of the Republic, any of the offences enumerated in these articles may be prosecuted and tried by French courts if that person is present in France"*, and Article 693 stipulates that, in cases where French courts

have extraterritorial jurisdiction, the competent court shall be that situated in the place of residence of the accused.

Villeparisis, where General Dabira has a residence, is in the judicial district of the Meaux *Tribunal de grande instance*. Hence the decision to transmit the file to the prosecutor of that court by his counterpart in Paris.

(b) On 8 December 2001 the Meaux prosecutor issued a document called "Notice of extension of jurisdiction" (decision under Article 18, paragraph 4, of the Code of Criminal Procedure, the purpose of which is to authorize judicial police officers to operate elsewhere on French territory, outside the territory in which they have jurisdiction, which read as follows:

> "*The* Procureur de la République *of the Meaux* Tribunal de grande instance,
>
> *Having regard to the preliminary enquiries currently being undertaken by the Versailles SRPJ* (acronym for the Regional Judicial Police Service, which is established in the judicial district of each appeal court to investigate the most serious or complex cases) *into acts constituting crimes against humanity* [emphasis added]
>
> *Against: person or persons unknown*
>
> *Having regard to the urgency*
>
> *Having regard to the provisions of Article 18, paragraph 4, of the Code of Criminal Procedure,*
>
> *Whereas evidence should be taken from Mr. Tsieno and Mr. Tounga*
>
> *Hereby requests Mr. Dupeyroux* (one of the judicial police officers involved in the investigation) *or any assistant he may designate to travel to Montfermeil and the Paris Region, and if necessary over the whole of the national territory, to conduct any examinations, searches or seizures and, in general, any operations that may assist in uncovering the truth, including, in particular, any appropriate interviews and enquiries." [Translation by the Registry]*

Thus, even before the application was issued, the Versailles SRPJ had, very *[sic]* pursuant to an informal application by the same prosecutor (the summary report on the preliminary enquiry, which will be mentioned below, refers to a transmittal order by an assistant prosecutor dated 8 December), conducted preliminary enquiries into the acts denounced. In the absence of any written evidence in the case file, it must be assumed that the Meaux prosecutor reacted to the denunciations transmitted immediately upon receiving them, on 8 December 2001.

It should be noted in passing that such a speedy, not to say precipitate, response by the public prosecutors, in both Paris and Meaux, to mere denunciations by private associations is quite unusual. It will be necessary to return to this point later.

3. The preliminary enquiries

The preliminary enquiries involved, in particular, the taking of evidence from Mr. Tsieno on 17 December 2001 and from Mr. Touanga on 18 January 2001.

Police Captain Franck du Peyroux (or Dupeyroux), the officer heading the investigation mentioned in the application for extension of jurisdiction cited above, prepared a summary report of those enquiries on 22 January 2002, to which were appended records *(procès-verbaux)* of the 14 statements prepared in the course of the enquiries (numbered 2001/2530), for the Director of the Versailles SRPJ, who transmitted it to the prosecutor in Meaux.

11 That report, after reviewing the circumstances in which the enquiries had been conducted, stated that General Dabira had been identified and his address in Villeparisis verified, and went on to analyse the interviews with Mr. Tsieno and Mr. Touanga.

It noted, in the statements by Mr. Tsieno, that the summary executions had allegedly taken place not far from the presidential palace. Looking at the records of these statements, we find that Mr. Tsieno, replying to the question *"Who, do you think, ordered the executions?"*, said: *"I don't know. All I can say is that the executions took place at the presidential palace of Mr. Sassou Nguesso and were carried out by the* Cobra, *who report to Mr. Sassou Nguesso"*.

In the case of Mr. Tounga's interview, the report recorded *inter alia* that he "*implicated the current President, Mr. Sassou Nguesso"* as the source of the instructions to commit the criminal acts reported by Mr. Tsiena and himself — summary executions followed by incineration of the victims. With regard to the possible implication of General Dabira, the officer leading the investigation noted that Mr. Touanga *"had no evidence"* and that *"he implied that he could not have been unaware of the facts because he had headed a commission responsible for elucidating the conduct of the presidential forces vis-à-vis civilians"*.

The following are the specific passages from that interview to which the summary report referred.

With regard to the implication of H.E. President Sassou Nguesso:

> *"Question: What did General Adoua mean when he referred to instructions from superiors?*
>
> *Reply: He meant that it was Mr. Sassou Nguesso who had ordered those executions so as to traumatize the population in the south and get the situation fully under control."*

With regard to the responsibility of General Dabira:

> *"Personally, I have no evidence of his physical involvement but I know that he was aware of what was happening in the Presidential Guard, because he had been appointed Chairman of the Commission set up to look into the conduct of the security services towards civilians." [Translation by the Registry]*

12 **4. Prosecutor's originating application**

On 23 January 2002, the prosecutor of the Meaux *Tribunal de grande instance* issued a *réquisitoire*, an originating application requesting an investigating judge to proceed with a judicial investigation (*instruction* or *information*), under the conditions and with the effects set out below.

The prosecutor's originating application represents the key document in the present proceedings before the Court. That document forms the basis of the violations of international law committed by the judicial authorities of the French Republic which have caused prejudice to the Republic of the Congo. All subsequent breaches can be traced back to that source.

It is necessary to reproduce that document in full:

"*The* Procureur de la République *of the Meaux* Tribunal de grande instance

Having regard to the appended documents, and in particular PV No. 2530/2001

Whereas it being apparent from said documents that there are against a person or persons unknown

Indicia suggesting that he (she, they) participated in the following acts:

— *Crimes against humanity: massive and systematic abductions of individuals, followed by their disappearance*

— *torture or inhuman acts for ideological reasons in implementation of a concerted plan against a group of the civilian population*

Having regard to Article 212-1 of the Criminal Code and

Article 689-1 of the Code of Criminal Procedure

Having regard to Articles 80, 80-1 and 86 of the Code of Criminal Procedure

Hereby requests his honour the investigating judge to commence an investigation by all available legal means

Done at the public prosecutor's office, 23 January 2001 [this should read 2002]

On behalf of the Procureur de la République
C. KRIEF, Assistant Prosecutor"
[Translation by the Registry]

As indicated above, the reference "PV No.°2530/2001" denotes the records prepared in the course of the preliminary enquiries. These are not the only documents appended to the *réquisitoire*. The denunciations discussed earlier are also of course appended thereto.

13 Article 212-2 of the Criminal Code is the text providing for the punishment of crimes against humanity other than genocide.

