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**INTERNATIONAL COURT OF JUSTICE**

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

**REJOINDER OF THE FRENCH REPUBLIC**

**11 August 2008**

*[Translation by the Registry]*

**INTERNATIONAL COURT OF JUSTICE**  
**CERTAIN CRIMINAL PROCEEDINGS IN FRANCE**  
**(REPUBLIC OF THE CONGO V. FRANCE)**  
**REJOINDER OF THE FRENCH REPUBLIC**

1. In accordance with the Order of the Court dated 11 January 2006, and within the time-limit laid down by the Court, the Republic of the Congo filed a Reply on 11 July 2006. Pursuant to the same Order, the French Republic was authorized to file a Rejoinder within a time-limit expiring on 11 August 2008. The present Rejoinder has been submitted in accordance with that decision.

2. Pursuant to Article 49, paragraph 3, of the Rules of Court “[t]he Reply and the Rejoinder, whenever authorized by the Court, shall not merely repeat the parties’ contentions, but shall be directed to bringing out the issues that still divide them”.

3. In its Reply, the Republic of the Congo refrained from “responding to the arguments developed by the French Republic in its Counter-Memorial”, putting forward “two new elements” which had emerged since the exchange of the Parties’ Memorial and Counter-Memorial<sup>1</sup>.

4. First, the Republic of the Congo held that, on the date of the filing of its Reply, its Application had become “devoid of purpose”, following the Judgment of the *Chambre de l’instruction* of the Paris Court of Appeal dated 22 November 2004, that Court having decided to annul the judicial proceedings instituted before the Meaux *Tribunal de grande instance* which had prompted the Applicant’s Application<sup>2</sup>. Second, according to the Applicant, “[t]he legal proceedings instituted in Brazzaville . . . led to proceedings on the merits before the [Brazzaville] *Cour d’assises* . . . ending in the acquittal of all those accused”, which is “in any event a bar to the exercise of . . . jurisdiction by the French courts [based on the Convention of New York against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]”<sup>3</sup>.

5. The French Republic notes moreover that the Republic of the Congo asked the Court “to give it an opportunity to add to the present Reply should the judgment terminating the criminal proceedings be overturned” and requested of it “formal acknowledgment that in any event the decision of the Congolese court is *res judicata* and a bar to a continuation of those proceedings”<sup>4</sup>.

6. Failing the submission of additional arguments by the Republic of the Congo in its Reply, France requests the Court, in accordance with Article 49, paragraph 3, of the above-mentioned Rules of Court, to refer to the written arguments which it set out in its Counter-Memorial dated 11 May 2004.

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<sup>1</sup>Reply of the Republic of the Congo (hereinafter “RRC”), p. 1.

<sup>2</sup>RRC, p. 2. The judgment was appended as Annex 1 to RRC.

<sup>3</sup>RRC, p. 3.

<sup>4</sup>*Ibid.*

7. Indeed, with respect to the first point, the Respondent can but observe that the Applicant has at this stage not yet availed itself of the reservation in its Reply, even though the *Chambre criminelle* of the French *Cour de Cassation*, in a judgment dated 10 January 2007, overturned the Judgment of the *Chambre de l'instruction* of the Paris Court of Appeal ordering the annulment of the proceedings<sup>5</sup>.

8. However, the French Republic wishes to inform the Court of the following judicial developments, and of the relevant decisions by French courts appended as annexes to the present Rejoinder. Following the Judgment of the *Cour de Cassation* of 10 January 2007, the Versailles Court of Appeal, in its decision on the referral, ruled on the jurisdiction of the investigating judge to look into the acts specified in the complaint and, in particular, those which might be attributable to Mr. Robert Dabira, as well as on the annulment of all proceedings relating to Mr. Jean-François N'Dengue, Director General of the Congolese police force<sup>6</sup>. In its Judgment of 20 June 2007, the *Chambre de l'instruction* of the Versailles Court of Appeal upheld the jurisdiction of the French courts and annulled all procedural measures relating to Mr. N'Dengue<sup>7</sup>. By a judgment dated 9 April 2008, the *Cour de Cassation* ruled on the various appeals lodged against the Judgment of the Versailles Court of Appeal, which it found were inadmissible or should be dismissed<sup>8</sup>. Consequently, the judicial proceedings instituted in 2002 before the Meaux *Tribunal de grande instance* should be reconvened shortly in conditions identical to those obtaining when the French Republic filed its Counter-Memorial in the present case.

9. Further, on the second point, the French Republic would point out that it devoted part of its Counter-Memorial to the objection of *res judicata* raised by the Republic of the Congo<sup>9</sup>, and that, in any event, it is for the French courts concerned to decide whether that objection is admissible in the present case.

### Submissions

For the reasons set out in this Rejoinder, the French Republic fully stands by the grounds set out in its Counter-Memorial. The French Republic requests the International Court of Justice to reject the claims of the Republic of Congo.

Paris, 11 August 2008,

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

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<sup>5</sup>Ann. I of the present Rejoinder.

<sup>6</sup>Mr. N'Dengue, who is not among the persons mentioned in the Republic of the Congo's Application, was placed under judicial investigation (*mis en examen*) on 2 April 2004, accused, in particular, of crime against humanity and torture.

<sup>7</sup>Ann. II of the present Rejoinder.

<sup>8</sup>Ann. III of the present Rejoinder.

<sup>9</sup>Counter-Memorial of 11 May 2004, pp. 50-63, paras. 2.75-2.106.

## LIST OF ANNEXES

- Annex I Judgment of the Criminal Division of the French *Cour de cassation* of 10 January 2007.
- Annex II Judgment of the *Chambre de l'instruction* of the Versailles Court of Appeal of 20 June 2007.
- Annex III Judgment of the Criminal Division of the French *Cour de cassation* of 9 April 2008.
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## ANNEX I

### **Judgment of the Criminal Division of the French Cour de cassation of 10 January 2007**

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

Ruling on the appeals brought by:

- the International Federation for Human Rights (FIDH);
- the French League for Human Rights (LDH);
- the Congolese Observatory for Human Rights (OCDH);
- Pascal Miena Youlou;
- Ghislain Matenbele;
- Aubin Mackaya;
- Blanchard Mouele;
- Linot Bardin Duval Tsieno;
- the “Disappeared of the Beach” Association;
- Marcel Touanga;
- the “Survie” Association.

civil parties,

against the Judgment of the *Chambre de l’instruction* of the Paris Court of Appeal, First Division, of 22 November 2004, which, in the investigation conducted in the proceedings brought by them against an unidentified person for crimes against humanity, acts of torture and abductions, ruled on an application to annul certain procedural documents;

