INTERNATIONAL COURT OF JUSTICE

YEAR 2002

2002
14 February
General List
No. 121

14 February 2002

CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

Facts of the case ¾ Issue by a Belgian investigating magistrate of "an international arrest warrant in absentia*" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity ¾ International circulation of arrest warrant through Interpol ¾ Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

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First objection of Belgium ¾ Jurisdiction of the Court ¾ Statute of the Court, Article 36, paragraph 2 ¾ Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings ¾ Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium ¾ Mootness ¾ Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium ¾ Admissibility ¾ Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium ¾ Admissibility ¾ Congo not acting in the context of protection of one of its nationals ¾ Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium ¾ Non ultra petita *rule ¾ Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law ¾ Claim not made in final submissions of the Congo ¾ Court unable to rule on that question in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

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Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs ¾ Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 ¾ Vienna Convention on Consular Relations of 24 April 1963 ¾ New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 ¾ Customary international law rules ¾ Nature of the functions exercised by a Minister for Foreign Affairs ¾ Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability ¾ No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity ¾ Distinction between jurisdiction of national courts and jurisdictional immunities ¾ Distinction between immunity from jurisdiction and impunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs ¾ Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs ¾ Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium ¾ International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

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Remedies sought by the Congo ¾ Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo ¾ Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

between

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,

Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,

Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,

Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),

Mr. Pierre d'Argent, *Chargé de cours*, Catholic University of Louvain,

Mr. Moka N'Golo, *Bâtonnier*,

Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, *Université libre de Bruxelles*,

Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gillès de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,

Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,

Mr. Pierre Morlet, Advocate-General, Brussels *Cour d'Appel*,

Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,

Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,

Mr. Tom Vanderhaeghe, Assistant at the *Université libre de Bruxelles*,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

For Belgium: Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

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10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels *tribunal de première instance* against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:
>
> 1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
>
> 2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;

3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;

2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

> "For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.
>
> If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

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13. On 11 April 2000 an investigating judge of the Brussels *tribunal de première instance* issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all

resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued."

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

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

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

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22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

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23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases *(Australia* v. *France)* and

(New Zealand v. *France)*, in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

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29. The second objection presented by Belgium is the following:

"That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further

in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

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33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

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37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law, a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the *Chambre du conseil* that the accused can defend himself before the *Chambre* and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person

who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

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41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot, and that the Application is admissible. Thus, the Court now turns to the merits of the case.

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45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

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

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d'affaires* are accredited.

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

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *rationae materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

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

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

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62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly "no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity

from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

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67. The Court will first recall that the "international arrest warrant in absentia", issued on 11 April 2000 by an investigating judge of the Brussels *Tribunal de première instance*, is directed against Mr. Yerodia, stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

> "— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
>
> — Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

"These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

"Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to

Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

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72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly,

infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

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78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

SEPARATE OPINION OF PRESIDENT GUILLAUME

Criminal jurisdiction of national courts ¾ Place of commission of the offence ¾ Other criteria of connection ¾ Universal jurisdiction ¾ Absence of.

1. I fully subscribe to the Judgment rendered by the Court. I believe it useful however to set out my position on one question which the Judgment has not addressed: whether the Belgian judge had jurisdiction to issue an international arrest warrant against Mr. Yerodia Ndombasi on 11 April 2000.

This question was raised in the Democratic Republic of the Congo's Application instituting proceedings. The Congo maintained that the arrest warrant violated not only Mr. Yerodia's immunity as Minister for Foreign Affairs but also "the principle that a State may not exercise its authority on the territory of another State". It accordingly concluded that the universal jurisdiction which the Belgian State had conferred upon itself pursuant to Article 7 of the Law of 16 June 1993, as amended on 10 February 1999, was in breach of international law and that the same was therefore true of the disputed arrested warrant.

The Congo did not elaborate on this line of argument during the oral proceedings and did not include it in its final submissions. Thus, the Court could not rule on this point in the operative part of its Judgment. It could, however, have addressed certain aspects of the question of universal jurisdiction in the reasoning for its decision (see Judgment, para. 43).

That would have been a logical approach; a court's jurisdiction is a question which it must decide before considering the immunity of those before it. In other words, there can only be immunity from jurisdiction where there is jurisdiction. Moreover, this is an important and controversial issue, clarification of which would have been in the interest of all States, including Belgium in particular. I believe it worthwhile to provide such clarification here.

2. The Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999, aims at punishing serious violations of international humanitarian law. It covers certain violations of the Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 additional to those Conventions. It also extends to crimes against humanity, which it defines in the terms used in the Rome Convention of 17 July 1998. Article 7 of the Law adds that "[t]he Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed".

3. The disputed arrest warrant accuses Mr. Yerodia of grave breaches of the Geneva Conventions and of crimes against humanity. It states that under Article 7 of the Law of 16 June 1993, as amended, perpetrators of those offences "fall under the jurisdiction of the Belgian courts, regardless of their nationality or that of the victims". It adds that "the Belgian courts have jurisdiction even if the accused (Belgian or foreign) is not found in Belgium". It states that "[i]n the matter of humanitarian law, the lawmaker's intention was thus to derogate from the principle of the territorial character of criminal law, in keeping with the provisions of the four Geneva Conventions and of Protocol I". It notes that

> "the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [is] to be viewed in the same way, recognizing the legitimacy of extra-territorial jurisdiction in the area and enshrining the principle of *'aut dedere aut judicare'*".

It concludes on these bases that the Belgian courts have jurisdiction.

4. In order to assess the validity of this reasoning, the fundamental principles of international law governing States' exercise of their criminal jurisdiction should first be reviewed.

The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that "in all systems of law the principle of the territorial character of criminal law is fundamental"[1].

The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution, in accordance with the maxim *aut dedere, aut judicare*[2].

Beginning in the eighteenth century however, this school of thought favouring universal punishment was challenged by another body of opinion, one opposed to such punishment and exemplified notably by Montesquieu, Voltaire and Jean-Jacques Rousseau[3]. Their views found expression in terms of criminal law in the works of Beccaria, who stated in 1764 that "judges are not the avengers of humankind in general . . . A crime is punishable only in the country where it was committed."[4]

Enlightenment philosophy inspired the lawmakers of the Revolution and nineteenth century law. Some went so far as to push the underlying logic to its conclusion, and in 1831 Martens could assert that "the lawmaker's power extends over all persons and property present in the State" and that "the law does not extend over other States and their subjects"[5]. A century later, Max Huber echoed that assertion when he stated in 1928, in the Award in the *Island of Palmas* case, that a State has "exclusive competence in regard to its own territory"[6].

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[1] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 20.

[2] Covarruvias, *Practicarum quaestionum*, Chap. II, No. 7; Grotius, *De jure belli ac paci*, Book II, Chap. XXI, para. 4; see also Book I, Chap. V.