Article 689-1 of the Code of Criminal Procedure contains the above-mentioned provisions concerning certain cases where French courts have extraterritorial jurisdiction.

Article 80 of that same Code provides for the prosecutor's originating application and Article 80-1 for the conditions under which a person may be placed under judicial examination.

The provisions of Article 86, which concerns the opening of a judicial investigation on the basis of a complaint with a civil-party application, is clearly irrelevant in the present case and can be disregarded.

5. The initial measures of judicial investigation

In accordance with the duty rota of investigating judges at the Meaux *Tribunal de grande instance*, drawn up by order of the President of that Court pursuant to Article 83 of the Code of Criminal Procedure, Mr. J. Gervillie was entrusted with the investigation pursuant to the above-mentioned application. At his request, the President of the Court, by order of 4 February 2002, "having regard to the seriousness and the complexity of the case", further assigned to the case Mme Odette-Luce Bouvier, Investigating Vice-President.

It is only necessary to relate here those events occurring at the beginning of that judicial investigation which are pertinent in light of the Congolese Republic's claims.

On 31 January 2002, Mr. Tsieno filed an application to join the proceedings as a civil party, pursuant to Article 87 of the Code of Criminal Procedure. He was heard by the investigating judges on 22 March 2002. On that occasion, he reiterated his previous statements.

Mr. Touanga was later heard as a witness on 17 June 2002.

In the meantime, the investigating judges had issued a *commission rogatoire* (instructions given to judicial police officers, pursuant to Articles 151 *et seq*. of the Code of Criminal Procedure, for the undertaking of certain investigative measures on behalf of the investigating judge) to the Chief Inspector of the Paris Criminal Investigation Unit *(section de recherches)* of the Ile de France Division of the Gendarmerie.

14 **6. The first steps in the investigation against General Dabira**

On 23 May 2002, judicial police officers from the Paris Criminal Investigation Unit, placed General Dabira in custody and interviewed him as a witness.

Later, on 8 July 2002, the investigating judges took testimony from him as a *témoin assisté* (a legally represented witness: the status defined by Articles 113-1 and 113-2 of the Code of Criminal Procedure applying to a person who is specifically mentioned by name in the prosecutor's originating application and is not placed under judicial examination, or who has been implicated by the victim or by a witness, or against whom there is evidence as to the likelihood of that person having participated in the offence of which the investigating judge is seised), in the presence of his counsel and without taking an oath, as provided for in Articles 113-3 and 113-7 of the Code of Criminal Procedure. General Dabira denied any participation in the alleged crimes and explained that his duties as Inspector-General of the

Armed Forces did not grant him any hierarchical authority over the members of the Republican Guard alleged by the complainants to have committed the offences in question.

Following that hearing, the investigating judges notified General Dabira that they would summon him to appear again on 11 September 2002 at 9.30 a.m. with a view to his being placed under judicial examination (*«mise en examen»*, a measure provided for under the above-mentioned Article 80-1 of the Code of Criminal Procedure, formerly known as *"inculpation"*, which consists of informing a person that there is strong or concordant evidence as to the likelihood of that person having participated in the offences of which the investigating judge is seised).

The judges thus addressed to him, on 23 August 2002, a Summons for First Appearance, with a view to the possibility of his being placed under judicial examination in accordance with the said Article 80-1, paragraph 2.

General Dabira then returned to Brazzaville and reported the measures taken against him to the President of the Republic of the Congo, who instructed him not to appear in response to the summons by the investigating judges, because French courts lacked jurisdiction to prosecute the alleged offences in question.

15 **7. The claim to jurisdiction submitted by the prosecutor of the Brazzaville *Tribunal de grande instance* to the prosecutor of the Meaux *Tribunal de grande instance* regarding the acts under investigation by the latter court**

On 9 September 2002, the prosecutor of the Brazzaville *Tribunal de grande instance* sent the prosecutor of the Meaux *Tribunal de grande instance* a detailed letter, in which he stated that he was informed of the proceedings initiated in Meaux against General Dabira and indicating that one of the above-mentioned complainant organizations, the Congolese Human Rights Observatory (OCDH) had published the same accusations in the Congo in 2000, thus leading the Congolese Minister of Justice to initiate an investigation.

The Brazzaville prosecutor added:

> "Following that enquiry, the Minister of Justice, considering that the statements of certain persons interviewed could contain facts capable of being characterized as offences under the criminal laws of the Republic, requested the public prosecutor to apply for the opening of a judicial investigation against persons unknown on account of abductions and disappearances of persons. By an originating application of 29 August 2000, the public prosecutor thus requested the opening of a judicial investigation on the above grounds. The senior investigating judge at the Brazzaville *Tribunal de grande instance* has accordingly been seised of the facts and has already carried out a number of acts of investigation." *[Translation by the Registry]*

He then stated that the initiation of a judicial investigation into the same facts by the Meaux prosecutor raised "a serious problem of conflict of jurisdiction between two courts belonging to two sovereign States" and that the Congolese courts alone should have jurisdiction, for three reasons that he set out in the remainder of his letter.

The first of those reasons was that the jurisdiction of a State to try offences committed on its territory constituted an attribute of sovereignty and a principle of international public order.

16 The second was that, even if the French courts had a basis of jurisdiction, which was far from being the case, the conflict of jurisdiction must be settled in favour of the Congolese courts: first, because the acts cited by the complainants were alleged to have taken place in the Congo, and, secondly, because the perpetrators and victims of those alleged crimes were said to be Congolese, and thirdly, since the alleged perpetrators, victims and witnesses were to be found in the Congo, the Congolese courts were in a position to conduct a meaningful investigation, whereas the French courts were not.

The third reason was that the jurisdiction provided for under the above-mentioned Article 689-1 of the French Code of Criminal Procedure could only be subsidiary to that of the State on whose territory the alleged offences were said to have been committed.

The Brazzaville prosecutor concluded as follows:

> "The proceedings undertaken by the investigating judge of the Meaux *Tribunal de grande instance* thus lacks any proper legal basis. Accordingly, the termination of those proceedings by the French Court for lack of jurisdiction would be the appropriate means for bringing an end to this unfortunate conflict, which could become a serious impediment to the proper administration of international criminal justice." *[Translation by the Registry]*

8. The Meaux prosecutor's failure to respond and the continuing judicial investigation in France; further measures taken against General Dabira

The Meaux prosecutor did not deign to respond to the letter from his Brazzaville counterpart.

