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

ANNEX I

(IV.9)

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

Reference: C.N.798.2003.TREATIES-4 (Depositary Notification)

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

NEW YORK, 10 DECEMBER 1984

CONGO: ACCESSION

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 30 July 2003.

The Convention will enter into force for the Congo on 29 August 2003 in accordance with its article 27 (2) which reads as follows:

"For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession."

31 July 2003

Attention: Treaty Services of Ministries of Foreign Affairs and of international organizations concerned. Depositary notifications are made available to the Permanent Missions to the United Nations at the following e-mail address: missions@un.int. Note that annexes to the depositary notifications are distributed in hard copy format only. The hard copy versions of the depositary notifications are available for pick-up by the Permanent Missions in Room NL-300. Such notifications are also available in the United Nations Treaty Collection on the Internet at http://untreaty.un.org.

ANNEX II

Letter dated 9 September 2002 from the Inspector-General of the Congolese Armed Forces and National Gendarmerie, General Norbert Dabira, to the Chargé d'affaires at the French Embassy in the Congo, Brazzaville.

Republic of the Congo
Ministry of National Defence
Inspectorate-General of the Congolese Armed Forces
and of the National Gendarmerie
Private Office

Further to the Summons for First Appearance sent by the investigating judge of the Meaux *Tribunal de grande instance*, I am unable to comply with that summons in view of formal instructions from my Government that I should not appear; first because, in my capacity as Inspector-General of the Congolese Armed Forces and of the National Gendarmerie, I do not have to justify my actions in the exercise of my duties before any court other than that of my country, unless an international letter of request has been issued; secondly, two investigating judges cannot be seised of the same facts. The proceedings in Meaux, subsequent to those before the Congolese investigating judge, are unquestionably barred by the principle of *"non bis in idem"*. The alleged perpetrators of the acts in question are all resident in Brazzaville and those acts are alleged to have been committed in Brazzaville. The jurisdiction of the Brazzaville investigating judge seems to be the most extensive in the present case. An application for withdrawal on the ground of a dispute as to jurisdiction will be lodged against the proceedings pending before the Meaux *Tribunal de grande instance*.

As I know that I am completely innocent in a case of which I do not know the full details, I insisted on obtaining an exit permit, but the Minister for National Defence reiterated the Government's formal instructions and he was not able to issue me with such authorization.

Letter of 9 September 2002 from the Minister for National Defence, General Jacques Ivon Ndolou, Brazzaville

Further to formal instructions from the Government of the Republic of the Congo, General Norbert Dabira is unable to comply with the summons of the Meaux *Tribunal de grande instance*. In his capacity as Inspector-General of the Congolese Armed Forces and the National Gendarmerie, in active service, he is not answerable to any court other than that of his country. The general status of the Congolese Armed Forces and of the National Gendarmerie leaves only one possibility in this respect. Officers of the Congolese Armed Forces can only be tried pursuant to a United Nations resolution attributing jurisdiction to a foreign court.

Accordingly, General Norbert Dabira cannot appear before the Meaux *Tribunal de grande instance*. I am unable to issue him with an exit permit.

ANNEX III

Letter of 5 February 2004 from the Embassy of the Congo in France to the Ministry of Foreign Affairs

The Embassy of the Republic of the Congo in France presents its compliments to the Ministry of Foreign Affairs and has the honour to inform it that, further to your request, Mr. Pierre Oba, Minister of the Interior of the Republic of the Congo, is temporarily in Paris on State business. However, Messrs. Serge Oboa, Grégoire Mbere and Emmanuel Yoka are at present in Brazzaville.

The Embassy of the Republic of the Congo in France thanks the Ministry of Foreign Affairs for its kind co-operation and avails itself of this opportunity to renew to it the assurances of its highest consideration.

Letter of 5 February 2004 from Jean-Pierre Asvazadourian, Deputy Head of Protocol of the French Ministry of Foreign Affairs to Adjudant Frederic Cook, Criminal Investigation Police of Paris.