[3] Montesquieu, *L'esprit des lois*, Book 26, Chaps. 16 and 21; Voltaire, *Dictionnaire philosophique*, heading *"Crimes et délits de temps et de lieu"*; Rousseau, *Le contrat social*, Book II, Chap. 12, and Book III, Chap. 18.

[4] Beccaria, *Traité des délits et des peines*, para. 21.

[5] G. F. de Martens, *Précis de droit des gens modernes de l'Europe fondé sur les traités et l'usage*, 1831, paras. 86 and 100.

[6] United Nations *Reports of International Arbitral Awards (RIAA)*, Vol. II, Award of 4 April 1928, p. 838.

In practice, the principle of territorial sovereignty did not permit of any exception in respect of coercive action, but that was not the case in regard to legislative and judicial jurisdiction. In particular, classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad. But as the Permanent Court stated, once again in the *"Lotus"* case, the exercise of that jurisdiction is not without its limits[7]. Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners.

5. Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy. In more recent times, Article 19 of the Geneva Convention on the High Seas of 29 December 1958 and Article 105 of the Montego Bay Convention of 10 December 1982 have provided:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed."

Thus, under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States, such as trafficking in slaves[8] or in narcotic drugs or psychotropic substances[9].

6. The drawbacks of this approach became clear at the beginning of the twentieth century in respect of currency counterfeiting, and the Convention of 20 April 1929, prepared within the League of Nations, marked a certain development in this regard. That Convention enabled States to extend their criminal legislation to counterfeiting crimes involving foreign currency. It added that "[f]oreigners who have committed abroad" any offence referred to in the Convention "and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country". But it made that obligation subject to various conditions[10].

A similar approach was taken by the Single Convention on Narcotic Drugs of 30 April 1961[11] and by the United Nations Convention on Psychotropic Substances of 21 February 1971[12], both of which make certain provisions subject to "the constitutional limitations

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[7] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

[8] See the Geneva Slavery Convention of 25 September 1926 and the United Nations Supplementary Convention of 7 September 1956 (French texts in Colliard and Manin, *Droit international et histoire diplomatique*, Vol. 1, p. 220).

[9] Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed at Vienna on 20 December 1988, deals with illicit traffic on the seas. It reserves the jurisdiction of the flag State (French text in *Revue générale de droit international public*, 1989/3, p. 720).

[10] League of Nations, *Treaty Series (LNTS)*, Vol. 112, p. 371.

[11] United Nations, *Treaty Series (UNTS)*, Vol. 976, p. 105.

[12] *UNTS*, Vol. 1019, p. 175.

of a Party, its legal system and domestic law". There is no provision governing the jurisdiction of national courts in any of these conventions, or for that matter in the Geneva Conventions of 1949.

7. A further step was taken in this direction beginning in 1970 in connection with the fight against international terrorism. To that end, States established a novel mechanism: compulsory, albeit subsidiary, universal jurisdiction.

This fundamental innovation was effected by The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970[13]. The Convention places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or prosecute him. But this would have been insufficient if the Convention had not at the same time placed the States parties under an obligation to establish their jurisdiction for that purpose. Thus, Article 4, paragraph 2, of the Convention provides:

> "Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to [the Convention]."

This provision marked a turning point, of which The Hague Conference was moreover conscious[14]. From then on, the obligation to prosecute was no longer conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible.

8. The system as thus adopted was repeated with some minor variations in a large number of conventions: the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973; the New York Convention Against the Taking of Hostages of 17 December 1979; the Vienna Convention on the Physical Protection of Nuclear Materials of 3 March 1980; the New York Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; the Montreal Protocol of 24 February 1988 concerning acts of violence at airports; the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988; the Protocol of the same date concerning the safety of platforms located on the continental shelf; the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; the New York Convention for the Suppression of Terrorist Bombings of 15 December 1997; and finally the New York Convention for the Suppression of the Financing of Terrorism of 9 December 1999.

9. Thus, a system corresponding to the doctrines espoused long ago by Grotius was set up by treaty. Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or

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[13] *UNTS*, Vol. 860, p. 105.

[14] The Diplomatic Conference at The Hague supplemented the ICAO Legal Committee draft on this point by providing for a new jurisdiction. That solution was adopted on Spain's proposal by a vote of 34 to 17, with 12 abstentions (see *Annuaire français de droit international*, 1970, p. 49).

prosecute. It must have first conferred jurisdiction on its courts to try him if he is not extradited. Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States.

By contrast, none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.

10. Thus, in the absence of conventional provisions, Belgium, both in its written Memorial and in oral argument, relies essentially on this point on international customary law.

11. In this connection, Belgium cites the development of international criminal courts. But this development was precisely in order to provide a remedy for the deficiencies of national courts, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts.

12. Hence, Belgium essentially seeks to justify its position by relying on the practice of States and their *opinio juris*. However, the national legislation and jurisprudence cited in the case file do not support the Belgian argument, and I will give some topical examples of this.

In France, Article 689-I of the Code of Criminal Procedure provides:

> "Pursuant to the international conventions referred to in the following articles[15], any person, if present in France, may be prosecuted and tried by the French courts if that person has committed outside the territory of the Republic one of the offences specified in those articles."

Two Laws, of 2 January 1995 and 22 May 1996, concerning certain crimes committed in the former Yugoslavia and in Rwanda extended the jurisdiction of the French courts to such crimes where, again, the presumed author of the offence is found in French territory[16]. Moreover, the French Court of Cassation has interpreted Article 689-I restrictively, holding that, "in the absence of any direct effect of the four Geneva Conventions in regard to search and prosecution of the perpetrators of grave breaches, Article 689 of the Code of Criminal Procedure cannot be applied" in relation to the perpetrators of grave breaches of those Conventions found on French territory[17].

In Germany, the Criminal Code *(Strafgesetzbuch)* contains in Section 6, paragraphs 1 and 9, and in Section 7, paragraph 2, provisions permitting the prosecution in certain circumstances of crimes committed abroad. And indeed in a case of genocide *(Tadiæ)*the German Federal Supreme Court *(Bundesgerichtshof)* recalled that: "German criminal law is applicable pursuant to section 6, paragraph 1, to an act of genocide committed abroad independently of the law of the territorial State (principle of so-called universal jurisdiction)". The Court added, however, that "a condition

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[15]Namely the international Conventions mentioned in paragraphs 8 and 9 of the present opinion to which France is party.

[16]For the application of this latter Law, see Court of Cassation, Criminal Chamber, 6 January 1998, *Munyeshyaka*.

