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INTERNATIONAL COURT OF JUSTICE

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

FRANCE

SUPPLEMENTARY OBSERVATIONS

17 May 2010

[Translation by the Registry]

INTERNATIONAL COURT OF JUSTICE

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

Supplementary Observations of the French Republic

1. Acting in accordance with the Court's Order of 23 November 2009 and within the time-limit given, the Republic of the Congo filed an additional pleading on 16 February 2010. By that same Order, the French Republic was authorized to file its supplementary observations within a time-limit expiring on 17 May 2010. The present observations are submitted in accordance with that decision.

2. In its supplementary observations, the Republic of the Congo has treated two separate legal issues: the purported subordination of the French court's jurisdiction to that of the Congolese court and the authority to be accorded by the French court to the 17 August 2005 judgment of the Criminal Division of the Brazzaville Court of Appeal. The two questions are not clearly distinguished from each other and they lead to a submission asking 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"[1].

3. France is of the view not only that a clear distinction must be drawn between these two issues of law, but that the second does not fall within the scope of the dispute over which France has consented to the Court's jurisdiction. The submission in the supplementary observations would therefore appear to be a new claim and, as such, not within the Court's jurisdiction. For convenience, this issue will be referred to subsequently herein as the "*non bis in idem* issue", since the effect claimed for the judgment of the Brazzaville Court of Appeal is that described by this familiar maxim.

4. The French Republic's supplementary observations will be confined to responding to the arguments set out in the Republic of the Congo's observations of 16 February 2010. In the first part of these observations France will aim to show that the *non bis in idem* issue is not within the scope of the Court's jurisdiction as consented to by France (§1). The second part of these observations will set out arguments made very much in the alternative concerning the difficulties encountered by the French judge in assessing application of the *non bis in idem* rule (§2).

§1. The *non bis in idem* issue does not fall within the scope of the dispute over which France has consented to the Court's jurisdiction

5. The *non bis in idem* issue does not fall within the scope of the dispute over which France has consented to the Court's jurisdiction for two reasons. The first is that the dispute concerns solely the jurisdiction of the French court and respect for international immunities (1.1). The

[1] Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, p. 7, para. 13.

second is that the dispute concerns the Republic of the Congo's own rights under international law, independent of any claim based on diplomatic protection (1.2).

1.1. The dispute concerns solely the jurisdiction of the French court and respect for international immunities

6. It is important first to recall to mind that the Court's jurisdiction in the present case is founded on a specific form of *forum prorogatum* provided for in Article 38, paragraph 5, of the Rules of Court. It derives from the combination of two separate instruments: the Application filed by the Republic of the Congo on 9 December 2002; and France's consent to the Court's jurisdiction under the conditions set out in its letter of 8 April 2003. Accordingly, these two instruments must be examined very carefully[2].

7. The Application of 9 December 2002 begins with a statement of the legal grounds relied upon by the Republic of the Congo in support of its claim. The Application thereby meets the requirements of Article 38, paragraph 2, of the Rules of Court, which requires a description of the "legal grounds upon which the jurisdiction of the Court is said to be based". In the second section, entitled "Nature of the Claim", the Application specifies the remedies sought, namely, the annulment of the measures of investigation and prosecution, while also containing a summary description of certain facts in respect of the proceedings in progress in France. It returns in more detail to the facts in the third section and to the legal grounds in the fourth. The fifth section is devoted to admissibility.

8. This format, which follows the structure of Article 38, paragraph 2, of the Rules of Court, makes it easy to identify the subject of the dispute and the claim, as those terms are used by the International Court of Justice. The subject of the dispute is circumscribed by the legal grounds relied upon — certain alleged violations of international law — in their relation to certain facts — the criminal proceedings brought in France upon the complaint of 7 December 2001. As for the claim, it consists of requesting that the Court rule *on the alleged violations* and define the ensuing legal consequences.

9. France subsequently accepted the jurisdiction of the Court but only "for the dispute which is the subject-matter of the Application and strictly within the limits of the claims formulated by the Republic of the Congo"[3]. The supplementary observations submitted by the Republic of the Congo on 16 February 2010 do however make significant additions in respect of both legal and factual elements of the dispute. These additions alter the subject of the dispute and the nature of the claim, and substantially exceed the limits of the consent given by France to the Court's jurisdiction in the present case.

10. The legal elements of the dispute were defined in the Application through the statement of the legal grounds on which the claim was based. The Application reads as follows:

> "1. Violation of the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, exercise its authority on the territory of another State,

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[2]See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 230-206, paras. 60-65 and p. 211, para. 87.

[3]Letter of 8 Apr. 2003, third paragraph.

by unilaterally attributing to itself universal jurisdiction in criminal matters

and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country;

2. Violation of the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court."

11. The two alleged violations are the grounds in law upon which "*the jurisdiction of the Court is said to be based*"[4] and in respect of which there is a conflict of legal views between the Parties. The statement of grounds obviously enables the scope of the dispute to be determined, just as does the statement of facts. In defining the scope of its jurisdiction in a case similar to this one in terms of the basis of jurisdiction, the International Court of Justice did moreover make reference to the legal grounds relating to the claim[5]. Consideration must therefore be given to these two legal grounds.

12. The "authority" referred to in the first legal ground is the State's judicial authority in criminal matters, that is to say, the jurisdiction of the French judicial authorities over the facts of the case. Confirmation is found later in the Application that the jurisdiction of the French courts is indeed the subject of the dispute as defined in this first ground[6]. As for the second ground, it concerns an alleged violation of the rules of international law governing Head-of-State immunity. No other legal question is mentioned.