On 4 February 2004 you requested me to provide information in connection with a judicial investigation undertaken on the basis of *commission rogatoire* (warrant) No. 3/02/40 issued on 10 July 2002 by Mr. Jean Gervillie, jointly with Ms Odette Luce Bouvier, investigating judges at the Meaux *Tribunal de grande instance*.

According to the information obtained from the Embassy of the Congo in France, only Mr. Pierre Oba, Minister of the Interior of the Republic of Congo, is currently in France. He is in this country on an official mission.

By virtue of customary international law, members of official delegations visiting France enjoy immunity from jurisdiction and from execution.

ANNEX IV

Letter to the Registrar dated 21 May 2003 from H. E. Jacques Obia, Ambassador of the Republic of the Congo

I have the honour to enclose herewith the following documents:

1. Criminal Code of the Republic of the Congo;
2. Code of Criminal Procedure of the Republic of the Congo;

together with:

— the Prosecutor's originating application;

— the Prosecutor's supplemental application;

— the Investigating Judge's letter of request.

Republic of the Congo
Court of Appeal of Brazzaville
Brazzaville *Tribunal de Grande Instance*
Office of the Public Prosecutor

***Réquisitoire à fin d'informer* (Prosecutor's originating application for a judicial investigation)**

I the undersigned, Jerome Ngouloubi, Deputy Public Prosecutor at the Brazzaville *Tribunal de Grande Instance*;

Whereas the book entitled *"Les guerres civiles du Congo Brazzaville"* and the newspaper "Tam-tam" No. 55 of 6 August 2001 report respectively on disappearances that occurred during the socio-political events of November 1993 and January 1994 and between 5 June 1997 and 15 October 1997, as well as disappearances in 1999 at Brazzaville Beach;

Whereas to date, the circumstances surrounding the disappearance of the thousands of Congolese civilians in question have not been elucidated and the perpetrators of those offences have not been identified;

Whereas in order to establish the truth, it is appropriate to open a judicial investigation on the counts of premeditated murder and rape;

Whereas under Article 2 of Law No. 21-99 of 20 December 1999 pertaining to an amnesty for acts of war arising from the civil wars of 1993 to 1994, 1997 and 1998 to 1999, an amnesty was granted for any "acts of war" committed during the above-mentioned civil wars;

Whereas Article 2 of Decree 99-270 of 31 December 1999, laying down the terms of implementation of Law No. 21-99, stipulates:

> "For the construction of the above-mentioned Law, an act of war shall refer to any act violating public order, the integrity of the person, personal freedom and private or public property, when such act is committed in a period of civil war for the exclusive purpose of the war. Any other act perpetrated during the same period but intended to serve the personal interests of its perpetrator and, therefore, not for the purposes of the war, shall not be covered by the Law of amnesty";

Whereas, accordingly, any offences of rape, torture and murder that cannot be regarded as necessities of the war do not fall within the provisions of Act No. 21-99 of 20 December 1999;

ON THESE GROUNDS:

I submit this application to the *Doyen des juges d'instruction* (Senior Investigating Judge) to open an investigation, by all legal means, against a person or persons unknown on the basis of serious presumptions of rape and premeditated murder; those serious crimes are provided for and punishable by Articles 296, 297, 298 and 332 of the Criminal Code;

And to issue any appropriate warrants.

Done at the Prosecutor's office, 29 August 2000

On behalf of the *Procureur de la République*
(Signed) Jerome NGOULOUBI

Brazzaville Court of Appeal
Brazzaville *Tribunal de Grande Instance*
Office of the Public Prosecutor

***Réquisition supplétif* (Prosecutor's supplemental application for an extension of the investigation)**

New fact, new charge

Public Prosecutor at the Brazzaville *Tribunal de Grande Instance*

Having regard to the proceedings brought against a person or persons unknown on the counts of rape and premeditated murder.

Whereas certain facts not provided for by the originating application of 29 August 2000 have been brought to the knowledge of the Investigating Judge who has forwarded to me the relevant evidence.

Whereas such evidence gives rise to serious presumptions that a person or persons unknown committed a violation of professional secrecy and failed to assist a person in danger.