To make matters worse, since General Dabira had not appeared before the investigating judges on 11 September 2002, having informed them through his lawyer that the Congolese authorities forbade him from doing so because the judges lacked jurisdiction, on 16 September 2002 those judges issued a warrant for his immediate presentation *(mandat d'amener)*, pursuant to Article 122, paragraph 3, of the Code of Criminal Procedure (that is to say, an instruction by the investigating judge to the police to bring before him forthwith the person against whom it is issued).

On 24 September 2002, reporters from the television channel France 2 produced a news item in the Villeparisis area, where they went to film General Dabira's house. Their report was broadcast in a number of news bulletins, which cited the allegations made against General Dabira by the complainants.

The next day, in the early morning of 25 September, four gendarmes arrived at his house to enforce the warrant and searched the entire premises, showing scant consideration for General Dabira's wife and small children.

17 9. The attempt by the investigating judges to take testimony from His Excellency President Denis Sassou Nguesso

Whilst His Excellency President Denis Sassou Nguesso was on a State visit to France, the investigating judges sent a request to the Minister for Foreign Affairs, purportedly pursuant to Article 656 of the Code of Criminal Procedure (which, as will be seen later, does not concern foreign Heads of State), to obtain a written deposition from the President.

The Minister for Foreign Affairs did not accede to that request.

10. Unofficial representations to the French political authorities by the Congolese political authorities

That situation led the Congolese political authorities to draw the attention of their French counterparts to the violation of international law constituted by the proceedings, initiated *proprio motu* by members of the French judiciary, and to request them to do everything in their power to put an immediate end to those proceedings. However, the French political authorities, whilst convinced of the correctness of the Congolese position, considered themselves unable to intervene effectively in this case, in light of the independence of the judiciary under French municipal law.

That conflict between international law, as invoked by the Republic of the Congo, and municipal law, as invoked by the French Republic, has thus created a legal dispute between the two States.

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II. Proceedings before the Court

11. Initiation of proceedings before the Court

It was in these circumstances that the Republic of the Congo, by an Application filed in the Registry on 9 December 2002, referred the dispute to the Court.

The Application requested the Court to declare that the French Republic should cause to be annulled the measures of investigation and prosecution taken, as stated above, 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 that court. The Congo contends, as will be shown below, that those measures were taken in violation of the rules of international law concerning the jurisdiction of States in criminal matters and the criminal immunity of Heads of State and Ministers responsible for public order.

The Application was accompanied by a request for the indication of a provisional measure, that is to say the suspension of the proceedings being conducted by the Meaux investigating judge, and it is that request which we shall now discuss.

12. Consent to the Court's jurisdiction by the French Republic

It should be recalled that, as the French Republic no longer accepted the Court's compulsory jurisdiction, the Republic of the Congo invited that State — with whom it entertained friendly relations, a Treaty of Co-operation having been concluded between the two States on 1 January 1974, Article 2 of which provides: "with due regard for the sovereignty . . . and territorial integrity of the other party, each High Contracting Party shall undertake 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.

By a letter of 8 April 2003, received in the Registry of the Court on 11 April, the French Republic consented to the Court's jurisdiction, with two qualifications which the Republic of the Congo fully endorses, concerning the limitation of that consent to the claim submitted in the Application and the scope of Article 2 of the Treaty of Co-operation in relation to the Court's jurisdiction.

The Republic of the Congo addressed, and now reiterates, its sincere thanks to H.E. President Jacques Chirac and to the Government of the French Republic for that consent. The Congo welcomes the respect for international law and the attachment to the principles of the United Nations Charter that France has thus once again shown.

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13. Order of 17 June 2003 on the request for the indication of a provisional measure

Following hearings on the request for the indication of a provisional measure, held on 28 and 29 April 2003, the Court rendered its Order on 17 June 2003.

In that Order, the Court found that the circumstances, as they presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

In its reasoning the Court first considered the risk of irreparable prejudice within the meaning of that Article.

On that point, the Court "noted", word for word, a statement made by the Agent of the French Republic during the hearing of 29 April.

For the purposes of further discussion, certain passages of that statement should be recalled:

> "In conformity with international law, French law embodies the principle of the immunity of foreign heads of state . . .
>
> One thing must be clear from the outset: France in no way denies that President Sassou Nguesso, as a foreign head of State, enjoys immunities from jurisdiction, both civil and criminal.
>
> Up to the present time it has never been disputed, and it is certainly not seriously disputable, that all the steps taken by the French courts in this particular case have been strictly in conformity with French law. They have respected the limits of their jurisdiction and have respected the immunities enshrined in French law in conformity with international law . . .
>
> . . . we have said that French law does not allow the prosecution of a foreign head of State; that is not a promise, it is a statement of the law. And also that French law subordinates the jurisdiction of the French courts over acts committed abroad to certain conditions. That too is not a promise, it is a statement of the law. At the very most, but it would be somewhat pointless to do so, we might promise that the French courts will respect French law. But I think this might be taken for granted or assumed, and if a specific judicial decision, of which there is currently no example in the present case, were to exceed the limits set down by the law, there would of course be means of recourse enabling any errors to be made good."

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In light of that statement, the Court observed that it was not called upon, at that stage, to determine the compatibility with the rights claimed by the Congo of the procedure thus far followed in France, but only the risk or otherwise of the French criminal proceedings causing irreparable prejudice to such claimed rights. It added that it did not appear to the Court that the criminal proceedings in France, at the present time, presented any risk of irreparable prejudice, either for H.E. President Sassou Nguesso or for General Oba, Minister of the Interior.

As regards the procedural measures actually taken against General Dabira, the Court found that it had not been established that any irreparable prejudice would be caused to the rights claimed by the Congo.

With respect to the question of urgency in the sense of that same Article 41, the Court further explained its decision by indicating, first, as regards H.E. President Sassou Nguesso, that the request for a written deposition made by the investigating judges, pursuant to Article 656 of the Code of Criminal Procedure, had not been passed on by the Minister for Foreign Affairs, and second, as regards General Oba and General Adoua, that they had not been the subject of any measures of judicial investigation, and that, accordingly, as no measures of that nature were [threatened] against the three individuals concerned, there was no urgency.

21

III. Discussion

Arguments will now be presented successively to justify each of the two grounds of the Congo's Application.

It is first necessary to address a point of law upon which each ground is predicated, that is to say the nature and scope of the prosecutor's originating application *(réquisitoire)* of 23 January 2002.

A. Nature and scope of the prosecutor's originating application of 23 January 2002

(a) *The relevant rules of French law will now be set out briefly*

14. Subject-matter of the originating application; against a named or unnamed person; *in rem* nature of seisin

The first two paragraphs of Article 80 of the Code of Criminal Procedure stipulate:

> "The investigating judge may only investigate pursuant to an application from the prosecutor.
>
> The prosecutor's application may be directed against a named or unnamed person (indicated in practice as: 'against X')."