13. Neither of the two grounds referred to above includes any invocation of the maxim *non bis in idem* or of any *res judicata* authority of foreign judgments. Indeed, the claim concerns neither the jurisdiction of the French courts under international law nor the assertion of international immunity; it is a procedural objection going to the merits of the case being heard in criminal proceedings in the French courts[7]. Accordingly, the Congo's claim is a new one.

14. Incidentally, the Republic of the Congo's observations clearly show that this is new, because the last paragraph is a submission drafted in the terms of a prayer for relief additional to those set out in the Application. It is also to be seen from this paragraph that the *non bis in idem* issue has nothing to do with either the jurisdiction of the French courts under international law or respect for international immunities, because the request made therein to put an end to the domestic proceedings is based on their "inadmissibility"[8].

15. Moreover, the supplementary observations show that the inadmissibility asserted by the Republic of the Congo in its new claim is not based on a violation of a rule of international law. French law alone, specifically Article 692 of the Code of Criminal Procedure ("CCP"), is cited as the cause of inadmissibility[9]. It should be kept in mind in this connection that, under Article 38 of

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[4]Rules of Court, Art. 38, para. 2.

[5]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 213, para. 93.

[6]See Application, Sec. IV.

[7]See para. 2 of the present response.

[8]Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, end of p. 7.

[9]*Ibid*., pp. 3-4, para. 4.

the Statute of the Court, the function of the International Court of Justice is to decide disputes under international law, not to take the place of a State's courts in interpreting and applying the domestic law of the State.

16. In its Memorial, the Republic of the Congo already alluded to the *non bis in idem* principle[10]. France took care to respond to that allusion in order to dispel any risk of confusion with the issue of subordination of jurisdiction, the only issue in the present case. The relevant passage in France's Counter-Memorial is indeed entitled: "*The rule* non bis in idem *has no relevance in the present case*"[11]. As well, France explained in the Rejoinder that it was for the French courts to rule on any objection based on *res judicata*, citing that same passage from its Counter-Memorial[12]. There can be no clearer way of expressing the refusal to accept inclusion within the scope of the dispute of a question that manifestly lies outside it.

17. And on top of this there is a change in the factual elements of the dispute. The fact cited in the Republic of the Congo's supplementary observations in support of its new claim, i.e., the 17 August 2005 judgment of the Brazzaville Court of Appeal and the force of *res judicata* which is said to have attached to it definitively under Congolese law[13], came into existence after the date on which the Congo filed its Application. This fact is obviously not referred to in the Application, which predates it by two and a half years. At the same time as a problem of jurisdiction *ratione materiae*, this raises a problem of jurisdiction *ratione temporis*.

18. In accordance with the Court's case law in this area, and this being a dispute in which the Court's jurisdiction is based on *forum prorogatum*, the applicable test is neither the continuity nor connexity of the fact with the facts set out in the Application, but rather what France "*has expressly accepted*"[14]. And in no way has France accepted the jurisdiction of the Court to determine the legal effects which a new legal decision, one not referred to in the Application, should be deemed to have. This is particularly clear in that the present case involves a legal decision by the courts of the applicant State, and that the question of any effects it may have in a foreign legal system — here, that of the respondent State — is a legal question completely separate from those addressed in the Application.

1.2. The dispute concerns the Congo's own rights under international law, independent of any claim based on diplomatic protection

19. The French Republic will point out another reason why jurisdiction is lacking, one relating to the nature of the Congolese nationals' rights whose violation is now alleged by the Republic of the Congo. In the Application, the claims concerned alleged violations of international law relating exclusively to inter-State relations: violation of the principle of sovereign equality on account of the jurisdiction of the French courts and violation of international immunities. The Congo submitted the Application on its own behalf and at no time claimed to be acting in the interest of one or more of its nationals. The supplementary observations, in particular their conclusion, significantly alter this aspect of the dispute.

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[10]Memorial of the Republic of the Congo (MC), 4 Dec. 2003, para. 28.

[11]Counter-Memorial of the French Republic (CMF), 11 May 2004, pp. 59-63, paras. 2.94-2.105.

[12]Rejoinder of the French Republic (RF), 11 Aug. 2008, para. 9.

[13]Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, p. 2, para. 2.

[14]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 212, para. 88.

20. The 17 August 2005 judgment of the Brazzaville Court of Appeal is mentioned for the first time in paragraph 2 of the Congo's observations, where it is described as a "signal event"[15]. The judgment does not concern the question of jurisdiction but the merits of a case alleged to coincide, as to the facts and the persons involved, with the matter which is the subject of criminal proceedings in France. The Republic of the Congo asserts in its supplementary observations that General Dabira's counsel informed the French investigating judge of that judgment and finds it regrettable that the judge has not reacted[16]. What is at issue is therefore the defence of an individual, General Dabira, in the proceedings now in progress in the French courts.

21. The acquittal handed down in the 17 August 2005 judgment of the Brazzaville Court of Appeal is next mentioned in paragraph 13 of the supplementary observations. It is said to give rise to a right "*for General Dabira's benefit*" barring the proceedings in progress in the French courts. This effect should moreover extend to "*any person not named in the originating application, even if any such individual were to be found in French territory*"[17]. General N'Dengue, who, it is noted in paragraph 2, was also acquitted[18], must certainly be included among those persons. However this may be, it is clear that the Republic of the Congo is thus acting in defence of certain natural persons who are identified either by name, like General Dabira, or by the fact that they were acquitted in the 17 August 2005 judgment.