Offences provided for and punishable under Articles 63 and 37 of the Criminal Code.

Having regard to Article 176 of the Code of Criminal Procedure, the Investigating Judge is hereby requested to extend his investigation to those offences, by all legal means . . .

Done at the Prosecutor's office, 11 November 2002.

(signed) A. ITOTO-ABAKASSAR

Procureur de la République.

Republic of the Congo
Brazzaville Court of Appeal
Brazzaville *Tribunal de Grande Instance*
Office of Mr. Patrice Nzouala
Doyen des juges d'instruction

***Commission rogatoire* (letter of request)**

I the undersigned Patrice Nzouala, Senior Investigating Judge at the Brazzaville *Tribunal de Grande Instance*; having regard to the judicial investigation against a person or persons unknown on the counts of premeditated murder, torture, crimes against humanity and rape;

Offences provided for and punishable by Articles 295, 297, 299, 332 *et seq.* of the Criminal Code; having regard to Articles 142, 143 and 144 of the Congolese Code of Criminal Procedure, in conjunction with Articles 11, 12, 114 and 15 of the General Agreement on Judicial Co-operation between Congo Brazzaville and the Democratic Republic of the Congo; hereby instruct the Senior Investigating Judge of Kinshasa to carry out the above-mentioned (*sic*) operations, which are necessary for the present investigation;

Operations to be performed

To take evidence from the representative of the Kinshasa HCR, according to the statutory provisions for the examination of international civil servants;

— please conduct the examination in the form of a questionnaire and report back with the answers of that organization;

— the questions are as follows:

1. Were there any written documents exchanged between the Kinshasa HCR and the civilian or military authorities of Brazzaville capable of reassuring the HCR as to the upholding of the fundamental rights and freedoms of the individuals that the HCR was entrusting to those authorities?

2. The HCR should be asked to provide the judiciary with the full names of individuals that it entrusted in May and June 1999 to the Congolese State;

3. How many of the Congolese nationals recorded in its registers are presumed to have disappeared at the Beach?

4. What precautions were taken by the HCR at the material time to avoid any unforeseeable event outside the Agreement and capable of constituting a threat to the persons that the HCR was supposedly entrusting to the Congolese State?

5. After reading in the press about the disappearance of the persons entrusted to the Congolese State, what action did it undertake for the purpose of tracing them?

Done at Brazzaville, 2 October 2002.

Facts of the case

During the year 2002, the Congolese Observatory of Human Rights (OCDH) affiliated to the International Federation for Human Rights (FIDH) made it known through the Brazzaville press

that in May 1999, thousands of Congolese who had previously left Brazzaville in a hurry to seek refuge from the fighting had decided to return home, with the help of the High Commission for Refugees (UNHCR), which for such purpose had taken the precautionary measure of creating a humanitarian corridor.

The UNHCR contended that over 350 disappearances had been enumerated during this return from exile and attributed those disappearances to the President of the Republic of the Congo, to the Minister of the Interior, to Mr. Norbert Dabira, Inspector General of the Armed Forces and to General Blaise Adoua, Commander of the Republican Guard, whom they accused of crimes against humanity, acts of torture and forced disappearances.

Following the publication of that information which was capable of constituting a breach of public order if found to be true, the prosecutor's office of Brazzaville opened a judicial investigation on counts of torture and premeditated murder, on the basis of an originating application dated 29 August. The Senior Investigating Judge of Brazzaville, having been lawfully seised of the matter, has performed a number of measures of investigation, some of which have required him to deliver *commissions rogatoires*.

ANNEX V

Appeal No. Z 00–87.215

Reporting Judge: Ms Chanet
Advocate-General: Mr. Launay

Procureur général
at the Paris Court of Appeal

versus

— the association S.O.S. Attentats
— Ms Béatrice Castelnau d'Essenault, née de Boery

Criminal Chamber hearing of 27 February 2001
(First and Second Sections combined)

Opinion of the Advocate-General

I shall not go over the facts and procedure, which the Reporting Judge has just related in full.