[17]Court of Cassation, Criminal Chamber, 26 March 1996, No. 132, *Javor*.

precedent is that international law does not prohibit such action"; it is only, moreover, where there exists in the case in question a "link" legitimizing prosecution in Germany "that it is possible to apply German criminal law to the conduct of a foreigner abroad. In the absence of such a link with the forum State, prosecution would violate the principle of non-interference, under which every State is required to respect the sovereignty of other States"[18]. In that case, the Federal Court held that there was such a link by reason of the fact that the accused had been voluntarily residing for some months in Germany, that he had established his centre of interests there and that he had been arrested on German territory.

The Netherlands Supreme Court *(Hoge Raad)* was faced with comparable problems in the *Bouterse* case. It noted that the Dutch legislation adopted to implement The Hague and Montreal Conventions of 1970 and 1971 only gave the Dutch courts jurisdiction in respect of offences committed abroad if "the accused was found in the Netherlands". It concluded from this that the same applied in the case of the 1984 Convention against Torture, even though no such specific provision had been included in the legislation implementing that Convention. It accordingly held that prosecution in the Netherlands for acts of torture committed abroad was possible only

> "if one of the conditions of connection provided for in that Convention for the establishment of jurisdiction was satisfied, for example if the accused or the victim was Dutch or fell to be regarded as such, or if the accused was on Dutch territory at the time of his arrest"[19].

Numbers of other examples could be given, and the only country whose legislation and jurisprudence appear clearly to go the other way is the State of Israel, which in this field obviously constitutes a very special case.

To conclude, I cannot do better than quote what Lord Slynn of Hadley had to say on this point in the first *Pinochet* case:

> "It does not seem . . . that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction . . . That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long established customary international law rule in

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[18] *Bundesgerichtshof*, 13 February 1994, *1 BGs 100.94*, in *Neue Zeitschrift für Strafrecht 1994*, pp. 232-233. The original German text reads as follows:

> *"4 a) Nach § 6 Nr. 1 StGB gilt deutsches Strafrecht für ein im Ausland begangenes Verbrechen des Völkermordes (§ 220a StGB), und zwar unabhängig vom Recht des Tatorts (sog. Weltrechtsprinzip). Vorraussetzung ist allerdings ¾ über den Wortlaut der Vorschrift hinaus ¾, daß ein völkerrechtliches Verbot nicht entgegensteht und außerdem ein legitimierender Anknüpfungspunkt im Einzelfall einen unmittelbaren Bezug der Strafverfolgung zum Inland herstellt; nur dann ist die Anwendung innerstaatlicher (deutscher) Strafgewalt auf die Auslandstat eines Ausländers gerechtfertigt. Fehlt ein derartiger Inlandsbezug, so verstößt die Strafverfolgung gegen das sog. Nichteinmischungsprinzip, das die Achtung der Souveränität fremder Staaten gebietet (BGHSt 27, 30 und 34, 334; Oehler JR 1977, 424; Holzhausen NStZ 1992, 268). "*

Similarly, Düsseldorf *Oberlandesgericht*, 26 September 1997, *Bundesgerichtshof*, 30 April 1999, *Jorgić*; Düsseldorf *Oberlandesgericht*, 29 November 1999, *Bundesgerichtshof*, 21 February 2001, *Sokolović*.

[19] *Hoge Raad*, 18 September 2001, *Bouterse*, para. 8.5. The original Dutch text reads as follows:

> *"indien daartoe een in dat Verdrag genoemd aankopingspunt voor de vestiging van rechtsmacht aanwezig is, bijvoorbeeld omdat de vermoedelijke dader dan wel het slachtoffer Nederlander is of daarmee gelijkgesteld moet worden, of omdat de vermoedelijke dader zich ten tijde van zijn aanhouding in Nederland bevindt."*

> the Courts of other states is another . . . The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it . . . There is no universality of jurisdiction for crimes against international law . . ."[20]

In other words, international law knows only one true case of universal jurisdiction: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction *in absentia* as applied in the present case is unknown to international law.

13. Having found that neither treaty law nor international customary law provide a State with the possibility of conferring universal jurisdiction on its courts where the author of the offence is not present on its territory, Belgium contends lastly that, even in the absence of any treaty or custom to this effect, it enjoyed total freedom of action. To this end it cites from the Judgment of the Permanent Court of International Justice in the *"Lotus"* case:

> "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . ."[21]

Hence, so Belgium claimed, in the absence of any prohibitive rule it was entitled to confer upon itself a universal jurisdiction *in absentia*.

14. This argument is hardly persuasive. Indeed the Permanent Court itself, having laid down the general principle cited by Belgium, then asked itself "whether the foregoing considerations really apply as regards criminal jurisdiction"[22]. It held that either this might be the case, or alternatively, that: "the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers"[23]. In the particular case before it, the Permanent Court took the view that it was unnecessary to decide the point. Given that the case involved the collision of a French vessel with a Turkish vessel, the Court confined itself to noting that the effects of the offence in question had made themselves felt on Turkish territory, and

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[20] House of Lords, 25 November 1998, *R.* v. *Bartle*; ex parte *Pinochet*.

[21] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

[22] *Ibid.*, p. 20.

[23] *Ibid.*, p. 20.

that consequently a criminal prosecution might "be justified from the point of view of this so-called territorial principle"[24].

15. The absence of a decision by the Permanent Court on the point was understandable in 1927, given the sparse treaty law at that time. The situation is different today, it seems to me — totally different. The adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle. International criminal law has itself undergone considerable development and constitutes today an impressive legal *corpus*. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community". Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.

16. States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.

17. Passing now to the specific case before us, I would observe that Mr. Yerodia Ndombasi is accused of two types of offence, namely serious war crimes, punishable under the Geneva Conventions, and crimes against humanity.

As regards the first count, I note that, under Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, [certain] grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned . . ."

This provision requires each contracting party to search out alleged offenders and bring them before its courts (unless it prefers to hand them over to another party). However, the Geneva Conventions do not contain any provision on jurisdiction comparable, for example, to Article 4 of The Hague Convention already cited. What is more, they do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State

[24] *Ibid.*, p. 23.

concerned. They accordingly cannot in any event found a universal jurisdiction *in absentia*. Thus Belgium could not confer such jurisdiction on its courts on the basis of these Conventions, and the proceedings instituted in this case against Mr. Yerodia Ndombasi on account of war crimes were brought by a judge who was not competent to do so in the eyes of international law.

The same applies as regards the proceedings for crimes against humanity. No international convention, apart from the Rome Convention of 17 July 1998, which is not in force, deals with the prosecution of such crimes. Thus the Belgian judge, no doubt aware of this problem, felt himself entitled in his warrant to cite the Convention against Torture of 10 December 1984. But it is not permissible in criminal proceedings to reason by analogy, as the Permanent Court of International Justice indeed pointed out in its Advisory Opinion of 4 December 1935 concerning the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*[25]. There too, proceedings were instituted by a judge not competent in the eyes of international law.

