Note: This translation has been prepared by the Registry for internal purposes and has no official character

INTERNATIONAL COURT OF JUSTICE

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

COUNTER-MEMORIAL OF FRANCE

11 MAY 2004

[Translation by the Registry]

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INTRODUCTION

1. By letter of 9 December 2002 the Registrar of the International Court of Justice informed the French Minister for Foreign Affairs that the Republic of the Congo had that day filed an Application against the French Republic, alleging that the latter had, first,

> "[violated] 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,
>
> 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"

and, second, "[violated] the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court".

2. By that Application the Congo requested the Court

> "to declare that the French Republic shall cause to be annulled the measures of investigation and prosecution taken by the *Procureur de la République* of the Paris *Tribunal de grande instance*, the *Procureur de la République* of the Meaux *Tribunal de grande instance* and the investigating judges of those courts".

The Congo further indicated that it proposed to found the Court's jurisdiction in the case on such consent as France might give pursuant to Article 38, paragraph 5, of the Rules of Court.

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3. By a letter dated 8 April 2003 addressed to the Registrar of the Court, the French Minister for Foreign Affairs stated that, pursuant to Article 38, paragraph 5, of the Rules, France accepted the Court's jurisdiction to entertain the Congo's Application, while qualifying that acceptance as follows:

> "Article 2 of the Treaty of Cooperation of 1 January 1974 between the French Republic and People's Republic of the Congo, to which the latter refers in its Application, does not constitute a basis of jurisdiction for the Court in the present case.
>
> The present consent to the jurisdiction of the Court applies only for the purposes of the case within the meaning of the above Article 38, paragraph 5, that is to say, 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."

4. By Order of 17 June 2003 the Court declined to accede to the request for the indication of provisional measures submitted by the Congo concurrently with its Application, emphasizing *inter*

alia that in this case it perceived no "threat of irreparable prejudice which would justify, as a matter of urgency, the indication of provisional measures"[1].

5. By Order of 11 July 2003 the Court fixed 11 December 2003 and 11 May 2004 as respective time-limits for the filing of the Memorial of the Republic of the Congo and the Counter-Memorial of the French Republic.

6. In the submission which concluded the Memorial filed by it on 4 December 2003, the Republic of the Congo

> "request[ed] the Court to declare that the French Republic shall, by appropriate legal means according to its own domestic law, . . . nullify the originating application filed by the *Procureur de la République* of the Meaux *Tribunal de grande instance* on 23 January 2002 and take steps to secure the termination of the criminal proceedings instituted by him".

7. After briefly setting out the relevant facts of the case (Chap. 1), the French Republic will in this Counter-Memorial address successively the alleged breaches of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign
3 equality (Chap. 2) and then the alleged violation of the immunities from jurisdiction of certain Congolese high officials (Chap. 3).

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[1] *Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, Request for the Indication of a Provisional Measure, Order of 17 June 2003, para. 36.

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CHAPTER 1

STATEMENT OF THE FACTS

1.1. Article 49 of the Rules of Court provides:

> "1. A Memorial shall contain a statement of the relevant facts . . .
>
> 2. A Counter-Memorial shall contain: an admission or denial of the facts stated in the Memorial; any additional facts, if necessary . . ."

1.2. In certain respects, the statement of facts with which the Memorial of the Republic of the Congo opens appears to be incomplete and often biased, and indeed on occasion mistaken. It is therefore necessary to explain the circumstances surrounding the issue, on 23 January 2002, of the prosecutor's originating application *(réquisitoire introductif d'instance)*, which, according to the Republic of the Congo, is "the key document in the present proceedings before the Court"[2] (Section 1). It is also necessary to determine the precise nature and scope of the procedural acts effected in France since that date (Section 2). Finally, it is necessary, in so far as this is possible, to set out the course of events in the Republic of the Congo, which the latter has to some extent failed to describe adequately or completely in its Memorial (Section 3).

Section 1 — The circumstances which led to the issue of the originating application

1.3. For the sake of clarity, we shall deal in turn with the complaint filed on 7 December 2001 (§1), its transmission and the ensuing preliminary enquiry (§2), and then the originating application of 23 January 2002 (§3).

§1. The complaint of 7 December 2001

1.4. On 7 December 2001 three non-governmental organizations, the International Federation for Human Rights, the Congolese Human Rights Observatory and the Human Rights League, filed with the *Procureur de la République* of the Paris *Tribunal de grande instance* a
5 complaint for "crimes against humanity, disappearances and torture" against Mr. Denis Sassou Nguesso, President of the Republic of the Congo, General Pierre Oba, Minister of the Interior, General Norbert Dabira, Inspector-General of the Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard[3]. That complaint contained a statement regarding the relevant facts and their attributability. To found the jurisdiction of the French courts, the complainants relied *inter alia* on Article 689-1 of the Code of Criminal Procedure, which provides:

> "Pursuant 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. The provisions of the present article are applicable to attempts to commit such offences, in cases where such attempts are punishable." *[Translation by the Registry.]*

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[2]Memorial, p. 12.

[3]Annexes VI-1 and VI-2 to the Memorial of the Republic of the Congo.

The complainants also relied on Article 689-2 of that Code, which provides:

> "For purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, any person who has committed torture within the meaning of Article 1 of that Convention may be prosecuted and tried in accordance with the provisions of Article 689-1." *[Translation by the Registry]*

The French Republic deposited its instrument of ratification of the New York Convention on 18 February 1986. The Republic of the Congo acceded to that Convention on 30 July 2003[4].

1.5. In its Memorial the Republic of the Congo contends that the document filed by the three non-governmental organizations is a "denunciation" and not a complaint in the sense that that term is used for purposes of French criminal procedure. However, the Applicant fails to explain what, if any, interest in the proceedings initiated by it could attach to that distinction, whose importance it failed to make apparent either in its Application or at the hearings on the request for the indication of a provisional measure[5].

6 1.6. In French law there is indeed a distinction between complaints and denunciations, which has been explained as follows:

> "[a denunciation] is an act whereby a third party, who has not himself been a victim of the offence, brings the attention of the police or judicial authorities to that offence; it thus stands in contrast with a 'complaint', which is a denunciation emanating from the victim himself"[6]. *[Translation by the Registry]*

This distinction does not however involve any consequences in regard to the possible results of these acts. Thus, under Article 40 of the Code of Criminal Procedure, in the version current at the date in question:

> "The *Procureur de la République* receives complaints and denunciations and determines what action should be taken on them. He informs the complainant if the case is discontinued, as well as the victim where the latter has been identified." *[Translation by the Registry]*

Thus, in the case both of a complaint and of a denunciation, the *Procureur de la République* retains a discretion to determine whether it is appropriate to proceed. By contrast, where the complainant decides to file a "civil party" application, action by the public authorities must necessarily be initiated[7]. That is clearly not the situation in the present proceedings, since the three non-governmental organizations did not seek to join a civil suit to what they themselves described as their "complaint"[8]. Hence France cannot see any reason why, at this stage of the proceedings,

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[4]Annex I, see below para. 1.32. As to the effects of that accession for purposes of the present proceedings, see below Chapter 2, paras. 2.64 to 2.74.

[5]The Application and the Congo's oral pleadings refer to "a complaint for crimes against humanity and torture" (see in particular the Application, "III — Statement of facts" and the oral statement of Maître Vergès (CR 2003/20, 28 April 2003, p. 12) and Mr. Decocq (CR 2003/22, 29 April 2003, p. 11).

[6]G. Stefani, G. Levasseur, B. Bouloc, *Procédure pénale*, Dalloz, Paris, 18th ed., 2001, p. 360.

[7]Subject as provided in Article 86, penultimate paragraph. As to civil party proceedings, see Articles 85 *et seq.* of the Code of Criminal Procedure.

[8]However, nine individuals have joined the proceedings as civil complainants since the initiation of the judicial investigation.

the terminology initially adopted by the Congo should be discarded — a terminology moreover espoused by the Court in the Order made by it in the present proceedings on 17 June 2003[9].

§2. Transmission of complaint and preliminary enquiry

1.7. In its Memorial, the Applicant expresses surprise at the "speed", not to say "precipitation", with which the public prosecutor's office is claimed to have reacted, in a "quite unusual way", to the filing of the complaint by the three non-governmental organizations[10]. Such a
7 criticism, even implicit, of the diligence shown by the competent authorities might appear curious; it is in any event unfounded. Far from demonstrating any kind of malicious or threatening intention, the series of acts carried out immediately after the filing of the complaint followed the customary course of French criminal procedure.

1.8. That is in particular the case in regard to transmission of the complaint to the prosecutor at the Meaux *Tribunal de grande instance* by the transmittal order *(soit transmis)* of 7 December 2001. According to the information available to him, including in the complaint itself, the Paris prosecutor noted that only one of the individuals named by the complainants was likely to be present on French territory. General Dabira has a home at Villeparisis (Seine-et-Marne), a municipality falling within the territorial jurisdiction of the Meaux *Tribunal*. Under Article 693 of the Code of Criminal Procedure, the Court having jurisdiction to deal with the matter is that of the place where the accused resides, that of his last known residence or that of the place where he is found. Under that provision, the Paris prosecutor was thus bound, as he did, to transmit the complaint without delay to his counterpart in Meaux.

1.9. The notice of extension of jurisdiction *(réquisitions aux fins d'extension de competence)* issued by the Meaux prosecutor on 8 December 2001 and the preliminary enquiry initiated by him do not require detailed comment, since they, too, are a normal element of criminal procedure. Under the fourth paragraph of Article 18 of the Code of Criminal Procedure, the former is necessary where the prosecutor deems it necessary to interview individuals who are not present within his area of jurisdiction. Such was the case of the two witnesses expressly identified in the notice of extension of jurisdiction. The preliminary enquiry initiated by police officers on the prosecutor's instruction is essential where the latter, as in the present case, is seised of a complaint with no civil party proceedings which involves serious charges. It provides the prosecutor with evidence on the basis of which he may make a determination as to the action to be taken on the complaint. In the present case it was in particular on the basis of the result of that enquiry that the Meaux prosecutor decided to place the matter before the investigating judge by his originating application of 23 January 2002.

8 **§3. The originating application**

1.10. In its statement of facts, the Republic of the Congo devotes little space to the originating application issued on 23 January 2002, which, in its own words, represents *"the key document in the present proceedings before the Court"*[11]. It is clear that that document, in terms both of its purpose and of its content, conforms in all respects with the relevant requirements of the Code of Criminal Procedure.

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[9]Order on the request for a provisional measure, paras. 10, 11 and 13.

[10]Memorial of the Republic of the Congo, p. 10.

[11]*Ibid.*, p. 12; original emphasis.

1.11. Thus it should be recalled that, under Article 79 of the Code, "a judicial investigation is compulsory in the case of serious offences". Hence, once he has determined that the evidence before him justifies further proceedings, the prosecutor must initiate a judicial investigation by informing the investigating judge of the matters alleged to constitute serious offences. Such was the purpose of the originating application issued by a Meaux senior assistant prosecutor *(substitut du procureur)* on 23 January 2002.

1.12. Under Article 80 of the Code of Criminal Procedure, the originating application must state the alleged offences of which the investigating judge is seised. In the present proceedings, the application of 23 January 2002 refers to the following:

"Crimes against humanity: on a massive and systematic scale

— abduction of individuals, followed by their disappearance

— torture or inhumane acts, on ideological grounds and in implementation of a concerted plan against a group of the civilian population."

Article 80 further provides that "the application may be issued against a named or unnamed person". The decision in the present case to initiate the judicial investigation "against X" will be analysed in depth in this Counter-Memorial[12]. For purposes of the present section, it suffices to recall that, in so acting, the Meaux prosecutor indicated that it was not possible for him, in light of the information available to him, to identify and list the individuals responsible for the offences in question. In such circumstances it is for the investigating judge, if he is able, to identify the perpetrators of the offences of which he has been seised.

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Section 2 — Relevant developments in France since 23 January 2002

1.13. At the hearing on the request by the Republic of the Congo for the indication of a provisional measure, the French Republic was able to inform the Court of the main developments in the judicial investigation opened by the originating application of 23 January 2002, as well as of the relevant rules of domestic law[13]. France accordingly does not consider it necessary to go over this ground again, except in order to clarify what the Congo has stated regarding acts taken in relation to General Dabira (§1) and regarding the request to question President Sassou Nguesso (§2). It is also necessary to provide the Court, as is permitted by Article 49 of its Rules, with a statement of "additional facts" having occurred since the Republic of the Congo filed its Memorial, in so far as these may be relevant to the present proceedings (§3).

§1. Proceedings against General Dabira

1.14. As the Applicant's statement of facts demonstrates by its silence, no procedural measure had been taken against Generals Oba and Adoua at the date of filing of the Memorial of the Republic of the Congo (nor, moreover, has any been taken since). The sole target of the judicial investigation conducted by the Meaux investigating judges has been General Dabira[14].

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[12]See below Chapter 3, paras. 3.6 to 3.15.

[13]See in particular Mr. Abraham's oral statement of 28 April 2003 (CR 2003/21, paras. 24-31 and 41-46).

[14]In accordance with Article 83 of the Code of Criminal Procedure, "where the seriousness or the complexity of the case call for it", the President of the Meaux *Tribunal de grande instance* decided on 4 February 2002 to second an additional investigating judge to the judge initially charged with conducting the investigation.

1.15. Under a warrant *(commission rogatoire)* issued by the investigating judges on 16 May 2002, police officers instructed by those judges took General Dabira into custody *(garde à vue)* and examined him as a witness on 23 May 2002. Following that examination, he was summoned to appear as a "legally represented witness" *(témoin assisté)*, that is to say as a person "against whom there is evidence raising a likelihood that he may have participated, as perpetrator
10 or accomplice, in the commission of offences of which the investigating judge is seised"[15]. At the close of this second hearing, on 8 July 2002, the investigating judges informed General Dabira that he would be summoned on 11 September 2002 in order to be placed under judicial examination *(mis en examen)*. Under the first subparagraph of Article 80-1 of the Code of Criminal Procedure,

> "On 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]*

Placing under judicial examination may thus be defined as the act whereby the judge notifies a person that he is officially the subject of proceedings; that person then enjoys defence rights and is entitled, *inter alia*, to be assisted by a lawyer and to have access to the case file.

1.16. On 9 September 2002 General Dabira informed the Chargé d'affaires of the French Embassy in the Congo that he had received "formal instructions from [his] Government" which prevented him from appearing before the Meaux investigating judges. In support of his refusal to obey the summons, General Dabira argued first that he did not have to "justify [his] actions in the exercise of [his] duties before a court other than that of [his] country, unless an international letter of request has been issued"; he also invoked the principle of *non bis in idem*[16].

1.17. Noting this situation, on 16 September 2002 the investigating judge issued a warrant for immediate presentation *(mandat d'amener)* against General Dabira. In execution of that warrant, which is defined in Article 122 of the Code of Criminal Procedure as "an order given by the judge to the law-enforcement authorities forthwith to bring before him the person against whom it has been issued", senior police officers from the Paris Criminal Investigation Unit *(Section de Recherches)* presented themselves on 25 September at the home of General Dabira in Villeparisis, where the latter's wife informed them that her husband was in Brazzaville. On the instructions of the Meaux judge, the officers charged with executing the warrant then entered General Dabira on the register of wanted persons. It should moreover be noted that the "unsuccessful search record" *(procès-verbal de perquisition et de recherches infructueuses)*, drawn up at the time and co-signed
11 by Mrs. Dabira, makes no mention of any kind of disturbance, contrary to what the Republic of the Congo appears to allege in its statement of the facts[17].

1.18. On 15 January 2004 the investigating judge issued an arrest warrant *(mandat d'arrêt)* against General Dabira, charging him with offences of torture and crimes against humanity. Unlike a *mandat d'amener*, an arrest warrant, which instructs the law enforcement authorities to "find the person against whom it is issued and bring him to [a] place of detention"[18], may be circulated internationally. That is what occurred in the case of the warrant issued against General Dabira, which was circulated through Interpol and through the Schengen system (SIS) on 26 March 2004.

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[15]Article 113-2 of the Code of Criminal Procedure. A represented witness is entitled to be assisted by a lawyer; he does not take an oath and cannot be arrested or placed under court supervision *(contrôle judiciaire)*.

[16]Annex II. On the nature and scope of the principle *non bis in idem*, see below Chapter 2, paras. 2.94 to 2.105.

[17]Memorial, p. 16.

[18]Article 122, fifth paragraph, of the Code of Criminal Procedure.

§2. The request to examine President Sassou Nguesso

1.19. As the French Republic has already had occasion to point out[19], no procedural act has been carried out against President Sassou Nguesso. It is true that twice, on 18 December 2002 and 19 February 2003, the Meaux investigating judges expressed the wish to receive his testimony. However, by derogation from the general law, such a request must meet specific conditions, which apply to all holders of public office representing their State at international level and, hence, to foreign heads of States.

1.20. Thus Article 656 of the Code of Criminal Procedure provides:

> "The written deposition of a representative of a foreign power shall be requested [by the investigating judge] through the intermediary of the Minister for Foreign Affairs. If the request is granted [i.e., accepted by the addressee], the deposition shall be taken by the President of the Court of Appeal or by such judge as he shall have delegated." *[Translation by the Registry]*

In other words, a foreign Head of State is in no way obliged to accede to a request to give evidence communicated to him through diplomatic channels. Hence his refusal to testify cannot be subject to penal sanction, by contrast to what is provided in the Criminal Code in relation to the position under the general law[20].

12 1.21. In the present case, as will be shown subsequently[21], the investigating judges were quite correct in basing their request to examine President Sassou Nguesso on Article 656 of the Code of Criminal Procedure. It should moreover be recalled that that request was not transmitted to its addressee.

§3. The course of events since the filing of the Memorial of the Republic of the Congo

1.22. In addition to the issue and international circulation of an arrest warrant against General Dabira[22], the French Republic deems it necessary to inform the Court, in the chronological order of their occurrence, of certain events having taken place since the filing of the Memorial of the Republic of the Congo.

1.23. Acting on a warrant *(commission rogatoire)* from the investigating judges, on 4 February 2004 the Paris Criminal Investigation Unit requested the Ministry of Foreign Affairs to inform it whether certain individuals, including General Oba, "were currently present in France on an official mission for the Republic of the Congo and enjoying diplomatic accreditation on that account". In response to a request from the Ministry, the Embassy of the Republic of the Congo in France stated that, unlike the other individuals named in the police request, General Oba was "temporarily in Paris on State business"[23]. On the basis of that information the Ministry of Foreign

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[19]See for example, Mr. Abraham's oral presentation of 28 April 2003 (CR 2003/21, para. 45).

[20]See Article 434-15-1 of the Criminal Code.

[21]See below Chapter 3, paras. 3.60-3.63.

[22]See above, para. 1.18.

[23]Ann. III.

Affairs informed the Criminal Investigation Unit that General Oba was in France on an official mission and accordingly enjoyed immunity under customary international law[24].