The Court, ruling after deliberations in the public hearing of 29 November 2006 at which were present: Mr. Cotte, President, Mrs. Chanet, rapporteur, Mr. Le Gall, Mr. Pelletier, Mrs. Ponroy, Mr. Arnould, Mrs. Koering-Joulin, Mr. Corneloup, Mr. Pometan, divisional judges, Mrs. Caron, auxiliary judge;

Advocate General: Mr. Mouton;  
Registrar: Mrs. Krawiec;

On the report of Mrs. Chanet, rapporteur, the observations made by the civil-law professional partnership Piwnica and Molinié, by Mr. Foussard and by the civil-law professional partnership Waquet, Farge and Hazan, lawyers in the Court, and the submissions of Mr. Mouton, Advocate General, the applicants’ lawyer being the last to speak;

Joining the appeals because they are related;

On the admissibility of the appeals brought by Marcel Touanga on 26 and 30 November 2004;

Whereas the applicant, having exercised his right to appeal against the judgment concerned by lodging an appeal together with the “Survie” Association on 26 November 2004, was not

entitled to appeal again against the same decision; whereas only the appeal lodged on 26 November 2004 together with the “Survie” Association is admissible;

Having regard to the personal and supplementary written submissions, the statement of defence and the additional observations made;

I — On the admissibility of the personal written submission from Marcel Touanga and the “Disappeared of the Beach” Association:

Whereas this written submission, which comes from applicants whom the judgment that they are challenging does not convict of any crime, was not filed in the Registry of the *Chambre de l’instruction* but was transmitted directly to the *Cour de cassation* without the assistance of a lawyer in that Court;

Whereas, since it does not meet the requirements of Article 584 of the Code of Criminal Procedure, the *Cour de cassation* is not seised of the pleas that it might contain;

II — On the supplementary written submission from the other civil parties and Marcel Touanga:

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

*On the sole ground of appeal, based on the violation of Articles 1, 5, 6 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, Articles 3, 6, 13 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Preliminary Article and Articles 40, 41, 80, 113-1, 173, 174, 689-1, 689-2, 591 and 593 of the Code of Criminal Procedure, inadequate and inconsistent reasons, faulty or insufficient reasons;*

*“In that the judgment in question annulled the application for a judicial investigation and the subsequent proceedings;*

*“On the basis that the provisions of Article 689-1 of the Code of Criminal Procedure, referred to in the application for a judicial investigation which assigned the investigating judge, consist of a derogation in that they allow perpetrators of offences committed outside the territory of the Republic to be prosecuted and tried in France even if neither they nor their victims are French nationals; that these provisions could only apply if both the offence was one of those covered by the international conventions listed in Articles 689-2 to 689-9 of the Code of Criminal Procedure and the person being prosecuted was in France when the proceedings were initiated; that, firstly, the application for a judicial investigation referred not only to acts of torture, as defined in Article 689-2 of the Code of Criminal Procedure by reference to the Convention against Torture of 10 December 1984, but also to crimes against humanity, which were not included in any of the conventions listed; that, secondly, the application that initiated the proceedings was made against an unidentified person and therefore did not provide the information necessary to ascertain whether the condition requiring the person being prosecuted to be on French soil was met, whereas ascertaining this was a necessary precondition of granting exceptional jurisdiction; that the fact that the provisions of Article 689-1 of the Code of Criminal Procedure constitute a derogation precluded simultaneous application of the general provisions of Article 80 of the Code of Criminal Procedure, by virtue of which the Public Prosecutor’s Department may issue an application against an identified or unidentified person; that, furthermore, in this instance, the opening of the investigation against an unidentified person led to the investigating judge issuing a warrant instructing testimony to be taken from Norbert Dabira, the*

*only person likely, according to the Public Prosecutor, to be covered by the investigation, which is prohibited by Article 113-1 of the Code of Criminal Procedure when the application mentions an individual by name; that the application, which did not meet the legal requirements for its existence, would be annulled together with all subsequent proceedings;*

- 1. Whereas the State Prosecutor, in the light of the information sent to him, having not only the right but also the duty to require an investigation to be opened, since the acts reported to have been committed abroad are consistent with the description of torture within the meaning of Article 1 of the Convention against Torture of 10 December 1984 and since the results of the preliminary enquiry carried out pursuant to Article 6 of that Convention revealed these acts to have occurred and one of the people involved was found to be on French territory, the application for a judicial investigation may only be annulled if it does not formally comply with the essential conditions of its legal existence; whereas in this case the Public Prosecutor's Department, which made the application for annulment, in no way contended that the application for a judicial investigation did not formally comply with the essential conditions of its legal existence and, given that this was not contested, the Chambre de l'instruction could not, without exceeding its powers, annul this document issued by the Public Prosecutor's Department and all the subsequent proceedings;*
- 2. Whereas the particulars of the application for a judicial investigation (D29) show that it is dated and signed, made against an unidentified person, refers to specific offences and the applicable texts and refers to the documents from the preliminary enquiry on which it is based and which are appended to it, such that this application does formally comply with the essential conditions of its legal existence; whereas in deciding the contrary the Chambre de l'instruction, which has exceeded its jurisdiction, has infringed the above-mentioned texts;*
- 3. Whereas the combined provisions of Articles 203, 689-1 and 689-2 of the Code of Criminal Procedure indicate that, since the French courts have jurisdiction to try acts of torture, cruel, inhuman or degrading treatment as referred to by both Article 1 of the Convention against Torture of 10 December 1984 and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, they have jurisdiction to try acts related to these offences, which is the case of crimes against humanity perpetrated to commit the aforementioned acts, as the Public Prosecutor asserted pertinently before the Chambre de l'instruction;*
- 4. Whereas the provisions of Articles 1, 4 and 5 of the Convention against Torture of 10 December 1984 lay down that the Signatory States to that Convention have jurisdiction to prosecute acts of torture perpetrated outside their territory if the alleged offender is on the territory under their jurisdiction, while respecting the legal definition of the offences, and shall ensure, 'that all acts of torture are offences under [their] criminal law'; whereas when torture is committed as part of a widespread or systematic attack directed against any civilian population this crime may be deemed simultaneously to be a crime against humanity;*
- 5. Whereas it can be deduced from the provisions of Articles 689-1 and 689-2 of the Code of Criminal Procedure that the State Prosecutor has the power to prosecute the offences referred to in Article 1 of the Convention against Torture of 10 December 1984 since the documents appended to the application show that one or more of the individuals concerned are in France, this power also being provided for in the above-mentioned Convention, and that, since this precondition is met, he is free to make applications either against the person or persons in*

*France or against unidentified persons; whereas in the present case, since the documents appended to the application show beyond doubt that Norbert Dabira, who is specifically implicated in those documents, was in France on the date on which the application was made, the rules on jurisdiction in the above-mentioned articles have not been infringed;*