If the Court had addressed these questions, it seems to me that it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law.

(Signed) Gilbert GUILLAUME.

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[25] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 65*, pp. 39 *et seq.*

DISSENTING OPINION OF JUDGE ODA

Lack of jurisdiction of the Court ¾ Absence of a legal dispute within the purview of Article 36, paragraph 2, of the Statute ¾ Mere belief of the Congo that the Belgian Law violated international law not evidence or proof that a dispute existed between it and Belgium ¾ Failure of the Application instituting proceedings to specify the legal grounds upon which the jurisdiction of the Court is said to be based or to indicate the subject of the dispute ¾ Failure of the Congo to cite any damage or injury which the Congo or Mr. Yerodia has suffered or will suffer except for some moral injury ¾ Changing of the subject-matter of the proceedings by the Congo ¾ Principle that a State cannot exercise its jurisdiction outside its territory ¾ National case law, treaty-made law and legal writing in respect of the issue of universal jurisdiction ¾ Inability of a State to arrest an individual outside its territory ¾ Arrest warrant not directly binding without more on foreign authorities ¾ Issuance and international circulation of arrest warrant having no legal impact unless arrest request validated by the receiving State ¾ Question of the immunity of a Minister for Foreign Affairs and of whether it can be claimed in connection with serious breaches of international humanitarian law ¾ Concluding remarks.

INTRODUCTION

1. I voted against all provisions of the operative part of the Judgment. My objections are not directed individually at the various provisions since I am unable to support any aspect of the position the Court has taken in dealing with the presentation of this case by the Congo.

It is my firm belief that the Court should have declared *ex officio* that it lacked jurisdiction to entertain the Congo's Application of 17 October 2000 for the reason that there was, at that date, no *legal dispute* between the Congo and Belgium falling within the purview of Article 36, paragraph 2, of the Statute, a belief already expressed in my declaration appended to the Court's Order of 8 December 2000 concerning the request for the indication of provisional measures. I reiterate my view that the Court should have dismissed the Application submitted by the Congo on 17 October 2000 for lack of jurisdiction.

My opinion was that the case should have been removed from the General List at the provisional measures stage. In the Order of 8 December 2000, however, I voted in favour of the holding that the case should *not* be removed from the General List but did so reluctantly "*only* from a sense of judicial solidarity" (declaration of Judge Oda appended to the Court's Order of 8 December 2000 concerning the request for the indication of provisional measures, para. 6). I now regret that vote.

2. It strikes me as unfortunate that the Court, after finding that "it has jurisdiction to entertain the Application" and that "the Application . . . is admissible" (Judgment, para. 78 (1) (B) and (D)), quickly comes to certain conclusions concerning "the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of [the Congo] enjoyed under international law" in connection with "the issue against [Mr. Yerodia] of the arrest warrant of 11 April 2000" and "its international circulation" (Judgment, para. 78 (2)).

I. NO LEGAL DISPUTE IN TERMS OF ARTICLE 36, PARAGRAPH 2, OF THE STATUTE

3. To begin with, the Congo's Application provides no basis on which to infer that the Congo ever thought that a *dispute* existed between it and Belgium regarding the arrest warrant issued by a Belgian investigating judge on 11 April 2000 against Mr. Yerodia, the Minister for

Foreign Affairs of the Congo. The word "dispute" appears in the Application only at its very end, under the heading "V. Admissibility of the Present Application", in which the Congo stated that:

> "As to the existence of a *dispute* on that question [namely, the question that the Court is called upon to decide], this is established *ab initio* by the very fact that it is the non-conformity with international law of the Law of the Belgian State on which the investigating judge founds his warrant which is the subject of the legal grounds which [the Congo] has submitted to the Court." (Emphasis added.)

Without giving any further explanation as to the alleged *dispute*, the Congo simply asserted that Belgium's 1993 Law, as amended in 1999, concerning the Punishment of Serious Violations of International Humanitarian Law contravened international law.

4. The Congo's mere belief that the Belgian law violated international law is not evidence, let alone proof, that a *dispute* existed between it and Belgium. It shows at most that the Congo held a different legal view, one opposed to the action taken by Belgium. It is clear that the Congo did not think that it was referring a *dispute* to the Court. The Congo, furthermore, never thought of this as a *legal dispute*, the existence of which is a requirement for unilateral applications to the Court under Article 36, paragraph 2, of the Court's Statute. The Congo's mere opposition to the Belgian Law and certain acts taken by Belgium pursuant to it cannot be regarded as a *dispute* or a *legal dispute* between the Congo and Belgium. In fact, there existed no such *legal dispute* in this case.

I find it strange that the Court does not take up this point in the Judgment; instead the Court simply states in the first paragraph of its decision that "the Congo filed in the Registry of the Court an Application instituting proceedings against Belgium in respect of a *dispute* concerning an 'international arrest warrant'" (Judgment, para. 1, emphasis added) and speaks of "a *legal dispute* between [the Congo and Belgium] concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the arrest warrant was unlawful" (Judgment, para. 27, emphasis added). To repeat, the Congo did refer in its Application to a *dispute* but only in reference to the admissibility of the case, *not* "in order to found the Court's jurisdiction", as the Court mistakenly asserts in paragraph 1 of the Judgment.

5. While Article 40 of the Court's Statute does not require from an applicant State a statement of "the legal grounds upon which the jurisdiction of the Court is said to be based", Article 38, paragraph 2, of the Rules of Court does and the Congo failed to specify those grounds in its Application. Furthermore, the Congo did not indicate "the subject of the dispute", which is required under Article 40 of the Statute.

In its Application the Congo refers only to "Legal Grounds" (Section I) and "Statement of the Grounds on which the Claim is Based" (Section IV). In those sections of the Application, the Congo, without referring to the basis of jurisdiction or the subject of dispute, simply mentions "violation of the principle that a State may not exercise [its authority] on the territory of another State and of the principle of sovereign equality" and "violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State".

6. The Congo's claim is, first, that the 1993 Belgian Law, as amended in 1999, is in breach of those two aforementioned principles and, secondly, that Belgium's prosecution of Mr. Yerodia, Foreign Minister of the Congo, violates the diplomatic immunity granted under international law to Ministers for Foreign Affairs. The Congo did *not* cite any damage or injury which the Congo or Mr. Yerodia himself has suffered or will suffer except for some moral injury; that is, at most, Mr. Yerodia might have thought it wise to forgo travel to foreign countries for fear of being arrested by those States pursuant to the arrest warrant issued by the Belgian investigating judge

(that fear being ungrounded). Thus, as already noted, the Congo did not ask the Court to settle a *legal dispute* with Belgium but rather to render a *legal opinion* on the lawfulness of the 1993 Belgian Law as amended in 1999 and actions taken under it.