1.24. On 26 March 2004 the investigating judge addressed an international letter of request to the Swiss authorities with a view to securing certain documents and examining a number of representatives of the United Nations High Commission for Refugees, whose seat is at Geneva.

13 1.25. On 8 April 2004, the President of the Examining Chamber *(chambre de l'instruction)* of the Court of Appeal, having been seised by the Meaux prosecutor of an application for the cancellation of certain acts carried out in the course of the investigation, ordered that the judicial investigation opened on 23 January 2002 be suspended until that application had been examined. That decision, which does not terminate the investigation and does not amount to a disseisin of the judges charged with conducting it, will enable the scope of their seisin to be more closely defined.

Section 3 — Subsequent events within the Republic of the Congo

1.26. In its Memorial the Republic of the Congo provides only a partial account of the judicial investigation opened in Brazzaville, on which it nonetheless seeks to found its request for cessation of the criminal proceedings in France (§1). Equally inexplicably, it fails to mention its accession on 30 July 2003 (§2) to the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

§1. The course of the judicial investigation initiated in Brazzaville

1.27. In its statement of facts the Republic of the Congo reproduces the substance of a letter dated 9 September 2002, whereby the *Procureur de la République* of the Brazzaville *Tribunal de grande instance* advises his counterpart in Meaux that it would be expedient to terminate the proceedings initiated in France because of a "serious problem of conflict of jurisdiction between two courts of two sovereign States"[25]. In support of his argument, the prosecutor states that the Congolese Minister of Justice has asked his office "to apply for the opening of a judicial investigation against persons unknown on account of abductions and disappearances". The prosecutor continues:

> "By an originating application of 29 August 2000, the *Procureur de la République* requested the opening of a judicial investigation on the above grounds. The senior investigating judge of the Brazzaville *Tribunal de grande instance* has
> 14 accordingly been seised of the facts and has already carried out a number of acts of investigation."[26]

1.28. The manner in which this document is presented in the Congo's Memorial calls for a number of comments. First, the "detailed letter"[27] cited by the Applicant gives no detail whatever of the nature and result of the "acts of investigation" carried out by the Brazzaville judge. Yet, according to that same document, the letter was sent to the Meaux prosecutor over two years after the date of initiation of a judicial investigation in the Congo. Secondly, there are no grounds for

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[24] Ann. III.

[25] Memorial, p. 15; the letter is reproduced as a "claim to jurisdiction" in Annex 7 to the Congo's Memorial.

[26] *Ibid.*

[27] *Ibid.*, p. 15.

asserting, from a reading of that letter alone, that the Meaux investigating judge has in fact been seised of the "same facts"[28] as his Brazzaville counterpart. Thus the letter of 9 September 2002 refers solely to "abductions and disappearances" and makes no mention of the acts of torture on the basis of which the judicial investigation was opened in Meaux on 23 January 2002[29]. Finally — particularly paradoxically in light of this remarkable lack of precision — the Republic of the Congo makes no mention whatever of a number of relevant documents sent by it to the Court on 21 May 2003[30].

1.29. However, from a reading of those documents it is possible to appreciate — albeit not make good — the deficiencies in the Congo's argument. Thus, even if one includes in the "acts of investigation" the originating applications issued by the Brazzaville prosecutor, it is apparent that, as at 21 May 2003, the Republic of the Congo was able to provide the Court with just three items relating to the judicial investigation conducted on its territory. The first is the "application for a judicial investigation" of 29 August 2000, cited by the Brazzaville prosecutor in his letter to his Meaux counterpart. The second is a document entitled "supplemental application" dated 11 November 2002 and signed by the same prosecutor. The third is a letter of request addressed on 2 October 2002 by the senior Brazzaville investigating judge to the investigating judge of Kinshasa (Democratic Republic of the Congo). Given that these two latter documents post-date the "claim to jurisdiction" addressed to the Meaux prosecutor, the "acts of investigation" allegedly carried out in
15 the Congo between the initiation of the judicial investigation on 29 August 2000 and 9 September 2002 remain a mystery, both to the French Republic and to the Court.

1.30. Moreover, the assertion that the investigating judges of Brazzaville and Meaux had been seised "of the same facts" is not corroborated by a careful examination of the documents provided to the Court by the Republic of the Congo. It is true that the letter of request issued on 2 October 2002 by the senior Brazzaville investigating judge begins with a citation in the following terms: "Having regard to the investigation initiated against X . . ., on account of acts of murder, torture, crimes against humanity, rape". However, that citation does not appear faithfully to reflect the scope of the investigating judge's seisin, pursuant to the originating application of 29 August 2000. Notwithstanding the poor legibility of the copy of this latter document provided by the Republic of the Congo, it is clearly apparent that the word "torture" is used only in connection with a statement of facts not falling within the terms of Law 21-99 of 20 December 1999 Providing Amnesty for Acts of War in Connection with the Civil Wars of 1993-1994, 1997 and 1998-1999. However, there is no mention of torture among the offences in respect of which the judicial investigation is initiated, the application itself being drafted in the following terms: "May it please the senior investigating judge to open an investigation by all legal means against X, against whom there are serious suspicions of rape and murder". Nor is torture mentioned in the document entitled "supplemental application", signed on 11 November 2002 by the Brazzaville prosecutor. Thus that document confines itself to requesting the investigating judge to extend the scope of his investigation to "serious suspicions of violations of professional secrecy and failure to provide assistance to persons in danger".

1.31. Thus, to date, the French Republic is aware of no solid evidence capable of substantiating the proposition that the investigating judges in Brazzaville and Meaux have been

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[28] *Ibid.*

[29] See above, para. 1.12.

[30] Those documents are reproduced in Annex IV of this Counter-Memorial.

16 seised of the same facts, irrespective of such legal conclusions as might drawn from that assertion if it were proven[31].

§2. Accession of the Republic of the Congo to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1.32. In its Memorial, the Republic of the Congo inexplicably fails to mention that on 30 July 2003 it acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984. That accession, which took effect on 29 August 2003, is however undoubtedly of crucial importance for purposes of the present proceedings[32].

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1.33. Before addressing the points of law raised by the arguments presented by the Republic of the Congo in its Application and Memorial, the French Republic wishes to deny in the strongest terms the assertions by the Applicant at the conclusion of its statement of facts. In their bilateral relations with their Congolese counterparts, which have been characterized by friendship and cooperation, the French political authorities have never suggested in any manner whatever that they are "convinced of the correctness of the Congolese position". That assertion, which is unsupported by any factual evidence, is completely untrue.

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[31] See below, Chap. 2, paras. 2.75 ff.

[32] *Ibid.*, paras. 2.64-2.74.

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CHAPTER 2

THE PURPORTED VIOLATION OF THE PRINCIPLE THAT A STATE MAY NOT EXERCISE ITS POWER ON THE TERRITORY OF ANOTHER STATE AND OF THE PRINCIPLE OF SOVEREIGN EQUALITY

2.1. The first ground invoked by the Republic of the Congo in its Memorial concerns France's exercise of its criminal jurisdiction in the proceedings in question. This first ground has two limbs, one concerning the jurisdiction of French courts in regard to crimes against humanity, the other their jurisdiction in regard to torture. The argument under the first limb concerns both French law and general international law. That in the second appears to relate primarily to treaty law. The manner in which the Applicant has thus presented its legal arguments calls for two preliminary observations.

2.2. The first concerns the argument relating to crimes against humanity. The Memorial seeks to show that under French law there is no head of universal jurisdiction for crimes against humanity. France does not dispute that the jurisdiction of the French courts in this case is founded on Article 689-2 of the Code of Criminal Procedure, and hence relates to acts of torture or other cruel, inhuman or degrading treatment or punishment — according to the manner in which such acts are characterized under French law.

2.3. The second observation concerns the section of the Memorial devoted to torture. In this part the Republic of the Congo relies essentially on the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although the Memorial remains silent on the point, this is doubtless a consequence of the fact that the Republic of the Congo is now a party to that Convention. Otherwise, it would be difficult to understand how the Applicant could seek to rely on the provisions of that Convention. The French Government accordingly concludes that the Applicant considers the Convention of 10 December 1984 to be applicable in legal relations between itself and France. That is also the view of the French Government.

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2.4. Out of a concern to provide a complete reply to the legal arguments raised or capable of being raised regarding the exercise by France of its criminal jurisdiction in the proceedings in question, three points will be successively addressed. First, it will be shown that the conduct of the French authorities complies fully with the rules of general international law regarding State jurisdiction (Section 1). Those rules in no way preclude it from exercising its jurisdiction against a foreign national in respect of the offences concerned, including where the acts have taken place abroad, provided that the offender is present on its territory. Moreover, the French State is in any event under an obligation to establish its jurisdiction in respect of such offences pursuant to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, whose provisions are applicable to the present dispute (Section 2). Finally, since one of the points raised by the Memorial of the Republic of the Congo concerns the relationship between the criminal jurisdiction of two or more States in respect of the same acts, it is necessary to consider what — if any — are the applicable rules of international law in this regard, both customary and conventional (Section 3).

Section 1 — France is entitled under general international law to exercise its criminal jurisdiction in the proceedings having given rise to the present dispute

2.5. Under general international law, France is entitled to exercise its jurisdiction in respect of offences such as those alleged against General Dabira, a Congolese national, even where they were committed abroad and against foreigners, provided that the offender is present on its territory. This follows in the first place from a presumption in favour of a State's freedom of action, which means that it is for the Applicant to demonstrate the existence of a contrary rule prohibiting such exercise. These are the true consequences of the principle of sovereign equality (§1). The French Government can further show that, at least in international law, there exists a specific rule allowing a State to establish such jurisdiction in respect of the offences in question (§2).

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§1. The consequences of the principle of sovereign equality

2.6. Contrary to what the applicant State contends, the principle of sovereign equality is in no way opposed to the exercise by France of its jurisdiction in the proceedings the subject-matter of the dispute. The Judgment of the Permanent Court of International Justice in the *Lotus* case, on which the Applicant relies[33], demonstrates on the contrary that States enjoy a broad measure of freedom in this regard, provided that no coercive action is taken outside State territory. It is accordingly for the Applicant to demonstrate the existence of a prohibitive rule of international law restricting that freedom, the corollary of sovereignty.

A. *The rules of international law reflected by the Judgment of the Permanent Court of International Justice in the* Lotus *case*

2.7. The Memorial of the Republic of the Congo wrongly treats the rules of international law applied in the *Lotus* Judgment as simply an application of the territoriality principle, exclusive of any other basis of jurisdiction. The *Lotus* Judgment itself denies this in the following passage:

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."[34]

2.8. The confusion derives from the fact that the Memorial fails to distinguish between a State's executive jurisdiction and its normative jurisdiction, which covers both legislative and judicial jurisdiction. That distinction is however fundamental, inasmuch as it entails differing effects in relation to the operation of the principle of sovereign equality, as the Permanent Court made perfectly clear in its Judgment of 7 September 1927.

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2.9 As regards executive jurisdiction, the territoriality principle does indeed operate in an exclusive manner, that is to say it prohibits the State from any "exercise of its power", namely any coercive act, on the territory of another State[35]. This was also the approach adopted by arbitrator

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[33]Memorial, p. 27.

[34]*P.C.I.J., Lotus* case, *Series A, No. 9*, p. 20.

[35]*P.C.I.J., Lotus* case, *Series A, No. 9*, p. 18.

Max Huber when, in his award of 4 April 1928 in the *Island of Palmas* case, he enunciated the principle that "the State has exclusive competence in regard to its own territory"[36].

2.10. However, in the proceedings in respect of which the Republic of the Congo has seised the International Court of Justice, France has at no time violated this principle of territoriality. Thus it should be emphasized that no exercise of the executive jurisdiction of the French State has taken place on the territory of another State. The only coercive act effectively carried out has been the taking into custody of General Dabira on 23 May 2002 at the Claye-Souilly Gendarmerie after he had been visited by police at Villeparisis, that is to say on French soil. It is moreover the general practice, where proceedings require the taking of certain actions on foreign territory, for the French judicial authorities to have recourse to the classic instruments of judicial co-operation between States, founded on the consent of the requested State and on strict respect for its sovereignty. Such instruments include an international letter of request *(commission rogatoire)* and a request for extradition. The same applies to an arrest warrant *(mandat d'arrêt)*, which, if it is to be executed abroad, must then comply with the procedure for mutual judicial assistance. By contrast, a warrant for immediate presentation *(mandat d'amener)* is enforceable only on the territory of the French Republic.

2.11. As regards normative jurisdiction, the principle of sovereign equality — a reflection of sovereign coexistence — produces completely different effects. In the words of the Permanent Court of International Justice:

> "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[37]

21 This wide measure of discretion on the part of the State, a corollary of its sovereignty, explains the great variety of domestic legal régimes. Only the existence of a rule of international law restricting the legislative and judicial jurisdictions of States could rebut the presumption in favour of State freedom. While aware of the "difficulties resulting from such variety" in practice, the Permanent Court was nonetheless able to give a ruling on an issue of principle in a manner fully compatible with the sovereignty principle[38].

2.12. The remainder of the Judgment deals more specifically with criminal proceedings. Whatever the latter's individual characteristics, the principle just stated is equally applicable in this field. Any challenge to the compatibility with international law of a criminal statute having extraterritorial scope must always be on the basis, whether conventional or customary, of a restrictive rather than a permissive rule[39]. As the Judgment quite clearly points out, "within these limits, [the State's] title to exercise jurisdiction rests in its sovereignty"[40].

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[36] *Reports of International Arbitral Awards*, Vol. II, p. 838.

[37] *P.C.I.J., Series A, No. 9*, p. 19.

[38] *Ibid.*, p. 19.

[39] *Ibid.*, in particular, pp. 20-21.

[40] *Ibid.*, p. 19.

2.13. Doubtless, by comparison with the era when the *Lotus* Judgment was rendered, international law today contains a far greater number of rules specific to criminal matters. Yet it is still necessary to ascertain how these rules operate whenever there is more than one State entitled to exercise its jurisdiction. The issue must be approached in a specific way, in accordance with the method suggested by the Permanent Court itself: "[t]his must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear"[41]. This is also the method recommended in the literature dealing with the issue of State jurisdiction[42]. In the absence of a specific rule, the governing principle in relation to normative
22 jurisdiction is necessarily that of State freedom, since, as the Permanent Court pointed out, "restrictions upon the independence of States cannot . . . be presumed"[43].

2.14. The principles of international law as interpreted by jurisprudence are thus particularly clear. If the existence of a specific rule concerning a given situation cannot be effectively demonstrated, then there is a presumption that a State is complying with international law when, in exercising its legislative and judicial jurisdiction, it limits the coercive effects of such exercise to its own territory.

B. *The Applicant must demonstrate the existence of a prohibitive rule*

2.15. Since the Republic of the Congo is the Applicant in the present case, it is for it to show that there has been a violation of international law attributable to France. To hold otherwise would be to violate the principle *actori incumbit probatio*, whereby the party seeking to put forward a proposition must prove it[44]. That rule applies not only to issues of fact, but also to those of law. It applies with particular force in the present dispute, inasmuch as what has to be demonstrated is the existence of a prohibitive rule, rebutting the presumption that jurisdictional title lies in sovereignty.

2.16. One is bound, however, to note that the Memorial makes scant effort to demonstrate the existence of a rule prohibiting France from exercising its criminal jurisdiction in respect of the offences alleged against General Dabira. The Applicant's few arguments are either couched in extremely general terms and not tied to the particular facts of the case, or else marred by errors of comprehension or interpretation in regard to the texts cited.

2.17. First, a mere reference to the principle of sovereign equality cannot be regarded as a form of proof. Quite apart from its brevity, it adds nothing of substance in terms of legal argument in relation to the law applied at the time of the *Lotus* case. While sovereign equality is indeed cited in Article 2 of the United Nations Charter, in reality it is one of the oldest basic principles of
23 international law, having existed long before the *Lotus* Judgment and being to some extent one of the fundamental premises of international law itself. The Permanent Court's solution simply

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[41] *Ibid.*, p. 21.

[42] The conclusion is that the principle of universality is applicable to international crimes. See, in particular, F. A. Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des cours de l'Académie de droit international*, 1964-I, Vol. 111, p. 82; C. Blakesley, "Extraterritorial Jurisdiction", in M. Cherif Bassiouni (ed.), *International Criminal Law*, Vol. II *(Procedural and Enforcement Mechanisms)*, Transnational Publishers Inc., Ardsley, New York, 2nd ed., 1999, pp. 39-40.

[43] *P.C.I.J., Series A, No. 9*, p. 18. See also *P.C.I.J., Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, P.C.I.J., Series B, No. 4*, pp. 21-24 (Advisory Opinion of 7 February 1923).

[44] J.C. Witenberg, "Onus Probandi devant les juridictions arbitrales", *RGDIP*, 1951, p. 234; Mojtaba Kazazi, *Burden of Proof and Related Issues — A Study on Evidence before International Tribunals*, Kluwer Law International, pp. 137-138 and 221 ff.; H.W.A. Thirlway, "Evidence before International Courts and Tribunals", in R. Bernhard (ed.), *Encyclopedia of Public International Law*, Vol. 1, 1981, p. 59.

represented an application of that principle. It is therefore necessary to show that contemporary international law contains more specific rules in the field of criminal law — rules which would have the effect of restricting the freedom of States in situations like that with which the present dispute is concerned.

2.18. The other arguments relied on by the Republic of the Congo are founded on errors. It has already been explained above how the principle of territoriality is to be understood in terms of the rules of international law[45]. The applicant State contends that, in the *Lotus* Judgment, "the Permanent Court accepted the existence of such a customary rule", that is to say, of a rule which "in the circumstances" *authorized* Turkey to exercise its jurisdiction[46]. That assertion is quite simply wrong. The Congo completely stands the Permanent Court's reasoning on its head. The Court started from the assumption that, in order to restrict Turkey's freedom, there would have to be a specific rule. It concluded that such a rule did not exist, either in conventional law or in customary law. It was thus *in the absence of*, and not *by reason of*, a specific customary rule applicable "in the circumstances" that the Court accepted that Turkey was entitled to exercise its criminal jurisdiction in respect of events arising out of a collision on the high seas between a French vessel and a Turkish vessel, of which Turkish nationals were victims[47].

2.19. Equally mistaken is the interpretation placed by the Republic of the Congo on the separate opinion of Judge Guillaume in the case concerning the *Arrest Warrant of 11 April 2000*[48]. In accordance with the method described above[49], Judge Guillaume focuses the reasoning in his opinion on a search for precedents most closely analogous with the situation in question. That situation consisted in "universal jurisdiction *in absentia*", that is to say, where the offender is not present on the territory of the State exercising its criminal jurisdiction in respect of offences committed abroad by a foreigner. That was precisely, in regard to jurisdiction, the problematic
24 aspect of the Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999, which was being addressed. However, the French statute differs very clearly from the Belgian Law as then applicable, since it requires the presence of the offender on French territory at the time when proceedings are initiated. There is thus no question of "universal jurisdiction *in absentia*". The French statute is moreover cited in the opinion in question as distinguishable from the Belgian Law and is presented in a positive light in that regard[50].

