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INTERNATIONAL COURT OF JUSTICE

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

REPUBLIC OF THE CONGO

SUPPLEMENTARY OBSERVATIONS

[Translation by the Registry]

INTERNATIONAL COURT OF JUSTICE

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

Supplementary Observations

For: The Republic of the Congo,

having as its Agent His Excellency Mr. Roger Menga, 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

As authorized to do so by the Court in its Order of 16 November 2009, the Republic of the Congo hereby submits the following supplementary observations.

Statement of facts occurring subsequent to the Reply

1. By judgment of 10 January 2007, the Criminal Division of the *Cour de cassation* quashed in its entirety the 22 November 2004 judgment of the *Chambre de l'instruction* of the Paris Court of Appeal cited in the Reply and referred the case and the parties to the *Chambre de l'instruction* of the Versailles Court of Appeal.

Referring first to Articles 689, 689-1 and 689-2 of the Code of Criminal Procedure, the judgment stated that, pursuant to them,

> "a person guilty of committing torture within the meaning of Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, outside the territory of the Republic may be prosecuted and tried by French courts if that person is present in France".

The Criminal Division next cited Articles 40, 41 and 80 of the Code of Criminal Procedure and stated:

> "*whereas on the basis of the second three above-mentioned articles, the* Procureur de la République *has the right to apply for an investigation to be opened in the light of any information sent to him and whereas the application for a judicial investigation may only be annulled if it does not formally comply with the essential conditions of its legal existence*".

It considered that the judgment under appeal had breached these principles in annulling the application in question, even though: first, the application was in proper form and referred to the reports from the preliminary enquiry appended thereto; secondly, the individuals suspected of having committed the reported acts were named in the "complaint"; and, finally, there was

sufficient evidence when the proceedings were initiated that at least one of those individuals, General Dabira, was in France, where he has his habitual residence and has settled with his family.

Strictly for reasons of domestic law, the *Chambre de l'instruction* of the Versailles Court of Appeal held that it was without jurisdiction to entertain any further proceedings and deferred to the investigating judge in Meaux.

2. In the meantime a signal event occurred which the *Cour de cassation* could not take into consideration because that court determines the legality of decisions appealed to it as of the date on which they were handed down: the proceedings underway in the Congo since 29 August 2000 in respect of the same matters being investigated in Meaux since 23 January 2002 culminated in a trial on the merits in the Criminal Division of the Brazzaville Court of Appeal. The trial was held from 19 July to 17 August 2005 and resulted in a judgment on the latter date acquitting all defendants. Among these were all the individuals who are the subjects of the denunciations which led to the opening of the present investigation. General N'Dengue, not one of those individuals, was also acquitted.

That judgment has become final.

Yet there has been no reaction from the investigating judge in Meaux, who has been informed by General Dabira's counsel of this judgment. The case is still before him but he has taken no procedural steps.

Discussion

3. It follows from the above-cited judgment of the Criminal Division of the *Cour de cassation* that the Division found Articles 689-1 and 689-2 of the Code of Criminal Procedure to be the sole possible bases for the French courts' jurisdiction over the acts in question. Implicitly, and in accordance with the pre-existing case law, the judgment rules out any universal jurisdiction in respect of crimes against humanity possibly arising out of the purported international custom alleged to exist by the civil parties.

Articles 689-1 and 689-2 of the Code of Criminal Procedure are part of Chapter I, "Jurisdiction of the French Courts", of Title IX of the Code, "Offences Committed outside the Territory of the Republic".

Article 689-1 provides that, pursuant to the international conventions referred to in the articles to follow, a person who is guilty of having committed any of the offences enumerated in those articles outside the territory of the Republic may be prosecuted and tried by French courts if that person is present in France.

Article 689-2 applies the principle thus laid down to those guilty of torture within the meaning of Article 1 of the Convention adopted at New York on 10 December 1984.