7. I fear that the Court's conclusions finding that this case involves a *legal dispute* between the Congo and Belgium within the meaning of Article 36, paragraph 2, of the Statute (such questions being the only ones which can be submitted to the Court) and upholding its jurisdiction in the present case will eventually lead to an excessive number of cases of this nature being referred to the Court even when no real injury has occurred, simply because one State believes that another State has acted contrary to international law. I am also afraid that many States will then withdraw their recognition of the Court's compulsory jurisdiction in order to avoid falling victim to this distortion of the rules governing the submission of cases. (See declaration of Judge Oda, Order of 8 December 2000.)

This "loose" interpretation of the compulsory jurisdiction of the Court will frustrate the expectations of a number of law-abiding nations. I would emphasize that the Court's jurisdiction is, in principle, based on the consent of the sovereign States seeking judicial settlement by the Court.

II. THE CONGO'S CHANGING OF THE SUBJECT-MATTER

8. In reaffirming my conviction that the Congo's Application unilaterally submitted to the Court was not a proper subject of contentious proceedings before the Court, I would like to take up a few other points which I find to be crucial to understanding the essence of this inappropriate, unjustified and, if I may say so, wrongly decided case. It is to be noted, firstly, that between filing its Application of 17 October 2000 and submitting its Memorial on 16 May 2001, the Congo restated the issues, changing the underlying subject-matter in the process.

The Congo contended in the Application: (i) that the 1993 Belgian Law, as amended in 1999, violated the "principle that a State may not exercise [its authority] on the territory of another State" and the "principle of sovereign equality" and (ii) that Belgium's exercise of criminal jurisdiction over Mr. Yerodia, then Minister for Foreign Affairs of the Congo, violated the "diplomatic immunity of the Minister for Foreign Affairs of a sovereign State". The alleged violations of those first two principles concern the question of "universal jurisdiction", which remains a matter of controversy within the international legal community, while the last claim relates only to a question of the "diplomatic immunity" enjoyed by the incumbent Minister for Foreign Affairs.

9. The Congo changed its claim in its Memorial, submitted seven months later, stating that

> "by issuing and internationally circulating the arrest warrant of 11 April 2000 against [Mr. Yerodia], Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (Memorial of the Democratic Republic of the Congo of 15 May 2001, p. 64 *[translation by the Registry]*).

Charging and arresting a suspect are clearly acts falling within the exercise of a State's criminal jurisdiction. The questions originally raised — namely, whether a State has *extraterritorial jurisdiction* over crimes constituting serious violations of humanitarian law wherever committed and by whomever (in other words, the question of universal jurisdiction) and whether a Foreign Minister is exempt from such jurisdiction (in other words, the question of diplomatic immunity) —

were transmuted into questions of the "issue and international circulation" of an arrest warrant against a Foreign Minister and the immunities of incumbent Foreign Ministers.

This is clearly a change in subject-matter, one not encompassed in "the right to argue further the grounds of its Application", which the Congo reserved in its Application of 17 October 2000.

10. It remains a mystery to me why Belgium did not raise preliminary objections concerning the Court's jurisdiction at the outset of this case. Instead, it admitted in its Counter-Memorial that there had been a dispute between the two States, one susceptible to judicial settlement by the Court, at the time the proceedings were instituted and that the Court was then seised of the case, as the Court itself finds (Judgment, para. 27). Did Belgium view this as a case involving a unilateral application and the Respondent's subsequent recognition of the Court's jurisdiction, instances of which are to be found in the Court's past?

Belgium seems to have taken the position that once Mr. Yerodia had ceased to be Foreign Minister, a dispute existed concerning him in his capacity as a *former* Foreign Minister and contended that the Court lacked jurisdiction under those circumstances. Thus, Belgium also appears to have replaced the issues as they existed on the date of the Congo's Application with those arising at a later date. It would appear that Belgium did not challenge the Court's jurisdiction in the original case but rather was concerned only with the admissibility of the Application or the mootness of the case once Mr. Yerodia had been relieved of his duties as Foreign Minister (see Belgium's four preliminary objections raised in its Counter-Memorial, referred to in the Judgment, paras. 23, 29, 33 and 37).

In this respect, I share the view of the Court (reserving, of course, my position that a *dispute* did not exist) that the alleged *dispute* was the one existing in October 2000 (Judgment, para. 38) and, although I voted against paragraph 78 (1) (A) of the Judgment for the reasons set out in paragraph 1 of my opinion, I concur with the Court in rejecting Belgium's objections relating to "jurisdiction, mootness and admissibility" in regard to the alleged *dispute* which Belgium believed existed after Mr. Yerodia left office.

Certainly, the question whether a *former* Foreign Minister is entitled to the same privileges and immunities as an *incumbent* Foreign Minister may well be a legal issue but it is not a proper subject of the present case brought by the Congo in October 2000.

III. DOES THE PRESENT CASE INVOLVE ANY LEGAL ISSUES ON WHICH THE CONGO AND BELGIUM HELD CONFLICTING VIEWS?

11. Putting aside for now my view that that there was no *legal dispute* between the Congo and Belgium susceptible to judicial settlement by the Court under its Statute and that the Congo seems simply to have asked the Court to render an opinion, I shall note my incomprehension of the Congo's intention and purpose in bringing this request to the Court in October 2000 when Mr. Yerodia held the office of Foreign Minister.

In its Application of October 2000, the Congo raised the question whether the 1993 Belgian Law, as amended in 1999, providing for the punishment of serious violations of humanitarian law was itself contrary to the principle of sovereign equality under international law (see Application of the Democratic Republic of the Congo of 17 October 2000, Part III: Statement of the Facts, A.). Yet it appears that the Congo abandoned this point in its Memorial of May 2001, as the Court admits (Judgment, para. 45), and never took it up during the oral proceedings.

12. It is one of the fundamental principles of international law that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law. From the base established by the Permanent Court's decision in 1927 in the *"Lotus"* case, the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc. Universal jurisdiction is increasingly recognized in cases of terrorism and genocide. Belgium is known for taking the lead in this field and its 1993 Law (which would make Mr. Yerodia liable to punishment for any crimes against humanitarian law he committed outside of Belgium) may well be at the forefront of a trend. There is some national case law and some treaty-made law evidencing such a trend.

Legal scholars the world over have written prolifically on this issue. Some of the opinions appended to this Judgment also give guidance in this respect. I believe, however, that the Court has shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the Court is not requested in the present case to take a decision on this point.