The application is thus the document by which the prosecutor initiates criminal proceedings before the investigating judge. The fact that he can choose whether to direct his application against a named or an unnamed person means that the prosecutor cannot restrict the seisin of the investigating judge to specific named individuals. It is up to that judge to determine which persons should be formally placed under judicial examination and then possibly committed for trial, regardless of whether or not they were named in the originating application: the investigating judge is seised *in rem* (which incidentally also means that he is not bound by the legal characterization of the prosecuted offence as proposed by the prosecutor) and not *in personam*.

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15. Indication of offence prosecuted; reference to appended documents

It follows that the originating application must indicate the offence prosecuted. In practice, it is extremely rare for this to be indicated directly. The application simply states: "Having regard to the appended documents", which is moreover printed on the forms issued

by the Ministry of Justice. According to the case law of the Criminal Chamber of the Court of Cassation:

> "The reference in the originating application to the appended documents is deemed to take account of their contents, whose terms accordingly determine the precise subject-matter and scope of the case referred to the investigating judge." (11 July 1972, *Bulletin des arrêts, No. 235*, p. 615.) *[Translation by the Registry]*

It has further been held that, even if the originating application does not specifically cite those documents, "by simply stating 'having regard to the appended documents' it is deemed to take account of their contents" (29 September 1992, *Bulletin, No. 288*, p. 787).

Accordingly, when an originating application refers to appended documents which include an ordinary complaint or a denunciation, without excluding from the judge's seisin specific facts alleged in that complaint or denunciation, the judge is necessarily seised thereof.

16. The prosecutor's discretionary power

Unless a complaint is filed with a civil-party application, the prosecutor decides, pursuant to the above-mentioned Article 40 of the Code of Criminal Procedure, on the basis of law and propriety, on how to respond to the complaints and denunciations that he receives, as well as to police reports transmitted to him. He is thus never obliged to initiate a judicial investigation.

In the event of any legal bar on the proceedings, for example if the court lacks jurisdiction or if criminal proceedings are inadmissible, in particular because of immunity enjoyed by certain persons named in a complaint, denunciation or police report, then, by contrast, he is under an obligation not to seek to initiate a judicial investigation.

23 **17. Irrevocability of the investigating judge's seisin**

Once an originating application has been issued, the prosecutor can no longer limit the seisin of the investigating judge. The Criminal Chamber [of the Court of Cassation] has ruled in this regard: "that the investigating judge is required to investigate all the facts of which he has been lawfully seised; that the prosecutor is not entitled subsequently to restrict the scope of that seisin" (24 March 1977, *Bulletin, No. 112*, p. 274).

That rule flows from the principle, which is inherent in the inquisitorial nature of French criminal procedure, that the prosecutor cannot manipulate criminal proceedings as he sees fit, because they appertain to society as a whole, on whose behalf he prosecutes.

Of course, if the prosecutor subsequently discovers that he has unlawfully applied for a judicial investigation, in particular when the court lacks jurisdiction or the criminal proceedings are inadmissible, he may use any appropriate remedies to correct that error (objection to jurisdiction addressed to the investigating judge, subject to appeal before the Examining Chamber, application for annulment to that Chamber). However, unless he does so, the defect contained in his originating application does not deprive it of its effect and in no way limits the seisin of the investigating judge.

18. Situation of individuals not placed under judicial examination but named in a complaint

Under French law as it now stands, since the reform enacted by Law No. 2000-516 of 15 June 2000, "reinforcing the protection of the presumption of innocence and the rights of victims", certain implications attach to the situation, in the context of a judicial investigation against persons unknown, of individuals who have not been placed under judicial examination but who have been implicated in various ways as having possibly participated in the offence prosecuted.

Article 80-1 of the Code of Criminal Procedure provides that "[o]n pain of nullity, the investigating judge may place under judicial examination only those persons against whom there is strong or concordant evidence raising a likelihood that they could have participated, as perpetrator or accomplice, in the commission of the offences of which he is seised." *[Translation by the Registry]*

However, in the absence of any such evidence, individuals who can only be heard as legally represented witnesses, or who can demand that status, are *ipso facto*, in terms of their legal position, under suspicion of having participated in the offences concerned.

24 Such individuals, in addition to those specifically named in an originating application but not placed under judicial examination by an investigating judge (see above-mentioned Article 113-1 of the Code of Criminal Procedure — obligation to be heard as legally represented witness), are those who have been named in a complaint or who have been implicated by the victim (above-mentioned Article 113-2 — right to demand to be heard by the investigating judge as a legally represented witness).

Such persons must consequently be regarded as subjects of the judicial investigation. They are not in the situation of third parties in relation to those proceedings. To conduct a judicial investigation, even against persons unknown, on the basis of accusations made against specific individuals, is tantamount to taking measures against those individuals.

(b) *Those principles should thus be applied to the originating application of 23 January 2002*

19. Scope of documents appended to originating application; burden of suspicion on persons denounced

As indicated above, the originating application was issued having regard to the documents appended thereto, which included denunciations characterized as complaints and admitted as such. Those "complaints" contained allegations of crimes against humanity and acts of torture. They claimed that international custom attributed jurisdiction to the French courts to prosecute such offences and rejected the immunity of Heads of State. They denounced, by name, as perpetrators of those crimes, H.E. the President of the Congolese Republic and H.E. the Minister of the Interior.

The originating application was issued without the slightest qualification as to the jurisdiction of the French courts or as to the admissibility of criminal proceedings against persons who are protected by international immunities.

It thus seised the investigating judge of the acts denounced and placed the named individuals in a situation where, being entitled to request a hearing by the investigating judge only as legally represented witnesses, they are under suspicion of implication in those acts. That originating application stands as an established fact in the case.

Accordingly, the investigating judges have the power, simply by relying on the terms of the application, to proceed without restriction, on the basis of the alleged offences denounced by the above-mentioned organizations, against the individuals named by them.

25 Whilst there may well be remedies against such excesses, the fact remains that the prosecutors have allowed a situation to develop requiring recourse to such remedies, instead of refraining from issuing an application which, as will now be shown, was unlawful.

B. The first ground of the Application (violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality, as laid down in Article 2, paragraph 1, of the Charter of the United Nations)

(a) *In respect of the alleged crimes against humanity*

20. No general principle of universal jurisdiction

The French investigating judge was wrong when, in reliance upon a universal jurisdiction incompatible with international law, he considered himself to have jurisdiction over alleged crimes against humanity stated to have been committed abroad by and against foreigners.