2.20. The Congo even implicitly accepts, in its discussion of the Belgian Law of 16 June 1993[51], that the French statute is fully in conformity with international law. The Belgian statute is criticized because it allowed:

> "public 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"[52].

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[45]Paras. 2.7-2.12.

[46]Memorial, p. 27.

[47]*P.C.I.J., Series A, No. 9*, pp. 22-31, and in particular p. 31: "It must therefore be held that there is no principle of international law . . . which precludes the institution of the criminal proceedings under consideration."

[48]Memorial, p. 27, citing paragraph 4 of President Guillaume's separate opinion.

[49]Para. 2.13.

[50]In paragraph 12 of President Guillaume's separate opinion.

[51]Memorial, pp. 26-27.

[52]Memorial, p. 26 (emphasis added).

Contrary to what is suggested in the Congo's abbreviated language, the International Court of Justice did not, in its Judgment of 14 February 2002 in the case concerning the *Arrest Warrant of 11 April 2000*, "find in favour of the DRC" in regard to the criminal jurisdiction of the Belgian courts[53], since the parties to the dispute had avoided addressing that issue and the Court ruled solely on the question of immunities. It is, however, true that the disputed statute was revised shortly after the Judgment had been rendered, including in relation to jurisdiction. The Congo, after severely criticizing the previous state of the law, concludes its historical analysis of the Belgian legislation in the following terms:

> "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."[54]

25 That is a statement of the various alternative heads of jurisdiction set out in the revised Belgian Law, the Congo's description of which is in fact incomplete, for universal jurisdiction *in absentia* remained possible, subject to various procedural restrictions[55]. Moreover, that Law of April 2003 was further amended by a Law of 7 August 2003[56]. It is true that all of these imprecisions are of relatively minor importance here. The essential point, and a particularly striking one, is that the Republic of the Congo regards the Law of 5 April 2003 as a reversion to the "general law", as long as a link with Belgium can be shown, which link could — according to the very terms of the Memorial — consist in the fact that "the suspected offender . . . is present in Belgium". That "general law" corresponds precisely to the manner in which France contemplates the exercise of its criminal jurisdiction.

2.21. The Republic of the Congo has thus failed to discharge the burden upon it as Applicant of demonstrating the existence of a prohibitive rule. Indeed, so singularly has it failed to do so that one is bound to ask oneself whether it has not in truth accepted the correctness of the French position. For its part, the French Government can readily demonstrate the existence in contemporary international law of a rule which, at its lowest, recognizes its right to exercise its

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[53] *Ibid.*

[54] *Ibid.*, pp. 26-27 (emphasis added).

[55] Law amending the Law of 16 June 1993 concerning the Punishment of Grave Breaches of International Humanitarian Law and Article 144*ter* of the Judicial Code, *Moniteur Belge*, 7 May 2003, Article 7:

> "(L.2003-04-23, Art. 5; Entry into force: 07-05-2003)
>
> 1. Subject to disseisin in the circumstances provided for in the following paragraphs, Belgian courts shall have jurisdiction in respect of the offences specified in this Law, irrespective of the place where such offences shall have been committed and even if the suspected perpetrator thereof is not present in Belgium.
>
> However, public proceedings may be initiated only at the request of the Federal Prosecutor where:
>
> 1. the offence was not committed on the territory of the Kingdom;
> 2. the suspected perpetrator is not Belgian;
> 3. the suspected perpetrator is not present on the territory of the Kingdom, and
> 4. the victim is not Belgian or has not resided in Belgium for at least three years.
>
> . . ."
>
> It accordingly impliedly follows that, in the contrary circumstances, the ordinary criminal procedure is applicable — including, in particular, civil-party proceedings.

[56] Law concerning Grave Breaches of International Humanitarian Law, *Moniteur Belge*, 7 August 2003. Article 18 of that Law (new Art. 12*bis* from the Preliminary Title of the Code of Criminal Procedure) continues to make provision for the exercise of universal jurisdiction under certain conditions.

criminal jurisdiction over that category of offences which includes both torture and crimes against humanity. In the French Government's view, such a demonstration goes beyond what the principles in regard to burden of proof require of it. It will nonetheless do so, thereby manifesting its wish to co-operate in full with the Court in the discharge of its mission to ascertain the rules of law applicable in the present proceedings.

26 **§2. The existence of a rule recognizing the right of a State to establish its criminal jurisdiction in respect of the offences in question**

2.22. The offences involved in the proceedings which are the subject-matter of the present dispute fall within the category of crimes under international law *(delicta juris gentium)*. In consequence, France is undeniably entitled to exercise its jurisdiction in respect of the offences in question, wherever they may have been committed and whatever the nationality of their perpetrator(s) or victim(s). However, the presence on its territory of the individual suspected of having committed such offences is a condition of the existence of such jurisdiction. That condition has been satisfied in the present case.

A. The specific nature of the offences in question

(1) Offences which constitute *delicta juris gentium*

2.23. There are many offences which are today defined in international terms. Over and above those contained in international conventions dealing with criminal matters, it is accepted that certain of them also derive from customary law. Within this corpus, a special place must be reserved for offences which constitute grave violations of the fundamental values of the community of nations and impugn the dignity of the human person. They may be characterized as "international offences by nature"[57]. Their commission is subject to universal condemnation and hence their prosecution is organized on a universal basis. They today include both crimes against humanity and torture and also, in particular, genocide and certain acts of terrorism[58].

2.24. The special character of such offences was noted by the International Court of Justice, in regard to genocide, in its Opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Taking the Convention as the starting point for its reasoning, the Court drew important consequences in terms of general international law:

27 > "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the

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[57]Claude Lombois, *Droit pénal international*, Dalloz, 2nd ed., 1979.

[58]Antonio Cassese, International Criminal Law, Oxford University Press, 2003, pp. 23-25; Victoria Abellan Honrubia, *"La responsabilité internationale de l'individu"*, *RCADI*, 1999, Vol. 180, p. 294.

condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."[59]

2.25. A comparable intention, that is to say an intention linked to the principle of humanity and the purposes of the United Nations, is to be found in the Convention against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment of 10 December 1984. Thus the preamble refers to "recognition of the equal and inalienable rights of all members of the human family", and to "the inherent dignity of the human person"[60]. It links the Convention to the "principles proclaimed in the Charter of the United Nations" and in particular to Article 55 thereof, pursuant to which States are under an obligation "to promote universal respect for, and observance of, human rights and fundamental freedoms"[61]. It refers to a number of previous international instruments having universal scope which place an absolute prohibition on torture: Article 5 of the Universal Declaration of Human Rights; Article 7 of the International Covenant on Civil and Political Rights; the Declaration of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[62]. Moreover, the Convention was adopted by the United Nations General Assembly on 10 December 1984 — the anniversary of the adoption of the Universal Declaration of Human Rights — by consensus[63]. The intention to organize the suppression of torture at international level is beyond doubt, since the articles in the first part deal essentially with penal matters, whether in order to define what can constitute acts of torture or to impose obligations in regard to jurisdiction and criminal procedures[64].

28 2.26. Reflecting the Convention's special nature, the rules prohibiting grave violations of the fundamental rights of the human person create obligations *erga omnes*. In this regard, we would recall the position taken by the Court in its Judgment of 5 February 1970 in the *Barcelona Traction* case:

> "33. . . . In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
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> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[65]

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[59]ICJ, Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23.

[60]Preamble, second and third paragraphs.

[61]Preamble, second and fourth paragraphs.

[62]Preamble, fifth and sixth paragraphs.

[63]General Assembly resolution 39/46.

[64]There are also provisions on administrative measures and victims' rights.

[65]ICJ Judgment of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 32, paras. 33-34.

2.27. Torture clearly represents such a case of grave violation of the "basic rights of the human person". Its extreme stigmatization under contemporary international law is notably apparent in particular from a reading of the conventions for the protection of human rights, the prohibition on torture being always included in those norms from which no derogation may be made[66]. The international community of States thereby manifests its attachment to "elementary considerations of humanity"[67]. Furthermore, international humanitarian law likewise regards acts of torture as a criminal offence where they are committed in the context of an armed conflict and, as the Congo points out[68], in the course of a general or systematic attack on a civilian population. Such acts may then properly be characterized either as a war crime or as a crime against humanity. This confirms — if confirmation were necessary — that the prohibition on torture is not only an obligation *erga omnes*[69], but has also become an intransgressible principle of customary law[70].

29 2.28. It is thus particularly unacceptable to seek, as the Applicant does[71], to draw a distinction according to whether or not the act is committed in connection with the "maintenance of public order". To accept such a reasoning would amount to emptying the rules of international law of all substance, for there is a strong likelihood that the perpetrators of acts of torture or acts constituting a crime against humanity would seek to shelter behind an official duty to "maintain public order", or indeed invoke it in order to commit the offence. Such a "defence" is moreover excluded by Article 1, paragraph 1, of the Convention of 10 December 1984[72].

2.29. The Congo seeks to draw an analogy in this regard between the present case and certain judgments rendered by the Court of Justice of the European Communities[73]. Such a parallel is thoroughly unconvincing. First, it is curious, not to say inappropriate, to compare the free movement of goods in Europe, however eminent that principle may be within the Community legal order, with the prohibition on torture, which forms part of the most basic norms of international law and derives from the necessary respect for human dignity. Moreover, the judgments cited are judgments which represent findings of violations in relation to the conduct of a State, and rulings on the international responsibility of that State, under Community law. That has nothing to do with the proceedings before the French courts which are the subject of the present dispute. These concern the criminal responsibility of certain individuals and not the responsibility of the Republic of the Congo. The fact that such offences may have been committed by officials responsible for the maintenance of order in no way exempts them from responsibility, whether in domestic law or in international law. The rules of international criminal law correctly reflect a notion of individual criminal responsibility which includes public officials. Under the Nuremberg principles, "the official position of defendants . . . shall not be considered as freeing them from responsibility or

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[66]See Articles 4 (2) and 7 of the International Covenant on Civil and Political Rights; Articles 3 and 15 of the European Convention on the Protection of Human Rights and Fundamental Freedoms; Articles 5 and 27 (2) of the American Convention on Human Rights; Article 5 of the African Charter on Human and Peoples' Rights.

[67]ICJ, Judgment of 9 April 1949, *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22.

[68]Memorial, p. 31.

[69]As to which, see International Criminal Tribunal for the former Yugoslavia, Judgment, *Prosecutor* v. *Anto Furundzija*, No. IT-95-17/1-T, 10 December 1998, para. 153.

[70]On this concept and on the criteria applied by the Court, see Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 257, para. 79.

[71]Memorial, pp. 34-35.

[72]"For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

[73]Memorial, pp. 34-35, para. 29.

mitigating punishment"[74]. This principle has been espoused by the General Assembly of the
30 United Nations and by the latter's International Law Commission[75]. It appears in the statutes of international criminal courts as one of the principles governing international criminal responsibility[76], and in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the definition of the offence[77]. It undeniably forms part of general international law.

2.30. In effect, the Memorial of the Republic of the Congo has confused the notion of individual criminal responsibility with that of international immunity. Thus it concludes its argument with an invitation to accord to the "Minister of the Interior, in respect of acts falling within the scope of his duties to maintain public order, an immunity analogous to that accorded, for other reasons, to Ministers for Foreign Affairs"[78]. The issue raised thus relates not to criminal jurisdiction, but to the scope of international immunities. However, the fact that certain individuals enjoy international immunity does not extinguish their responsibility, if only because the State which they represent retains the power to withdraw such immunity. The question of immunities will be examined later on in this Counter-Memorial[79]. Here, we will confine ourselves to noting that the passage ends, curiously, with a claim to immunity restricted to the Minister of the Interior alone, contradicting the overall thrust of the preceding argument[80].

2.31. Thus contemporary international law clearly establishes that the commission of an act of torture is always prohibited, whatever the context, and constitutes an international criminal offence *(delicta juris gentium)*[81]. The rights and obligations attaching to that rule under international law are rights and obligations *erga omnes*[82]. Every State accordingly has a legal interest in securing the punishment of acts of torture.

31 **(2) Offences whose international character justifies their prosecution worldwide**

2.32. The international nature of the offence means that no State can dispute the right of another State to establish its jurisdiction to secure prosecution of the offence, wherever it may have been committed or whatever the nationality of those involved, provided some connection exists with the State of jurisdiction. As the International Court of Justice emphasized in its Opinion of 28 May 1951 in regard to genocide, one of the consequences of the nature of the offence is "the

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[74]Article 7 of the Statute of the International Military Tribunal, annexed to the London Agreement of 8 August 1945. See also Judgment of the International Military Tribunal, *Trials of Major War Criminals Before the International Military Tribunal*, Official Text in the English Language, Vol. I, Official Documents, Nuremberg, 1947, p. 235.

[75]General Assembly resolutions 3 and 95 (I) of 13 February and 11 December 1946; Report of the International Law Commission on the work of its second session, 5 June to 29 July 1950 (Principle III).

[76]Article 7 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia; Article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda; Article 27 of the Statute of the International Criminal Court.

[77]See above, para. 2.28.

[78]Memorial, p. 35.

[79]See below, Chapter 3.

[80]Memorial, pp. 34-35, para. 29.

[81]See also the following paragraphs.

[82]See, *mutatis mutandis*, in relation to genocide, the ICJ Judgment of 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 616, para. 31: "the rights and the obligations enshrined by the Convention are rights and obligations *erga omnes*".

universal character both of the condemnation . . . and of the co-operation required . . ."[83]. The existence of this specific rule of customary international law is apparent from: *(a)* the relationship between treaty law and customary law; *(b)* the laws and practice of States; *(c)* the position of international bodies.

(a) *The relationship between treaty law and customary international law*

2.33. The need for co-operation at international level explains today's high number of international conventions defining offences and recognizing the right, or laying down the obligation, for States to add other heads of jurisdiction to their territorial and personal jurisdiction. In certain cases they call for what the Republic of the Congo, using the language of a major current of doctrine, describes as "universal jurisdiction"[84]. In reality that expression is not to be found in the conventions in question. It is a linguistic short-cut — perhaps a disputable one[85] — used to designate an obligation on States either to extradite or to prosecute offenders present on their territory[86]. Such a provision appears in the following conventions: Geneva Convention of 20 April 1929 for the Suppression of Counterfeiting Currency (Article 9); Convention of 26 June 1936 for the Suppression of the Illicit Traffic In Dangerous Drugs (Article 8); Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft (Article 4); Single Convention of 30 March 1961 on Narcotic Drugs (Article 36); Vienna Convention of 21 February 1971 on Psychotropic Substances (Article 22); Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Article 5); United Nations Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons (Article 3); European Convention of 27 January 1977 on the Suppression of Terrorism (Article 6); OAU Convention of 3 July 1977 for the Elimination of Mercenarism In Africa (Article 8); Vienna Convention of 26 October 1979 on the Physical Protection of Nuclear Material (Article 8); New York Convention of 17 December 1979 Against the Taking of Hostages (Article 5); United Nations Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 5); Inter-American Convention of 9 December 1985 to Prevent and Punish Torture (Article 12); Rome Convention of 10 March 1988 for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Article 6); European Convention of 4 November 1988 on the Protection of the Environment Through Criminal Law (Article 5); United Nations Convention of 4 December 1989 against the Recruitment, Use, Financing and Training of Mercenaries (Article 9); United Nations Convention of 9 December 1994 on the Safety of United Nations and Associated Personnel (Article 3); Convention of 15 December 1997 for the Suppression of Terrorist Bombings (Article 6); International Convention of 9 December 1999 for the Suppression of the Financing of Terrorism (Article 7); United Nations Convention of 15 November 2000 against Transnational Organized Crime (Article 15). The Republic of the Congo is moreover party to a certain number of these instruments, such as the Montreal Convention of 1971, and, recently, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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2.34. The characteristic feature of these conventional instruments is the obligation they impose on States parties to establish within their domestic law the specific heads of jurisdiction for which the instruments provide. However, to include in a treaty an *obligation* on States parties to establish a particular head of jurisdiction implies that they already have the *right* to do so under

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[83]ICJ Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23.

[84]Memorial, pp. 25 ff.

[85]See below, para. 2.52.

[86]In this regard, see below para. 2.54.

general international law. The extremely high number of ratifications and accessions to these conventions demonstrates, moreover, a recognition of the customary nature of the *right* to exercise the jurisdictions in question.

2.35. If this had not been the underlying assumption of the States parties, it would have been necessary to provide for both right and obligation on the basis of reciprocity and to make the exercise of jurisdiction subject to the condition that any other State or States having an interest in
33 the offence *ratione loci* or *ratione personae* were also parties to the convention. However, none of these conventions includes a clause of this kind, for a somewhat obvious reason. To make the exercise of a State's jurisdiction subject to the agreement of the State where the offence has been committed and/or the agreement of the State of nationality of the offender, or even possibly to the agreement of the State of nationality of the victims, would have been contrary to the very purpose of those conventions, which is to encourage the suppression of the most serious kinds of crimes. Moreover, it would hardly have been compatible with the *erga omnes* nature of the obligations of which it is sought to secure respect, since all States have a "legal interest" in having those obligations respected[87]. The absence of any reciprocity provision in regard to heads of jurisdiction thus shows that States' right to establish such heads of jurisdiction was, at the time of adoption of those instruments, regarded as already existing under customary international law. The purpose of those conventions is to transform into an obligation the right derived by every State from general international law.

2.36. Thus, focusing on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, we find the States parties stating in the preamble that they "[d]esir[e] to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world". The expression "throughout the world" clearly excludes the notion of an implied condition of reciprocity. The *travaux préparatoires* also demonstrate the universal character of the Convention, including in its penal aspects:

> "The two important elements of the draft convention were the system of universal jurisdiction and the implementation system. The first was of value in ensuring that persons who had practised torture could be prosecuted no matter where they were. It was important that the international community should assume responsibility for investigating claims of torture and initiating proceedings."[88]

2.37. It should be noted that the Republic of the Congo has never expressed any objection regarding the principles on which the Convention is based. Quite to the contrary, the attitude of the Congolese authorities, prior to the Convention's entry into force for the Republic of the Congo, was always favourable to the Convention. Thus, in the report submitted in 1997 by the Congo to the Human Rights Committee in respect of its obligations under the International Covenant on
34 Civil and Political Rights, it is stated that the new Congolese Constitution of 15 March 1992 now includes a provision prohibiting torture and other cruel, inhuman or degrading treatments or punishments (Art. 16), intended to enable it to accede to the Convention[89]. Subsequently, a Law authorizing accession was adopted by the National Transitional Council and promulgated by the President of the Republic of the Congo on 15 August 1999. Finally, on 30 July 2003, when the present proceedings before the International Court of Justice had already commenced, the Republic of the Congo acceded to the Convention without attaching any reservation or declaration.

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[87]ICJ Judgment of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 32, para. 34.

[88]United Nations Commission on Human Rights, 40th session, doc. E/CN.4/1984/SR.34.