13. It is clear that a State cannot arrest an individual outside its territory and forcibly bring him before its courts for trial. In this connection, it is necessary to examine the effect of an arrest warrant issued by a State authority against an individual who is subject to that State's jurisdiction to prescribe law.

The arrest warrant is an official document issued by the State's judiciary empowering the police authorities to take forcible action to place the individual under arrest. Without more, however, the warrant is not directly binding on foreign authorities, who are not part of the law enforcement mechanism of the issuing State. The individual may be arrested abroad (that is, outside the issuing State) only by the authorities of the State where he or she is present, since jurisdiction over that territory lies exclusively with that State. Those authorities will arrest the individual being sought by the issuing State only if the requested State is committed to do so pursuant to international arrangements with the issuing State. Interpol is merely an organization which transmits the arrest request from one State to another; it has no enforcement powers of its own.

It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is even some doubt whether the Court itself properly understood this, particularly as regards a warrant's legal effect. The crucial point in this regard is *not* the issuance or international circulation of an arrest warrant but the response of the State receiving it.

14. Diplomatic immunity is the immunity which an individual holding diplomatic status enjoys from the exercise of jurisdiction by States other than his own. The issue whether Mr. Yerodia, as Foreign Minister of the Congo, should have been immune in 2000 from Belgium's exercise of criminal jurisdiction *pursuant to the 1993 Law as amended in 1999* is twofold. The first question is whether in principle a Foreign Minister, the post which Mr. Yerodia held in 2000, is entitled to the same immunity as diplomatic agents. Neither the 1961 Vienna Convention on Diplomatic Relations nor any other convention spells out the privileges of Foreign Ministers and the answer may not be clear under customary international law. The Judgment addresses this question merely by giving a hornbook-like explanation in paragraphs 51 to 55. I have no further comment on this.

The more important aspect is the second one: can diplomatic immunity also be claimed in respect of serious breaches of humanitarian law — over which many advocate the existence of universal jurisdiction and which are the subject-matter of Belgium's 1993 Law as amended in 1999 — and, furthermore, is a Foreign Minister entitled to greater immunity in this respect than ordinary diplomatic agents? These issues are too new to admit of any definite answer.

The Court, after quoting several recent incidents in European countries, seems to conclude that Ministers for Foreign Affairs enjoy absolute immunity (Judgment, paras. 56-61). It may reasonably be asked whether it was necessary, or advisable, for the Court to commit itself on this issue, which remains a highly hypothetical question as Belgium has not exercised its criminal jurisdiction over Mr. Yerodia pursuant to the 1993 Belgian Law, as amended in 1999, and no third State has yet acted in pursuance of Belgium's assertion of universal jurisdiction.

IV. CONCLUDING REMARKS

15. I find little sense in the Court's finding in paragraph (3) of the operative part of the Judgment, which in the Court's logic appears to be the consequence of the finding set out in paragraph (2) (Judgment, para. 78). Given that the Court concludes that the violation of international law occurred in *2000* and the Court would appear to believe that there is nothing in *2002* to prevent Belgium from issuing a new arrest warrant against Mr. Yerodia, this time as a *former* Foreign Minister and not the *incumbent* Foreign Minister, there is no practical significance in ordering Belgium to cancel the arrest warrant of April 2000. If the Court believes that this is an issue of the sovereign dignity of the Congo and that that dignity was violated in 2000, thereby causing injury at that time to the Congo, the harm done cannot be remedied by the cancellation of the arrest warrant; the only remedy would be an apology by Belgium. But I do not believe that Belgium caused any injury to the Congo because no action was ever taken against Mr. Yerodia pursuant to the warrant. Furthermore, Belgium was under no obligation to provide the Congo with any assurances that the incumbent Foreign Minister's immunity from criminal jurisdiction would be respected under the 1993 Law, as amended in 1999, but that is not the issue here.

16. In conclusion, I find the present case to be not only unripe for adjudication at this time but also fundamentally inappropriate for the Court's consideration. There is not even agreement between the Congo and Belgium concerning the issues in dispute in the present case. The potentially significant questions (the validity of universal jurisdiction, the general scope of diplomatic immunity) were transmuted into a simple question of the issuance and international circulation of an arrest warrant as they relate to diplomatic immunity. It is indeed unfortunate that the Court chose to treat this matter as a contentious case suitable for judicial resolution.

(Signed) Shigeru ODA.

DECLARATION DE M. RANJEVA

Effet du retrait de la première conclusion initiale du Congo — Exclusion de la compétence universelle par défaut de l'objet des demandes — Compétence universelle de la juridiction nationale : législation belge — Evolution en droit international du régime de la compétence universelle — La piraterie maritime et la compétence universelle en droit coutumier — Obligation de réprimer et compétence des juridictions nationales — Aut judicare aut dedere — Gravité des infractions non constitutive de titre de compétence universelle — Interprétation de l'affaire du Lotus —Compétence universelle par défaut en l'absence de lien de connexité non encore consacrée en droit international.

1. Je souscris sans réserve à la conclusion de l'arrêt selon laquelle l'émission et la diffusion internationale du mandat d'arrêt du 11 avril 2000 constituaient des violations d'une obligation internationale de la Belgique à l'égard du Congo en ce qu'elles ont méconnu l'immunité de juridiction pénale de ministre des affaires étrangères du Congo. J'approuve également la position de la Cour qui, au vu des conclusions du Congo en leur dernier état, s'est abstenue d'aborder et de traiter la question de savoir si la licéité dudit mandat devait être remise en cause au titre de la compétence universelle telle qu'elle a été exercée par la Belgique.

2. Les considérations de logique auraient dû amener la Cour à aborder la question de la compétence universelle, une question d'actualité et sur laquelle une décision en la présente affaire aurait nécessairement fait jurisprudence. Le retrait de la première conclusion initiale du Congo (voir paragraphe 10 du texte de l'arrêt), en soi n'était pas suffisant pour justifier l'attitude de la Cour. On pouvait raisonnablement considérer cette première demande initiale comme une fausse conclusion et l'analyser comme un moyen qui a été exposé pour servir de fondement à la principale demande : la déclaration de l'illicéité du mandat d'arrêt sur le terrain de la violation des immunités de juridiction pénale. L'évolution des demandes du Congo montre que de moyen de demande, la question de la compétence universelle s'est transformée en moyen de défense de la Belgique. Sur le plan procédural, c'est cependant par rapport aux *petita* et aux moyens de demande que la Cour statue quel que soit, par ailleurs, l'intérêt en soi des questions soulevées au cours de la procédure. Compte tenu des conclusions sur le caractère illicite du mandat, il n'était plus nécessaire d'aborder le second aspect de l'illicéité, à mon grand regret. Une chose est certaine : on ne saurait inférer du texte de l'arrêt une interprétation selon laquelle la Cour se serait montrée indifférente à l'égard de la compétence universelle; la question reste ouverte au regard du droit.