In his separate opinion appended to the Judgment rendered by the Court on 14 February 2002 (case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*), Judge Gilbert Guillaume, then President of the Court, shows that the only real instance of universal jurisdiction recognized by customary international law is that of piracy, as specified in Article 19 of the Geneva Convention on the High Seas of 29 December 1958 and later in Article 105 of the Montego Bay Convention of 10 December 1982:

> "[U]niversal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States . . .".

The only other instances of universal jurisdiction stem from specific international instruments, none of which (until the Rome Convention of 17 July 1998) relates generally to crimes against humanity. Domestic courts therefore remain without jurisdiction even if
26 legislation of the State in question purports in its own right to establish universal jurisdiction, as was the case for the Belgian Law of 1993-1999.

21. Non-conformity with international law of legislation enacted by a State which purports to establish its universal jurisdiction; case of the Belgian Law of 16 June 1993

The Belgian Law of 16 June 1993 on the Punishment of Serious Violations of International Humanitarian Law, as extended by the Law of 10 February 1999 to cover genocide and crimes against humanity, violated two principles of classic international law: the territoriality standard and immunities of members of foreign governments. Thus, it allowed for criminal proceedings to be initiated solely on the basis of a civil-party complaint filed with an investigating judge, even in the absence of the persons against whom the proceedings were taken, even against individuals entitled to claim immunity.

On 17 October 2000 the Democratic Republic of the Congo (DRC) seised the Court of a dispute arising out of the international arrest warrant issued by Judge Vandermeersch against the incumbent Minister for Foreign Affairs of the DRC, Mr. Yerodia Abdoulaye Ndombasi. In its Application the DRC accused Belgium of violating, by that warrant, the sovereignty of the Democratic Republic, as well as the principle that a State may not exercise its powers on the territory of another. Belgium's position was particularly inconsistent, since the 1999 Law withdrew immunity for foreign government members, yet Belgian law continued to confer a special status on Belgian ministers and to protect them from assize jurisdiction. In its Judgment of 14 February 2002 the Court found in favour of the DRC. Judge Guillaume, in his above-mentioned separate opinion, even warned of the judicial chaos and international disorder which the Belgian Law could cause if copied by all States.

The Belgian Law of 1993-1999 was applied in the trial of the "Butare Four": four individuals responsible for the Rwandan genocide, who had fled to Belgium, were tried before the Brussels Assize Court and convicted in June 2001 of crimes against humanity. Unfortunately, this precedent led to a proliferation of complaints and Belgium proved unable to cope with this either at judicial or at diplomatic level. A new Law of 5 April 2003 brought Belgium back into line with the general law: a complaint is now only admissible if the offence has been committed in Belgium, if the suspected offender is Belgian or present in Belgium, or if the victim is Belgian or has resided in Belgium for at least three years.

27

Belgium had committed the "offence of impudence", in the words of Mr. Benoît de Jemmepe, *Procureur du Roi* (Crown Prosecutor) in Brussels. Not wishing to confine itself to advocating international punishment for the most serious crimes, it aspired to the role of global legislator. As Mr. Bertrand Badie notes in his essay on "the diplomacy of human rights" (Paris, 2002), "speaking on behalf of all humanity is inevitably liable to be seen as a form of power". The ambiguity of the Belgian Law revealed a certain arrogance in respect of others' justice, and the arrogance of the former colonizer towards the justice of the formerly colonized, as shown by the *Arrest Warrant* case.

21. The territoriality principle: rejection of universal jurisdiction

If domestic courts lack jurisdiction even when legislation of the State in question purports in its own right to establish their universal jurisdiction, as was the case for the Belgian Law, then such lack of jurisdiction applies *a fortiori* in the absence of such legislation, as in the case of the French Republic here.

This lack of jurisdiction follows from the principle of the territorial character of criminal law, which is "fundamental" "in all systems of law", as the Permanent Court of International Justice observed in its Judgment of 7 September 1927 in the *Lotus* case. In his award of 4 April 1928 in the *Island of Palmas* case, Max Huber noted the "principle of the exclusive competence of the State in regard to its own territory". True, as the *Lotus* Judgment showed, classic international law does not bar a State from the possibility of exercising its jurisdictional power over offences committed abroad; in that case Turkey had invoked a customary rule allowing it to prosecute the party responsible for injury caused to Turkish nationals outside Turkish territory (here, the French officer of the watch on duty when the French vessel "Lotus" collided on the high seas with a Turkish collier) and the Permanent Court recognized the existence of such a customary rule. But, as Judge Guillaume points out in his separate opinion in the *Arrest Warrant* case, that exercise is not without its limits:

28 "Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners."

22. Territoriality as a corollary of sovereignty

In truth, the principle of territoriality is a corollary of the principle of sovereignty. Sovereign power cannot but be supreme, cannot emanate from any superior power: "only one who is absolutely sovereign derives nothing from another", observed Jehan Bodin in his "Six Books of the Commonwealth". And the original exegete of sovereignty stressed from the start the formal equality which sovereignty confers on newly independent political entities: "a minor king is just as sovereign as the greatest monarch in the world". This is now confirmed in Article 2, paragraph 1, of the Charter of the United Nations: "The Organization is based on the principle of the sovereign equality of all its Members".

23. No French statute establishing universal jurisdiction in respect of crimes against humanity

This is the context in which a case similar in nature to the *Arrest Warrant* case has arisen between the Republic of the Congo (Brazzaville) and France. Also eager to set an example and hold themselves out as a model to an ex-colony, French judicial officers, specifically the *Procureurs de la République* of the Paris and Meaux *Tribunaux de grande instance*, decided to pursue the same objective, that of universal jurisdiction, but in this case without the benefit of any domestic legislation to justify that ambition. Seised of a complaint by three humanitarian associations for crimes against humanity and torture, these French judicial officers, failing to consider the conformity of their actions with international law or the consequences of the existence of Congolese sovereignty, took actions leading, after a preliminary enquiry, to an application originating a judicial investigation.

In fact, there is no provision of French law, leaving aside two temporary, very specific implementing statutes, which establishes universal jurisdiction in respect of crimes against humanity.