[89]Doc. CCPR/C/63/Add.5, 5 May 1997, para. 20.

(b) *The laws and practice of States*

2.38. Anticipating or following the trend fostered by the above-mentioned conventions, a large number of States have adopted domestic legislation aimed at ensuring the prosecution of international crimes irrespective of their place of commission or of the nationality of those involved. That legislation is not confined, however, to the offences defined in the Conventions, but also covers grave violations of international customary law. That is particularly true of crimes against humanity, a definition of which is now to be found in Article 7 of the Statute of the International Criminal Court. Such legislative activity is evidence not only of a widespread practice, but also of an *opinio juris* on the part of the various legislators to the effect that international law in no way precludes them from adopting rules of this kind in regard to criminal jurisdiction[90]. None of this legislation includes any restriction on the basis of reciprocity.

2.39. One of the oldest examples is the Ethiopian Criminal Code of 1957, whose Article 17, paragraph 1 *(a)*, provides that the Ethiopian courts may prosecute any person having committed abroad "an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered"[91]. That provision thus permits prosecution by reference to international law, both customary and conventional. A similar technique is also used in relation to the principle of universality by El Salvador (Article 10 of the Criminal Code of 1998) and by Georgia (Articles 5 and 6 of the
35 1999 Criminal Code). Other States, such as the Netherlands, enumerate or define the offences concerned in terms of domestic law, or combine the two techniques, like Spain (Article 23-4 of the Organic Law on Judicial Power) or Ghana (Article 56 (4) of the Courts Act). In general terms, it can be seen that all the major legal systems are represented: common law (United Kingdom), Roman-Germanic law (Article 6 of the German Criminal Code), Chinese law (Article 9 of the Chinese New Criminal Code of 1997), Islamic law (Article 8 of the Iranian Criminal Code). It is apparent from the information provided by States to the Committee against Torture that more than 80 States have the power, under their domestic law, to bring prosecutions on account of acts of torture committed abroad by foreigners against foreigners[92].

2.40. Certain State jurisdictions have had occasion to implement the universality principle, in particular in relation to crimes against humanity. The reasoning in such cases is founded on the nature of the offence. This was the approach of the Jerusalem District Court in its judgment of 12 December 1961 in the celebrated *Eichmann* case:

> "The abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself *(delicta juris gentium)*. Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to

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[90]It is noteworthy in this regard that in many cases the national legislator has sought to transpose into domestic law rules of international law relating to the offences in question.

[91]Quoted and commented on by Philippe Graven, *An Introduction to Ethiopian Penal Law (Arts. 1-84 Penal Code)*, Faculty of Law, Haile Selassie I University, Addis Ababa, Oxford University Press, 1965, p. 46.

[92]This paragraph and those which follow are based in particular on Antonio Cassese and Mireille Delmas-Marty (ed.), *Juridictions nationales et crimes internationaux*, Presse universitaires de France, Paris, 2002, vi-673p, and on the Amnesty International study, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, AI index: IOR 53/002-018/2001, September 2001 (CD-rom), based mainly on information provided by States in their periodic reports to the international monitoring bodies set up by treaty. See also the texts and decisions available on the website of the International Committee of the Red Cross: www.icrc.org.

> give effects to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*."[93]

This analysis by the Jerusalem District Court was confirmed by the judgment of 29 May 1962 of the Israel Supreme Court[94].

36 2.41. In the United States a federal appeal court, ruling on a *habeas corpus* petition in respect of extradition proceedings against Mr. John Demjanjuk, had to address the issue of title to jurisdiction based on the principle of universality. In its judgment of 31 October 1985, after citing Section 404 of the Restatement (Third) of the Foreign Relations Law of the United States, which expressly accepts such a title so as to punish "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism", the Court stated:

> "This 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."[95]

2.42. In equally clear terms, the Canadian Supreme Court, in its judgment of 24 March 1994 in the *Finta* case, held that:

> "The principle of universality permitted a state to exercise jurisdiction over criminal acts committed by non-nationals against non-nationals wherever they took place if the offence constituted an attack on the international legal order. In addition, there were acts which were crimes under international law which could be punished by any state which had custody of the accused."[96]

2.43. On the same basis, trials have been held in various countries in the course of the 1990s. In November 1994 a Bosnian Muslim was convicted in Denmark for crimes committed in a Bosnian prison camp[97]. Between 1997 and 1999, four Bosnian Serbs were convicted in Germany for war crimes committed in the former Yugoslavia against Bosnian Muslims[98]. In July 1997 a similar case resulted in an acquittal in Switzerland for lack of evidence[99]. Rwandan nationals have

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[93]English translation in *International Law Reports*, Vol. 36, pp. 275-276, at p. 276 (para. 12).

[94]English translation in *International Law Reports*, Vol. 36, pp. 277-342, at p. 287: "The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."

[95]*International Law Reports*, Vol. 79, p. 545 (*Demjanjuk* v. *Petrovsky*).

[96]*International Law Reports*, Vol. 104, p. 287.

[97]See Rafaelle Maison, "Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes", *European Journal of International Law/Journal européen de droit international*, Vol. 6, No. 2, pp. 260-263.

[98]*Djaji*, *Bayerisches Oberlandesgericht*, judgment of 23 May 1997, 3 StR 20/96; *Jorgi*, *Oberlandesgericht Düsseldorf*, judgment of 6 September 1997, affirmed by the Federal Supreme Court, judgment of 30 April 1999, 3 StR 215/98; *Sokolovi*, *Oberlandesgericht Düsseldorf*, judgment of 29 November 1999, affirmed by the Federal Supreme Court, judgment of 21 February 2001, 3 StR 372/00; *Kuslji*, *Bayerisches Oberlandesgericht*, judgment of 15 December 1999, affirmed by the Federal Supreme Court on 21 February 2001, 3 StR 244/00.

[99]Case concerning *G.*, Military Tribunal, Division 1, Lausanne, 18 April 1997, and Military Tribunal, Cassation, 5 September 1997. See *American Journal of International Law*, 1997, Vol. 92, p. 78.

37 been convicted in Switzerland and in Belgium for crimes committed during the Rwandan genocide[100].

2.44. Although not resulting in a criminal trial, the *Pinochet* case is undoubtedly the most well known in regard to torture. The House of Lords decision of 24 March 1999 in the proceedings conducted in the United Kingdom, where Augusto Pinochet had been staying, constitutes an important precedent[101]. Lord Browne-Wilkinson, summarizing their Lordships' position, stated:

> "the basic proposition common to all, save Lord Goff of Chieveley, is that torture is an international crime over which international law and the parties to the Torture Convention have given universal jurisdiction to all courts wherever the torture occurs".

The majority of six judges all accepted that the special nature of the offence in international law provided a basis of jurisdiction for both the English and the Spanish courts.

2.45. The Dutch courts have also addressed the issue of torture, in the *Bouterse* case[102]. The Amsterdam Court of Appeal held that in 1982, when the offences had been committed in Surinam, customary international law accorded States competence to exercise "extraterritorial (universal) jurisdiction".

(c) *The position of international bodies*

2.46. The United Nations Security Council showed itself favourable to the approach *aut dedere aut judicare*, urging States to adopt it in the context of the fight against terrorism. Thus in resolution 1333 (2000) the Council recalls "the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists";
38 it further reaffirms that "the suppression of international terrorism is essential for the maintenance of international peace and security". In resolution 1373 (2001), the Council "calls upon all States" to "[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999", which includes such a provision.

2.47. In relation to the violation of the fundamental rights of the human person, the United Nations has set an example. On 6 June 2000, the Special Representative of the United Nations Secretary-General, Head of the United Nations Transitional Administration in East Timor, issued an Order setting up special judicial bodies ("panels") with "universal jurisdiction" to try certain categories of serious offences[103]. The offences in question are genocide, crimes against humanity,

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[100]For Switzerland: *Fugence Niyonteze*, Military Tribunal, Division 2, Lausanne, judgment of 30 April 1999, as amended by Military Appeal Tribunal of 26 May 1999, appeal affirmed by Cassation Tribunal, 27 April 2001. For Belgium: case of *Higanirio, Ntezimana, Mukangango and Kizito*, *Cour d'assises de l'arrondissement administrative de Bruxelles-Capitale*, 8 June 2001.

[101]House of Lords (committee of seven judges), *Regina* v. *Bartle and the Commissioner for the Metropolis and Others* Ex Parte *Pinochet* — *Regina* v. *Evans and Another and the Commissioner of Police and Others* Ex Parte *Pinochet*, judgment of 24 March 1999.

[102]Amsterdam Court of Appeal, 5th Chamber, 20 November 2000, applications R 97/163/12SV and R 97/176/12Sv. However the Supreme Court, by decision of 18 September 2001, held that the offender must be present on Dutch territory. See below, para. 2.53.

[103]Order of 6 June 2000, Doc. UNTAET/REG/2000/15, Sections. 2.1. and 2.2.

war crimes, torture[104]. While these panels are for practical purposes of a domestic nature, their constituent act is formally of an international character, since it was adopted by a subsidiary organ of the United Nations on the basis of Security Council resolution 1272 (1999).

2.48. Mention should also be made of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. Thus, in its Judgment of 10 December 1998 in the *Furundzija* case, a Trial Chamber of the Tribunal held in quite clear terms in favour of the universal character of the right to prosecute torture:

> "Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to
> 39 prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, 'it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission'."[105]

The legal force of the prohibition of torture is an issue which we consider it unnecessary for the International Court of Justice to address, since it is clear that this is an intransgressible principle of customary international law[106], confirming that prosecution of the offence must be organized on an international basis. It places torture on an equal footing in terms of reprehensibility with grave breaches of international humanitarian law, which may be defined as violations of humanitarian law that entail a right of States to establish their jurisdiction wherever the offence may have been committed and irrespective of the nationality of the offenders.

2.49. In conclusion, both international law and many domestic systems accept the proposition that the international character of certain offences means that every State has the right to secure their prosecution. This is, however, generally subject to one restriction: the presence of the offender on the territory of the State exercising its so-called "universal" jurisdiction. That restriction represents a balance between the need to respect State sovereignty as regards criminal jurisdiction and the need for effective and coherent international co-operation. It also allows consideration to be given to the question of the existence of a specific connection with the prosecuting State.

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[104]The offences are defined in Sections 4 to 7 of Order 2000/15.

[105]ICTY, Judgment, *Prosecutor* v. *Anto Furundzija*, No. IT-95-17/1-T, 10 December 1998, para. 156. The Judgment was affirmed on appeal (ICTY, Judgment, *Prosecutor* v. *Anto Furundzija*, No. IT-95-17/1-A, 21 July 2000).

[106]See above, para. 2.27.

B. The requirement that the offender must be present on the territory of the prosecuting State

2.50. In the absence of a jurisdictional title based on the place of commission of the offence (territorial jurisdiction) or on the nationality of those involved (personal jurisdiction), or on a violation of the State's specific interests (*in rem* jurisdiction), the presence of the offender creates a link with the prosecuting State which justifies the exercise of its criminal jurisdiction.

40 2.51. It would indeed be strange if international law prevented a State from prosecuting an individual present on its own territory in respect of whom there were serious grounds for believing that he had committed a crime under international law. A violation of the fundamental values of the community of States represents, by definition, a disturbance to the public order of each of its component States. This is particularly so where the State has defined the offence both, jointly with its peers, in the international order and in its own domestic legal order. In the present case, the acts of which General Dabira is accused would, if they were proved, constitute offences under both international law and French law. That is the basis of the jurisdiction exercised by the French judicial authorities in this case.

2.52. In view of this element connecting the case to French territory, it is not certain that the expression "universal jurisdiction" is the most appropriate term, even if it is more convenient to use[107]. In their Opinion appended to the Judgment of 14 February 2002 in the case concerning the *Arrest Warrant of 11 April 2000*, some of the Court's judges considered that this was not a case of universal jurisdiction *stricto sensu*, stating in this regard:

> "By the loose use of language the latter has come to be referred to as 'universal jurisdiction', though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere."[108]

This analysis is in line with that adopted in the literature, which prefers to speak of a jurisdictional title based on the *forum deprehensionis*, and insists on the presence of the offender on the territory[109]. The expression "universal jurisdiction" should logically be reserved for a jurisdictional title established in the absence of any connection with the forum State, in particular that constituted by the presence of the offender on its territory. True universal jurisdiction is an absolute and unconditional jurisdiction. However that situation in no way corresponds to the circumstances of the present dispute, since the French statute requires the presence of the offender on the territory of the Republic as a condition enabling the French courts to prosecute acts constituting international
41 offences committed abroad by foreigners against foreigners. In so doing, French law follows the "general law", to adopt the language used by the Republic of the Congo in its Memorial[110].

2.53. If we analyse the practice of States, it can readily be seen that the condition of presence on the territory is always required, either because it is expressly imposed by law, or because it is asserted by the courts. Thus, in the *Bouterse* case, the Dutch Supreme Court held that the offender

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[107]For convenience, we shall hereafter use the expression "universal jurisdiction" in relation to the French statute, but always in quotation marks.

[108]Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 41.

[109]Henri Donnedieu de Vabres, *Les principes modernes du droit pénal international*, Sirey, Paris, 1928, pp. 135-136; M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes — Historical Perspectives and Contemporary Practices", *Virginia Journal of International Law*, Vol. 42, No. 1, Fall 2001, pp. 136-137.

[110]See above, para. 2.20.

must be present on the territory in order for the Dutch statute to be applicable[111]. In this regard, the Belgian Law of 16 June 1993 constituted an exception, since it permitted prosecution *in absentia*, a situation to which the Law of August 2003 put an end.

2.54. Above all, this condition appears in international conventions providing for the prosecution of serious violations of international law through the medium of the principle *aut dedere aut prosequi*. That clearly constitutes a significant technical refinement, in that it both clarifies States' jurisdictional titles and renders international co-operation more effective. If a State has a choice between *extraditing* or prosecuting, this implies that, whichever alternative it chooses, it is potentially in a position where it may be seised of an extradition request from another State, and hence that the suspected individual is present on its territory. There are different ways in which this choice of alternatives may be exercised according to the various conventional régimes[112]. However, in any event, the principle presupposes: (i) that the offender is present on the territory of the State which has undertaken to extradite or prosecute him; (ii) that that State has in any case a title of criminal jurisdiction at the time when the offender is found on its territory, without which there would be no choice of alternatives.

2.55. The French statute is fully compatible with the trend of international conventions and of comparable State practice: it does not provide for absolute universal jurisdiction. Article 689-1 of the Code of Criminal Procedure provides that the perpetrator must be present on French territory in order for the French judicial authorities to have jurisdiction to initiate proceedings, in cases where the acts were committed abroad and neither the perpetrator nor the victims are of French nationality. That provision was fully complied with in the case presently before the Court, since
42 General Dabira, who has a home in France, was staying there at the time when the investigating judge was seised of the matter.

2.56. Thus the Republic of the Congo has no basis for challenging the attitude of the French judicial authorities in light of general international law. That said, and irrespective of the right accorded to France by international custom, France could still rely on the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which require it to establish its jurisdiction where the perpetrator of an act of torture is present on its territory.

Section 2 — In any event, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, to which the Congo is party, requires France to establish the jurisdiction of its criminal courts in respect of situations such as that having given rise to the present dispute

2.57. The Convention is applicable to the present dispute, as the Applicant itself admits. Otherwise, it would be difficult to see why so much space would be devoted to it in the Memorial[113]. It is accordingly necessary to set out precisely the resultant rights and obligations in regard to criminal jurisdiction for States which, like France, are parties to the Convention (§1). Moreover, the Congo's accession to the Convention represents a new development in relation to the preceding phases of the proceedings before the International Court of Justice; it is necessary to examine the effects of this (§2).

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[111] See above, para. 2.45.

[112] For torture, see below, paras. 78-79.

[113] Memorial, pp. 30-33.

43 **§1. The aim of the Convention's provisions is to increase the effectiveness worldwide of the fight against torture and other cruel, inhuman or degrading treatment or punishment**

2.58. Torture as envisaged by the Convention is a fundamental violation of individual rights, the commission or attempted commission of which engenders individual criminal responsibility. Under Article 4, States parties shall ensure that "all acts of torture" are offences under their criminal law. The provisions of the Convention dealing with States' jurisdictional titles are to be read in relation to the offences referred to in that Article.

2.59. The principal object of the Convention is to establish States' titles of jurisdiction with a view effectively to combating torture. Under Article 5 (1), each State Party is required to establish its jurisdiction when the offence has been committed "in any territory under its jurisdiction or on board a ship or aircraft registered in that State" (Article 5 (1) *(a)*), or when the alleged offender is a national of that State (Article 5 (1) *(b)*). Where the victim is a national of that State, the latter may establish its jurisdiction (Article 5 (1) *(c)*). A further obligation is set out in Article 5 (2), which is directly relevant to the case concerned by the present dispute before the Court, and applies to the situation where "the alleged offender is present in any territory under [the State's] jurisdiction and it does not extradite him". This is not a case of unconditional universal jurisdiction, but of a régime of the kind *aut dedere aut prosequi* which the State is required to provide for in its domestic law. The alternative of *aut prosequi* requires provision to be made in domestic law for criminal jurisdiction in respect of acts of torture committed by foreigners, abroad, against foreigners, where the offender is present on any territory under the jurisdiction of the State Party. France complies with this obligation through Articles 689, 689-1 and 689-2 of its Code of Criminal Procedure.

2.60. It should further be noted that the Convention against Torture includes a provision permitting States to go beyond the jurisdictional titles envisaged in paragraphs 1 and 2 of Article 5 and recognizing their freedom in regard to jurisdiction. Under Article 5 (3), "this Convention does
44 not exclude any criminal jurisdiction exercised in accordance with internal law". Such a provision is indeed a classic one and appears in other criminal conventions[114].

2.61. The requirement of extradition or prosecution clearly represents a key element of the prosecution régime. And that obligation is notably strengthened by Article 7 (1), which lays down detailed rules for the implementation of Article 5. The State where the alleged perpetrator of an act of torture is "found" is required to submit the case "to its competent authorities for the purpose of prosecution", if it does not extradite him. That provision is particularly noteworthy, inasmuch as it emphasizes the role of the State on whose territory the offender is found. It highlights the principal purpose of the Convention, which is to enable torture to be effectively prosecuted by preventing its perpetrators from seeking refuge on another territory.

2.62. Furthermore, Article 7 (2) provides for States to have recourse to their internal procedures applicable to "any ordinary offence of a serious nature" for purposes of exercising the titles of jurisdiction provided for or authorized under Article 5. In the present case, the proceedings have been conducted in accordance with the provisions of the French Code of Criminal Procedure.