4. Article 692 of the Code of Criminal Procedure, the first article in Chapter II ("Conduct of Prosecution and Court with Territorial Jurisdiction") of Title IX, provides:

> "In the cases described in the preceding chapter, no prosecution may be conducted against a person who proves that he has been finally tried abroad for the same matters and, in the case of conviction, that the sentence has been served or barred by the passage of time."

The jurisdiction conferred by Articles 689-1 and 689-2 is therefore subject to these requirements on the conduct of prosecutions. The jurisdiction thereby established is subordinate to that of the State having territorial jurisdiction if that State has exercised its own jurisdiction and has finally tried the party in question and, in case of conviction, if the sentence has been served.

French courts are plainly bound by the provisions of Article 692 and are powerless to review the substance of a competent foreign court's ruling on any grounds whatsoever. The bases of jurisdiction established by Article 689-1 of the Code of Criminal Procedure are exceptions to the general rules of law and therefore not open to expansive interpretation. Moreover, they are strictly dependent on the terms of the international conventions to which they give effect.

5. Under the Convention referred to in Article 689-2, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984 and published by way of Decree No. 87-916 of 9 November 1987 (*Journal Officiel* of 14 November 1987, p. 13,267), the jurisdiction recognized to the State where the arrest is made is merely secondary.

Everything goes to show this.

First, Article 5, paragraph 1, of the Convention provides that each State Party shall take such measures as may be necessary to establish its jurisdiction over offences characterized as acts of torture under its criminal law (these offences are referred to in Article 4, the underlying acts having been defined as offences in pursuance of Article 1) in three cases: when the offences have been committed in its territory *(a)*; when the alleged offender is a national of the State *(b)*; and when the victim is a national of the State if the State considers it appropriate.

Paragraph 2 of that Article provides:

> "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article."

The use of the adverb "likewise" and the reference to extradition to a State having jurisdiction under paragraph 1 necessarily mean that the State where the arrest is made has secondary jurisdiction.

Secondly, Article 6 of the Convention, governing the powers in respect of custody (paragraph 1) and preliminary inquiry (paragraph 2) of the State in whose territory a person alleged to have committed any of the relevant offences is present, adds in paragraph 4:

> "When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

These provisions corroborate that jurisdiction under Article 5, paragraph 2, is secondary. They must be understood as reflecting a determination to give the State having jurisdiction the opportunity under paragraph 1 of Article 5 to seek the suspect's extradition with a view to exercising such territorial or personal jurisdiction.

Moreover, in placing the head of jurisdiction established in Article 689-2 of the Code of Criminal Procedure in the same class as those to which Article 692 applies, the French legislature made it abundantly clear that it recognized the secondary nature of that jurisdiction in the Convention of 10 December 1984.

6. It bears keeping in mind in this connection not only that the *Procureur de la République* in Meaux has failed to cause the Government to perform the obligations under the above-quoted Article 6, paragraph 4, but also that he has ignored a letter sent to him by the *Procureur de la République* in Brazzaville.

As already set out in the Republic of the Congo's first Memorial, the *Procureur de la République* at the Brazzaville *Tribunal de grande instance* sent a detailed letter on 9 September 2002 to the *Procureur de la République* at the Meaux *Tribunal de grande instance* stating that he had learned of the proceedings underway in the Meaux court against General Dabira and informing the *Procureur* in Meaux that one of the organizations having submitted a denunciation, the *Organisation congolaise des droits de l'homme* (OCDH), had made the same accusations in the Congo in 2000, as a result of which the Minister of Justice of the Congo had ordered an enquiry.

He added:

> "Following that enquiry, the Minister of Justice, considering that the statements of certain persons interviewed could describe acts capable of being characterized as offences under the criminal laws of the Republic, requested the *Procureur de la République* 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 *Procureur de la République* thus requested the opening of a judicial investigation on the above grounds. The senior investigating judge at the Brazzaville *Tribunal de grande instance* was thus seised of the facts and has already carried out a number of acts of investigation."

He went on to state that the opening of a judicial investigation by the Prosecutor's Office in Meaux in respect of the same facts 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 which he then expounded in his letter.