29 Of course, this does not mean that the concept is unknown. The notion of crime against humanity saw the light of day with the Charter of the International Military Tribunal of Nuremberg, annexed to the London Agreement of 8 August 1945. Under Article 6 *(c)*, crimes against humanity include "murder . . ., enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds". The Criminal Chamber of the Court of Cassation has explained that crimes against humanity "are common crimes committed under particular circumstances and on particular grounds" and that the term covers "inhumane acts and persecutions . . . in the name of a State practising a policy of ideological hegemony", "systematically committed not only against individuals because of their membership in a racial or religious group but also against opponents of that policy, whatever the form of their opposition" (20 December 1985). The Charter has outlived the Nuremberg Tribunal, as is evidenced by the Law of 26 December 1964 on the inapplicability of any statute of limitations to crimes against humanity, or the Law of 13 July 1990 supplementing the Law of 1881 on freedom of the press with a provision dealing with denial of the existence of such crimes. However, as interpreted by the Court of Cassation, the Charter's definition of offences applied only to crimes committed during the Second World War by nationals of the European Axis Powers. While the French Criminal Code which entered into force on 1 March 1994

does define crimes against humanity as criminal offences (Articles 211-1 to 213-5), it does not do so retroactively.

Nonetheless, French law does not provide for universal jurisdiction in this area.

Under French law today, almost all offences, whether consummated or attempted, which are subject to universal jurisdiction and denote conduct prohibited by international treaty law are enumerated in Articles 689-1 to 689-9 of the Code of Criminal Procedure, as amended by the Laws of 16 December 1992 and of 15 and 30 June 2000: torture, terrorism, illegal use of nuclear materials, unlawful acts against the safety of maritime navigation and fixed platforms, unlawful acts against the safety of civil aviation, corruption or offence detrimental to the financial interests of the European Communities, acts of terrorism committed with explosive or deadly devices . . . Only two temporary implementing statutes — the Laws of 2 January 1995 and 22 May 1996 adapting French statute law to United Nations Security Council resolutions 827 and 955 setting up the International Criminal
30 Tribunals for the Former Yugoslavia and for Rwanda — provide for universal jurisdiction in respect of crimes against humanity.

Thus, there is even less to justify the ambition of French judicial officers to assume the role of global judges than there was in respect of the short-lived ambition of Belgian judges, who were supported by their parliament, posing as global legislature.

(b) ***The alleged instances of torture***

24. The provisions of French law applicable to international jurisdiction in respect of torture

The French investigating judge was wrong when, in reliance on a universal jurisdiction which is no more than residual, he considered himself to have jurisdiction over alleged acts of torture committed abroad by and against foreigners.

Unlike crimes against humanity, the crime of torture is the subject of both a specific international instrument and a text of French law.

Further to Article 689-1 as cited above, Article 689-2 of the French Code of Criminal Procedure refers to the New York Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which entered into force on 26 June 1987.

25. Definition of torture

Torture is defined in Article 1 of that Convention as any act by which severe suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of a public official for a particular purpose (obtaining a confession or information, inflicting punishment for an act committed, intimidating, coercing a third person etc.). This definition takes up the three constituent elements defined, at the regional level, by the European Commission of Human Rights in the Greek Case (concerning the admissibility of applications 3321/67 and 4448/70, submitted by the three Scandinavian States and also, in respect of the
31 first, the Netherlands): the intensity of the suffering, wilful intention, a specific objective; it leaves unaddressed the notions of inhuman or degrading treatment, considered "lesser" than torture; it establishes an exception for pain or suffering arising from *sanctions "légitimes"*, a more subjective concept than *sanctions "légales"*, introduced in Article 7 of the Rome Treaty of 11 July 1998 laying down the Statute of the International Criminal Court and including torture among the acts constituting crimes against humanity.

26. Obligations of the States parties to the New York Convention

The New York Convention lays down the obligations of States parties. Those obligations fall into four categories: prevention, criminalization and punishment, extradition or prosecution, judicial protection of victims and compensation. It would appear that the Convention founds this legal power of the State party to assert jurisdiction in respect of the crime of torture first of all, and in keeping with the traditional approach, on the State's personal jurisdiction over its nationals and on its territorial jurisdiction: under Article 5 (1), each State party is required to establish its jurisdiction in the following three cases: the offence is committed in its territory, the alleged offender is one of its nationals, or the victim is one of its nationals. But Article 5 (2) broadens the jurisdiction of the State party to cover cases where an individual suspected of having committed an offence is found in its territory; Articles 6 and 7 describe the conditions under which such person shall be identified, taken into custody and tried. Thus, from Article 5 (2) onwards, the Convention would appear to be indifferent to nationality as regard the implementation of its provisions: a State party is under an obligation to identify, arrest and try any alleged perpetrator of the crime of torture who is found in its territory, irrespective of the nationality of offender or victim.

The drafters of the New York Convention would thus appear to have sought to establish a mechanism for universal jurisdiction. The originality of the Convention, like that of other human rights instruments with specialized subject-matters, ostensibly lies in the fact that it embodies law which is international in origin but domestic in object and is ultimately aimed at a transnational community of individuals distinct from the community of States.

However, the general scheme of the Convention calls for greater caution.

First: since an alleged perpetrator of torture discovered on the territory of a State party can be detained and tried by that State, irrespective of his nationality and of where the offence was committed, it would be tempting to consider that nationals of a third State claiming to
32 have been victims of Convention violations can rely on the Convention's provisions, even though those provisions are not binding on their own State. Those individuals would therefore have standing to invoke the Convention before the judicial organs of any State party.

Second: the Convention establishes a monitoring process after an act of torture has taken place, but that process is at each stage completely subordinate to acceptance by States. The Convention sets up a "Committee against Torture", whose powers are, admittedly, broad: it can examine reports by States parties, inter-State complaints and individual complaints and can even take the initiative in conducting inquiries . . . but review by the Committee of inter-State and individual complaints is possible only if the State directly concerned has submitted an optional declaration accepting this procedure. Another limitation: enquiries may be instigated only if the Committee "receives reliable information . . . that torture is being systematically practised in the territory of a State Party"; moreover, a State which becomes a party to the Convention enjoys the possibility of rejecting *in toto* the Committee's powers of investigation.

Thus, there is conflict in the New York Convention between the principles of sovereignty and interventionism: how are Articles 5 (2), 6 and 7, which facilitate prosecutions involving non-party States, to be reconciled with Articles 20-22, which establish a strict framework for the Convention's monitoring system?