2.63. Every State Party is bound by its obligations under the Convention, whether in relation to Article 5 or to Article 7, and irrespective of whether other States potentially having jurisdiction in the same case are parties to the Convention. That accords both with the logic of individual

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[114] See *inter alia* Article 3 (3) of the Tokyo Convention of 14 September 1963 on Offences and Certain Other Acts Committed onboard Aircraft.

criminal responsibility and with the object of the Convention, and no provision of the Convention or anything in the *travaux préparatoires* suggests otherwise. France, in exercising its jurisdiction in the proceedings subject-matter of the dispute before the International Court of Justice, has thus acted in pursuance of the rights and obligations deriving from the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. And that is confirmed by the fact that the Convention also applies in mutual relations between France and the Republic of the Congo as a result of the latter's accession thereto.

45 **§2. The accession of the Republic of the Congo to the Convention**

2.64. The instrument whereby the Republic of the Congo acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was deposited on 30 July 2003 with the United Nations Secretary-General. Pursuant to its Article 27 (2), the Convention entered into force for the Republic of the Congo on 29 August 2003. Accession took immediate effect on that date, rendering it applicable to the present dispute. Moreover, it is clear from its terms that the Convention has an effect *ratione temporis* which covers the entirety of the proceedings conducted in France. Thus the Republic of the Congo cannot challenge France's exercise of a criminal jurisdiction which is fully compatible with the rights and obligations deriving from a convention by which the Congo is likewise bound.

A. The immediate effect of accession

2.65. The law of treaties provides that a treaty takes effect in relation to a State party on the date when it enters into force for that State[115]. The Convention of 10 December 1984 contains a specific provision in this regard, Article 27 (2), which provides that it shall enter into force for a State "on the thirtieth day after the date of the deposit of its . . . instrument of ratification or accession". The Congo's accession thus took effect on 29 August 2003.

2.66. However, the proceedings initiated in France which are the subject-matter of the present dispute before the International Court of Justice have continued beyond 29 August 2003 and are still continuing. The presence of General Dabira on French territory at the time when the prosecution was initiated enabled the investigating judge to be properly seised of the case, and his jurisdiction remains established. The French judicial authorities have thus initiated a prosecution for an ordinary offence of a serious nature, in accordance with Article 7 (2) of the Convention[116]. The investigation conducted by the French investigating judge continues to relate to acts of torture on Congolese territory and continues to rely on a jurisdictional title recognized in the Convention
46 of 10 December 1984. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment thus forms part of the law applicable to the dispute.

2.67. However, this clear finding faces a potential challenge as a result of the biased manner in which the Applicant presents the grounds of its Application, which are claimed to depend on a preliminary "point of law"[117]. Thus the Memorial seeks to reduce the prosecution to the prosecutor's originating application *(réquisitoire introductif)*[118]. It is contended that the prosecution is frozen at a precise moment in time — a snapshot, as it were; whereas, by definition,

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[115]Article 24 (3) of the Vienna Convention on the Law of Treaties of 23 May 1969, which on this point reflects customary law.

[116]See above para. 2.62.

[117]Memorial, p. 21.

[118]Memorial, pp. 21-25.

any legal proceeding is an ongoing process, with no restriction as to its duration. Moreover, this in no way corresponds to the terms in which the dispute was submitted to the International Court of Justice by the Applicant itself in the Application filed in the Registry on 9 December 2002. The subject-matter of the dispute, as set out in the Application's first ground, relates to a title of criminal jurisdiction under international law, and not to a specific procedural act. We would recall the terms of the Application, namely that France had:

> "[violated] 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,
>
> 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".

It is clearly the jurisdictional title, or "power" of the State, which is the subject-matter of the dispute. Moreover, in the section following that entitled "Nature and scope of the originating Application of 23 January 2002", the Memorial consistently presents the first ground as a challenge to "universal jurisdiction"[119].

2.68. This case involves a challenge to the jurisdiction exercised by the French courts in certain proceedings. It follows that the proceedings conducted in France must be considered in their entirety. In that sense, the legal issue involved is identical to that addressed by the Permanent
47 Court of International Justice in the *Lotus* case, where the Court stated the following:

> "The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings — such as his being put to trial, his arrest his detention pending trial or the judgment given by the Criminal Court of Stamboul — but of the very fact of the Turkish Courts exercising criminal jurisdiction."[120]

If each procedural act had to be considered in isolation, this would no longer be a dispute between two States over the exercise of State jurisdictions, but either a dispute concerning the application of French law by the French courts, or else a dispute relating to the exercise by the Republic of the Congo of its right of diplomatic protection in favour of one of its nationals. In the latter case, it will be recalled that the procedure is only at the investigation stage, and that local remedies have not been exhausted by General Dabira. The Republic of the Congo moreover admits as much[121].

2.69. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must therefore be so applied as to determine the rights and obligations of the Parties to the dispute before the International Court of Justice; it is, moreover, clear from its terms that the Convention has an effect *ratione temporis* which covers the entirety of the acts in question.

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[119]See the headings to paragraphs 20 (p. 25), 21 (p. 26), 21 (*sic*, p. 27), 23 (p. 28), 24 (p. 30), 27 (p. 33).

[120]*P.C.I.J., Series A, No. 9*, p. 12.

[121]Memorial, p. 25.

B. The effect of the Convention *ratione temporis*

2.70. A clear distinction must be drawn between the question of the date when a treaty enters into force and that of its effects over time[122]. The former relates to the treaty *qua* legal act, the latter to its substance *qua* legal norm. Article 28 of the Vienna Convention on the Law of Treaties, entitled "Non-Retroactivity of Treaties", concerns this second aspect and raises a presumption regarding the effects of a treaty *ratione temporis*. However, it concerns only certain of the possible legal situations:

48 "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party."

2.71. The question of law raised in the present dispute in regard to the first ground, namely the jurisdiction of the French judicial authorities, constitutes neither an act or fact precisely situated in time, nor a situation which has "ceased to exist": it is a continuous, ongoing situation[123]. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment itself contains no provision on the matter. It is moreover accepted that retroactivity — in the present case more apparent than real, since we are dealing here with an immediate effect upon ongoing proceedings which arose as soon as the Convention entered into force — can follow implicitly from the object of a treaty. The Judgment of 30 August 1924 of the Permanent Court of International Justice in the case of the *Mavrommatis Palestine Concessions* is a well-known precedent in this regard[124]. Where a treaty is silent as to its effects on situations which are ongoing at the time of its entry into force, then regard must be had to its object and purpose.

2.72. The purpose of the Convention of 10 December 1984 is to protect the "inherent dignity of the human person" and, to that end, "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world"[125]. The Convention's overall régime must be interpreted in light of that objective. The reasoning followed by the International Court of Justice in its Opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* may serve as a guide in this regard:

"The Convention was manifestly adopted for a purely humanitarian and civilizing purpose . . . In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance
49 between rights and duties. The high ideals which inspired the Convention provide, by

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[122]See *inter alia* Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. I, Grotius Publications Ltd., 1986 (republished, Cambridge University Press, 1993), p. 388.

[123]On the different cases, see Paul Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public (Problèmes de droit intertemporel ou de droit transitoire), LGDJ*, 1970, pp. 289 ff; Max Sorensen, "Le problème du droit dit intertemporel dans l'ordre international", Annuaire de l'Institut de droit international, 1973, Vol. 55, pp. 35-47.

[124]*P.C.I.J., Series A, No. 2*, p. 35.

[125]Preamble, third and seventh recitals.

virtue of the common will of the parties, the foundation and measure of all its provisions."[126]

For these same reasons, the Court has jurisdiction here to apply the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the entirety of the acts which are the subject of the present dispute.

2.73. Furthermore, the relevant provisions of the Convention relate to a question of judicial jurisdiction. Such provisions inherently imply an effect *ratione temporis* covering the entirety of proceedings which are ongoing at the time of the Convention's entry into force. The Permanent Court of International Justice held as a matter of principle that its own jurisdiction was established in relation to disputes concerning facts prior to the entry into force of the instrument conferring such jurisdiction[127]. One cannot see why the effect *ratione temporis* of an international convention conferring a jurisdictional title should be different where that title is exercised by a domestic court rather than an international one. It should further be noted that it is generally accepted in the case of extradition treaties that these are applicable to proceedings in respect of offences committed before their entry into force[128]. This is particularly pertinent in regard to jurisdiction deriving from Article 5 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, since the requirement *aut dedere aut prosequi* presupposes a close connection between jurisdiction and extradition.

2.74. The Convention of 10 December 1984 is accordingly applicable to legal relations between France and the Republic of the Congo, thus further confirming the jurisdictional title of the French judicial authorities under conventional law. It should, however, be recalled that, even in the absence of an *obligation* in this regard, France in any event has the *right* to establish its jurisdiction in such a situation pursuant to general international law.

50 **Section 3 – The criminal proceedings initiated in France are in breach neither of a purported principle of subsidiarity nor of the rule *non bis in idem***

2.75. Paragraph 27 of the Memorial of the Republic of the Congo seeks to address — in its own words — the "subsidiarity of universal jurisdiction in respect of torture", whilst paragraph 28 is entitled "Failure by the French judicial authority to respect the principle of subsidiarity". In the first of these two paragraphs, the argument of the Republic of the Congo refers in summary fashion to what it calls "the mechanism established by the Convention against Torture"; in the following paragraph, it criticizes the French judicial authorities for having failed to take account of the proceedings initiated before the Brazzaville *Tribunal de première instance*, of which they had been informed in a letter of 9 September 2002.

The Applicant thus confuses two distinct, albeit often related, issues: on the one hand that of subsidiarity, a characteristic often attached in the literature to the exercise of "universal jurisdiction"; on the other, that of the possible effect of the rule *non bis in idem*, which prohibits the duplication of proceedings in respect of the same facts.

As these are in reality two quite distinct issues, each must be addressed in its own turn.

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[126]ICJ, Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23.

[127]PCIJ, *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2*, p. 35; PCIJ, *Phosphates in Morocco, P.C.I.J., Series A/B, No. 77*, p. 24.

[128]Paul Tavernier, *op. cit.*, pp. 187-189; Max Sorensen, *op. cit.*, p. 42.

§1. "Universal jurisdiction" is not necessarily of a subsidiary nature

2.76. Contrary to what the very brief paragraph 27 of the Congolese Memorial suggests, the question of the "subsidiarity" attaching to "universal jurisdiction" is not confined to an examination of the New York Convention of 1984 against Torture. The extent to which that Convention represents a *lex specialis* has to be determined, in particular as regards its significance and scope, on the basis of what it adds to the already existing relevant rules of general international law. Thus, here again, we have to take as our starting-point the position under customary international law, in order then to consider how this has been supplemented or modified by the provisions of the 1984 Convention.

51 **A. "Subsidiarity" and customary international law**

2.77. As has been shown in the preceding section of this chapter, customary law in regard to the exercise of judicial jurisdiction in respect of offences committed abroad by foreigners against foreigners contains no prohibition of principle. The matter has to be viewed in terms simply of rights or powers, rather than of an obligation to establish or exercise such jurisdiction. As we have seen, this is shown in particular by the jurisprudence of the Permanent Court of International Justice in the *Lotus* case[129]: in the case of normative jurisdiction as opposed to executive jurisdiction, the Judgment showed that every State has "a wide measure of discretion which is only limited in certain cases by prohibitive rules"[130]: only persons not enjoying immunity from jurisdiction by reason of their status may be prosecuted by a State other than that of their nationality, a condition fully satisfied by France in the present case[131]; prosecution on the basis of "universal jurisdiction" is possible only in respect of certain types of offence, sufficiently serious to impugn the rights and interests accorded to and by all States, one such offence being the practice of torture; finally, the existence of a *sufficient connecting factor* between the prosecuting State and the suspected offender must be established. The *presence* of the suspected offender on the territory of the State at the time when it commences prosecution against that individual constitutes a sufficient connection in this regard. That condition was satisfied at the time when the prosecution was initiated against General Dabira.

2.78. It follows that "universal jurisdiction" cannot generally operate as readily as the jurisdiction exercisable by the State on whose territory the offence has been committed, or by the State of nationality of the offender, both of which can act unconditionally.

Although, under general international law, "universal jurisdiction" is conditional, it is nonetheless not "supplemental". Thus, if the conditions precedent are complied with, as is the case here, general international law permits the *concurrent* exercise of judicial jurisdiction by two States
52 in respect of the *same* individuals having committed the *same* offences. That applies, for example, in the case of concurrent prosecutions by the State of the *locus delicti commissi* or active nationality on the one hand and, on the other, prosecution by a different State, which need not necessarily be that of passive nationality.

2.79. How then should the exercise of concurrent jurisdictions best be organized? We are bound to observe here that general international law, addressing the issue in terms of the *right or power to exercise judicial jurisdiction* and not of obligation, contains no rule necessarily or automatically, for example, according *priority* to the jurisdiction of the State where the offence was

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[129] See above, paras. 2.7-2.14.

[130] *P.C.I.J., Series A, No. 9*, p. 19.

[131] See below, paras. 3.33-3.47.

committed over that of another State whose actions satisfy the requirements imposed by positive law.

In this sense it can be said that there is nothing in customary international law from which there might be derived some "principle of subsidiarity" over and above the conditions already described for the exercise of "universal jurisdiction".

2.80. In particular, one would seek in vain a solid basis in customary law for any form of rule lending support for the adage *primo dedere secundo prosequi*. It is indeed notably because of this lack of any rule governing relations between criminal jurisdictions exercised concurrently in different countries that a dense network of bilateral or multilateral treaties has grown up governing the conditions for extradition of an individual from one country to another. Moreover, the subject of extradition is not governed solely by treaty law. It also derives from the combined effects of the respective domestic laws of the States concerned[132].

2.81. In international practice, at most all that can be said, in terms of fact rather than law, is the following: the State where the offence has been committed or the State of the offender's nationality is often, in practice, in a better position successfully to prosecute an individual whom it has reason to suspect of having committed a serious offence of the type previously described. That applies particularly to the gathering of evidence.

It is this question of ease of prosecution which explains why States other than the State of the *locus delicti* or that of active nationality often prefer to extradite individuals apprehended on their
53 territory to one of those States rather than to prosecute them in their own courts.

There is, however, no obligation to do so; at least under customary law, that is to say, in the absence of a treaty obligation, a State is perfectly entitled to refuse to extradite, without thereby committing a wrongful act. The practice in this regard is extremely abundant. Thus the United Kingdom, for example, frequently refuses, in the absence of an extradition treaty with a given State, to accede to a request from the latter for the extradition of a specific individual. Yet no one has ever dreamt of characterizing such a practice as a breach of customary international law. It would be for the Republic of the Congo to demonstrate the contrary as regards the current position under international law; yet, in its Memorial, it does not even venture to tell us what customary law has to say on the subject. Thus the only requirements governing a State's exercise of its "universal jurisdiction" are those recalled above[133].

In other words, in general international law we must not confuse the issue of the *conditions* governing a prosecution based on "universal jurisdiction" with that of its *subsidiarity*.

2.82. A quite separate question, wrongly confused in the Congo's Memorial with the preceding one, is the matter of whether and to what extent the *non bis in idem* rule applies in a given situation. However, as we shall see later, in the second part of the present section, that question is not one of priorities as between competing jurisdictions but concerns the principle of substantive law whereby offenders cannot be tried twice for the same acts.

2.83. Remaining with the specific examination of the question of the "subsidiarity" of "universal jurisdiction", we must now turn to treaty law, and specifically to that constituted by the

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[132]See *inter alia* G. Gilbert, *Aspects of Extradition Law*, Nijhoff, Dordrecht, 1991, XIII-282 p.; Y. Dinstein, "Some Reflections on Extradition", *German Yearbook of International Law*, 1993, pp. 46-59.

[133]See above, same section, §3.

New York Convention of 1984, in order to ascertain whether, contrary to customary law, that Convention attaches a condition of "subsidiarity" to the "universal jurisdiction" which it requires States parties to establish in relation to that exercisable unconditionally by the State of the *locus delicti* or the State of the offender's nationality.

54 **B. "Subsidiarity" and the Convention against Torture**

2.84. As regards the exercise of judicial jurisdictions, we have already seen above[134] that the provision establishing the key obligation is to be found in Article 5. That Article first provides that each State party shall take the measures necessary to establish its jurisdiction in respect of acts of torture committed in two categories of situation, which may be summarized as follows: *(a)* when the offence is committed on its territory or in any area or means of transport under its jurisdiction; *(b)* when the alleged offender is its own national (or if it considers it appropriate, when the victim of such acts is its national). This does not, however, mean that a State party does not have jurisdiction in respect of offences committed outside its territory, or where the alleged offender is not its national. In such cases, customary law continues to apply; and, as we have seen, it permits prosecution subject to the conditions previously indicated.

Moreover there is a specific provision in the Convention which obliges States parties to establish the "universal jurisdiction" of their courts. Article 5 (2) merits particular attention in this regard. That provision requires every State party to take

> "such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present and in any territory under its jurisdiction and it does not extradite him . . ."

2.85. In regard to Article 5 of the Convention against Torture, the Republic of the Congo attempts to set up a legal argument. According to its Memorial, it is in that Article, and specifically in its first paragraph, that we will find evidence of the "subsidiary" nature of "universal jurisdiction" over the offences covered by the Convention. The Memorial expresses this as follows:

> "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."[135]

55 2.86. The Applicant's Memorial impliedly refers to Article 7 of the Convention against Torture. For it is that Article which defines the conditions for the exercise of the rule *aut dedere aut prosequi*, which, as we know, is to be found in a number of conventions dealing with the

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[134]See preceding section, §1.

[135]Memorial of the Republic of the Congo, p. 33, para. 27.

suppression of various offences affecting the interests common to all States. A number of those instruments, although not all, concern the fight against various forms of terrorism[136].

It is unnecessary for us to involve ourselves here in an abstract reflection on the question whether provision of a choice of alternatives by definition establishes parity between the two alternatives or whether, in certain cases, it could be considered to go further and lay down an order of priority. Certain considerations might doubtless suggest that some of the conventions providing for such a régime were conceived with the implicit notion of conceding priority to the State of the *locus delicti* or the State of active nationality.

2.87. However, in the present case we must focus our attention solely on the 1984 Convention against Torture, in the form resulting from the intention of its authors. The intention of the parties thereto is ascertainable in particular from the authorized commentaries on the Convention[137], and still more so from its *travaux préparatoires*.

In respect of suspected perpetrators of acts of torture detained on the territory of a Member State other than that of their nationality, Article 7 restates the classic option: extradite or prosecute[138].

Article 7 (1) must be read here in conjunction with Article 5 (2), which, as we have seen above[139], requires States parties to give their courts the necessary jurisdiction to prosecute acts of torture in cases other than those cited in Article 5 (1) (territorial jurisdiction; active and, if deemed appropriate, passive nationality).

56 2.88. It is the combination of these two provisions which makes the exercise of so-called "universal" jurisdiction possible, whilst there is nothing in any provision of the Convention to indicate the latter's purported subsidiary character.

Article 7 also confirms, as was already indicated in Article 5 (3), that a State party which exercises its criminal jurisdiction over an offender whom it has decided to prosecute shall do so within the framework of its own domestic criminal law[140].