6. *Whereas, to ascertain the scope of an application which has been claimed to be invalid before them – which, incidentally, was not the case in this instance — it is vital for the Chambres de l’instruction to refer to the documents appended to that application, the official receipt marked on these documents signifying that they have been taken into account, and whereas in this case record No. 2530/2001, appended to the application for a judicial investigation, clearly showed that Norbert Dabira was on French territory, a fact that the judgment in question chose to ignore in the interests of adopting a decision that is tantamount to a refusal to conduct an investigation;*
7. *Whereas any formal defect resulting from the investigating judge failing to observe the provisions of Article 113-1 of the Code of Criminal Procedure is clearly unlikely to affect the validity of the application for a judicial investigation;*
8. *Whereas the combined provisions of Articles 3, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms show that a State violates the principle of fair trial if its judicial authorities refuse, in breach of the provisions of the Convention against Torture — and that includes by deciding to annul the application for a judicial investigation and the subsequent proceedings — to take action in response to a complaint filed, for example, by human rights organizations for acts of torture committed abroad, when the complaint and the documents from the preliminary enquiry show that at least one of the presumed perpetrators was on the territory of that State;”*

*And on the same ground raised by the Court of its own motion in consideration of the “Disappeared of the Beach” Association;*

The grounds for the appeal being justified;

Having regard to Articles 689, 689-1, 689-2, 40, 41 and 80 of the Code of Criminal Procedure;

Whereas, on the one hand, in accordance with the first three of these articles, a person guilty of committing torture within the meaning of Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts;

Whereas, on the other hand, on the basis of the second three above-mentioned articles, the State Prosecutor has the right to require an investigation to be opened in the light of any information sent to him and whereas the application for a judicial investigation may only be annulled if it does not formally comply with the essential conditions of its legal existence;

Whereas the judgment challenged states that the International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) and the Congolese Observatory for Human Rights (OCDH) filed a complaint against Denis Sassou N’Gusso, President of the Republic of the Congo, Pierre Oba, Minister of the Interior, Norbert Dabira, Inspector-General of the Congolese Armed Forces, and Blaise Adoua, Commander of the Republican Guard, for arbitrary arrests, acts of torture and forced disappearances, between May and July 1999 involving displaced persons

returning to the Congo through the river port of Brazzaville known as “the Beach”, following the conclusion of an agreement under the auspices of the United Nations High Commissioner for Refugees establishing a humanitarian corridor;

Whereas the State Prosecutor in Paris transmitted the complaint to the Public Prosecutor’s Department in Meaux, which had territorial jurisdiction by virtue of the fact that Norbert Dabira was known to have a permanent residence at 54, Allée des Tilleuls, Boisparisis in Villeparisis; whereas, once the preliminary enquiry had confirmed that Norbert Dabira and his family did indeed permanently reside at this address, the State Prosecutor requested the opening of an investigation on the grounds of crimes against humanity, acts of torture and abductions;

Whereas the assigned investigating judge took several procedural steps, *inter alia* by issuing warrants, with regard to the individuals referred to in the complaint; whereas Jean-François N’Dengue, Director-General of the Congolese Police, who was residing in Meaux, was arrested, remanded in police custody, had his testimony taken and was then released on the basis that he enjoyed diplomatic immunity; whereas Norbert Dabira had his testimony taken as a legally represented witness, then declined to respond to the summonses of the investigating judge, who thereupon issued an arrest warrant against him; whereas several victims have filed civil-party complaints;

Whereas on 5 April 2004 the State Prosecutor made an application to annul the steps taken in respect of Jean-François N’Dengue, Pierre Oba and Blaise Adoua, on the grounds that the application for a judicial investigation, which had been incorrectly made against an unidentified person, could actually only refer to Norbert Dabira, the only person likely to have been involved in the reported offences and to have been established to have a permanent residence on national territory;

Whereas the judgment annuls not only the documents referred to in the application from the Public Prosecutor’s Department but also the application for a judicial investigation and all the subsequent proceedings for the reasons reproduced in the ground for the appeal;

But whereas in so deciding, when, firstly, the application for a judicial investigation, correctly dated and signed by a judge in the Public Prosecutor’s Department, referred to the reports from the preliminary enquiry appended thereto, secondly, the individuals suspected of having committed the reported acts were referred to by name in the complaint and, finally, sufficient evidence had been gathered when proceedings were initiated that at least one of them, Norbert Dabira, whose habitual residence is on French territory where he is established with his family, was in France, the *Chambre de l’instruction* failed to observe the scope and meaning of the above-mentioned texts and the principles recalled above;

The judgment is therefore overturned;

On these grounds:

I — On the private appeal brought by Marcel Touanga on 26 November 2004:

*Declares it to be inadmissible;*

II — On the other appeals:

*Overturns and annuls* all the provisions of the aforementioned Judgment of the *Chambre de l’instruction* of the Paris Court of Appeal of 22 November 2004 so that the appeal may be heard again in accordance with the law;

*Refers* the case and the parties to the *Chambre de l'instruction* of the Versailles Court of Appeal, designated following special deliberations in closed session;

*Orders* this judgment to be printed, recorded in the official registers held in the Registry of the *Chambre de l'instruction* of the Paris Court of Appeal and referenced either in the margins of the annulled Judgment or immediately thereafter;

Judgment thus done and decided by the *Cour de cassation*, Criminal Division, and delivered by the President on the tenth of January, two thousand and seven;

In witness whereof, the present Judgment has been signed by the President, the Rapporteur and the Registrar;

Certified copy,  
(Signed) Chief Registrar.

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## ANNEX II

### **Judgment of the *Chambre de l'instruction* of the Versailles Court of Appeal of 20 June 2007**

Judgment delivered on the twentieth of June two thousand and seven

#### **Composition of the Court**

During the deliberations and the decision:

Mr. Riquin, President  
Mrs. Dalloz, judge  
Mrs. Pieri-Gauthier, judge

all three appointed under the provisions of Article 191 of the Code of Criminal Procedure.

During the deliberations:

Mr. Junillon, Advocate General  
Ms Le Fricc, Registrar

For the delivery of the Judgment the Judgment was read out by Mr. Riquin, President, in the presence of the Public Prosecutor's representative and Ms Le Fricc, Registrar.

#### **Parties in the case:**

##### **Person under formal investigation:**

N'Dengue, Jean-François  
born on 5 May 1952 in Brazzaville (Congo)  
of Congolese nationality  
residing at 1 Avenue de la Concorde, Résidence le Verseau, 77100 Meaux

at liberty

Characterization of the acts: crimes against humanity, massive and systematic practice of abduction of persons followed by their disappearance, torture or inhuman acts, on ideological grounds and in pursuit of a concerted plan against a group of the civil population.