The fact is that the system established by the New York Convention against Torture represents the new approach developed, beginning in 1970, in a series of conventions designed to combat international terrorism. The first example was the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft: the State in whose

territory a hijacker takes refuge must extradite or prosecute him; but the Convention imposes on States the obligation to establish the jurisdiction of their courts for this purpose. The same family of treaties includes, in addition to the Convention against Torture: the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the New York Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the New York Convention of 17 December 1979 against the Taking of Hostages; the Vienna Convention of 3 March 1980 on the Physical Protection of Nuclear Material; the
33 Montreal Protocol of 24 February 1988 for the Suppression of Unlawful Acts of Violence at Airports; the Rome Convention and Protocol of 10 March 1988 for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Safety of Fixed Platforms located on the Continental Shelf; the New York Conventions of 15 December 1997 and 9 December 1999 for the Suppression of Terrorist Bombings and of the Financing of Terrorism.

27. Subsidiarity of universal jurisdiction in respect of torture

The mechanism established by the Convention against Torture is thus one of universal jurisdiction which is compulsory but subsidiary. Compulsory jurisdiction: prosecution is no longer subject to the existence of jurisdiction; jurisdiction must be established in order to allow for prosecution. Subsidiary jurisdiction: the State in whose territory the offender is present must extradite or prosecute him, but the States most directly concerned remain those referred to "in Article 5, paragraph 1", i.e., the State of which the alleged offender is a national, the State of which the victim is a national, the State in whose territory the acts were committed.

A State detaining an alleged offender is under an obligation of mutual assistance and co-operation with those States: it can keep the alleged offender in custody only so long as necessary to allow for the bringing of criminal proceedings . . . or extradition proceedings; it must immediately notify the States referred to "in . . . paragraph 1".

28. Failure by the French judicial authorities to respect the principle of subsidiarity

It is this duty of mutual assistance and co-operation which was obviously ignored here: the Meaux prosecutor took no account of the proceedings which had been brought, in respect of the same acts, in the Congo — proceedings which, as stated above, had been drawn to his attention by the Brazzaville prosecutor in a letter dated 9 September 2002.

34 He ignored the subsidiary nature of the universal jurisdiction of the State in which the suspect is present and the primacy, under the principles of international law recalled above, of the jurisdiction of the State in whose territory the alleged crime of torture was committed.

(c) ***The proceedings against the Minister of the Interior of a sovereign State***

29. Maintenance of public order, an essential attribute of sovereignty: consequence in respect of the Minister of the Interior

The above-noted principle that a State cannot exercise its authority on the territory of another State has a further consequence in the present case.

In seeking the opening of an investigation against H.E. General Oba on the grounds of the alleged crimes denounced, the prosecutor took it upon himself, as representative of the French judicial authorities, to prosecute and try the Minister of the Interior of a foreign State

for alleged offences he had committed in the exercise of his duties relating to the maintenance of public order in his country.

A foreign State claiming jurisdiction over such acts thereby interferes in the exercise by the Minister in question of the sovereignty of his country in its most fundamental form.

In this regard, reference may be made, *a contrario*, to the case law of the Court of Justice of the European Communities concerning violations ascribable to Member States for failing to take appropriate police and judicial action to prevent obstacles to the free movement of goods caused by physical, and sometimes violent, action by private individuals (Judgments of 9 December 1997, *Commission* v. *France*, case C-265/95, Reports of Cases, p. I-6959, and opinion of Advocate General C. O. Lenz, and of 12 June 2003, *Schmidberger*, case 112/00, not yet published in the Reports of Cases, opinion of Advocate General F. G. Jacobs). However, while the Court of Justice considers itself entitled to pass judgment on the way in which Member States maintain public order, that is because of the specific obligation imposed by the Treaty of Rome on those States to allow the free movement in their territory of goods coming from or bound for other Member States and to refrain from imposing any quantitative restriction or other measure having equivalent effect. And even so the Court held that:

35 "Member States . . . retain exclusive competence as regards the maintenance of public order and safeguarding of internal security" and "[i]t is therefore not for the Community institutions to act in place of the Member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard the free movement of goods". The only power which that Court recognizes for itself is the power to verify whether the Member State concerned has adopted appropriate measures for complying with its obligations. Moreover, limited as it is, the power to review the exercise of the authority to maintain public order belongs here to a court independent of the Member States, not to another Member State.

In the case of two States not bound by obligations similar in nature to those laid down in the Treaty of Rome, it is *a fortiori* unacceptable for one to seek to pass judgment — moreover after criminal proceedings — on the manner in which the other State exercises the essential attribute of sovereignty represented by the maintenance of public order.

It follows from this that a Minister of the Interior, in respect of acts falling within the scope of his duties to maintain public order, should enjoy an immunity analogous to that accorded, for other reasons, to Ministers for Foreign Affairs.

C. The second ground of the Application (violation of the immunity of a foreign Head of State)

30. No dispute over the principle of immunity for foreign Heads of State

International law has been violated in that the prosecutors seised of the above-mentioned complaint failed to find at the outset that it was inadmissible by virtue of the principle of absolute immunity from criminal jurisdiction which protects foreign Heads of State from criminal proceedings before French courts, and in that the Meaux investigating judge failed to refuse to commence judicial proceedings against the President of the Republic of the Congo.

Given that the French Republic, speaking through its Agent, has stated that French law fully recognizes the principle of immunity for foreign Heads of State, this point is undisputed. The Republic of the Congo therefore has nothing to add to its Application in respect of this principle.

36 On the other hand, it disputes the position of the French Republic on the question whether this principle has been respected by the French authorities in the present case.

31. Scope of immunity of foreign Heads of State in French criminal procedure; prohibition on applications seeking the opening of an investigation against persons unknown if a foreign Head of State is named in a complaint

It is axiomatic that this immunity precludes any act of prosecution directed at a foreign Head of State by name, such as issuing a prosecutor's originating application designating him by name, or placing him under judicial examination.

However, in light of the particular characteristics of French criminal procedure, as described above, it is clear that no other act may be carried out which would amount to a manifestation of suspicion against a Head of State and to the conduct of an investigation with a view to establishing guilt on his part.

Immunity prohibits, *inter alia*, the issue of an application for an investigation against persons unknown when the Head of State has been named in a complaint included among the documents annexed to the application.

The rationale for this prohibition lies in the status, as described above, of an individual named in a complaint: the fact that he can demand to be heard by the investigating judge only as a legally represented witness means that he is officially under suspicion.

The leading decision by the Criminal Chamber of the French Court of Cassation on the immunity of foreign Heads of State (13 March 2001, *Bulletin*, No. 64, p. 218) implicitly, but necessarily, imposes the prohibition in question.