22. In addition, the function of notions such as *non bis in idem* and *res judicata* in criminal law is to give rise to personal rights under the terms laid down in each legal system. France has already made this point in its Counter-Memorial[19]. Thus, the only rights which can be at issue in this connection are rights of individuals, not the State's own rights. Further, the Republic of the Congo cites no violation of international law in support of its new claim, only a violation of Article 692 of the French CCP[20]. Here again, it must be kept in mind that the function of the International Court of Justice is not to take the place of State courts in interpreting and applying domestic law.

23. Thus, whether we consider the legal case made by the Republic of the Congo in its supplementary observations or the nature itself of the maxim *non bis in idem* and of its potential effects in the context of domestic criminal proceedings, everything goes to show that the only rights in question are personal rights, not the Congo's own rights.

24. It is therefore important to stress that the Court's jurisprudence draws a clear distinction between claims which are matters of the protection granted by a State to one or more of its nationals and those which are direct matters of relations between States. Thus, in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, which at first concerned the jurisdiction of the Belgian courts and international immunities, and later immunities alone, the Court pointed out that the Democratic Republic of the Congo had "*never sought to invoke before it . . . personal rights*" before rejecting Belgium's fourth

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[15]Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, p. 2.

[16]*Ibid*., p. 5, para. 6.

[17]*Ibid*., p. 7.

[18]*Ibid*., p. 2.

[19]CMF, 11 May 2004, pp. 59-60, paras. 2.95-2.98.

[20]Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, pp. 3-4, para. 4.

objection[21]. Nor in the present case did the Republic of the Congo initially seek to assert personal rights, but an attempt to do so is clearly to be seen now in its supplementary observations, particularly in their conclusion. Accordingly, the claim must be dismissed for being radically different from the claims which were asserted in the Application and in respect of which France consented to the Court's jurisdiction.

25. In any event, were the Court nevertheless to find jurisdiction in respect of the *non bis in idem* issue, it could not but hold that the claim under the heading of diplomatic protection put forward by the Republic of the Congo in its supplementary observations is inadmissible, owing to the failure by those concerned to exhaust local remedies.

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26. To conclude, the Court cannot allow a dispute before it to be transformed into a different dispute by means of a change made in the submissions of one of the parties[22]. It has consistently drawn attention in its decisions to the risk that such a practice would have repercussions on the jurisdiction of the Court and on the rights of third States[23]. The first such reason is all the more cogent in the present case since the Court's jurisdiction is based on a *forum prorogatum* established in accordance with Article 38, paragraph 5, of the Rules of Court.

27. Consequently, France requests the Court to find that it is without jurisdiction over the *non bis in idem* issue because it lies outside the subject of the dispute and the strict limits of the claims asserted in the Application, as accepted by France. In the unlikely event that the Court were to find that it has jurisdiction over this question — *quod non* —, it should hold that the claim on this point is inadmissible owing to the failure to exhaust local remedies by the individuals for whose benefit the Applicant is seeking to exercise its diplomatic protection.

§2. Application of the *non bis in idem* principle requires an assessment of the legal and factual aspects of the case by the judge now seised of it

28. The French Government is briefly making the following points very much in the alternative, should the Court decide to adjudicate the *non bis in idem* issue.

29. In its supplementary observations of 16 February 2010, the Republic of the Congo bases its argument on the existence of a decision to acquit handed down by the Criminal Division of the Brazzaville Court of Appeal on 17 August 2005. It relies exclusively on the application of French law, specifically Article 692 of the French CCP, which 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

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[21] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 18, para. 40.

[22] *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, paras. 69-70; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 17, para. 36.

[23] *Ibid*.

served or barred by the passage of time." Application of this provision, which is founded on the *non bis in idem* rule, pursuant to which "no one may be tried twice for the same crime", presupposes that the French judge has jurisdiction in the case (2.1). Moreover, for this rule to be capable of leading to the discharge of the case *[non-lieu]*, the French investigating judge, alone, is at present the sole authority in a position to ascertain, in the light of the facts of the case, whether the legal requirements governing application of the rule have been met (2.2).

2.1. Application of the *non bis in idem* rule presupposes jurisdiction on the part of the French judge

30. It is worth noting that the supplementary observations of the Republic of the Congo assert exactly the opposite position to that taken in its earlier pleadings. In its Memorial of 4 December 2003, the Republic of the Congo maintained that "[t]he French investigating judge was wrong when . . . he considered himself to have jurisdiction" to hear this case, concerning both crimes against humanity[24] and torture[25]. Contradicting that statement, the Republic of the Congo in its supplementary observations recognizes the jurisdiction of the French judge since it argues for application of Article 692 of the CCP[26].

31. The Republic of the Congo's position is thus self-contradictory. While originally it asked the French Republic to "*cause to be annulled* the measures of investigation and prosecution taken by the *Procureur de la République* . . ."[27] and then "*cause to be cancelled* the application requesting the opening of an investigation submitted by the *Procureur de la République*"[28] by virtue of the fact that, *inter alia*, the French courts lacked jurisdiction, it is now asking it to

> "*cause to be terminated* the criminal proceedings being pursued before the investigating judge . . . 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"[29].