I shall simply recall that the facts put forward in the civil parties' complaint gave rise to a judicial investigation between September 1989 and January 1998, during which not all of the civil parties saw fit to seise the judicial authorities of claims invoking the criminal responsibility of Col. Qaddafi, the Libyan Head of State.

By judgment *in absentia* handed down on 10 March 1999, the Paris Assize Court, as specially constituted, sentenced the six Libyan nationals being tried before it to life imprisonment.

Ms de Castelnau d'Essenault and the association S.O.S. Attentats, represented by its President, Ms Rudetzki, who had already lodged civil complaints in connection with the investigation, lodged complaints as civil parties with the same investigating judge on 16 June 1999 against Col. Qaddafi, contending that he was implicated in the attack on the UTA aircraft.

The order rejecting the public prosecutor's submissions that no investigation should be opened was upheld by the Indictments Chamber, whose judgment, dated 20 October 2000, is now before you for consideration.

The facts relied on by the civil parties are based, for the most part, on information found in the record of investigation on which the Assize Court rendered its judgment of 10 March 1999.

I. The civil parties' preliminary comments on the admissibility of the appeal from the Paris *Procureur Général*

The civil parties argue in their pleadings that, since a claim of immunity is not a jurisdictional plea but a simple preliminary objection, there is a question whether the prosecutor's office can directly assert it in the stead of the alleged holder of immunity.

It is said to follow that the only time when Col. Qaddafi could assert his immunity would be upon notification that he has been placed under judicial examination.

On this point, the reasoning should be by analogy with parliamentary immunity, which is raised *proprio motu* by the prosecutor's office, in the absence of an express request by the Member of Parliament, without any need for a finding of inadmissibility, or even for the admissibility issue to have been raised before the court.

But what must be emphasized is that the prosecutor's office necessarily enjoys the capacity to act *proprio motu* in such a case since it involves a question of international law directly affecting France's diplomatic relations.

II. The place of custom in international law

The writers are unanimous: custom plays a crucial role, recognized by various international texts, in creating international law.

Indeed, the régime of immunities and privileges held by leaders is governed, in large part, by customary rules of international law.

Thus, [the Statute of] the International Court of Justice, established by the Charter of the United Nations signed at San Francisco on 26 June 1945, states in Article 38, paragraph 1: "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . international custom, as evidence of a general practice accepted as law".

Similarly, the Vienna Convention on the Law of Treaties of 23 May 1969 states in its preamble that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention" and notes that a rule set forth in a treaty can become binding upon a third State "as a customary rule of international law, recognized as such".

The importance to be assumed by international custom in a State's domestic legal order is, more often than not, determined by the State's Constitution.

As far as our country is concerned, the preamble to the Constitution of 27 October 1946, incorporated by reference into the Constitution of 4 October 1958, is regarded as enshrining the legal force of international custom when it states: "the French Republic, faithful to its traditions, shall conform to the rules of international law".

As the Indictments Chamber rightly observed in the challenged judgment, international custom, seen as evidence of a general practice universally accepted as a source of law, governs the relationships between States and carries the same authority as treaties.

But, as the Indictments Chamber also noted, stating at the beginning of its judgment that "a State cannot be bound by a custom unless it has accepted it", the existence of a custom requires the presence of two elements: *first, a material element*, that is to say a general, consistent, uniform practice, based on a build-up of precedents, which can consist of failures to protest as well as positive acts, and; *second, a psychological element*, *opinio juris*, i.e., the belief on the part of States that they are complying with a true rule of law or, at the very least, a legal requirement.

While it is not necessary for all States in the international community to have assented in order for a customary norm to exist, adherence by a sufficiently large and representative number of States is required.