In that case, an association and an individual had lodged a complaint as civil parties against the Libyan Head of State for aiding and abetting the destruction of property caused by an explosive substance involving the death of a third party, in connection with a terrorist undertaking (case concerning the UTA DC-10). On the basis of the immunity enjoyed by foreign Heads of State, the prosecutor had submitted that no investigation should be opened. The investigating judge rejected those submissions and held that an investigation should be commenced against the Libyan Head of State. Acting on the prosecutor's appeal, the Indictments Chamber upheld the investigating judge's order on the ground that "whilst immunity for foreign Heads of State has always been recognized by the international community, including France, no immunity can cover the offences" alleged to have been committed by the Libyan Head of State.

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The Criminal Chamber of the Court of Cassation quashed that decision, stating that, "in so ruling, notwithstanding that under international law the offence alleged, regardless of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State, the Indictments Chamber misconstrued the principle" of that immunity.

It is particularly noteworthy that no act of prosecution or investigation naming the Libyan Head of State had been carried out in that case before the prosecutor made his submissions against the opening of an investigation. The Libyan Head of State had been named only in the complaint lodged by civil parties. In response to such a complaint, the prosecutor could simply have issued an application limited to the opening of an investigation against persons unknown, and the investigating judge was under no obligation to place the Head of State in question under judicial examination; he could have confined himself to taking testimony from him as a legally represented witness.

This judgment must therefore be interpreted as meaning that, in itself, the existence of a complaint (whether or not accompanied by a civil-party application) naming a foreign Head

of State bars the prosecutor from requesting the opening of an investigation, even against persons unknown.

32. Prohibition on the taking of testimony as a witness from a foreign Head of State named in a complaint

Even if it were accepted that a judicial investigation could be opened under such circumstances, the investigating judge would be barred from taking testimony from the Head of State as a legally represented witness.

In respect of the immunity of the President of the French Republic, the Court of Cassation, sitting as a full court, held in a formal judgment of 10 October 2001 (B, No. 206, p. 660) that the President could not be heard as a witness, even as a non-represented witness. That judgment states:

> "Whereas, read in conjunction with Article 3 and Title II of the Constitution, Article 68 must be interpreted as meaning that, having been 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, the President of the Republic cannot, during his term of office, be heard as a legally represented witness, or be placed under judicial examination, summoned to appear or committed for trial for any offence before any organ of ordinary criminal jurisdiction; 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." *[Translation by the Registry]*

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A fortiori, the President of the Republic cannot be heard as a legally represented witness.

What holds good for the President of the French Republic must apply also by analogy to foreign Heads of State.

An investigating judge cannot take advantage of the procedure laid down in Article 656 of the Code of Criminal Procedure to circumvent the prohibition on taking testimony as a legally represented witness from a foreign Head of State named in a complaint.

That Article provides:

> "The written deposition of a representative of a foreign power shall be requested through the intermediary of the Minister for Foreign Affairs. If the request is granted, such deposition shall be taken by the President of the Court of Appeal or by such judge as he shall have delegated.
>
> Subsequent proceedings shall be governed by Article 654, paragraph 2, and Article 655." *[Translation by the Registry]*

There is a first, compelling, reason militating against use of this procedure in respect of a foreign Head of State: he is not a "representative" of a foreign power within the meaning of Article 656; he is the supreme organ of that power. In its commentary on this article, the General Instruction of 11 March 1959 for the Application of the Code of Criminal Procedure uses the terms "diplomatic representative in France of a foreign power" and "foreign diplomat" (Art. C.763). One particularly well-qualified author defines the representatives of a

foreign power as being "the members of a diplomatic mission whose functions consist in representing the sending State in the receiving State" and "some members of a consular post" (*Juris-Classeur de Procédure pénale*, Arts. 652 to 656, commentary by Mr. Pierre Gonnard).

There is a further, second reason: it would be a deliberate attempt to violate the right of a person named in a complaint to demand that he be heard by the investigating judge only in the capacity of legally represented witness.

39 **33. Violation of the immunity of H.E. the President of the Republic of the Congo in the criminal proceedings in question**

There has been a violation of the immunity of the President of the Republic of the Congo in this case, notwithstanding that H.E. Mr. Denis Sassou Nguesso was neither named in the prosecutor's applications referred to above, nor placed under judicial examination, nor summoned as a legally represented witness.

As observed above, an application requesting the opening of an investigation was issued on the basis of documents received in the form of a complaint naming him personally, whereas the prosecutor should have opposed an investigation on grounds of the immunity enjoyed by that foreign Head of State.

Moreover, the investigating judges manifested their intention to open an investigation against H.E. the President of the Republic of the Congo by attempting, through unlawful recourse to the procedure under Article 656 of the Code of Criminal Procedure, to obtain his written testimony.

SUBMISSION

The Republic of the Congo requests the Court to declare that the French Republic shall, by appropriate legal processes under its domestic law, cause to be cancelled the application requesting the opening of an investigation submitted by the *Procureur de la République* of the Meaux *Tribunal de grande instance* on 23 January 2002 and cause to be terminated the criminal proceedings which he has initiated.

Done at Brussels, 4 December 2003.

(Signed) Jacques OBIA
Ambassador Extraordinary and Plenipotentiary
Agent of the Republic of the Congo.

LIST OF ANNEXES TO THE MEMORIAL

I: Extracts from the French Code of Criminal Procedure

II: Judgment of the Criminal Chamber of the Court of Cassation, 11 July 1972 [Not translated]

III: Judgment of the Criminal Chamber of the Court of Cassation, 24 March 1977 [Not translated]

IV: Judgment of the Criminal Chamber of the Court of Cassation, 29 September 1992 [Not translated]

V: Judgment of the Criminal Chamber of the Court of Cassation, 13 March 2001

VI: Copies of documents from the criminal case file at the Meaux *Tribunal de grande instance.*

NB. These are mostly unofficial scanned reproductions made by one of General Dabira's lawyers, who was unable to obtain all the official copies from the registry.

1. "Complaint" filed by Maître Henri Leclerc
2. "Complaint" filed by the International Federation for Human Rights
3. Notice of extension of jurisdiction
4. Police interview with Mr Tsieno during preliminary enquiry
5. Police interview with Mr Touanga during preliminary enquiry
6. Summary police report
7. Prosecutor's originating application of 23 January 2002

8 and 9. Documents relating to the appointment of investigating judges [Not translated]

10. Civil-party application by Mr. Tsieno
11. Hearing of Mr. Tsieno as civil party
12. Police interview with General Dabira, in police custody, on a warrant
13. Witness statement of Mr. Touanga
14. Statement of General Dabira as legally represented witness

VII: Claim of jurisdiction by the Brazzaville prosecutor

VIII and IX: Letters from General Dabira to his then lawyer, Maître Jacques Vergès, dated 1 and 25 September 2002.

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