Lawyers:

Mr. Jean-Pierre Versini-Campinchi, 4 Rue de la Tour des Dames, 75009 Paris  
Mr. Jean-Marc Florand, 66 Boulevard Malesherbes, 75008 Paris  
Ms Katy Richard, 1 Rue Thiers, Place de la Gare, 95300 Pontoise  
Mr. Jacques Verges, 20 Rue de Vintimille, 75009 Paris  
Mr. François Saint Pierre, 3 Place Célestins, 69002 Lyon  
Mr. Oko replaced by Mr. Versini-Campinchi, address for service at the office of  
Mr. Versini-Campinchi.

**Legally represented witness:**

Norbert Dabira  
at liberty  
residing at 54 Rue des Tilleuls, 77270 Villeparisis.

Lawyers:

Mr. Jean-Pierre Versini-Campinchi, 4 Rue de la Tour des Dames, 75009 Paris  
Ms Caty Richard, 1 Rue Thiers, Place de la Gare, 95300 Pontoise  
Mr. François Saint Pierre, 3 Place Célestins, 69002 Lyon.

**Civil parties:**

(see French original)

In a letter of 22 May 2007, Mr. Florand indicated that he would no longer be a legal adviser for Jean-François N'Dengue.

**Summary of the proceedings**

By Judgment of 22 November 2004, the *Chambre de l'instruction* of the Paris Court of Appeal, First Division, to which an application for annulment had been made by the State Prosecutor in Meaux on 5 April 2004, annulled the application for a judicial investigation and all of the subsequent proceedings conducted by one of the investigating judges in Meaux in the investigation against an unidentified person for crimes against humanity — massive and systematic practice of abduction of persons followed by their disappearance, torture or inhuman acts, on ideological grounds and in pursuit of a concerted plan against a group of the civil population — in which Jean-François N'Dengue had been placed under formal investigation and testimony had been taken from Norbert Dabira as a legally represented witness;

The Criminal Division of the *Cour de cassation* delivered a judgment on the appeal brought by eleven of the civil parties on 10 January 2007, overturning and annulling all of the provisions of that judgment and referring the case and the parties to the *Chambre de l'instruction* of the Versailles Court of Appeal;

In accordance with the provisions of Articles 194 and 197 of the Code of Criminal Procedure, the Public Prosecutor:

- notified the date on which the case would be heard to **Jean-François N'Dengue**, under formal investigation, **Norbert Dabira**, legally represented witness, the civil parties and their lawyers, by registered letters on 21 May 2007;
- deposited the file in the Registry of the *Chambre de l'instruction* with his written statements dated 21 May 2007 to be made available to the lawyers of the person under formal investigation, the legally represented witness and the civil parties;

In accordance with the provisions of Article 198 of the Code of Criminal Procedure, the following written submissions were filed with the Registry, initialled by the Registrar and communicated to the Court:

Mr. Versini-Campinchi on 18 May 2007:

- a submission on behalf of Norbert Dabira seeking a declaration that the proceedings are void;

- a submission on behalf of Norbert Dabira and Jean-François N'Dengue seeking a decision to terminate the criminal proceedings;
- a submission on behalf of Jean-François N'Dengue seeking a declaration that the proceedings are void based on diplomatic immunity.

Mr. Versini-Campinchi on 24 May 2007:

- a submission on behalf of Norbert Dabira and Jean-François N'Dengue in reply to the Public Prosecutor's statement

Mr. Verges on 29 May 2007:

- a submission on behalf of Jean-François N'Dengue

Mr. Oko on 29 May 2007:

- a submission on behalf of Jean-François N'Dengue

Mr. Esseau on 29 May 2007:

- a submission on behalf of Norbert Dabira

Mr. Missamou on 29 May 2007:

- a submission on behalf of the "Disappeared of the Beach" Association

Mr. and Mrs. Touanga  
the families of the victims

Mr. Baudouin on 29 May 2007:

- a submission on behalf of:

the International Federation for Human Rights (FIDH)  
the French League for Human Rights (LDH)  
the Congolese Observatory for Human Rights (OCDH)  
Ghislain Matembele  
Linot Bardin Duval Tsieno  
Blanchard Mouele  
Aubin Gautier Mackaya  
Pascal Miena Youlou  
Edgar Parfait Kouandzi

Mr. Bourdon on 29 May 2007:

- a submission on behalf of:

the "Survie" Association  
Mr. and Mrs. Touanga

Mr. Pantou on 29 May 2007:

- a submission on behalf of Marcel and Madeleine Touanga

The "Collective of Parents of the Victims of the Forced Disappearances of the Beach" also sent a letter.

### **Conduct of the deliberations**

At the hearing in closed session on 30 May 2007, the following were heard:

- Mr. Riquin, President, who presented his report;
- Mr. Junillon, Advocate General, who presented his conclusions;

- Mr. Saint Pierre, lawyer of Norbert Dabira and Jean-François N’Dengue, who presented his observations;
- Mr. Clamagirand, lawyer of Jean-François N’Dengue, who presented his observations;
- Mr. Verges, lawyer of Jean-François N’Dengue, who presented his observations;
- Mr. Versini-Campinchi, lawyer of Norbert Dabira and Jean-François N’Dengue, who presented his observations;
- Ms Richard, lawyer of Norbert Dabira and Jean-François N’Dengue, who presented his observations;
- Mr. Esseau, lawyer of Jean-François N’Dengue, who presented his observations;
- Mr. Baudouin, lawyer of civil parties:
  - the International Federation for Human Rights (FIDH)
  - the French League for Human Rights (LDH)
  - the Congolese Observatory for Human Rights (OCDH)
  - Ghislain Matembele
  - Linot Bardin Duval Tsieno
  - Blanchard Mouele
  - Aubin Gautier Mackaya
  - Pascal Miena Youlou
  - Edgar Parfait Kouandzi

who presented his observations;

- Mr. Pantou, lawyer of Marcel and Madeleine Touanga, civil parties, who presented his observations;
- Mr. Missamou, lawyer of the “Disappeared of the Beach” Association, of Mr. and Mrs. Touanga and of the families of the victims, civil parties, who presented his observations;
- Mr. Delva, deputizing for Mr. Bourdon, lawyer of the “Survie” Association and of Mr. and Mrs. Touanga, civil parties, who presented his observations;
- Ms Richard, lawyer of Norbert Dabira and Jean-François N’Dengue, who presented his observations;
- Mr. Verges, lawyer of Jean-François N’Dengue, who presented his observations;
- Mr. Esseau, lawyer of Jean-François N’Dengue, who presented his observations;
- Mr. Saint Pierre, lawyer of Norbert Dabira and Jean-François N’Dengue, who presented his observations;
- Mr. Versini-Campinchi, lawyer of Norbert Dabira and Jean-François N’Dengue, who presented his observations;

The lawyers of Norbert Dabira, legally represented witness, and Jean-François N’Dengue, under formal investigation, were the last to speak.