Under the terms of the Republic of the Congo's own reasoning therefore, the French investigating judge must necessarily have jurisdiction in the present case since that jurisdiction is indispensable to application of the *non bis in idem* rule.

32. Under Article 692 of the CCP, on which the Republic of the Congo relies, the existence of a final foreign judgment can be invoked to put an end to a prosecution being brought in France. But, before ordering a discharge *[non-lieu]* and closing the investigation, the French judge must examine the merits of the case to ascertain whether the requirements laid down by that Article have in fact been met in the case. Such an examination necessarily presupposes that the French judge has jurisdiction in the case.

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[24]MC, 4 Dec. 2003, p. 25, para. 20.

[25]*Ibid.*, p. 30, para. 24.

[26]Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, p. 3, para. 4.

[27]Application instituting proceedings, filed in the Court Registry on 9 Dec. 2002, p. 2; emphasis added.

[28]MC, 4 Dec. 2003, p. 39; emphasis added.

[29]Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, p. 7, para. 13; emphasis added.

2.2. Application of the *non bis in idem* rule entails exclusively the application by the French judge of the legal requirements under French law in the light of an analysis of the facts of the case

33. Although the *non bis in idem* rule has been recognized in public international law, it is not appropriate in the present case to apply it with the meaning it is given in either treaty-based or customary international law. As pointed out in the French Republic's Counter-Memorial, Article 14 (7) of the International Covenant on Civil and Political Rights applies only to courts of a given State and not between courts of different States[30]. Accordingly, French law alone is relevant in determining the conditions for the rule to operate in the present case and only the investigating judge hearing the case is at this juncture empowered to decide whether, in the light of the legal requirements under French law, the *non bis in idem* rule applies to the facts being investigated and therefore necessitates an order closing the investigation on the ground that there is no case to answer *[non-lieu]*. The judge's decision can be appealed to the *Chambre de l'instruction* and, as the case may be, to the *Cour de cassation*.

34. The legal requirements for the *non bis in idem* rule to apply in the context of a foreign judgment are, as indicated above[31], laid down in Article 692 of the CCP. This Article stipulates, on the one hand, that there must be a final judgment abroad and, on the other, that the persons and facts in question must be the same. Only the judge seised of the matter on the merits is in a position to ascertain whether, in this case, the persons to whom the Brazzaville Court of Appeal judgment relates are the same as those who are the subject of the investigation, and whether the persons acquitted by the Brazzaville Court of Appeal were acquitted in respect of the same acts as those under judicial investigation in France.

35. At the current stage of proceedings, it is for the French investigating judge hearing the matter, and him alone, to determine whether the *non bis in idem* rule applies to the case[32]. And it is important to point out how difficult it is for the judge to ascertain whether the conditions are met for Article 692 of the CCP to operate in the present case.

A final judgment abroad

36. As already explained by the French Republic in its Counter-Memorial[33], the foreign judgment must be final. In the present case, the Republic of the Congo adduces a judgment handed down on 17 August 2005 by the Criminal Division of the Brazzaville Court of Appeal, under which the fifteen defendants[34] were acquitted.

37. An acquittal, in contrast to a decision to discharge *[non-lieu]* or a discontinuance of proceedings *[classement sans suite]*, may satisfy this requirement of a final judgment, provided it is indeed a final decision which has not been appealed and is not open to any appeal on a point of law *[pourvoi en cassation]*. The Republic of the Congo, in its supplementary observations, states that

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[30]CMF, 11 May 2004, p. 60, para. 2.98.

[31]Para. 29.

[32]RF, 11 Aug. 2008, p. 3, para. 9.

[33]CMF, 11 May 2004, p. 63, para. 2.103.

[34]The fifteen defendants: Nobert Dabira, Blaise Adoua, Jean François Ndengue, Guy Pierre Garcia, Marcel Ntourou, Jean Aïve Allakoua, Jean Pierre Essouebe, Emmanuel Avoukou, Edouard Dinga Oba, Gabriel Ondonda, Rigobert Mobede, Vincent Vital Bakana, Samuel Mbouassa, Yvon Dieudonné Sita Bantsiri and Guy Edouard Taty.

"[t]hat judgment has become final"[35], but does not elaborate further. It would appear, however, that the civil parties lodged an appeal against that decision, to the Supreme Court of the Republic of the Congo. In a ruling of 4 May 2007, the Criminal Division of the Supreme Court apparently quashed in part the Court of Appeal's judgment of 17 August 2005. A number of aspects, therefore, warrant further explanation. Without that information, it will be extremely difficult for the French investigating judge to rule on whether the *non bis in idem* rule applies to the case before him.

The same facts and the same persons

38. The *non bis in idem* rule only applies if the French proceedings and the foreign proceedings relate to the same facts. It is accordingly for the investigating judge, in the course of the French judicial investigation, to establish any similarities between the facts concerned in the judgment of the Criminal Division of the Brazzaville Court of Appeal and those he is investigating and, if appropriate, to apply the provisions of the Code of Criminal Procedure.

39. The judgment delivered on 17 August 2005 by the Brazzaville Court of Appeal lacks detail as to the facts which were the subject of the proceedings in the Republic of the Congo. The information discernible from the decision is fragmentary. It is therefore not enough merely to forward the judgment itself to the French judge; he must also be given the judgment committing the defendants to the Criminal Division of the Brazzaville Court of Appeal, the only decision capable of enabling him to make a thorough assessment of whether the requirements for the *non bis in idem* rule to apply are met, by carrying out a comprehensive comparative analysis of the foreign proceedings and those currently underway in France.