III. Head of State's immunity before a foreign criminal court

On this point the Indictments Chamber judgment rejected the reasoning of the investigating judge, who had found:

— that the offences alleged in the complaint fell within the scope of Article 113-7 of the Criminal Code;

— that an investigating judge acting on a complaint cannot apply anything but legal texts and ratified international conventions;

— that no provision of the Criminal Code or of international conventions or treaties ratified by France gave rise to any immunity for incumbent Heads of State which would shield them from criminal proceedings against them;

— that, in the absence of any immunity provided by statute or international convention, international customary law, assuming it to be proved, could not constitute a legal norm prevailing over statute law.

In this respect, the Indictments Chamber did not deny the merit of the *Procureur Général*'s submissions pointing out that custom was a source of international law to which France was required to conform.

Broadly 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, but, being founded on international custom and not international texts, it does not have the same legal basis.

In the case of incumbent Heads of State, protection follows from two fundamental principles.

First, their immunity derives from the sovereignty of the State, which bars a State from judging the acts of another sovereign State, unless the latter consents thereto.

A foreign Head of State enjoys special treatment, safeguarding him from sanctions under foreign law and from any judicial supervision.

This principle is based on the independence which a foreign Head of State must necessarily be recognized to enjoy and on the respect owed to his office and the dignity of the State which he represents.

The idea from which this principle derives is thus the identification of the State with its representative, the State's freedom of action having to be preserved in the person of the individual concerned.

It follows that all acts performed by the Head of State are deemed to have been carried out by the State, a sanction for criminal conduct being applicable only to the State and not to its representative.

Second, the principle of immunity for Heads of State is traditionally assimilated to a rule of comity of nations, necessary for the maintenance of friendly relations among States.

In this regard, the preamble to the Vienna Convention of 1961 notes that diplomatic privileges and immunities contribute to the development of friendly relations among nations, irrespective of their differing political systems.

The principle of sovereign equality among States *per se* implies equality of treatment of Heads of State as the supreme State organs, each State's freedom of action and sovereignty thereby being preserved by way of the person of its leader.

The Indictments Chamber correctly observes that French courts' jurisdiction over crimes committed abroad against victims of French nationality ceases if the individual being prosecuted for having committed such acts holds immunity from jurisdiction.

And the Indictments Chamber adds that while a foreign Head of State's immunity from jurisdiction is not founded on any international treaty to which France is a party nor on any other text, it has nevertheless always been accepted by the international community, including France, and that French courts, both civil and criminal, as well as legal scholars, have consistently recognized it.

These various observations by the Indictments Chamber, which run counter to the reasoning of the investigating judge, must be approved since they match the practice of judicial and administrative courts, which consider international custom to be a component of domestic law and capable of application by a national court.

Moreover, it should be observed that the question of a conflict between statute law and custom does not arise in this case because French law, while not expressly laying down the principle of criminal immunity for foreign Heads of State, in no way repudiates it either.

Finally, the argument raised by the civil parties before the Indictments Chamber to the effect that Col. Qaddafi does not have the status of Libyan Head of State does not stand up to scrutiny.

In light of the criteria applied under international law to determine that status, it cannot in all seriousness be denied that the individual in question exercises full political power and that he occupies the highest office in the hierarchy of Libyan authorities; there seems, moreover, to be no further argument about this before the Court of Cassation.

IV. Criticism of the Indictments Chamber's judgment

The Indictments Chamber observes that the immunity from jurisdiction enjoyed by Heads of State, originally absolute, has since the end of the Second World War been made subject to limits, as a result of which there is today a legal practice that is universally accepted, including by France, pursuant to which a Head of State's immunity from jurisdiction applies only to acts of public authority or public administration that cannot be considered international crimes.

In support of this position, the Indictments Chamber relies *first* on many international conventions which, according to it, show that such a customary rule is now in force; *second* on recent decisions of a number of foreign jurisdictions; and *finally*, on the existence of a norm of *"jus cogens"* applicable to "international crimes" and taking precedence over the customary rule providing for the immunity of foreign Heads of State.

A. International conventions

The Indictments Chamber relies first on United Nations Security Council resolutions 827 and 955, establishing, respectively, the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague and the International Criminal Tribunal for Rwanda (ICTR) in Arusha.

But, in those two cases, the rule of immunity is expressly rejected in the founding text and that is therefore binding on all Member States of the United Nations.