3. Le silence de l'arrêt sur la question de la compétence universelle me met dans une situation inconfortable. L'expression d'une opinion sur la question est singulière : elle porterait sur des développements hypothétiques alors que le problème est réel tant dans la présente affaire que compte tenu de l'évolution du droit pénal international lorsqu'il s'agit de la prévention et de la répression des crimes odieux et attentatoires aux droits et à la dignité de l'être humain au regard du droit international. Aussi la présente déclaration portera-t-elle sur l'interprétation que la Belgique donne de la compétence universelle.

4-. En application de la loi belge du 16 juin 1993 modifiée le 10 février 1999, portant répression des violations graves du droit international humanitaire, le juge d'instruction près le tribunal de grande instance de Bruxelles a émis un mandat d'arrêt international à l'encontre de M. Yerodia Ndombasi, alors ministre des affaires étrangères du Congo; il était reproché à ce dernier des violations graves de règles de droit humanitaire ainsi que des crimes contre l'humanité.

Aux termes de l'article 7 de ladite loi, les auteurs de telles infractions «relèvent de la compétence des juridictions belges quelle que soit leur nationalité et celle de la victime». L'intérêt de la présente décision réside dans le fait que l'affaire est une véritable avant-première.

5. La législation belge qui institue la compétence universelle *in absentia* pour les violations graves du droit international humanitaire a consacré l'interprétation la plus extensive de cette compétence. Les juridictions ordinaires belges sont compétentes pour juger les crimes de guerre, contre l'humanité et de génocide, commis par des non-Belges, en dehors du territoire belge tandis que le mandat émis à l'encontre de M. Yerodia Ndombasi est la première des applications de cette hypothèse extrême. Il ne semble pas que des dispositions législatives en droit positif autorisent l'exercice de la compétence pénale en l'absence d'un lien de connexité territoriale ou personnelle actif ou passif. L'innovation de la loi belge réside dans la possibilité de l'exercice de la compétence universelle en l'absence de tout lien de la Belgique avec l'objet de l'infraction, la personne de l'auteur présumé de l'infraction ou enfin le territoire pertinent. Mais après les tragiques événements survenus en Yougoslavie et au Rwanda, plusieurs Etats ont invoqué la compétence universelle pour engager des poursuites contre des auteurs présumés de crimes de droit humanitaire; cependant, à la différence du cas de M. Yerodia Ndombasi, les personnes impliquées avaient auparavant fait l'objet d'une procédure ou d'un acte d'arrestation, c'est-à-dire qu'un lien de connexion territoriale existait au préalable.

6. En droit international, la même considération liée au lien de connexité *ratione loci* est également exigée pour l'exercice de la compétence universelle. La piraterie maritime est l'unique cas classique d'application de la compétence universelle selon le droit coutumier. L'article 19 de la convention de Genève du 29 décembre 1958 puis l'article 105 de la convention de Montego Bay[1] du 10 décembre 1982 disposent que :

> «Tout Etat peut, en haute mer ou en tout autre lieu ne relevant de la juridiction d'aucun Etat, saisir un navire ou un aéronef pirate, ou un navire ou un aéronef capturé à la suite d'un acte de piraterie et aux mains de pirates, et appréhender les personnes et saisir les biens se trouvant à bord. Les tribunaux de l'Etat qui a opéré la saisie peuvent se prononcer sur les peines à infliger.»

La compétence universelle, en l'occurrence, s'explique en haute mer par l'absence de souveraineté déterminée et le régime de liberté; la juridiction de l'Etat du pavillon représente ainsi normalement le facteur de garantie du respect du droit. Mais la piraterie étant définie comme la répudiation et la soustraction du pirate de la juridiction de tout ordre étatique, l'exercice de la compétence universelle permet d'assurer le rétablissement de l'ordre juridique. C'est donc l'atteinte à l'aménagement international de l'ordre des juridictions des Etats qui explique, dans ce cas particulier la consécration de la compétence universelle des tribunaux nationaux chargés de juger les pirates et les actes de piraterie. En revanche, la gravité, en soi, des infractions, n'a pas été considérée comme suffisante pour établir la compétence universelle. Il n'y a pas d'autre exemple d'infraction commise en haute mer pour laquelle la compétence universelle a été consacrée (par exemple : conventions du 18 mai 1904 et du 4 mai 1910 (relatives à la répression de la traite des blanches); convention du 30 septembre 1921 (pour la répression de la traite des femmes et des enfants); convention du 28 juin 1930 (sur le travail forcé ou obligatoire) et du 5 juin 1957 (abolissant le travail forcé)).

7. L'évolution du droit pénal conventionnel, dans les dernières décennies, s'est orientée vers la consécration de l'obligation de réprimer et un nouvel aménagement de la compétence des Etats en matière de répression. Alors que les conventions de droit humanitaire de Genève de 1949 sont

[1] Convention des Nations Unies sur le droit de la mer.

sources d'obligations juridiques internationales, elles ne comportent aucune disposition sur la compétence des juridictions nationales pour en assurer sur le plan judiciaire l'effectivité. Il en était de même de la convention de 1948 sur le génocide. Il a fallu attendre l'organisation sur le plan international de la lutte contre le terrorisme sur les aéronefs pour l'adoption de dispositions qui relèvent de l'exercice de la compétence universelle : la consécration du principe *aut judicare aut dedere* dans le paragraphe 2 de l'article 4 de la convention de la Haye du 16 décembre 1970, dans les termes suivants : «Tout Etat contractant prend les mesures nécessaires pour établir sa compétence aux fins de connaître de l'infraction dans le cas où l'auteur présumé de celle-ci se trouve sur son territoire et où ledit Etat ne l'extrade pas.»[2] On relèvera que la mise en œuvre du principe *aut judicare aut dedere* est conditionnée par l'arrestation effective au préalable de l'auteur présumé. Cette disposition de 1970 a servi de modèle pour l'extension, dans diverses conventions ultérieures, de la compétence pénale des juridictions nationales dans l'exercice de la compétence universelle. Ce développement n'a pas eu pour effet la reconnaissance d'une compétence *in absentia* ou par défaut.