40. It also needs pointing out that this requirement as to identity of facts is not defined in the French Code of Criminal Procedure, and the courts are particularly strict in assessing whether it is met. To find that a foreign judgment has the force of *res judicata*, therefore, the investigating judge must take into account not only identity of material elements[36], but also of the *mens rea* of the offence prosecuted, and of its legal characterization[37].

41. It being kept in mind that this falls very much within the exclusive jurisdiction of the French judge, it seems possible to say already that the required identity of facts, which is one of the conditions for Article 692 of the CCP to operate, does not appear to be present in this case. It emerges, from a comparison between the judgments of the Criminal Division of the Brazzaville Court of Appeal and the judgment of the *Chambre de l'instruction* of the Paris Court of Appeal, that the French investigating judge is seised of 200 cases of disappearances reported on 14 May 1999, whereas the proceedings before the Congolese court concerned only 61 victims.

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[35]Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, p. 2, para. 2.

[36]*Van Esbroeck*, C-436/04, *ECJ judgment of 9 March 2006*, para. 36: "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances *which are inextricably linked together*" (emphasis added); *Zolotukhin* v. *Russia*, *ECHR judgment of 10 February 2009*, para. 84: on the definition of an offence in Article 4 of Protocol No. 7, the Court held that it arose from identical facts, which it described as those "facts which constitute a set of concrete factual circumstances involving the same defendant and *inextricably linked together in time and space*" (emphasis added).

[37]*Cass., Crim., 22 November 1973, Bull. No 434*; *Cass., Crim., 3 June 1991, Bull. No. 233, D. 1992*, p. 228, Note, Pannier. See also L. Desessard, "Les compétences criminelles concurrentes nationales et internationales et le principe *non bis in idem*", *Revue internationale de droit pénal*, 2002, Vol. 73, p. 925.

Procedural guarantees

42. According to the Republic of the Congo, "There is no need to add that the New York Convention [against Torture, of 10 December 1984] does not provide for any substantive review by a court of any State whatsoever of judicial decisions taken in other States."[38]

43. A distinction needs to be drawn here. While it is true that the French courts cannot review the decisions of Congolese courts, France is without doubt entitled to satisfy itself that internationally recognized fundamental procedural rights are upheld when it comes to implementing a foreign decision in its own legal system. In the present case, for the reasons set forth above, this assessment falls to the investigating judge before whom the individuals concerned invoke the judgment of the Brazzaville Court.

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44. To conclude, there is no doubt whatsoever that application of the *non bis in idem* rule, at this stage in the proceedings, is a matter exclusively for the jurisdiction of the French investigating judge. That judge alone is capable of analysing whether the legal conditions laid down by French law are satisfied in the light of the facts in issue in the case. Furthermore, it is by no means certain that the French investigating judge is in a position, at present, to carry out such an assessment.

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Conclusions

45. The French Republic maintains in their entirety the grounds it set out in its Counter-Memorial and its Rejoinder. For the reasons set out in these supplementary observations, it requests the International Court of Justice to find that it is without jurisdiction to hear the *non bis in idem* issue, and, in the alternative, were the Court nevertheless to hold that it has jurisdiction over that point, to find that the new claim advanced by the Republic of the Congo in its observations of 16 February 2010 is inadmissible. Further in the alternative, should the Court decide to adjudicate the *non bis in idem* issue, the French Republic requests the Court to find that the French judge alone has jurisdiction to rule on the application of that rule in the present case.

Paris, 17 May 2010.

(Signed) Edwige BELLIARD,
Agent of the French Republic.

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[38] Supplementary Observations of the Republic of the Congo, 16 Feb. 2010, p. 6, para. 7.

ANNEX

Judgment of the Criminal Division of the French
***Cour de cassation* of 9 April 2008**

JUDGMENT OF THE CRIMINAL DIVISION OF THE FRENCH
***COUR DE CASSATION* OF 9 APRIL 2008**

The *Cour de cassation*, Criminal Division, at a public hearing held at the *Palais de justice* in Paris, has delivered the following Judgment:

Ruling on the appeals brought by:

— Norbert Dabira, person under formal investigation;

— Madeleine Bikindou, married name Touanga;

— The "Survie" Association;

— The "Disappeared of the Brazzaville Beach" Association;

— Marcel Touanga;

— Ghislain Matembele;

— Linot Bardin Duval Tsieno;

— Mouele, Blanchard;

— Aubin Gautier Mackaya;

— Pascal Miena Youlou;

— the International Federation for Human Rights (FIDH);

— the French League for Human Rights (LDH);

— the Congolese Observatory for Human Rights (OCDH).

civil parties,

against the Judgment of the *Chambre de l'instruction* of the Versailles Court of Appeal of 20 June 2007, which, in respect of the investigation being conducted as part of the proceedings brought by them for crimes against humanity, torture, acts of barbarity and abductions, the case being referred to it after the previous judgment was overturned, ruled on an application to annul certain procedural documents;

The Court, ruling after deliberations in the public hearing of 12 March 2008 at which were present: Mr. Cotte, President, Ms Chanet, rapporteur, Mr. Le Gall, Mr. Pelletier, Ms Ponroy, Mr. Arnould, Ms Koering-Joulin, Mr. Corneloup, Mr. Pometan, Ms Canivet-Beuzit, Mr. Finidori, divisional judges, Ms Caron, Ms Lazerges, auxiliary judges;