The Indictments Chamber next cites the Rome Convention of 17 July 1998, laying down the Statute of the International Criminal Court (ICC), which has jurisdiction over four categories of crime: genocide, crimes against humanity, war crimes and the crime of aggression.

However, that Convention requires 60 ratifications before entering into force and thus far has been ratified by only 29 States, including France recently.

At the end of its judgment, the Indictments Chamber does however stress the fact that France's ratification of the Rome Convention requires it, in the Chamber's view, to prosecute international crimes. The Chamber relies in this connection on both the Preamble to the Rome Convention (the sixth recital of which provides that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes") and on Article 22, paragraph 3, of that instrument (which notes that the characterization of any conduct as criminal under international law, independently of the Statute, shall not be affected) and draws the conclusion therefrom that States having ratified the Convention are under a duty to prosecute international crimes — which are not limited to crimes against humanity, genocide, war crimes and the crime of aggression — even where the accused enjoys the official status of Head of State or Head of Government.

Here again, the reasoning is highly questionable.

It is strange to read into the Preamble to the Convention a broader ambit than that of its operative provisions; it is just as odd to turn what is merely a possibility (Art. 22, para. 3) into an obligation on States having ratified the Convention.

And, above all, the reasoning completely ignores Article 98 of the Statute, providing "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to . . . State or diplomatic immunity . . .". Thus, while Article 27 of the Statute clearly overrides the immunity of Heads of State when the States are parties to the Rome Convention, it is not at all clear that the same is true for States not parties to the Statute because, under the principle of the relative effect of treaties, a treaty cannot create obligations for a State which is not a party thereto unless that State consents (see Article 34 of the 1969 Vienna Convention on the Law of Treaties, which in this respect reflects customary law). Now, Libya, unlike France, has not ratified the Rome Convention (which, at any rate, has not yet entered into force and cannot therefore be cited at this time as a conventional norm).

These examples clearly show that whenever it has been decided to derogate from the customary rule of immunity from jurisdiction for incumbent Heads of State, it has been done expressly in treaty texts.

In addition to these three recent examples, others may be cited, but they either came to nothing or are not meaningful for the present case.

— For example, in 1919 the former German Kaiser Wilhelm II was arraigned in the Treaty of Versailles for "a supreme offence against morality and the sanctity of treaties". But there could be no trial as the Netherlands refused to surrender the accused, who had been granted asylum on its territory, to the Allied Powers.

— The Military Tribunal at Nuremberg, which was created by the London Conference of 8 August 1945, providing for the trial of Heads of State guilty of war crimes and crimes against humanity, as defined by the Tribunal's Charter, was unable to function in respect of that provision of the agreement, owing to Hitler's suicide.

— Nor could the Charter of the Tokyo Tribunal, dated 19 January 1946, which drew upon the same provisions as those in the Charter of the Nuremberg Tribunal, be implemented either, as the American authorities decided for reasons of political expediency not to prosecute Emperor Hirohito.

B. Recent decisions of some foreign courts

The Indictments Chamber also relies on judicial decisions handed down by the House of Lords in the extradition proceedings against General Pinochet in connection with acts of torture and on the proceedings brought by the United States of America against General Noriega for drug trafficking and holds that they are evidence of a general practice accepted by all, including France, and of the principle that immunity from jurisdiction covers only acts of public authority or public administration carried out by the Head of State, provided that they are not considered international crimes.

The Indictments Chamber's position cannot reasonably be seen as falling within the framework of positive law.

No national court, other than the Indictments Chamber in the present case, has upheld legal proceedings against an incumbent Head of State on the ground that the crimes of which he was accused were, by their very nature, not covered by customary immunity.

The Pinochet case is not an apposite precedent in this respect since, first, it involved a Head of State who was no longer in office and, second, the House of Lords pointed out that both the United Kingdom and Chile were parties to the 1984 New York Convention against Torture, reasoning therefrom that, in ratifying the Convention, Chile had waived the immunity of its former Head of State for that crime.