The case was then adjourned until 20 June 2007.

## Decision

Taken after due deliberation in accordance with Article 200 of the Code of Criminal Procedure, by judgment delivered in closed session:

### As to the form

Whereas the following information is evident from the case file:

By letter of 7 December 2001, Mr. Henri Leclerc, lawyer and member of the Paris bar, acting on behalf of the International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) and the Congolese Observatory for Human Rights (OCDH), filed a complaint (D1, 2) with the State Prosecutor in Paris against, “Mr. Denis Sassou N’Guesso, President of the Republic of the Congo, Mr. Pierre Oba, Minister of the Interior, Mr. Norbert Dabira, Inspector-General of the Congolese Armed Forces, Mr. Blaise Adoua, Commander of the Republican Guard, known as the Presidential Guard, and any others “for arbitrary arrests, acts of torture and forced disappearances, which took place from May to July 1999 and concerned displaced persons returning to the Congo through the river port of Brazzaville known as ‘the Beach’, following the conclusion of an agreement under the auspices of the United Nations High Commissioner for Refugees establishing a humanitarian corridor”.

On the same day, 7 December 2001, the State Prosecutor in Paris transmitted the complaint to the Public Prosecutor’s Department in Meaux, which had territorial jurisdiction “under Articles 689-1 and 693 of the Code of Criminal Procedure” by virtue of the fact that Norbert Dabira was known to have a permanent residence in Villeparisis (D1/1).

Once the preliminary enquiry had confirmed that Norbert Dabira and his family did indeed have a permanent residence at this address, the State Prosecutor in Meaux submitted a request on 23 January 2002 (D29) for an investigation to be opened against an unidentified person on the grounds of:

“crimes against humanity: massive and systematic practice of

— abduction of persons followed by their disappearance,

— torture or inhuman acts,

on ideological grounds and in pursuit of a concerted plan against a group of the civil population,”

having regard to Article 212-1 of the Penal Code and Article 689-1 of the Code of Criminal Procedure.

The investigating judge assigned took several procedural steps, *inter alia* by issuing warrants:

The testimony of Norbert Dabira, who was referred to in the initial complaint and apprehended at his Villeparisis home (77270), was taken while he was in custody on 23 May 2002 and subsequently as a legally represented witness by the investigating judge on 8 July 2002 (D57); he failed to comply with a further summons; a warrant for immediate appearance was issued against him on 16 September 2002 (D69), then an arrest warrant on 15 January 2004, which indicated that he had been placed under formal investigation (D104 to D140);

Jean-François N’Dengue, Director-General of the Congolese Police, was apprehended on 1 April 2004 at 1 Rue du Verseau in Meaux where he was residing;

When he was remanded in custody at 12.30 p.m. he said that he was in France on an official mission and that he had a diplomatic passport and a mission order from President Sassou N’Gusso dated 19 April 2004.

On 1 April 2004 at 10.55 p.m. the State Prosecutor of the Meaux *Tribunal de grande instance* applied for Jean-François N’Dengue to be released from custody, referring to the note from the Director of the Private Office of the Minister for Foreign Affairs stating that:

“Mr. N’Dengue shall, by virtue of the documents that he bears, which are signed by the President of the Republic of the Congo, indicating that he has been in France on an official mission since 19 March 2004, be considered to enjoy immunity from jurisdiction and execution (the latter precluding any coercive measure)” (D242).

On 2 April 2004, Jean-François N’Dengue was placed under formal investigation for,

“crimes against humanity: massive and systematic practice of abduction of persons followed by their disappearance, torture or inhuman acts, on ideological grounds and in pursuit of a concerted plan against a group of the civil population, from April to July 1999 in Brazzaville (Republic of the Congo),

acts rendered criminal offences by Article 212-1 of the Penal Code, Articles 689-1 and 689-2 of the Code of Criminal Procedure and Article 1 of the Convention against Torture of 10 December 1984” (D244);

He was remanded in custody before being released on 3 April 2004 on appeal and following an urgent application for his release.

On 5 April 2004, the State Prosecutor in Meaux filed an application to annul documents with the *Chambre de l’instruction* of the Paris Court of Appeal.

He sought the annulment of, “the measures taken in respect of Jean-François N’Dengue under the warrant (including the official report of the judicial investigation — D233 — and his hearing in custody — D234), the procedural steps taken by the investigating judge (including the interrogation at first appearance — D244 — and the order referring the matter to the judge responsible for detention) and the measures taken by the judge responsible for detention (including the record of the hearing of both parties and the arrest warrant) as well as all of the other measures related thereto and the supporting documents”.

In support of his application, he stated that,

“the court in Meaux does not have jurisdiction to investigate Jean-François N’Dengue’s actions in connection with the crimes against humanity that have been referred to an investigating judge in the case against Norbert Dabira, for the following two reasons:

- As the note from the Minister for Foreign Affairs states, Jean-François N’Dengue enjoys diplomatic immunity under the conditions set out in our above-mentioned statements;
- the *in personam* nature of the case referred to the investigating judge under Article 689-1 of the Code of Criminal Procedure means that the investigation is restricted to Norbert Dabira, given that no proceedings have been initiated by a supplementary application referring explicitly to Jean-François N’Dengue on the grounds of the discovery of new facts”.

By decision of 9 April 2004, the President of the *Chambre de l'instruction* ordered the investigation to be suspended pending a decision on the validity of the proceedings.

By Judgment of 22 November 2004, the *Chambre de l'instruction* of the Paris Court of Appeal annulled the application for a judicial investigation and all the subsequent proceedings for the reasons that, “firstly, the application for a judicial investigation refers not only to acts of torture, as defined in Article 689-2 of the Code of Criminal Procedure by reference to the Convention against Torture of 10 December 1984, but also to crimes against humanity which are not included in any of the conventions listed,” and secondly that, “the application that initiated the proceedings was made against an unidentified person and therefore does not provide the information necessary to ascertain whether the condition requiring the person being prosecuted to be on French soil is met, whereas ascertaining this is a necessary precondition to granting exceptional jurisdiction”;

The Criminal Division of the *Cour de cassation*, having regard to Articles 689, 689-1, 689-2, 40, 41 and 80 of the Code of Criminal Procedure, delivered a judgment on the appeal brought by eleven of the civil parties on 10 January 2007, overturning and annulling all the provisions of the Judgment of the *Chambre de l'instruction* of the Paris Court of Appeal of 22 November 2004 and referring the case and the parties to the *Chambre de l'instruction* of the Versailles Court of Appeal.