Advocate General: Mr. Boccon-Gibod;
Registrar: Mr. Souchon;

On the report of Ms Chanet, rapporteur, the observations made by Mr. Bouthors and the civil-law professional partnership Piwnica and Molinié, lawyers in the Court, and the opinion of Mr. Boccon-Gibod, Advocate General, the parties' lawyers being the last to speak;

Having regard to the order of the President of the Criminal Division, dated 21 September 2007, joining the appeals because they are related and ordering them to be examined immediately;

I — On the admissibility of the appeal brought by the "Disappeared of the Beach" Association on 27 June 2007:

Whereas the applicant, having exercised its right to appeal against the judgment concerned by lodging an appeal on 26 June 2007, was not entitled to appeal again against the same decision; whereas only the appeal lodged on 26 June 2007 is admissible;

II — On the other appeals:

Having regard to Article 575 (2), sub-paragraphs 4 and 7, of the Code of Criminal Procedure;

Having regard to the written statements submitted by both the applicants and the respondents;

Whereas on 7 December 2001, the International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) and the Congolese Observatory for Human Rights (OCDH) filed a complaint against Denis Sassou N'Guesso, President of the Republic of the Congo, Pierre Oba, Minister of the Interior, Norbert Dabira, Inspector-General of the Congolese Armed Forces, and Blaise Adoua, Commander of the Republican Guard, for arbitrary arrests, torture, acts of barbarity and abductions, which took place from May to July 1999 and concerned displaced persons returning to the Congo through the river port of Brazzaville known as "the Beach", following the conclusion of an agreement under the auspices of the United Nations High Commissioner for Refugees establishing a humanitarian corridor;

Whereas, the complaint having been referred to him, the State Prosecutor in Meaux, who had territorial jurisdiction by virtue of the fact that Norbert Dabira was known to have a permanent residence in Villeparisis, requested the opening of an investigation on the grounds of crimes against humanity, torture, acts of barbarity and abductions; whereas the investigating judge assigned took several procedural steps, *inter alia* by issuing warrants, with regard to the individuals referred to in the complaint; whereas Jean-François N'Dengue, Director-General of the Congolese Police, who was residing in Meaux, was arrested, remanded in police custody, had his testimony taken and was then released on the basis that he enjoyed diplomatic immunity; whereas Norbert Dabira had his testimony taken as a legally represented witness then declined to respond to the summons from the investigating judge, who thereupon issued an arrest warrant against him; whereas a number of natural and legal persons have filed civil-party complaints; whereas on 5 April 2004 the State Prosecutor made an application to annul the measures taken in respect of Jean-François N'Dengue, Pierre Oba and Blaise Adoua, on the grounds that the application for a judicial investigation, which had been incorrectly made against an unidentified person, could actually only refer to Norbert Dabira, the only person likely to have been involved in the reported offences and to have been established to have a permanent residence on national territory; whereas by judgment of 22 November 2004, the *Chambre de l'instruction* of the Paris Court of Appeal annulled not only the documents referred to in the Public Prosecutor's Department's application but also the application for a judicial investigation and all the subsequent proceedings; whereas, the civil parties' appeal against this judgment being referred to it, the Criminal Division overturned this Judgment on 10 January 2007 and transferred the case and the parties to the *Chambre de l'instruction* of the Versailles Court of Appeal; whereas this Court, by the Judgment challenged, granted the application of the Public Prosecutor's Department by ordering all the procedural documents concerning Jean-François N'Dengue to be declared null and void and the proceedings to be referred back to the investigating judge in Paris;

This being so,

On the sole ground for appeal, put forward by the civil-law professional partnership Piwnica and Molinié on behalf of the civil parties, based on the infringement of Articles 3, 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 1, 2 and 29 to 37 of the Vienna Convention on Diplomatic Relations of 18 April 1961, Articles 1, 5, 6 and 7 of the Convention against Torture, adopted in New York on

10 December 1984, all the general principles of international law, Article 113-1 of the Penal Code, Articles 609-1, 689-1, 689-2, 591 and 593 of the Code of Criminal Procedure, inadequate reasons, faulty or insufficient reasons;

"In that the judgment in question annulled the record of Jean-François N'Dengue's hearing in custody and the subsequent proceedings;