Moreover, it is to be noted that the New York Convention makes no mention of the criminal responsibility of incumbent Heads of State, which would appear to indicate that the drafters did not intend to create an exception to the principle of immunity in this regard.

As for the crimes of which General Pinochet was accused, they fell into the category of "crimes against humanity", not terrorist crimes.

In respect of the General Noriega case, the American courts rejected his lawyers' immunity-based claim, on the ground that he was not the Panamanian Head of State.

As for the decision to indict the ex-President of Yugoslavia, Milosević, then incumbent Head of State, it was based on the characterization of the acts as crimes against humanity. But that position follows from the straightforward application of the Statute of the Criminal Tribunal for the former Yugoslavia in The Hague, not from a rule of general international criminal law.

It is also noteworthy that a complaint was filed in late 1998 with the *Procureur de la République* in Paris by the International Federation for Human Rights, in respect of torture and inhuman and degrading treatment, against Laurent Kabila, President of the Republic of the Congo and recently assassinated, who was on an official trip to France.

The authorities decided not to take further action on that complaint, precisely because of the immunity enjoyed by incumbent Heads of State.

C. The existence of a norm of *"jus cogens"* applicable to "international crimes" and taking precedence over the international customary rule of foreign-Head-of-State immunity

Another question remains to be answered: whether the bombing which is the subject of the tragic case now before you could constitute an "international crime" of such gravity that its prohibition and punishment would fall under a "peremptory norm of general international law . . . accepted and recognized [as such] by the international community of States as a whole", i.e., a norm of *"jus cogens"*, in accordance with Article 53 of the Vienna Convention on the Law of Treaties.

Thus formulated, the question is in reality twofold; it must be determined:

— first, whether crimes of terrorism can be treated as "international crimes";

— second, whether punishment of "international crimes" is a matter of *"jus cogens"*.

1. Treatment of terrorist crimes as international crimes

The Indictments Chamber infers from its findings that no immunity can cover acts of aiding and abetting voluntary homicide and the destruction of property caused by explosive substances and involving death, in connection with terrorist activities, where those acts by a Head of State consisted of ordering an airliner to be blown up, and that such acts, assuming them proved, would fall within the category of "international crimes" and could not in any case be deemed to fall within the duties of a Head of State.

It should be recalled that none of the major international conventions dealing with acts of terrorism has laid down an express exception to Head-of-State immunity from jurisdiction, whether we consider the conventions on air terrorism (Conventions of Tokyo of 1963, The Hague of 1970, Montreal of 1971 and 1988), the Rome Convention of 1988 concerning maritime terrorism or the New York Convention of 1979 against the taking of hostages.

Moreover, crimes of terrorism, as heinous as they may be, are not referred to in the United Nations Security Council resolution establishing the International Tribunal for the former Yugoslavia nor in the 1998 Convention concerning the Statute of the future International Criminal Court.

While certain States had expressed the desire to see other crimes, such as terrorism and drug trafficking, added to the list of crimes falling within the jurisdiction of the International Criminal Court, the Rome Conference did not adopt their point of view.

France, like its European partners, in fact demonstrated its hostility to treating them alike.

It was simply agreed that a Review Conference would be held seven years after the entry into force of the Statute of the International Criminal Court to consider the crimes of terrorism and drug crimes "with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".

2. The question of *"jus cogens"*

According to the respondent's pleadings, the Indictments Chamber found that the criminalization under domestic law of such a serious offence, violating fundamental human rights, fell within the category of norms of *"jus cogens"*.

Thus, it is argued, in criminal proceedings this is a general principle of international law which can be described as "natural" and which requires adherence by all Member States of the United Nations by binding all, in the hierarchy of international norms, as having force transcending the international customary rule of immunity for foreign Heads of State.