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In his written statements of 21 May 2007, the Public Prosecutor requests the Court to:

- adjudge and declare, firstly, that the persons suspected of having committed the reported offences were referred to by name in the civil parties’ initial complaint;
- adjudge and declare, secondly, that when the proceedings were initiated there was sufficient evidence that at least one of the persons referred to by name — in this instance, Mr. Norbert Dabira — was in France;
- order these investigation proceedings to be referred back to the *Chambre de l'instruction* of the Paris Court of Appeal, originally seised of the matter.

On 18 May 2007, a first submission was filed on behalf of Norbert Dabira which, citing the provisions of Article 689-1 of the Code of Criminal Procedure, requests the Court to declare that all the proceedings are void, as from document D1.

On the same day, a second submission was filed on behalf of Norbert Dabira and Jean-François N’Dengue which, citing

- Articles 6 and 692 of the Code of Criminal Procedure, Articles 6 (1) and 6 (2) of the European Convention on Human Rights and
- the final Judgment of the Criminal Division of the Brazzaville Court of Appeal of 17 August 2005,

requests the Court to:

“adjudge and declare that the defence of *res judicata* that has been submitted is admissible and well founded, state that the proceedings commenced cannot be brought against Norbert Dabira and Jean-François N’Dengue, decide to terminate the criminal proceedings concerning Norbert Dabira and Jean-François N’Dengue”.

On the same day, 18 May 2007, a third submission was filed on behalf of Jean-François N’Dengue which, citing diplomatic immunity, requests the Court to:

- “grant the application for annulment filed on 5 April 2004 by the State Prosecutor of the Meaux *Tribunal de grande instance*;
- annul documents D172, D174, D190 to D192, D198 to D208, D211 to D214, D200 to D222, D225 to D228, D232 to D244, D246 to D248, D257 to D278 and all the custody documents with a C reference in judicial investigation No. 03/02/40 commenced at the office of Mr. Grevillie concerning Jean-François N’Dengue”.

The Public Prosecutor issued an additional application requesting the Court to:

- “adjudge and declare that the said submissions are inadmissible as far as the Versailles Court is concerned;
- order these investigation proceedings to be referred back to the *Chambre de l’instruction* of the Paris Court of Appeal, originally seized of them”.

On 24 May 2007, a “submission in reply” was filed on behalf of Norbert Dabira and Jean-François N’Dengue, which, citing Articles 170 *et seq.* of the Code of Criminal Procedure and Articles 7 and 13 of the European Convention on Human Rights, requests the *Chambre de l’instruction* to, “adjudge and declare that the points of law contained in the submissions duly filed on behalf of Mr. Dabira and Mr. N’Dengue are admissible and, as to the merits, to declare that the proceedings are void and to decide to terminate the criminal proceedings on the terms and for the reasons contained in these submissions”.

On 29 May 2007, two submissions were filed in the interests of Jean-François N’Dengue:

- a submission which, referring to the, “judgment delivered on 17 August 2005 by the Criminal Division of the Brazzaville Court of Appeal” and to the *non bis in idem* principle, requests the Court to, “adjudge and declare that there are no grounds for continuing the judicial investigation being conducted against General Jean-François N’Dengue”;
- a second submission, “seeking a decision to terminate the proceedings being brought against Jean-François N’Dengue, the matter being *res judicata*, a final court decision having been given in the Congo,” and requesting the Court to, “adjudge and declare that there are no further grounds for bringing proceedings against Mr. Jean-François N’Dengue in the ‘Disappeared of the Beach’ case”.

On 29 May 2007, a submission was filed on behalf of Norbert Dabira requesting the Court to, “establish, adjudge and declare that the criminal proceedings shall be terminated, the matter being *res judicata*, the judgment already given being universally binding, in accordance with the provisions of Article 6 of the French Code of Criminal Procedure”.

On 29 May 2007, several submissions were filed in the interests of the civil parties, pleading that the application for annulment and the submissions seeking annulment should be rejected, specifically:

— a submission on behalf of:

the “Disappeared of the Beach” Association, made in the person of its president;  
Mr. and Mrs. Touanga;  
the families of the victims;

requesting the Court:

“Primarily:

to adjudge and declare that the plea to terminate the criminal proceedings entered by Mr. Jean-François N’Dengue and Mr. Norbert Dabira is inadmissible;

to adjudge and declare that the criminal investigation and court proceedings that gave rise to the acquittal of Mr. Jean-François N’Dengue and Mr. Norbert Dabira do not comply with either Article 6 of the European Convention on Human Rights and Fundamental Freedoms or Article 7 of the African Charter on Human and Peoples’ Rights;

Alternatively:

to adjudge and declare that the offences of which Mr. Jean-François N’Dengue is accused are excluded from diplomatic immunity under customary international law;

to adjudge and declare that placing Mr. Jean-François N’Dengue under formal investigation is not incompatible with the *in personam* nature of the case referred to the investigating judge under Article 689-1 of the Code of Criminal Procedure;

to adjudge and declare that the international arrest warrant issued against Mr. Norbert Dabira complies with the provisions of Articles 131 *et seq.* of the Code of Criminal Procedure;

to adjudge and declare that the proceedings brought against Mr. Norbert Dabira are lawful;

as a result, to order these investigation proceedings to be referred back to the *Chambre de l’instruction* of the Paris Court of Appeal, originally seized of them”.

— a submission on behalf of:

the International Federation for Human Rights (FIDH)  
the French League for Human Rights (LDH)  
the Congolese Observatory for Human Rights (OCDH)  
Ghislain Matembele  
Linot Bardin Duval Tsieno  
Blanchard Mouele  
Aubin Gautier Mackaya  
Pascal Miena Youlou  
Edgar Parfait Kouandzi

which, referring to:

- the Judgment of the Criminal Division of the *Cour de cassation* of 10 January 2007,
- Article 609-1, sub-paragraph 2, of the Code of Criminal Procedure,
- the statements of the Public Prosecutor of the Versailles Court of Appeal,

requests the Court to:

- “reject the Public Prosecutor’s Department’s initial application for annulment;
  - reject, on the grounds that they are inadmissible and unfounded, the claims contained in the submissions filed on behalf of Mr. Jean-François N’Dengue and Mr. Norbert Dabira;
  - adjudge and declare that the persons suspected of having committed the reported offences were referred to by name in the civil parties’ initial complaint;
  - adjudge and declare that when the proceedings were initiated there was sufficient evidence that at least one of the persons referred to by name — in this instance, Mr. Norbert Dabira — was in France;
  - declare that these investigation proceedings shall be transferred back in their entirety to the *Chambre de l’instruction* of the Paris Court of Appeal, to which they were originally referred”.
- a submission on behalf of:
- the “Survie” Association;
  - Mr. and Mrs. Touanga;

requesting the Court to:

- “adjudge and declare that the submissions made by the legally represented witness and the person under formal investigation are inadmissible;
  - order that these investigation proceedings be referred back to the *Chambre de l’instruction* of the Paris Court of Appeal, originally seized of them”.
- a submission on behalf of Marcel and Madeleine Touanga

which, having regard to:

- the Judgment of the Criminal Division of the *Cour de cassation* of 10 January 2007,
- the Convention on Special Missions of 8 December 1969,
- Articles 6, 80-1, 689-1 and 692 of the Code of Criminal Procedure,
- the case file,

requests the Court to:

- “declare that the application for annulment of documents and measures relating to the investigation proceedings opened at the *Tribunal de grande instance* concerning Jean-François N’Dengue is unfounded;
- adjudge and declare that the requests, objections and conclusions put forward by Mr. Jean-François N’Dengue and Mr. Norbert Dabira are unfounded;
- order the investigation to be continued”.