"On the basis that when he was remanded in custody on 1 April 2004 at 12.30 p.m. Jean-François N'Dengue said that he was in France on an official mission and that he had a diplomatic passport and a mission order from President Sassou N'Guesso dated 19 April 2004; that, according to the procedural documents, when the Ministry of Foreign Affairs was consulted it replied verbally at 4.30 p.m. that Jean-François N'Dengue did not have diplomatic accreditation and that a written reply would be made to the investigators (D236); that a written reply was provided at 6 p.m. by the Ministry of Foreign Affairs, which forwarded to the investigators a statement by Mr. Henri Lopes, Ambassador of the Republic of the Congo to France, who had been asked in particular about the date on the mission order; that he certified that the date of 19 April 2004 indicated on the mission order was a clerical error and that it should read '19 March 2004' (D236); that the statement read as follows: 'I (. . .) certify that Mr. Jean-François N'Dengue, Director-General of the Congolese Police, is indeed in France on an official mission, bearing a mission order signed by the Congolese Head of State. Having spoken to him, I formally confirm that a clerical error was made in the date of issue indicated on that mission order. It should read 19 March 2004 instead of 19 April 2004 (. . .)'; that, in addition, on 1 April 2004 at 9.31 p.m. the Director of the Private Office of the Minister for Foreign Affairs sent a note from the Protocol Service to the State Prosecutor in Meaux worded as follows: 'The Ministry of Foreign Affairs confirms that the Ambassador of the Republic of the Congo to France has certified that Jean-François N'Dengue, bearer of a document signed by the President of the Republic of the Congo, has been in France on an official mission since 19 March 2004, that this being the case, and under customary international law, he enjoys immunity from jurisdiction and execution'; that this note was appended to the application made by the State Prosecutor on 1 April at 10.55 p.m. to have Jean-François N'Dengue released from custody (D24); that it was not for the Chambre de l'instruction *to enquire into the nature of the business transacted during the official mission, as the civil parties invited it to in their submissions, given that the authenticity of the document had been confirmed; that the note from the Protocol Service of the Ministry of Foreign Affairs was unequivocal about Jean-François N'Dengue's immunity, notwithstanding France's failure to ratify the Convention on Special Missions adopted in New York on 8 December 1969; that the waivers provided for in the Statute of the International Criminal Court and relied on by the civil parties would not have been applicable in that Court; that, in the light of the foregoing, there was reason to consider that when Jean-François N'Dengue was remanded in custody he enjoyed immunity from jurisdiction and execution; that this applied regardless of the nature of the offences and therefore precluded any coercive measure against him; that there were therefore grounds for granting in part the application to annul the procedural measures concerning Jean-François N'Dengue as specified in the operative provisions of the judgment;*

"1) Whereas, when the Cour de cassation *overturns a judgment of a* Chambre de l'instruction, *the jurisdiction of the* Chambre de l'instruction *to which the case is referred is confined to resolving the issue that caused the case to be referred to it; whereas the issue that caused the case to be referred to the Versailles Court of Appeal was confined to determining the validity of the application for a judicial investigation; whereas the* Chambre de l'instruction *of the Versailles Court of Appeal, the court to*

which the case was referred, was not therefore entitled to rule on whether or not Jean-François N'Dengue enjoyed diplomatic immunity, as has been claimed;

"2) Whereas diplomatic immunity may only apply to heads of diplomatic missions, members of diplomatic staff, administrative and technical staff attached to missions and members of their service staff, as well as to Heads of State and serving ministers for foreign affairs; whereas it was established that Jean-François N'Dengue, Director-General of the Congolese Police, did not meet any of these conditions; whereas therefore he could not enjoy diplomatic immunity;

"3) Whereas even if a director-general of police could enjoy such immunity, this would imply that he had been put in charge of a diplomatic mission and accredited in that capacity; whereas the Chambre de l'instruction *could not therefore have concluded that Jean-François N'Dengue enjoyed diplomatic immunity without enquiring into the nature of the mission that he headed and establishing whether he enjoyed an accreditation granting him a status that would qualify him for immunity;*

"4) Whereas, in any case, the immunity that a director-general of a foreign police force could enjoy on an official mission in France would be valid only for the period that he held that position; whereas the Chambre de l'instruction *could not therefore have concluded that Jean-François N'Dengue enjoyed diplomatic immunity by virtue of a mission in France in 2004 in respect of acts committed in the Congo in 1999;*

"5) Whereas diplomatic immunity is no impediment to the universal jurisdiction of the French courts in cases of torture;"

Whereas the *Chambre de l'instruction* annulled all the procedural documents concerning Jean-François N'Dengue for the reasons reproduced in the ground for the appeal;

Whereas this being the case, disregarding subsidiary grounds relating to the immunity pleaded, the judgment is not liable to censure;

Whereas, on the one hand, the judges, to whom an overturned judgment was referred, a judgment which ruled on procedural nullities pursuant to Articles 173 and 174 of the Code of Criminal Procedure, were required to rule on the application which had already been submitted to the *Chambre de l'instruction* whose judgment was overturned in full;

Whereas, on the other hand, Jean-François N'Dengue, who is not mentioned in either the complaint or any application, cannot be prosecuted in the French criminal courts on the basis of universal jurisdiction, as provided for by Article 689-2 of the Code of Criminal Procedure;

The ground is not therefore admissible;

On the first ground for appeal, put forward by Mr. Bouthors on behalf of Norbert Dabira, based on the infringement of Articles 6, 13 and 14 of the European Convention on Human Rights, Articles 1 to 7 of the Convention against Torture, adopted in New York on 10 December 1984, the Preliminary Article and Articles 6, 81, 82-3, 171, 173, 206, 591, 593, 689, 689-1, 689-2 and 692 of the Code of Criminal Procedure;

"In that the Court declared the pleas to have the criminal proceedings terminated on the grounds of res judicata *inadmissible;*

"On the basis that there were grounds for declaring the plea entered by Jean-François N'Dengue and Norbert Dabira seeking a decision to terminate the

criminal proceedings on the grounds of res judicata *inadmissible, as this defence is not provided for in Articles 171 and 173 of the Code of Criminal Procedure (Judgment p. 22* in fine *and p. 23, paragraph 1);*