(a) Admittedly, certain arguments can be advanced in support of this thesis:

— For example, the superiority of *"jus cogens"* over conventional and ordinary customary law was recognized in the 10 December 1998 *Furundzija* judgment by the ICTY, which affirmed that it is impossible to derogate from *"jus cogens"* by means of agreement;

— Evidence of this affirmation of peremptory norms, valid *"erga omnes"* and from which no derogation is possible, is also found in international jurisprudence, including that of the United Nations Human Rights Committee, the European Court of Human Rights (this is the notion of European *ordre publique*) and even the International Court of Justice, which employs the notion of "intransgressible principles" (see Advisory Opinion of 8 July 1996 concerning nuclear weapons, para. 79);

— Further, examples in public international law of rules considered to be peremptory norms or the like include, *inter alia*:

  — the prohibition on torture (see ICTY — *Furundzija* case of 10 December 1998);

  — the prohibition on genocide (International Court of Justice, *Barcelona Traction* case);

  — the "intransgressible principles" or "cardinal principles" constituting the fabric of humanitarian law, such as the distinction between civilians and combatants and the prohibition on causing unnecessary suffering (International Court of Justice, Opinion on nuclear weapons);

  — generally, "respect for the basic rights of the human person" and the "cardinal principles of humanitarian law", based on elementary considerations of humanity, "even more exacting in peace than in war" (International Court of Justice, 27 June 1986, "Nicaragua"; United Nations Human Rights Committee, General Comment 24).

(b) But as serious as these arguments based on a *"jus cogens"* superior to international custom affording Head-of-State immunity may appear when it comes to certain particularly serious international crimes, in respect of France they nevertheless run up against the fact that our country has not recognized the concept of *"jus cogens"*, as defined in the 23 May 1969 Vienna Convention on the Law of Treaties, and that is why France has not yet acceded to that Convention.

It is therefore a bold, not to say illogical, claim that there already exists, pursuant to a *"jus cogens"* we have yet to recognize under the Vienna Convention, an exception to immunity from jurisdiction for foreign Heads of State in respect of certain crimes considered under international law to be exceptionally serious, when, moreover, the crimes falling into that category remain to be defined.

True, the International Law Commission, instructed by the United Nations in 1998 to draw up a draft "Crimes against the Peace and Security of Mankind", adopted the following as the definition of an "international crime of a State": "[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole"; but hardly any progress has been made since then.

OPINION

I shall end by saying that, while the principle of immunity from jurisdiction of incumbent Heads of State is still considered under positive international law to be *general*, in that it covers all crimes committed by a Head of State, and *absolute*, in that it extends to acts of any nature which the Head of State may have committed, subject to those few exceptions which I have mentioned, it is however to be observed that a noticeable relaxing of this principle is becoming evident both in France and abroad.

It remains true nevertheless that while this evolution in international law can, in accordance with the position adopted by some States, limit the scope of the traditionally recognized immunities, these limitations are, as is always the case in criminal law, to be interpreted strictly.

Thus, the assertion alone that the facts of this case fall, by virtue of their seriousness, into the category of international crimes is not enough to provide a basis for concluding that no immunity can cover them and that it is therefore appropriate for the French courts to investigate the individual accused by the complainants.

If you were to adopt that latter view, and if you were thus to permit a French court to try a foreign Head of State in violation of current customary international law, there would be a great risk that France's international responsibility could be engaged by the other State in question.

Thus, the leading decision which your Chamber will render is anxiously awaited and bears enormous importance, for it will be the first ruling, after the Indictments Chamber's decision which has been referred to you, on the thorny question of immunity from jurisdiction of foreign Heads of State.

I am nonetheless well aware of the tragedy which the friends and relations of the victims of this horror have suffered and continue to suffer.

I further wish to pay tribute to Ms Rudetzki, a civil party, who, after having herself been the victim of a very serious attack, took the initiative to found the association "S.O.S. Attentats", which she leads with unflagging fervour and exemplary devotion.

Be that as it may, I cannot overstate the importance of the fact that the Court of Cassation's sole role is to state the law, and nothing but the law, with no possibility — whatever that may sometimes cost it — of taking into account subjective or humanitarian considerations.

I therefore have no choice but to opine, under positive law as it now stands, that the appealed judgment should be quashed, and, in my view, without being referred back.