As is shown by the very terms of Article 7 (1), this provision accords a *freedom of choice* as between the two possibilities offered to the State on whose territory the suspected perpetrator of an

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[136]See, *inter alia*, the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft, prepared under the auspices of the International Civil Aviation Organization; Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; New York Convention of 14 December 1973 on the Prevention and Punishment of Crimes Against Diplomatic Agents; New York Convention of 17 December 1979 Against the Taking of Hostages; Vienna Convention of 3 March 1980 on the Physical Protection of Nuclear Material; Montreal Protocol of 24 February 1988 for the Suppression of Unlawful Acts of Violence at Airports; Rome Convention of 10 March 1988 for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; Protocol of 10 March 1988 concerning the Safety of Fixed Platforms located on the Continental Shelf.

[137]See, *inter alia*, the commentary to this effect by J. Hermann Burgers and H. Danielius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht/Boston/London, 1988, pp. 133 and 137; M. Henselin, *Le principe de l'universalité en droit pénal international – Droit et obligations pour les Etats de poursuivre et juger selon le principe de l'universalité*, Helbing & Lichtenhahn, Bâle/Genève/Munich, Bruylant, Bruxelles, 2000, p. 349.

[138]Regarding extradition, Article 8 automatically extends to any extradition treaty concluded by a State party to the Convention against Torture the option established by the latter in Article 7.

[139]See above, para. 2.87.

[140]See in this regard the observation by Judges Higgins, Kooijmans and Buergenthal in paragraph 38 of their joint separate opinion appended to the above-mentioned Judgment of 14 February 2002.

act of torture has been found[141]. The Article seeks to offer a true choice to the State concerned; it does not dictate an order of priorities but leaves the State free either to extradite or to prosecute as it sees fit, having regard *inter alia* to the identity of the country requesting extradition and the status of the suspected torturer, according to whether or not he is an agent of that State (and subject, of course, to the special rules contained in any extradition treaties applicable between the two States).

2.89. If there were any doubts as to this reading of Article 7, we would find confirmation of its correctness in the *travaux préparatoires*. Thus it is apparent from these, to quote the words of the report of the United Nations Commission on Human Rights at its Fortieth Session[142], that:

> "The two important elements of the draft convention were the system of universal jurisdiction and the implementation system. The first was of value in ensuring that persons who had practised torture could be prosecuted no matter where they were. It was important that the international community should assume responsibility for investigating claims of torture and initiating proceedings."

57 Thus the overriding aim of the Convention is to ensure that crimes of torture, wherever they have been committed, including in States not party to the Convention, do not go unpunished.

2.90. For this reason the drafters of the Convention wanted the State party on whose territory the perpetrator of the crime of torture was arrested *to have the possibility of refusing extradition*. That is in particular the case where extradition is requested by the State on whose territory the act or acts of torture took place. If, in particular, it is apparent that the individual in question is an agent of that State and has acted in that capacity when committing the acts of which he is accused, extradition may appear inappropriate and may therefore be refused. The fear of the authors of the Convention was that in such a case the judicial organs of the State requesting his repatriation would have scant concern for proceeding with diligence against the agent of a policy often decided on or tolerated at an upper level of its own government hierarchy. This is clear in particular from the report of the Working Group on the draft 1984 Convention[143].

2.91. In any event, the idea of the State of the *locus delicti* or that of active nationality (often one and the same in practice, as is the case here) being given jurisdictional priority was expressly rejected in the preparatory discussions.

Thus the delegations of Argentina and China, the former unequivocally, the latter in more nuanced terms, had, at the session of 24 to 31 January 1983 of the Working Group set up by the Human Rights Commission, expressed their opposition to the principle of so-called "universal jurisdiction".

In an attempt to find a middle position between the two sides, those in favour of and those against "universal jurisdiction", the Brazilian delegation had then proposed that the State on whose territory the suspected offender had been arrested should be given jurisdiction only "if extradition

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[141]Nothing in this provision, or indeed anywhere else in the Convention, refers to, suggests or implies, in the event that a Contracting Party decides to prosecute a foreigner, any form of prior authorization by the latter's State of nationality, whether or not it is a State party. See docs. E/CN.4/1982/WG.2/WP.5 and E/CN.4/1983/63, pp. 6 and 7.

[142]E/CN./1984/SR.34, p. 17.

[143]Commission on Human Rights – 40th session E/CN.4/1984/63, p. 5, and E/CN.4/1984/72. V. Burgers and Danelius, *The UN Convention against torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, op. cit. supra*, p. 85. It should be noted that China withdrew its opposition to the principle of "universal jurisdiction" in 1984. See doc. E/CN.4/1983/63, pp. 6 and 7.

[was] not requested within 60 days by the categories of State cited in Article 5 (1) or if extradition [was] refused".

However this proposal was rejected. Thus we see confirmation that Article 7 of the Convention does not make any exercise of "universal jurisdiction" subject to the failure of efforts
58 to extradite the offender to the State of the *locus delicti* or to that of his nationality. Between the two terms, extradite *or* prosecute, there is a relationship of equality; the former does not take priority over the latter. *A fortiori*, in the absence of any request for extradition, the Convention in no way requires the State on whose territory the suspected offender is found to refrain from initiating or pursuing a criminal prosecution simply because proceedings have been commenced, in respect of the same facts, by the State of the *locus delicti* or by that of the suspect's nationality. In other words, the Convention against Torture does not provide for the subsidiarity of "universal jurisdiction".

2.92. Finally, the language of the Convention confirms that its authors started from a premise deriving from customary law: there is no need for the State of the *locus delicti* or that of the *nationality* of the accused to be party to the Convention in order to enable the system established by the latter to function. The participation of those States would have been necessary only on the assumption that they have in principle some form of exclusive right to exercise their jurisdiction over individuals suspected of having committed the crime of torture. However, as we have already shown, there is nothing in general international law to support this notion.

The ultimate aim of the régime established by the Convention, over and above that deriving from customary law, is to ensure that all States parties will take the necessary measures to enable what had been only a right of prosecution to be strengthened by a series of obligations, the combined consequence of which will be to render more effective the punishment, by one or another State party, of those who have committed acts of torture.

2.93. As regards the "subsidiarity" which it is often sought to attach to the exercise of "universal jurisdiction", it can in any event be said that this has no basis either in customary law or in the régime established by the 1984 Convention against Torture. In the former case, it is true that the State of the *locus delicti* and that of active nationality (sometimes, that of passive nationality) enjoy a practical advantage, deriving from the greater ease with which they will be able to conduct judicial proceedings against the suspected torturer. In the latter case, it follows from the terms of Article 7, read in conjunction with Article 5 (2), and confirmed by examination of the *travaux préparatoires*, that the authors of the Convention did indeed intend to accord the State having arrested the suspected offender the possibility of refusing to extradite him to his State of nationality or to the State where the torture took place.

59 **§2. *The rule* non bis in idem *has no relevance in the present case***

2.94. We shall show below that the rule must be considered in light both of public international law and of the law of the country where it might potentially apply, in this case French law.

A. The *non bis in idem* rule in public international law

2.95. As has already been pointed out, the Memorial of the Republic of the Congo, making an error of law, confuses the purported "subsidiarity" of "universal jurisdiction" which it seeks to find in the text of the Convention against Torture with the effect of the *non bis in idem* rule. This confusion may be explicable by the fact that, at first sight, the alleged subsidiarity of such

jurisdiction and the effect of this rule might appear to represent two means of establishing a prior right of prosecution in favour either of the State of the *locus delicti* or of that of the offender's nationality.

2.96. In reality, it is clear not only, as we saw above, that the alleged "subsidiarity" of such jurisdiction is supported neither by customary law nor by the provisions of the Convention against Torture, but that in any event the *ratio legis* of the two rules — even assuming that the former exists — is totally different.

In the one case, it is sought to establish a procedural hierarchy as between the States competent to prosecute.

In the other, that of the effect of the *non bis in idem* rule, it is sought to safeguard a personal right, the beneficiary of which is the offender himself, as can be seen from paragraph 7 of Article 14 of the International Covenant on Civil and Political Rights:

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

2.97. It follows from the terms in which the *non bis in idem* rule is stated in the United Nations Covenant just cited that, in so far as it might be sought to derive a general principle from that rule, as some have suggested in the literature, the fact would remain that its operation would vary from one case to another according to the content of the applicable domestic legislation.

60 Moreover, it is not easy, precisely because of the variability in the conditions under which the rule operates, to derive from it any general principle of law, still less any general principle of international criminal law. While it is unnecessary to labour the point here, it should moreover be noted, if only by way of guidance, that, while the rule is indeed included in the Statute of the International Criminal Court in its Article 20, it does not figure among the "general principles of criminal law" set out in Articles 22 to 31.

2.98. We should therefore strictly confine ourselves to the terms of the rule as set out in Article 14 (7) of the Covenant cited above, to which both the Republic of the Congo and France are parties.

It can then be seen that the *non bis in idem* rule does not refer to the mere initiation of a prosecution. On the contrary, it is conditional on the offender being "finally convicted or acquitted" in a State. However, we know that in the present case no final verdict has been rendered in respect of General Dabira, or indeed of any other person having participated in the same acts, by any Congolese court.

Moreover, the United Nations Human Rights Committee has interpreted Article 14 (7) of the International Covenant on Civil and Political Rights as applying to courts *of the same State*[144]. It accordingly follows that, even if a final verdict were to be rendered in the trial of General Dabira in the Republic of the Congo in respect of the same acts as those of which he is accused before a French court, this would not bring into play the *non bis in idem* rule as it is understood in international treaty law nor, *a fortiori*, on the basis of international customary law.

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[144]Human Rights Committee, finding No. 204/1986 of 2 November 1987.

B. The *non bis in idem* rule in French law

2.99. The rule in question does indeed exist in French law. In fact, the latter goes well beyond the requirements of international law, inasmuch as in certain cases it takes account of a criminal verdict rendered by a foreign court. It can, however, operate only under very precise conditions. In any event, the mere existence of proceedings commenced before the Brazzaville *Tribunal de première instance* cannot have any effect on those conducted concurrently in France in respect of the same acts. These various points will be addressed below.

61 2.100. First, French law accepts the operation of the rule, but under very precise conditions. Thus the *non bis in idem* rule does not apply where the offences were committed on French territory or are deemed to have been so committed. This follows from Articles 113-2 to 113-5 of the Criminal Code. In this connection, the courts have had occasion to recall that no provision of domestic law prevents the prosecution before the French courts of a person convicted abroad for an offence committed on the territory of the French Republic[145]. This principle applies where France has active personality jurisdiction (French perpetrator in respect of offences committed abroad) or passive personality jurisdiction (French victim of offences committed abroad), as can be seen from Articles 113-6, 113-7 and 113-9 of the Criminal Code.

2.101. Moreover, Article 113-10 of the Criminal Code makes no reference to the *non bis in idem* rule. The rule is not susceptible of application in cases of *in rem* jurisdiction (offences committed abroad affecting the nation's fundamental interests). France thus takes no account of foreign judgments where its fundamental interests are at stake.

2.102. On the other hand, in the case of "universal jurisdiction", as contemplated in Article 689 of the Code of Criminal Procedure, then, pursuant to Article 692 of that Code, the *res judicata* authority of a foreign judgment does indeed preclude the commencement or pursuit of criminal proceedings in France.

That might doubtless be the case at some indefinite time in the future in respect of the acts subject to the current proceedings before the Meaux investigating judge.

2.103. In this regard, the conditions to be satisfied under French law are the following:

(a) first, as the Criminal Chamber of the Court of Cassation has recalled, on the basis of Article 692 of the Code of Criminal Procedure as referred to above, decisions of foreign courts only have the force of *res judicata* where they concern offences committed *outside* the territory of the Republic[146];

(b) further, the authority of the foreign judgment may be relied on in the French courts only if the acts prosecuted abroad are identical with those prosecuted in France;

62 *(c)* furthermore, as can be seen from a judgment of the Criminal Chamber of the Court of Cassation of 17 October 1889[147], the foreign decision must be a judgment. *Mere proceedings commenced abroad are not sufficient for proceedings in respect of the same acts to be discontinued in France*;

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[145]Court of Cassation, Criminal Chamber, 17 Mar. 1999, *Bull. crim.*, No. 44.

[146]Court of Cassation, Criminal Chamber, 3 Dec. 1998, *Bull. crim.* No. 331.

[147]Court of Cassation, Criminal Chamber, 17 Oct. 1889, *Bull. crim.* No. 312.

(d) finally, it is generally agreed that the foreign judgment must be a final one. An old decision had held that only foreign judgments of an adversarial nature could be regarded as final, and that judgments rendered *in absentia* were excluded[148]. In reality, the question whether a judgment is final or not must be determined solely by reference to the legislation of the country in which it was rendered[149].

2.104. Further considerations, in addition to those just cited, govern the operation of the *non bis in idem* rule. Although domestic law does not expressly say so, it is generally held in the literature that the domestic court must ascertain that the foreign verdict emanates from a court which was competent under international law. Thus, as long ago as 1928, Donnedieu de Vabre stated in *Les principes modernes du droit pénal international*[150]:

> "The task of the domestic court is not to determine whether, of the courts of the foreign State, the one which rendered the judgment was competent to do so. That is a question relating to the judicial organization of the foreign State and for decision by that State alone. As regards the correctness of the foreign verdict in terms of form, that is a matter to be assessed by the domestic court in accordance with the law of the State where the verdict was rendered.
>
> On the other hand, since the domestic court is guardian of the international order, it must verify the general jurisdiction of the foreign court. It must assure itself that such jurisdiction was properly founded, whether on the basis of the *locus delicti*, of the nationality of the offender, or at least on the presence of the offender on the territory. If none of those conditions is satisfied, the court, as far as its own position is concerned, will deny any legal existence to the foreign judgment." *[Translation by the Registry.]*

2.105. By way of conclusion to the present section, we are thus bound to note that paragraphs 27 and 28 of the Memorial of the Republic of the Congo address in a superficial manner two legally distinct questions which are wrongly treated as a single issue. Moreover, the Congo's
63 approach to these questions manifests a disregard for positive law, both international and domestic, in relation both to the so-called issue of the "subsidiarity" of the exercise of "universal jurisdiction" and to the operation of the *non bis in idem* rule. This latter might indeed one day become applicable, not by virtue of international law, but on the exclusive basis of French domestic law. That would at any rate be the case if the conditions laid down by domestic law, in particular in regard to the finality of the judgment rendered abroad in respect of the same acts, were effectively satisfied.

That is currently in no way the case. While it has yet to be ascertained that the proceedings pending before the Brazzaville *Tribunal de première instance* indeed relate to the same acts as those which are the subject of the proceedings initiated before the Meaux judge, it is in any event clear that those proceedings have not yet resulted in any judgment and, *a fortiori*, in any final judgment.

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[148]Court of Cassation, Criminal Chamber, 21 Dec. 1861, *Bull. crim.* No. 282.

[149]See C. Lombois, *Droit pénal international*, Dalloz, 2nd edition, 1979, No. 398.

[150]Paris, Sirey, 1928, p. 316.

2.106. It follows from all of the foregoing that:

(i) France, in exercising its jurisdiction in the proceedings which are the subject-matter of the dispute submitted to the International Court of Justice, has acted in pursuance of the rights and obligations deriving from the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, to which the Republic of the Congo is also party;

(ii) the Republic of the Congo has no grounds for challenging the attitude of the French judicial authorities on the basis of international treaty law;

(iii) nor can it find any justification for its action in general international law, which, in any event, and indeed independently of the Convention, recognizes the right of France so to act;

(iv) France, in exercising its jurisdiction in the proceedings which are the subject-matter of the dispute submitted to the Court, has violated neither a purported principle of subsidiarity nor the *non bis in idem* rule.

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CHAPTER 3

THE ALLEGED VIOLATION OF THE JURISDICTIONAL IMMUNITIES OF CERTAIN CONGOLESE OFFICIALS

3.1. The second ground invoked by the Republic of the Congo in support of its Application concerns "the violation of the immunity of a foreign Head of State, as recognized by the jurisprudence of the Court"[151]. This ground is discussed in pages 35 to 39 of the Memorial.

3.2. The French Republic, however, queries the precise scope which the Applicant seeks to accord to this ground: seemingly invoked solely in favour of the Congolese Head of State, it is nevertheless also fleetingly raised in respect of the Minister of the Interior, who, according to the Congo, should enjoy "an immunity similar to that accorded, for other reasons, to Ministers for Foreign Affairs"[152]. In the interest of providing as thorough a response as possible to the Applicant's arguments, France will thus first consider the scope of jurisdictional immunity from a general point of view (Section 1) and then will show that there has been no violation of Mr. Sassou Nguesso's immunity (Section 2).

Section 1 — The jurisdictional immunity which the Republic of the Congo is entitled to claim does not have the scope which the Applicant ascribes to it

3.3. Under the Applicant's reasoning, the Meaux prosecutor's originating application of 23 January 2002[153], although "against X", in reality applied to all the individuals mentioned in the complaint filed by the International Federation for Human Rights on 5 and 7 December 2001[154], since it "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"[155]. That is said to be
65 the case of the following:

— 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; and

— General Blaise Adoua, Commander of the Republican Guard, known as the Presidential Guard.

3.4. In reality, of these four individuals only the Congolese Head of State can claim the immunity from jurisdiction invoked by the Applicant; more specifically, that immunity cannot extend to the Minister of the Interior (§2). Moreover, the originating application against X has not violated any immunities which the Congo would be entitled to claim (§1).

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[151] Application, p. 11.

[152] Application, p. 11 and Memorial, p. 35.

[153] Memorial, Ann. VI-7.

[154] *Ibid.*, Anns VI-1 and VI-2.

[155] Memorial, p. 24.

§1. The prosecutor's originating application does not violate any immunity which the Congo would be entitled to claim

3.5. According to the Congo, which does not challenge any other element of the procedure, the prosecutor's originating application of 23 January 2002 *"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."*[156] The scope of the application should therefore be examined (A), with a view to determining whether it is capable in any way of violating internationally recognized immunities (B).

A. The scope of the originating application of 23 January 2002

3.6. As the Applicant points out, Article 80 of the French Code of Criminal Procedure provides that an originating application "is . . . the document by which the prosecutor initiates criminal proceedings before the investigating judge"[157]. In light of the information available to him, the prosecutor can choose to open a judicial investigation against a named or an unnamed person (in the latter case, the judicial investigation is said to be opened against "X").

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3.7. If the prosecutor feels that the information available to him justifies proceedings against one or more suspects, he will choose to open a judicial investigation against a named person. If, on the other hand, he feels that the incriminating evidence is still insufficient to implicate anyone by name, he will choose to open a judicial investigation against "X". As has been noted in the literature: "in respect of the individuals against whom the prosecution is to be initiated, the *ministère public* is not required to name them unless the information already gathered makes it possible to identify them and hold them responsible for the acts in question"[158] *[translation by the Registry]*. In the present case, the above was the choice made by the prosecutor.