The first reason was that every State's jurisdiction to try cases involving offences committed in its territory is an attribute of sovereignty and a principle of international *ordre public*.

The second was that, even if there were a basis for the jurisdiction of the French courts, which was hardly the case, the conflict of jurisdiction should be resolved in favour of the Congolese courts: first, because the alleged acts cited by those filing the denunciations purportedly took place in the Congo; second, because the perpetrators and victims of the alleged crimes were Congolese; and finally because, in contradistinction to the French courts, the Congolese courts were in a position to investigate effectively, since the alleged perpetrators, the victims and the witnesses were in the Congo.

The third reason was that the jurisdiction established by Article 689-1 of the French Code of Criminal Procedure was necessarily subordinate to the jurisdiction of the State in whose territory the alleged crimes were committed.

The Brazzaville *Procureur de la République* concluded as follows:

> "The proceedings undertaken by the investigating judge of the Meaux *Tribunal de grande instance* thus lack any serious legal basis. It is for this reason that the termination of those proceedings by the French court, for lack of jurisdiction, would appropriately bring to an end this regrettable dispute, which could constitute a serious impediment to the proper administration of international criminal justice."

The *Procureur de la République* in Meaux has not deigned to respond to the letter from his counterpart in Brazzaville, which raises the inference that he has not even informed the Minister of Justice and Keeper of the Seals, through the *Procureur général* at the Paris Court of Appeal, of the Congolese *démarche*.

7. There is no need to add that the New York Convention does not provide for any substantive review by a court of any State whatsoever of judicial decisions taken in other States.

True, the convention establishing the Statute of the International Criminal Court, adopted at Rome on 17 July 1998, in Article 17, paragraphs 1 *(a)* and *(b)* and 2, does open the way for such a review by that court, in those situations that are exhaustively and strictly defined; however, what is permissible for a United Nations institution speaking for the international community is not permitted to a judicial organ of a Member State, which is simply on a par with all other States. Article 17 itself is enough to show this. The situations therein described (the State which normally has jurisdiction is unwilling or unable to carry out the procedure; the decision was made for the purpose of shielding the person concerned from justice; an unjustified delay or a lack of independence or impartiality on the part of the judges is inconsistent with an intent to bring the person concerned to justice) presuppose either that State's powerlessness or its collusion with the individual subject to criminal proceedings — in any event, a value judgment on the action taken by that State. No court of any State may however arrogate to itself the power to make such a judgment about another sovereign State.

It must be added that, shocking *per se* as any such pretension in violation of the sovereignty of all States may be, it would offend even more if the State whose courts would presume to review the substance of judgments handed down in another State were the former colonial Power having ruled over that other State.

[13]. Thus, General Dabira's acquittal by the Congolese criminal court must be a bar to the pursuance of the proceedings being taken against him in France. It must also bar any proceedings against any person not named in the originating application, even if any such individual were to be found in French territory.

The French judge now in charge of the case need of course only apply Article 692 of the Code of Criminal Procedure for the French Republic's international obligations to be fulfilled. But he is not doing so and, whatever the reason may be for his inertia (carelessness or recalcitrance) for more than three years now, it gives cause to fear that this unacceptable situation will persist indefinitely.

The French Government can put an end to this, as Article 30 of the Code of Criminal Procedure empowers the Minister of Justice to "direct [the *procureur général*], by means of written instructions to be added to the record, . . . to seise the relevant court of such written orders as the Minister considers to be appropriate". There is an imperative need for such instructions, as this is a matter of ensuring that a State organ complies with the international obligations of the French Republic.

In conclusion, 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 terminated the criminal proceedings being pursued before the investigating judge at the Meaux *Tribunal de grande instance*, on the ground that the action is inadmissible by virtue of the *res judicata* authority attaching to the final judgment of 17 August 2005 handed down by the Criminal Court of Brazzaville.

(Signed) Roger-Julien MENGA,
Ambassador Extraordinary
and Plenipotentiary.