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Whereas this *Chambre de l’instruction* is required by the Judgment of the Criminal Division of 10 January 2007 to rule on the two grounds of nullity in the Application made by the State Prosecutor in Meaux on 5 April 2004, based on the infringement of the provisions of Article 689-1 of the Code of Criminal Procedure and the failure to respect the diplomatic immunity of Jean-François N’Dengue; whereas the written submissions of the person under formal investigation and the legally represented witness are admissible because they relate to the grounds in the initial application made by the State Prosecutor in Meaux;

Whereas there are grounds for declaring the plea entered by Jean-François N’Dengue and Norbert Dabira seeking a decision to terminate the criminal proceedings on the grounds of *res judicata* inadmissible, as this defence is not provided for in Articles 171 and 173 of the Code of Criminal Procedure;

Whereas, having regard to the provisions of Article 609-1 of the Code of Criminal Procedure, Jean-François N’Dengue’s requests for the annulment of any procedural steps taken since the judicial investigation was declared to be suspended on 8 April 2004 shall also be declared inadmissible.

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\* \*

On the ground based on the infringement of Article 689-1 of the Code of Criminal Procedure:

Whereas, on the one hand, in accordance with Articles 689, 689-1 and 689-2 of the Code of Criminal Procedure, a person guilty of committing torture, within the meaning of Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts;

Whereas, on the other hand, the State Prosecutor has the right, under Articles 40, 41 and 80 of the same Code, to require an investigation to be opened in the light of all of the information sent to him;

Whereas in this instance the State Prosecutor in Meaux, the recipient of the complaint of 7 December 2001, filed on behalf of the International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) and the Congolese Observatory for Human Rights (OCDH) against Denis Sassou N’Gusso, President of the Republic of the Congo, Pierre Oba, Minister of the Interior, Norbert Dabira, Inspector-General of the Congolese Armed Forces, Blaise Adoua, Commander of the Republican Guard, and any others for arbitrary arrests, acts of torture and forced disappearances, which took place from May to July 1999 and concerned displaced persons returning to the Congo through the river port of Brazzaville known as “the Beach”, following the conclusion of an agreement under the auspices of the United Nations High Commissioner for Refugees establishing a humanitarian corridor, and the recipient of the reports from the preliminary enquiry (D16), from which it emerged that at least one of the individuals referred to in the complaint was in France, and more specifically within the jurisdiction of the Meaux *Tribunal de grande instance*, the individual concerned being Norbert Dabira, who possessed a permanent residence in Villeparisis (77270), 5 Allée des Tilleuls, had a vehicle registered at that address and had had administrative documents delivered there, applied for a judicial investigation to be opened against an unidentified person for, “crimes against humanity: massive and systematic practice of

— abduction of persons followed by their disappearance,

— torture or inhuman acts,

on ideological grounds and in pursuit of a concerted plan against a group of the civil population,” having regard to Article 212-1 of the Penal Code and Article 689-1 of the Code of Criminal Procedure;

Whereas therefore, having regard to the combined provisions of Articles 80, 689, 689-1 and 689-2 of the Code of Criminal Procedure, the investigating judge of the Meaux *Tribunal de grande instance* was entitled to investigate the acts reported in the complaint, and in particular those with which Norbert Dabira was likely to be charged, but also those with which Jean-François N’Dengue was likely to be charged, who, incidentally, possessed an apartment in Meaux where he resided for part of the year and where he was apprehended;

Whereas this ground shall therefore be dismissed.

On the ground based on Jean-François N’Dengue’s diplomatic immunity:

Whereas when he was remanded in custody on 1 April at 12.30 p.m. Jean-François N’Dengue said that he was in France on an official mission, and that he had a diplomatic passport and a mission order from President Sassou N’Gusso dated 19 April 2004;

Whereas, according to the procedural documents, when the Ministry of Foreign Affairs was consulted it replied verbally at 4.30 p.m. that Mr. N’Dengue did not enjoy a diplomatic accreditation and that a written reply would be made to the investigators (D236);

Whereas a written reply was provided at 6 p.m. by the Ministry of Foreign Affairs, which forwarded to the investigators a statement by Mr. Henri Lopes, Ambassador of the Republic of the Congo to France, who had been asked in particular about the date on the mission order;

Whereas he certified that the date of 19 April 2004 indicated on the mission order was a clerical error and that it should read “19 March 2004” (D236);

Whereas the statement reads as follows: “I (. . .) certify that Mr. Jean-François N’Dengue, Director-General of the Congolese Police, is indeed in France on an official mission, bearing a mission order signed by the Congolese Head of State.

Having spoken to him, I formally confirm that a clerical error was made in respect of the date of issue indicated on that mission order.

It should read 19 March 2004 instead of 19 April 2004 (. . .)”;

Whereas, in addition, on 1 April 2004 at 9.31 p.m., the Director of the Private Office of the Minister for Foreign Affairs sent a note from the Protocol Service to the State Prosecutor in Meaux worded as follows: “The Ministry of Foreign Affairs confirms that the Ambassador of the Republic of the Congo to France has certified that Mr. N’Dengue, bearer of a document signed by the President of the Republic of the Congo, has been in France on an official mission since 19 March 2004.