3.8. Moreover, that choice has no impact on the rights asserted by the Republic of the Congo. The investigating judge, whether seised of an originating application against named individuals or against X, is initially seised of facts. He is said to be seised *in rem*, and it is for him to enquire into, i.e., investigate, the facts brought to his attention by the prosecutor: all of those facts, but only those facts.

3.9. As eminent authorities have written: "[t]he prosecution is directed (and the investigating judge is seised) *in rem*, not *in personam*. It is for the investigating judge to decide whether to place under formal examination . . . any individual against whom there appears strong or concordant evidence of participation in the acts of which the judge is seised."[159] Moreover, he can "enquire into all the facts of which he is seised *(and do so in respect of any individual identified in the investigation)*, but only those facts"[160]. Thus, it is only when the initial investigation has been completed that it becomes possible to determine the individual(s) who may be placed under formal examination; it is only decisions to place a person under formal examination and warrants (*mandat*

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[156]Memorial, p. 12; original emphasis.

[157]*Ibid.*, p. 21.

[158]Gaston Stefani, Georges Levasseur and Bernard Bouloc, *Procédure pénale*, Dalloz, 18th ed., 2001, p. 547, para. 622.

[159]*Ibid.*, p. 547, para. 622; italics original; see also p. 575, para. 651.

[160]*Ibid.*, p. 575, para. 651; emphasis added.

67 *d'amener* [warrant for immediate presentation], *mandat de dépôt* [committal warrant], *mandat d'arrêt* [arrest warrant] and *mandat de comparution* [order to appear]) issued in the course of the investigation which must specify the identity of the person against whom they are issued[161] and thus implicate a given individual. The power to place someone under formal investigation *"mise en examen"* (which procedure has replaced the former *"inculpation"* so as better to safeguard the presumption of innocence[162]) is, in a manner of speaking, a power unique to the investigating judge[163]. It should further be noted that, even in that case, the person under examination is "presumed innocent"[164].

3.10. This rule that seisin is exclusively *in rem* applies whenever the acts were committed on national territory or whenever the investigating judge seeks to implicate a French national. In these two situations the judge can place under examination any individual against whom there is strong or concordant evidence raising a likelihood that he could have participated, as perpetrator or accomplice, in the commission of the offences of which the judge is seised (Article 80-1 of the Code of Criminal Procedure). On the other hand, even where the judge has jurisdiction in respect of the acts, his seisin has to be supplemented in respect of the persons subject to investigation whenever the facts to be dealt with by the investigating judge involve an issue of "universal jurisdiction". Thus, pursuant to Articles 689-1 and 689-2 of the Code of Criminal Procedure, French courts do not have jurisdiction over acts of torture and other cruel, inhuman or degrading treatment or punishment, within the meaning of the New York Convention of 10 December 1984, committed abroad, by and against aliens, unless the implicated individual is present on French territory.

3.11. Hence the investigating judge has jurisdiction, pursuant to "universal jurisdiction", to conduct an investigation against a foreign national only if two conditions are met: first, he is seised of acts allegedly committed by the party in question and, second, in the case where the individual only came to France after the date of the originating application, the public prosecutor's office has issued a supplemental application authorizing the judge to investigate the person in question, just as under the procedure provided for in Articles 80 and 82 of the Code of Criminal Procedure when the
68 investigating judge discovers new facts not falling within the scope of his original remit.

3.12. It is thus apparent that, except for General Dabira, who was in France at the time of the originating application, any suspicion of involvement, developed as a result of the investigation carried out by the investigating judge, against any other Congolese national who happened to be in French territory could not result in the investigating judge placing that person under examination unless the Meaux prosecutor issued the judge with a supplemental application.

3.13. If, in the course of the investigation, which, unlike the case in other legal systems, is carried out to establish "*innocence* as well as guilt"[165], the investigating judge discovers a bar to the continuation of the procedure against an individual, in particular a jurisdictional immunity enjoyed

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[161]See Articles 113-8, 116 and 123 of the Code of Criminal Procedure.

[162]Article 116 of the Code of Criminal Procedure.

[163]See Article 176 of the Code of Criminal Procedure: "The investigating judge considers whether there exist against the person under judicial examination charges constituting an offence, the legal characterization of which is to be determined by the investigating judge."

[164]See Article 137 of the Code of Criminal Procedure.

[165]Article 81 of the Code of Criminal Procedure: "The investigating judge undertakes, in accordance with the law, any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt."

by that individual, he is required to make a finding to that effect in a reasoned order[166]. Further, where a supplemental application naming an individual is required[167], the prosecutor cannot issue any such application against an individual enjoying an immunity, since there would be a legal bar preventing the continuation of the investigation, within the meaning of Article 86 of the Code of Criminal Procedure, which authorizes a prosecutor not to initiate a judicial investigation whenever, for reasons affecting the prosecution, the facts of the case cannot lawfully give rise to a prosecution (he then makes submissions that no investigation should be opened).

3.14. Moreover, all procedural acts adopted in the course of the investigation are open to appeal and can be annulled in whole or *in part*[168].

3.15. It is clear from the foregoing that the originating application of the Meaux prosecutor:

— cannot cause harm or prejudice to anyone, because, like any such application, it seises the investigating judge *in rem*, not *in personam*, of facts on the basis of which an investigation may be opened and in no sense represents a charge against individuals (even when they are expressly named therein, which, moreover, is not the case here);

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— having been issued against X, implicates no one and cannot prejudice the legal interests of any person, including, and this is self-evident, those of the Republic of the Congo;

— does not prejudice individuals who might later be prosecuted — a matter for determination by the investigating judge in the course of his investigations, and which will require a supplemental application in the event that it should prove necessary to proceed against named individuals on the basis of "universal jurisdiction" who were not present in France at the time of the originating application.

Furthermore, it is only if during the investigation the judge discovers a bar to the continuation of the proceedings (notably, an immunity) in respect of an individual that he must so state in a reasoned order.

B. The scope of the immunities invoked by the Congo in regard to the originating application of 23 January 2002

3.16. In an attempt to escape the consequences of these facts, the Congo puts forward the following arguments:

1. the reference in the originating application to the documents appended thereto is deemed to take account of their contents, whose terms accordingly determine the subject-matter and scope of the case referred to the investigating judge[169];

2. once the investigating judge has been seised, seisin is irrevocable and, unless the prosecutor uses the appropriate remedies to correct any error, he cannot subsequently restrict the scope of his seisin[170];

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[166]Article 81 of the Code of Criminal Procedure, p. 576, para. 652.

[167]See para. 3.11, *supra*.

[168]See Article 174 of the Code of Criminal Procedure; see also Article 182, providing for partial committals for trial.

[169]Memorial, p. 22.

3. the prosecutor is under an obligation not to seek to initiate a judicial investigation if certain of the named individuals enjoy immunity[171]; and

4. persons named in a complaint should be regarded as subjects of the judicial investigation and can be heard as legally represented witnesses, which places them under suspicion of having participated in the offences concerned[172].

70 3.17. Aside from the fact that it rests on certain technical misconceptions — or on transparent "artifices" of presentation — this line of argument is vitiated by two fundamental mistakes in reasoning.

3.18. First, the Republic of the Congo's entire argument is underpinned by a mistaken assumption: that the application by the Meaux prosecutor charged the investigating judge with investigating the conduct of particular individuals. Yet, as explained above (A), in cases of "universal jurisdiction", the two elements of the judge's jurisdiction, seisin *in rem* and seisin *in personam*, must be combined.

3.19. The investigating judge is first seised of facts, and those facts delimit the scope of his jurisdiction. Further, he was only entitled to find himself competent in respect of General Dabira, because General Dabira was present within the Meaux judicial district at the time the criminal proceedings were initiated by the prosecutor, and that is the only circumstance in which a prosecution may be conducted against foreign nationals pursuant to "universal jurisdiction".

3.20. By contrast, as pointed out above[173], the investigating judge cannot investigate any other Congolese national unless two conditions are met: the Congolese individual is present on national territory and the investigating judge has obtained from the Meaux prosecutor a supplemental application expressly naming the new individual implicated. It cannot be said that the inclusion of names in the ordinary complaint initially filed, which concerned individuals not present on national territory, is sufficient to confer jurisdiction on the investigating judge to investigate those persons. In the absence of a supplemental application, the investigating judge is without jurisdiction over them.

3.21. Secondly, the Republic of the Congo's reasoning misses a crucial legal point. The Applicant would appear to claim that individuals named in a complaint can give statements only in the capacity of persons under examination or of legally represented witnesses. It deduces
71 therefrom that the scope of the seisin of the investigating judge is unlimited and violates the rules on immunities[174]. However, while it is true Article 113-2 of the Code of Criminal Procedure does provide that a person named in an ordinary complaint can be heard as a legally represented witness and that, when appearing before the investigating judge, that person must be heard in that capacity if he so requests, the Congo overlooks a necessary precondition: these provisions apply only if the investigating judge has jurisdiction to investigate the person implicated. Further, even when seised of a supplemental application against a named individual, the investigating judge remains free, in light of the information in the case file, to choose to place that person under examination or to

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[170]Memorial, p. 23.

[171]*Ibid.*, p. 22.

[172]*Ibid.*, pp. 23-24.

[173]Paras. 3.10-3.12.

[174]Memorial, p. 24, para. 19.

allow him the benefit of the safeguards in respect of defence rights afforded by the status of legally represented witness.

3.22. Moreover, it is legally incorrect to maintain, as the Congo does[175], that the prosecutor was not entitled to open a judicial investigation since one of the individuals named in the complaint could claim an immunity recognized both by international custom and by French domestic law. True, the complaint named President Sassou Nguesso, but the Meaux prosecutor did not open a judicial investigation against him — an act which could have been open to challenge not only under the rules of territorial connection in respect of "universal jurisdiction" but also under those concerning immunity. On the other hand, there was no legal bar to the bringing of criminal proceedings against the only foreigner who was both named in the complaint and present on national territory at the time the judicial investigation was initiated — General Dabira; hence, there was nothing to prevent the prosecutor from deciding to initiate criminal proceedings on 22 January 2002.

3.23. It should be stressed that the investigating judge never opened an investigation against President Sassou Nguesso, which, according to the Republic of the Congo's mistaken reasoning, he could have done[176]. That reasoning would lead to wholly unacceptable results. If it were to be followed, then it would suffice for a complaint to name, among many others, one person covered by immunity in order for any investigation to become barred. The result would be a kind of "immunity by contagion": all persons implicated in an unlawful act in which one individual
72 enjoying immunity might have taken part would then find themselves shielded from any investigation or prosecution. That, assuredly, cannot be the law.

3.24. True, the prosecutor is not required to follow up on a complaint (if it is not accompanied by a civil-party application), but he must ensure enforcement of the criminal law[177] and he certainly cannot refrain from initiating criminal proceedings for the sole reason that certain individuals named in the complaint cannot be prosecuted because of their immunity.

3.25. As Sir Arthur Watts has written,

> "the grant of immunity to a head of State [does not] necessarily mean that the proceedings may not go ahead; it means simply that they may not continue as regards that particular defendant, who is not subject to the jurisdiction of the forum State's courts. If there are other defendants, it will be a separate question whether there is any bar to the continuation of the proceedings against them."[178]

3.26. In light of those observations, and in order to reply more specifically to the Congo's argument[179], it should be noted that:

(1) While it is true that the reference in the originating application to the documents appended thereto may have the effect of determining the subject-matter and scope of the investigating

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[175]Memorial, p. 24, para. 19.

[176]*Ibid.*, p. 24, para. 19.

[177]See Articles 31 and 35 of the Code of Criminal Procedure.

[178]Sir Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *RCADI* 1994-III, Vol. 247, p. 54.

[179]See para. 16, above.

judge's *in rem* seisin, this element applies only to the acts in question and, in cases of "universal jurisdiction", requires supplementation as regards the criterion of territorial connection.

(2) While it is true that the investigating judge's seisin under an originating application is irrevocable, that in no sense presupposes his "universal jurisdiction" in the case of any foreign nationals implicated.

(3) On the other hand, it is legally incorrect to contend that the prosecutor was not entitled to
73 initiate a judicial investigation because certain of the individuals named in the complaint enjoyed immunity. As long as at least one individual who might be prosecuted was present on national territory and enjoyed no immunity, the prosecutor was entitled to initiate a judicial investigation.

(4) Nor is it correct to contend that individuals named in a complaint should or could be regarded as suspected of having participated in the offences in question because they could be heard as legally represented witnesses. They could only be heard in that capacity if the investigating judge had jurisdiction in relation to them.

3.27. The Congo is mistaken in this regard in suggesting that the *possibility* of being heard as a legally represented witness could violate potential immunities. Thus the Court has consistently held that it rules on facts, not on possibilities: "the function of the Court is to state the law, but it may pronounce judgments only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties"[180]. That sensible approach applies particularly in the present case, given, as France has already pointed out above, that, if in the course of his investigation the investigating judge considered that he needed to enquire into acts attributable to foreign nationals who were not present on French territory at the time when the originating application was issued, he would have to obtain a supplemental application against a named individual, which the prosecutor could not issue if the individual in question enjoyed immunities or was not present on French territory. He could also decide *proprio motu* not to investigate by reason of the immunities in question.

3.28. It should be noted that the possibility raised by the applicant State has not materialized: from the time when the Congo submitted its Application to the International Court of Justice up to the date of the present Counter-Memorial, only General Dabira has been heard as a legally represented witness. However, as France will subsequently demonstrate (§2), he enjoys no
74 immunity for purposes of the present case. As regards the only individual on behalf of whom the Congo could claim jurisdictional immunity, President Sassou Nguesso, not only has no step of this kind been taken, but the proceedings conducted by the investigating judges show clearly that they are fully aware that the immunity enjoyed by him in principle protects him against any such measure[181].

3.29. The position taken by the Republic of the Congo is moreover both contradictory and paradoxical. According to the Applicant, the mere fact that their names have been mentioned in a complaint referred to in the originating application places such individuals "under suspicion of

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[180]ICJ, Judgment of 2 December 1963, *Northern Cameroons*, *I.C.J. Reports 1963*, pp. 33-34; see also separate opinion of Sir Gerald Fitzmaurice, *ibid.*, p. 99; PCIJ, Judgment of 13 September 1928, *Factory at Chorzów* (Claim for Indemnity — Merits), *Series A, No. 17*, p. 57; ICJ, Judgment of 20 December 1974, *Nuclear Tests*, *I.C.J. Reports 1974*, p. 272, para. 59, and p. 477, para. 62; Judgment of 25 December 1997, *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports 1997*, pp. 41-45, paras. 53-56; Judgment of 6 November 2003, *Oil Platforms*, para. 93.

[181]See below, paras. 3.55-3.56 and 3.66-3.73.

having participated in the offences concerned"[182]. Not only is this not correct — such "suspicion" cannot arise until the matter has been investigated — but the Congo's argument would lead to the following results:

— refusal by the prosecutor to issue an originating application would in itself demonstrate his belief that the individual or individuals protected by immunity had committed the acts complained of;

— by the same token, his refusal would lend credibility to the complaint, even before any credible, neutral or objective judicial investigation has been conducted.

3.30. Moreover, the Applicant's thesis is further weakened inasmuch as it misconstrues the scope of the immunities accorded by international law. As the Court emphasized in its Judgment of 14 February 2002:

> "the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."[183]

75 Although the Court strictly confined the scope of its Judgment to the particular case before it[184], the above passage is applicable to all immunities, irrespective of the persons entitled to rely thereon.

3.31. It follows that immunity enjoyed by an individual vested with official functions undoubtedly protects him from prosecution, but not from "suspicion": if such a suspicion is justified, that person may, subject to the conditions imposed by international law[185], be called upon to answer for his actions.

3.32. At all events, as France has shown, the originating application of 23 January 2002 could not, and did not, engender any form of suspicion against any person whatever. *A fortiori*, it does not represent an act of prosecution or indictment. It could not, and did not, violate any immunity on which the Congo might be entitled to rely.

§2. Only the Congolese Head of State is covered by jurisdictional immunity

3.33. The Congo contends that the disputed criminal proceedings concern four persons, since these are specifically named in the complaint which is the basis for the originating application by the Meaux prosecutor of 23 January 2003. As has been recalled above[186], they are the President of the Republic, Mr. Sassou Nguesso, the Minister of the Interior, General Oba, the Inspector-General

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[182]Memorial, p. 23.

[183]Para. 60.

[184]See paragraph 51 of the Judgment: "For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider."

[185]See *ibid.*, para. 61; see also below, paras. 3.43-3.47.

[186]See para. 3.3.

of the Armed Forces, General Norbert Dabira, and the Commander of the Republican Guard, General Blaise Adoua.

3.34. Apart from the fact that the mention of these individuals by name does not amount to proceedings against them[187] and that, of the four, only General Dabira has been the subject of procedural measures directed at him personally, it should be noted that, in the legal part of its argument, the Congo makes no mention either of General Adoua or of General Dabira. The fact is that, as regards the issue of immunities, these two individuals are in the same position as
76 General Oba, of whom the Applicant observes simply that, "in respect of acts falling within the scope of his duties to maintain public order, [he] should enjoy an immunity analogous to that accorded, for other reasons, to Ministers for Foreign Affairs"[188]. The same argument may thus be applied to all three of these individuals (A).

3.35. By contrast, the rules applicable to them differ from those applying to Mr. Sassou Nguesso, President of the Congolese Republic, who, by virtue of that office, is entitled to the immunity accorded to foreign heads of State (B).

A. The Congo cannot claim any immunity on behalf of Generals Adoua, Dabira and Oba

3.36. Notwithstanding the elliptical nature of the Congo's argument regarding the immunity to be accorded to a Minister of the Interior, which consists of a single short paragraph[189] and is linked to that regarding universal jurisdiction, it would seem that it impliedly relies on the Court's reasoning in the case concerning the *Arrest Warrant of 11 April 2000*, which resulted in the Judgment of 14 February 2002.

3.37. According to that decision:

> "In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs."

Having laid down this general principle, the Court then sets out in detail the very specific functions of a Minister for Foreign Affairs:

> "He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has
77 full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives

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[187] See §1 above.

[188] Memorial, p. 35.

[189] Reproduced above, para. 3.34.

> of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited."

It is these considerations, quite exclusively based on the specific functions of a Minister for Foreign Affairs, which lead the Court to conclude:

> "that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."[190]

3.38. These considerations are not transposable to a Minister of the *Interior*, nor to a Head of the Republican Guard, nor to an Inspector-General of the Armed Forces. Just as in the case of Ministers of Education, these individuals' duties do not involve "frequent foreign travel"[191]. None of these persons is in principle called upon to represent the Congolese State abroad; nor is any of them vested, by virtue of his office, with a power to enter into international treaties, or with any form of dispensation from the obligation to produce full powers in the context of international negotiations.

3.39. It is certainly not impossible that one or other of them might take part in a special diplomatic mission, or even lead it — although, given the nature of their duties, there is little likelihood of such a situation often arising; nor indeed does the Congo contend as much. However, in such circumstances those concerned would in any event enjoy the benefit of the provisions of Article 1, paragraph 2, of the New York Convention on Special Missions of
78 8 December 1969, to which neither the Congo nor France are parties, but which nonetheless reflects customary law in the matter[192]. Under that provision:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of higher rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present convention, the facilities, privileges and immunities accorded by international law."