"*Whereas when a case is referred to a French court in accordance with a universal jurisdiction clause, the court has to ensure that the fact that a final decision has already been handed down by a foreign court is not an impediment to proceedings being initiated in France; whereas this is a compulsory exercise determining whether or not the criminal proceedings are lawful and has to be carried out in the preparatory phase of the criminal proceedings in France; whereas in the absence of such an assessment, if the* Chambre de l'instruction *itself carries out such an exercise, the parties concerned are entitled to appeal as appropriate on any grounds that might constitute an impediment to criminal proceedings being initiated; whereas in declaring the defence of* res judicata *inadmissible, the Court infringed the above-mentioned provisions and principles;*

Whereas, in dismissing the ground based on the defence of *res judicata*, the appeal court judges stated that this defence is not provided for in Articles 171 and 173 of the Code of Criminal Procedure;

Whereas in so deciding, the *Chambre de l'instruction* justified its decision;

The ground cannot therefore be accepted;

On the second ground for appeal, put forward by Mr. Bouthors on behalf of Norbert Dabira, based on the infringement of Articles 6, 13 and 14 of the European Convention on Human Rights, Articles 1 to 7 of the Convention against Torture, adopted in New York on 10 December 1984, Articles 31 et seq. *of the Vienna Convention on the Law of Treaties of 1969 and the Preliminary Article and Articles 52, 382, 591, 593, 689, 689-1, 689-2 and 693 of the Code of Criminal Procedure;*

"*In that the* Chambre de l'instruction *recognized the jurisdiction of the French courts to entertain the proceedings in question against the applicant;*

"*On the basis that, on the one hand, in accordance with Articles 689, 689-1 and 689-2 of the Code of Criminal Procedure, 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 and who happens to be in France may be prosecuted and tried by French courts; that, on the other hand, the State Prosecutor in Meaux, the recipient of the complaint of 7 December 2001, filed on behalf of the International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) and the Congolese Observatory for Human Rights (OCDH) against Denis Sassou N'Guesso, President of the Republic of the Congo, Pierre Oba, Minister of the Interior, Norbert Dabira, Inspector-General of the Congolese Armed Forces, Blaise Adoua, Commander of the Republican Guard, and any others for arbitrary arrests, acts of torture and forced disappearances, which took place from May to July 1999 and concerned displaced persons returning to the Congo through the river port of Brazzaville known as 'the Beach', following the conclusion of an agreement under the auspices of the United Nations High Commissioner for Refugees establishing a humanitarian corridor, and the recipient of the reports from the preliminary enquiry (D16), from which it emerged that at least one of the individuals referred to in the complaint was in France, and more specifically in the area of jurisdiction of the Meaux* Tribunal de grande instance, *the individual concerned being Norbert Dabira, who possessed a permanent residence in Villeparisis (77270), 5 Allée*

des Tilleuls, had a vehicle registered at that address and had had administrative documents delivered there, applied for a judicial investigation to be opened against an unidentified person for 'crimes against humanity: massive and systematic practice of abduction of persons followed by their disappearance, torture or inhuman acts, on ideological grounds and in pursuit of a concerted plan against a group of the civil population' having regard to Article 212-1 of the Penal Code and Article 689-1 of the Code of Criminal Procedure; that therefore, having regard to the combined provisions of Articles 80, 689, 689-1 and 689-2 of the Code of Criminal Procedure, the investigating judge of the Meaux Tribunal de grande instance *was entitled to investigate the acts reported in the complaint, and in particular those with which Norbert Dabira was likely to be charged, but also those with which Jean-François N'Dengue was likely to be charged, who, incidentally, possessed an apartment in Meaux where he resided for part of the year and where he was apprehended (Judgment, pp. 23 and 24);*

"1) Whereas, firstly, in implementing a universal jurisdiction clause a State must abide by the mandatory conditions for exercising that jurisdiction, as set out in the relevant international convention; whereas neither the internal law nor the Chambre de l'instruction *was entitled to extend the scope of the* 'forum de prehensionis' *criterion, solely provided for by the Convention against Torture;*

"2) Whereas, secondly, the universal jurisdiction clause, which is based on the presumed perpetrator of an offence that is likely to fall within the scope of the Convention against Torture of 10 December 1984 being in France, is mandatory law and may not be extended to cases where the person concerned has a permanent residence or abode in France when the condition that the latter has to be physically present in the country when the proceedings are initiated is not met;

"3) Whereas, finally, the universal jurisdiction clause provided for by the Convention against Torture, on the basis that the person alleged to have committed an offence is in France, has to be implemented in conjunction with the principle of 'aut dedere aut judicare' *provided for by Articles 5 and 7 of that Convention, according to which a State that does not extradite a person who is alleged to have committed an offence is obliged to prosecute them itself; whereas therefore the* Chambre de l'instruction *extended the scope of the French court's universal jurisdiction to a situation in which the Convention against Torture did not permit it to exercise it;"*

Whereas, in recognizing the jurisdiction of the French courts to rule on the proceedings initiated against Norbert Dabira, the appeal court judges gave the reasons reproduced in the ground for the appeal;

Whereas this being the case, the *Chambre de l'instruction* justified its decision both in respect of the conventions referred to in the ground for the appeal and in respect of Article 689-1 of the Code of Criminal Procedure;

The ground shall therefore be dismissed;

And whereas the judgment meets the necessary formal requirements;

I — On the appeal brought by the "Disappeared of the Beach" Association on 27 June 2007:

Declares it to be inadmissible;

II — On the other appeals:

Dismisses them;

Judgment thus done and decided by the *Cour de cassation*, Criminal Division, and delivered by the President on the ninth of April, two thousand and eight;

In witness whereof, the present judgment has been signed by the President, the rapporteur and the Registrar.

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