This being so, and under customary international law, he enjoys immunity from jurisdiction and execution”;

This note being appended to the application made by the State Prosecutor on 1 April at 10.55 p.m. to have Jean-François N’Dengue released from custody (D24);

Whereas the *Chambre de l’instruction* is not required to enquire into the nature of the business transacted during the official mission, as the civil parties invite it to do in their submissions, given that the authenticity of the document has been confirmed;

Whereas the note from the Protocol Service of the Ministry of Foreign Affairs is unequivocal about Jean-François N’Dengue’s immunity, notwithstanding France’s failure to ratify the Convention on Special Missions adopted in New York on 8 December 1969; whereas the waivers provided for in the Statute of the International Criminal Court and cited by the civil parties would not be applicable in this Court;

Whereas, in the light of the foregoing, there are grounds to hold that when Jean-François N’Dengue was remanded in custody he enjoyed immunity from jurisdiction and execution; whereas this applies regardless of the nature of the offences and therefore precluded the implementation of any coercive measure against him;

Whereas there are therefore grounds for granting in part the application to annul the procedural measures concerning Jean-François N’Dengue as specified in the operative provisions of this judgment;

### **On these grounds**

#### **The Court**

Having regard to the application for annulment of documents filed on 5 April 2004 by the State Prosecutor of the Meaux *Tribunal de grande instance*;

Having regard to the Judgment of the Criminal Division of 10 January 2007;

Granting the application in part;

Orders the following documents to be declared null and void:

- D234: Record of hearing in custody of Jean-François N'Dengue, comprising ten pages plus annex of 2 pages;
- D237: Record of investigations of 1 April 2004;
- D238: Requisition and medical certificates;
- D239: Record of seizure of a mission order;
- D240: Requisitions – medical certificate;
- D244: Record of the first appearance of Jean-François N'Dengue, comprising 3 pages;
- D247: Notification to proceed of 6 April 2004;
- D249 and D250: Notification to proceed of 9 April 2004;
- all of the custody documents relating to Jean-François N'Dengue (C1 to C11).

Orders the original documents and copies thereof to be withdrawn and rules that they shall be filed in the Registry of the *Chambre de l'instruction*;

Orders the deletion of the words, "Jean-François N'Dengue: detention order . . . released on . . . person placed under formal investigation for . . ." ("*Jean-François N'DENGUE: mandat de dépôt . . . libéré le . . . personne mise en examen des chefs de . . .*")

from the following documents:

- D246/1: record of joinder of documents of 5 April 2004;
- D276: warrant of 5 April 2004;
- D281/2: the "P2" information sheet annexed to the notification to proceed of 12 May 2004.

Having regard to Article 609-1 of the Code of Criminal Procedure, refers the proceedings back to the *Chambre de l'instruction* of the Paris Court of Appeal, originally seised of them;

Orders that the present judgment be executed upon the instructions of the Public Prosecutor;

(Signed) Ms LE FRIEC,  
Registrar.

(Signed) Mr. RIQUIN,  
President.

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### ANNEX III

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

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

Ruling on the appeals brought by:

- Norbert Dabira, person under formal investigation;
- Madeleine Bikindou, married name Touanga;
- The “Survie” Association;
- The “Disappeared of the Brazzaville Beach” Association;
- Marcel Touanga;
- Ghislain Matembele;
- Linot Bardin Duval Tsieno;
- Mouele, Blanchard;
- Aubin Gautier Mackaya;
- Pascal Miena Youlou;
- the International Federation for Human Rights (FIDH);
- the French League for Human Rights (LDH);
- the Congolese Observatory for Human Rights (OCDH).

civil parties,

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

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

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

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

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

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

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

II— On the other appeals:

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

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

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

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

This being so,

*On the sole ground for appeal, put forward by the civil-law professional partnership Piwnica and Molinié on behalf of the civil parties, based on the infringement of Articles 3, 6 and 13*

*of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 1, 2 and 29 to 37 of the Vienna Convention on Diplomatic Relations of 18 April 1961, Articles 1, 5, 6 and 7 of the Convention against Torture, adopted in New York on 10 December 1984, all the general principles of international law, Article 113-1 of the Penal Code, Articles 609-1, 689-1, 689-2, 591 and 593 of the Code of Criminal Procedure, inadequate reasons, faulty or insufficient reasons;*

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

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

*“1) Whereas, when the Cour de cassation overturns a judgment of a Chambre de l’instruction, the jurisdiction of the Chambre de l’instruction to which the case is referred is confined to resolving the issue that caused the case to be referred to it;*

*whereas the issue that caused the case to be referred to the Versailles Court of Appeal was confined to determining the validity of the application for a judicial investigation; whereas the Chambre de l'instruction of the Versailles Court of Appeal, the court to which the case was referred, was not therefore entitled to rule on whether or not Jean-François N'Dengue enjoyed diplomatic immunity, as has been claimed;*

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

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

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

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

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

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

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

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

The ground is not therefore admissible;

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

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

*“On the basis that there were grounds for declaring the plea entered by Jean-François N’Dengue and Norbert Dabira seeking a decision to terminate the criminal proceedings on the grounds of res judicata inadmissible, as this defence is not provided for in Articles 171 and 173 of the Code of Criminal Procedure (Judgment p. 22 in fine and p. 23, paragraph 1);*

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

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

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

The ground cannot therefore be accepted;

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

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

*“On the basis that, on the one hand, in accordance with Articles 689, 689-1 and 689-2 of the Code of Criminal Procedure, a person guilty of committing torture within the meaning of Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts; that, on the other hand, the State Prosecutor in Meaux, the recipient of the complaint of 7 December 2001, filed on behalf of the International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) and the Congolese Observatory for Human Rights (OCDH) against Denis Sassou N’Guesso, President of the Republic of the Congo, Pierre Oba, Minister of the Interior, Norbert Dabira, Inspector-General of the Congolese Armed Forces, Blaise Adoua, Commander of the Republican Guard, and any others for arbitrary arrests, acts of torture and forced disappearances, which took place from May to July 1999 and concerned displaced persons returning to the Congo through the river port of Brazzaville known as ‘the Beach’, following the conclusion of an agreement under the auspices of the United Nations High Commissioner for Refugees establishing a humanitarian corridor, and the recipient of the reports from the preliminary enquiry (D16), from which it emerged that at least one of the individuals referred to in the complaint was in France, and more specifically in the area of*

*jurisdiction of the Meaux Tribunal de grande instance, the individual concerned being Norbert Dabira, who possessed a permanent residence in Villeparisis (77270), 5 Allée des Tilleuls, had a vehicle registered at that address and had had administrative documents delivered there, applied for a judicial investigation to be opened against an unidentified person for, 'crimes against humanity: massive and systematic practice of abduction of persons followed by their disappearance, torture or inhuman acts, on ideological grounds and in pursuit of a concerted plan against a group of the civil population,' having regard to Article 212-1 of the Penal Code and Article 689-1 of the Code of Criminal Procedure; that therefore, having regard to the combined provisions of Articles 80, 689, 689-1 and 689-2 of the Code of Criminal Procedure, the investigating judge of the Meaux Tribunal de grande instance was entitled to investigate the acts reported in the complaint, and in particular those with which Norbert Dabira was likely to be charged, but also those with which Jean-François N'Dengue was likely to be charged, who, incidentally, possessed an apartment in Meaux where he resided for part of the year and where he was apprehended (Judgment pp. 23 and 24);*

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

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

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

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

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

The ground shall therefore be dismissed;

And whereas the judgment meets the necessary formal requirements;

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

*Declares it to be inadmissible;*

II— On the other appeals:

*Dismisses them;*

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

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

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