3.40. France in no way disputes the fact that those immunities could be relied on against it in the event that any of the three individuals concerned were to take part in a special mission. In that case, but in that case only, they would be entitled to the benefit of the immunities attaching to the status of a person representing the State. But that is an exceptional situation, and it is not claimed, either in the Congo's Application or in its Memorial, that it comes within the scope of the present

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[190] *Ibid.*, paras. 53 and 54.

[191] See ICJ, Order of 8 December 2000, *Arrest Warrant of 11 April 2000 (Request for the Indication of Provisional Measures), I.C.J. Reports 2000*, p. 201, para. 72.

[192] See Sir Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *RCADI*, 1994-III, Vol. 247, p. 38.

proceedings. Thus, unlike the Democratic Republic of the Congo in the *Arrest Warrant* case[193], the Applicant in the present case does not claim that the disputed criminal proceedings in any way hinder the Congo's diplomacy or the conduct of its international relations.

3.41. On the contrary, the applicant State argues expressly that those proceedings, at least in so far as they are directed against the Minister of the Interior, affect "the maintenance of public order" *in the Congo*[194]. That is what makes this case totally different from the case which resulted in the 2002 Judgment: there, what was at issue was an arrest warrant whose mere threat of execution abroad compromised the exercise by the Minister for Foreign Affairs of the DRC of his international functions; here, we are dealing with an originating application against "X", and it is impossible to see how that could affect the exercise by the Congo's Interior Minister of his duties in regard to the maintenance of public order, which, by definition, can only be performed on Congolese territory and not beyond its borders.

3.42. *Mutatis mutandis*, the same reasoning can be applied to General Adoua, Head of the Republican Guard, and to General Dabira, Inspector-General of the Armed Forces, and it is indeed
79 not disputed that, in the case of the latter, as a result of his temporary presence in France (outside the context of any official mission), placement under judicial examination has been announced and an arrest warrant has been issued. However, there can be no legal objection to such acts, since there is no immunity attaching to his office on which the individual concerned might rely.

B. The Congo is entitled to claim jurisdictional immunity on behalf of the Head of State

3.43. As the Agent of the French Republic stated at the hearings on the Congo's request for the indication of a provisional measure:

> "In conformity with international law, French law embodies the principle of immunity of foreign Heads of State . . . There are no written rules deriving from any legislation relating to the immunities of States and their representatives. It is the jurisprudence of the French courts which, referring to customary international law and applying it directly, have asserted clearly and forcefully the principle of those immunities."[195]

3.44. The Court took note of these statements in its Order of 17 June 2003[196], while the Congo itself noted in its Memorial that, "[g]iven 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"[197].

3.45. Unless it were to be found that this principle, which is fully accepted by France, had been breached — which is not the case[198] — there is thus no dispute on this point between the

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[193]See the above-mentioned Judgment of 14 February 2002, paras. 63-64.

[194]Memorial, p. 34.

[195]CR 2003/21, 28 April 2003, p. 15, para. 32; see also Professor Allain Pellet's speech: "One thing must be clear at the outset: France in no way denies that President Sassou Nguesso enjoys, as a foreign Head of State, 'immunities from jurisdiction, both civil and criminal'." (*Ibid.*, p. 24, para. 13.)

[196]Para. 13.

[197]Memorial, p. 35.

[198]See Section 2 below.

Parties: unlike Generals Adoua, Dabira and Oba, Mr. Sassou Nguesso is entitled by virtue of his high office to an immunity from criminal jurisdiction which, in the absence of any treaty to the contrary, is an absolute one.

3.46. The Criminal Chamber of the Court of Cassation recently applied the "principle of immunity from jurisdiction for incumbent foreign Heads of State" in its judgment of 13 March 2001. In that decision, the highest French judicial body recalled that "international
80 custom prohibits the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties, before the criminal courts of a foreign State"[199]. This principle, which was applicable to the Libyan Head of State — subject of the 2001 judgment — clearly applies equally to the President of the Republic of the Congo.

3.47. As the Agent of the French Republic emphasized to the Court:

> "this decision makes it perfectly clear that the French courts apply international custom and, in particular, the customary principle which confers immunity from jurisdiction and enforcement on foreign Heads of State. It is important to remember that the French Court of Cassation applied this customary principle even before your own Court made its solemn decision on the issue in the Judgment which it delivered on 14 February 2002 in the *Arrest Warrant* case, since the reasoning adopted by your Court in that case in connection with a Minister for Foreign Affairs applies *a fortiori* to a Head of State. It is therefore quite clear that the French courts, which have already recognized the principle of the immunity of foreign Heads of State, will apply it all the more firmly in the future for its having been forcefully reasserted by the International Court."[200]

Section 2 – There has been no violation of Mr. Sassou Nguesso's immunity

3.48. Notwithstanding a passing reference to the immunity allegedly enjoyed by General Oba[201], the Congo's second ground, based on an alleged violation of the immunity of a foreign Head of State, concerns only Mr. Sassou Nguesso, President of the Republic of the Congo[202].

3.49. Already in its Application, the applicant State relied on this ground, in support of which it principally invoked the Judgment rendered by the Court in 2002 in the *Arrest Warrant* case[203]. By contrast, the Congolese Memorial no longer cites the jurisprudence of the International
81 Court of Justice, relying exclusively on two judgments of the French Court of Cassation, that of 13 March 2001 concerning the jurisdictional immunity of the Libyan Head of State[204] and the other of 10 October of the same year regarding the consequences of the immunity enjoyed by the President of the French Republic[205]. This changed approach is doubtless explicable by the fact that

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[199]Court of Cassation, Criminal Chamber, *S.O.S. Attentats et B. Castelnau d'Essenault* (hereinafter, the "*Qaddafi* case"), *Bull.* No. 64, p. 218 — Annex V to the Memorial; see also submissions of Advocate-General Launay, reproduced in Annex V.

[200]CR 2003/21, p. 16, para. 33.

[201]See above, para. 3.34.

[202]*Ibid.*, pp. 35-39.

[203]Application, pp. 7-8.

[204]See footnote 199 above.

[205]Court of Cassation, Joint Chambers, *Bull.* No. 206, p. 660.

the Republic of the Congo realized that there was no difference of views between the Parties in regard to the applicability of the principle of jurisdictional immunity of foreign Heads of State. "On the other hand", as the Congo has rightly said, "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"[206].

3.50. This ground consists of two limbs. First, the applicant State contends that Mr. Sassou Nguesso's immunity has been violated as a result of the opening of an investigation against X following a complaint in which he is identified by name (§1). Secondly, the investigating judges are said to have "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"(§2).

§1. The originating application of the Meaux prosecutor does not violate the jurisdictional immunity of the President of the Republic of the Congo

3.51. There would appear to be little point in devoting lengthy arguments to the first limb of the ground. As France has already shown[207], an originating application is not in itself capable of violating anybody's immunity. In an attempt to demonstrate the contrary, the Congo puts forward two arguments.

3.52. First, it contends that an originating application cannot be issued against persons unknown where a Head of State has been named in a complaint included among the documents appended to that application, because "the fact that he can demand to be heard by the investigating
82 judge only as a legally represented witness means that he is officially under suspicion"[208]. Over and above the general objections to such an argument[209], it is particularly misconceived in the case of a foreign Head of State, whom French law protects against any risk of being required to give evidence in any form of proceeding.

3.53. Thus the first paragraph of Article 656 of the French Code of Criminal Procedure 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." *[Translation by the Registry]*

3.54. Subject to the applicability of this provision — which France will demonstrate more specifically below[210] — it is thus apparent that all representatives of a foreign State (including in particular the Head of State) are subject to a régime which derogates from the general law. It accordingly does not provide an argument which would support the Congolese position: even accepting that the mere fact of *being entitled* to demand to be heard as a legally represented witness

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[206]Memorial, p. 36.

[207]Section 1, §1.

[208]Memorial, p. 36.

[209]See above, paras. 3.27 to 3.32.

[210]Paras. 3.64-3.71.

renders the individual concerned in some way "suspect" — which France formally denies[211] — there can be no question of that in the present case and no formal measure of investigation has been adopted which might suggest the contrary: in seeking to secure testimony from Mr. Sassou Nguesso, the investigating judges acted under Article 656 of the Code of Criminal Procedure and not under Article 113-2. In so doing, the investigating judges, far from violating the jurisdictional immunity of the Head of the Congolese State, on the contrary demonstrated their belief that he was entitled to the benefit thereof.

3.55. The second limb of the Applicant's argument is equally unfounded. According to the Congo, the prohibition on issuing the disputed originating application followed "implicitly, but necessarily," from the leading decision by the Criminal Chamber of the Court of Cassation in the *Qaddafi* case[212]. The Congo observes:

83 "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."[213]

3.56. On this latter point, it should be noted that the Congo is mistaken: contrary to what it wrongly contends, there is no question here, any more than there was in the *Qaddafi* case, either of placing the Head of State in question under judicial examination or of hearing him as a legally represented witness — simply because that is not possible under French law[214].

3.57. Moreover, and above all, the Congo's argument on this point however adroitly presented, cannot obscure the great differences between the facts in the *Qaddafi* case and those in the present proceedings. It should be noted in particular that the civil-party complaint in the *Qaddafi* case was directed exclusively at the Libyan Head of State[215]; since there was no doubt as to the principle of the latter's immunity, the only uncertainty was as to whether one of the exceptions to the principle of immunity was applicable; the Court of Cassation answered this question in the negative[216]. The circumstances of the present case are totally different: in the first place, the complaint did not include a civil-party application; secondly, it also named persons other than the Congolese Head of State, a fact with important implications[217].

3.58. Thus, contrary to what the Republic of the Congo contends, the above judgment cannot "be interpreted as meaning that, in itself, the existence of a complaint (whether or not accompanied

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[211] See above, *ibid.*

[212] Memorial, p. 36.

[213] *Ibid.*, p. 37.

[214] See above, paras. 3.52 and 3.53.

[215] See the submissions, as previously referred to (footnote 199), of Advocate-General Launay, set out in Annex V.

[216] See the above-mentioned judgment, *ibid.*

[217] See above, paras. 3.22-3.24.

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"[218]. At most, it shows that, where a complaint is directed exclusively at a foreign Head of State, the prosecutor's decision not to seek to initiate an investigation cannot be challenged in law — at least in so far as there is no exception to the jurisdictional immunity of the Head of State in question which might be invoked.

84 3.59. In the present case, the situation is the reverse of that in the *Qaddafi* case: this is not a case of the prosecutor having refused to seek to initiate proceedings naming a foreign Head of State, but of having decided to issue an application against persons unknown; the initial complaint (without any civil-party application) names Mr. Sassou Nguesso only as one among other individuals, who, for their part, enjoy no jurisdictional immunity.

§2. Inviting the President of the Republic of the Congo to testify did not represent a violation of his jurisdictional immunity

3.60. According to the Congo, "the investigating judge would be barred from taking testimony from the [Congolese] Head of State as a legally represented witness"[219]. That is beyond dispute. But it is in no sense the point at issue here: Mr. Sassou Nguesso was *not* heard as a legally represented witness; it was not contemplated that he would be, and he *could not be*, since, under Article 656 of the Code of Criminal Procedure, representatives of a foreign power can only be invited to make a written deposition and are under no duty whatever to accede to such a request.

3.61. For the same reason, the proposition that recourse to the Article 656 procedure "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"[220] is totally unfounded. Representatives of foreign powers fall within a completely different category: unlike foreign nationals and foreigners not representing their country[221], they are under no obligation to testify; and no consequence attaches to their refusal to accede to a request for a written deposition addressed to them by an investigating judge through the Minister for Foreign Affairs. This is assuredly a protection at least equivalent to that deriving from Article 113-2.

85 3.62. Moreover, in the present case the Congo is particularly lacking in any support for its claim that President Sassou Nguesso's jurisdictional immunity was violated, since, while it is true that the investigating judges did send the French Minister for Foreign Affairs a request for the President's written deposition, the Minister, as the Congo itself admits, "did not accede to that request"[222].

3.63. However, the applicant State invokes two further arguments in support of the second limb of its second ground. First, it relies on a decision regarding the President of the French Republic, which it contends is applicable by analogy to foreign Heads of State (A). Secondly, it relies on a ground, which it describes as "compelling"[223], whereby it argues that a Head of State "is not a 'representative' of a foreign power within the meaning of Article 656 [of the Code of

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[218]Memorial, p. 37.

[219]*Ibid.*

[220]Memorial, p. 38.

[221]See Article 109 of the Code of Criminal Procedure; see below, para. 3.66.

[222]Memorial, p. 17.

[223]*Ibid.*, p. 38

Criminal Procedure]; he is the supreme organ of that power"[224] (B). Neither of these arguments is persuasive.

A. The decision regarding the President of the French Republic

3.64. The Congo cites, with some insistence[225], a plenary judgment of the Court of Cassation of 10 October 2001, holding that:

> "the President of the [French] 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; 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"[226]. *[Translation by the Registry]*

3.65. According to the applicant State, "[w]hat holds good for the President of the French Republic must apply also by analogy to foreign Heads of State"[227]. France has, to say the least, serious doubts as to the possibility of proceeding by analogy: the grounds underlying the immunity of a Head of State in relation to domestic law on the one hand and to international law on the other
86 are not identical; furthermore, constitutional rules generally provide special procedures under which the Head of State may be prosecuted where he is in serious breach of his duties or commits serious criminal offences[228].

3.66. There is, however, no point in entering into that debate. It follows from the very terms of the judgment just cited that the bar on taking evidence from the President of the French Republic derives from the fact that, under Article 109 of the Code of Criminal Procedure, there attaches to a witness' obligation to appear "a measure of publicly enforceable constraint and it is sanctioned by a criminal penalty". However, that is not so in the case of a refusal to testify by a person requested to do so under Article 656 of the Code: such a request merely represents an *invitation to testify*, which the representative of the foreign State is at full liberty to decline; and no criminal sanction or other measure of constraint attaches to such a refusal[229].

3.67. This procedure, which is founded on the freedom of decision of the person to whom the request is addressed, is fully compatible with Article 31, paragraph 2, of the Vienna Convention of 18 April 1961: "A diplomatic agent is not obliged to give evidence as a witness." From this it may be concluded, in accordance with the generally accepted interpretation, that, while he is not obliged to *give* his evidence, there is nothing, on the other hand, to prevent him from being *asked* to do so[230].

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[224] *Ibid.*

[225] *Ibid.*, pp. 37-38.

[226] 10 October 2001, *Bull.* No. 206, p. 660.

[227] Memorial, p. 38.

[228] For France, see Article 68 of the Constitution.

[229] See above, paras. 3.53-3.54.

[230] See Jean Salmon, *Manuel de droit diplomatique*, Bruylant, Brussels, 1994, pp. 319-320.

B. A Head of State is a representative of that State

3.68. In an attempt to escape the consequences of this analysis, the Congo puts forward an argument, which it describes as "compelling", to the effect that a foreign Head of State is not "a representative" of a foreign power, but "the supreme organ of that power"[231].

87 3.69. France in no way disputes that a Head of State is that State's supreme organ. But that status does not preclude him from representing the State of which he is head; on the contrary, it is in that capacity that he represents it. And while there can be no doubt that the provisions of Article 656 are applicable to members of diplomatic missions and to certain members of a consular post, that does not mean that they are not applicable to a Head of State (or to a Minister for Foreign Affairs) of a foreign power.

3.70. That is moreover the consistent practice of the French judicial authorities, one fully in conformity with international law. Thus, in his submissions in the *Qaddafi* case Advocate-General Launay, after recalling that "[b]roadly speaking, the legal régime governing immunity from jurisdiction for foreign Heads of State is identical with that established by the Vienna Convention of 18 April 1961 for diplomatic personnel", justified such immunity on the basis of "the identification of the State *with its representative*"[232]. Similarly, in the *Arrest Warrant* case the Court "observe[d] that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, *like the Head of State* or the Head of Government, he or she is recognized under international law *as representative of the State* solely by virtue of his or her office"[233].

3.71. This proposition applies with particular force in the present case, since the issue before the Court is not whether the investigating judges correctly applied the provisions of Article 656 of the French Code of Criminal Procedure — it is not for the Court to interpret and apply French law[234] — but to decide whether or not the request by the French investigating judges, which was formulated pursuant to that provision but not transmitted by the Minister for Foreign Affairs to President Sassou Nguesso, was compatible with international law and whether it violated the jurisdictional immunity enjoyed by the latter. The French Republic considers that, for all of the reasons set out above, the reply to that question must indisputably be in the negative.

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[231]Memorial, p. 38.

[232]See above, footnote 199 and Ann. V.

[233]Judgment of 14 February 2002, para. 53. See also, for example, Article 7, paragraph 2 *(a)*, of the Vienna Convention of 1969 on the Law of Treaties, Article 21 of the 1969 Convention on Special Missions and Article 1 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

[234]See PCIJ, Judgment of 25 May 1926, *Certain German Interests in Polish Supper Silesia, Series A, No. 7*, p. 19; Advisory Opinion of 4 February 1932, *Treatment of Polish Nations and Other Persons of Polish Origin or Speech in the Danzig Territory, Series A/B, No. 44*, p. 24.

88 3.72. Following this analysis, it is clear that the second ground relied upon by the Republic of the Congo cannot be upheld:

(i) the prosecutor's originating application of 23 January 2002 did not have — and could not have had — the effect of giving the Meaux investigating judge jurisdiction to conduct an investigation in respect of Congolese nationals not present on French territory at the time when it was issued, in the absence of a later supplemental application identifying such persons by name;

(ii) General Dabira, the only individual named in the complaint (to which the originating application of 23 January 2002 refers) who was present on French territory at that date enjoys no jurisdictional immunity;

(iii) the same applies to Generals Oba and Adoua, who, in any event, could not be the subject of acts of investigation unless the prosecutor issued a supplemental application identifying them by name in the event that they were present in France otherwise than on an official diplomatic mission; furthermore, the claims by the Republic of the Congo in respect of those individuals are without object, since they contemplate a purely contingent situation;

(iv) on the other hand, the French Republic does not dispute that President Sassou Nguesso is entitled to the benefit of the immunities accorded to foreign Heads of State, which, in the circumstances of the present case, are absolute;

(v) those immunities have not in any way been violated by the invitation to testify addressed by the investigating judges to the French Ministry of Foreign Affairs, and to which, pursuant to the clear rules of the French Code of Criminal Procedure, Mr. Sassou Nguesso would not in any case have been required to respond, even if it had reached him.

89 **SUBMISSIONS**

For the reasons set out in this Memorial, the French Republic requests the International Court of Justice to reject the claims of the Republic of the Congo.

Paris, 11 May 2004

(Signed) Ronny ABRAHAM

Agent of the French Republic.

ANNEXES