8. L'argumentation belge invoque à son profit non seulement une obligation juridique internationale de réprimer les infractions graves de droit humanitaire mais également la faculté qui est reconnue de légiférer de manière discrétionnaire en la matière. Il n'est pas utile de revenir sur le manque de fondement du premier volet de cette argumentation qui confond à tort l'obligation de réprimer et son mode opératoire : la revendication de la compétence *in absentia* des juridictions pénales nationales en l'absence de clause attributive de compétence. Ainsi l'affirmation de la Belgique selon laquelle «on sait que la justice belge a le droit de connaître de violations graves du droit international humanitaire même si leur auteur présumé n'est pas trouvé sur le territoire belge» (contre-mémoire de la Belgique, p. 89, par. 3.3.28) reste une pétition de principe. Les exemples invoqués à l'appui de cette proposition ne sont pas concluants : sur cent-vingt-cinq législations nationales concernant la répression de crimes de guerre ou contre l'humanité, seuls cinq Etats ne requièrent pas la présence sur le territoire pour l'ouverture de poursuites pénales (contre-mémoire de la Belgique, p. 98-99, par. 3.3.57).

9. Quant à l'étendue de la compétence législative nationale, la Belgique l'a justifiée de la jurisprudence de l'affaire du Lotus :

> «Mais il ne s'ensuit pas que le droit international défend à un Etat d'exercer, dans son propre territoire, sa juridiction dans toute affaire où il s'agit de faits qui se sont passés à l'étranger et où il ne peut s'appuyer sur une règle permissive du droit…. Loin de défendre d'une manière générale aux Etats d'étendre leurs lois et leur juridiction à des personnes, des biens et des actes hors du territoire, il leur laisse à cet égard, une large liberté, qui n'est limitée que dans quelques cas par des règles prohibitives; pour les autres cas chaque Etat reste libre d'adopter les principes qu'il juge les meilleurs et les plus convenables.» (*C.P.J.I. série A n° 10*, p. 19.)

et plus loin le même arrêt de dire :

> «tout ce qu'on peut demander à un Etat, c'est de ne pas dépasser les limites que le droit international trace à sa compétence;… La territorialité du droit pénal n'est donc pas un principe absolu du droit international et ne se confond aucunement avec la souveraineté territoriale.» (*Ibid.*, p. 19-20.)

Sans aucun doute, on peut analyser l'évolution des idées et des conditions politiques dans le monde contemporain comme favorable à une atténuation de la conception territorialiste de la compétence et à l'émergence d'une approche plus fonctionnaliste dans le sens d'un service au profit des fins

[2] Convention pour la répression de la capture illicite d'aéronefs.

supérieures communes. Prendre acte de cette tendance ne saurait justifier l'immolation des principes cardinaux du droit sur l'autel d'une certaine modernité. Le caractère territorial de la base du titre de compétence reste encore une des valeurs sûres, le noyau dur du droit international positif contemporain. L'acceptation doctrinale du principe énoncé dans l'affaire du Lotus, lorsqu'il s'est agi de la lutte contre les crimes internationaux, ne s'est pas encore traduite par un développement consécutif du droit positif en matière de compétence juridictionnelle pénale.

10. Enfin l'argumentation de la Belgique invoque plus particulièrement à l'appui de son interprétation de la compétence universelle *in absentia* le passage suivant du même arrêt Lotus :

> «S'il est vrai que le principe de la territorialité du droit pénal est à la base de toutes les législations, il n'en est pas moins vrai que toutes ou presque toutes ces législations étendent leur action à des délits commis hors du territoire; et cela d'après des systèmes qui changent d'Etat à Etat.» (*Ibid*. p. 20.)

Il est difficile d'induire de cette proposition la consécration de la compétence universelle *in absentia*. Au contraire, la Cour permanente se montre très prudente; elle restreint sa sphère d'investigation au cas d'espèce qui est soumis à son examen et recherche des analogies étroites avec des situations analogues. En fait toute tentative d'y vouloir trouver les bases d'une compétence universelle *in absentia* relève de la spéculation : les faits de l'espèce se limitaient au problème de la compétence des juridictions pénales turques à la suite de l'arrestation du lieutenant Demons dans les eaux territoriales turques alors que cet officier commandait en second un navire battant pavillon français.

11. En définitive, la question liée à la compétence universelle *in absentia* réside dans la difficulté qui existe dans la possibilité d'une compétence pénale extraterritoriale en l'absence de tout lien de rattachement de l'Etat qui revendique l'exercice de cette compétence avec le territoire où les faits incriminés ont eu lieu, avec l'effectivité de son autorité sur les auteurs présumés de ces forfaits. Ce problème s'explique par la nature d'un acte en procédure pénale : il n'a pas un caractère virtuel, il est exécutoire et requiert, à cette fin, une base matérielle minimale au regard du droit international. Pour ces raisons, l'interdiction explicite de l'exercice d'une compétence universelle, au sens où la Belgique l'a interprété, ne constitue pas une base suffisante.

12. En conclusion, indépendamment de l'ardente obligation de rendre effective la nécessité de prévenir et de réprimer les crimes de droit international humanitaire pour favoriser l'avènement de la paix et de la sécurité internationales, et sans qu'il soit, pour autant, indispensable de réprouver la loi belge du 16 juin 1993 modifiée le 10 février 1999, il aurait été difficile, au regard du droit positif contemporain, de ne pas donner droit à la première conclusion initiale de la République démocratique du Congo.

(Signé) Raymond RANJEVA.

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SEPARATE OPINION OF JUDGE KOROMA

Legal approach taken by Court justified in view of position of Parties, the origin and sources of the dispute and consistent with jurisprudence of the Court ¾ Actual question before Court not a choice between universal jurisdiction or immunity ¾ Though two concepts are linked, but not identical ¾ Judgment not to be seen as rejection or endorsement of universal jurisdiction ¾ Court not neutral on issues of grave breaches ¾ But legal concepts should be consistent with legal tenets ¾ Cancellation of warrant appropriate response for unlawful act.

1. The Court in paragraph 46 of the Judgment acknowledged that, as a matter of legal logic, the question of the alleged violation of the immunities of the Minister for Foreign Affairs of the Democratic Republic of the Congo should be addressed only once there has been a determination in respect of the legality of the purported exercise of universal jurisdiction by Belgium. However, in the context of the present case and given the main legal issues in contention, the Court chose another technique, another method, of exercising its discretion in arranging the order in which it will respond when more than one issue has been submitted for determination. This technique is not only consistent with the jurisprudence of the Court, but the Court is also entitled to such an approach, given the position taken by the Parties.

2. The Congo, in its final submissions, invoked only the grounds relating to the alleged violation of the immunity of its Foreign Minister, while it had earlier stated that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at its request but, rather, by virtue of the defence strategy adopted by Belgium. Belgium, for its part, had, at the outset, maintained that the exercise of universal jurisdiction is a valid counterweight to the observance of immunities, and that it is not that universal jurisdiction is an exception to immunity but rather that immunity is excluded when there is a grave breach of international criminal law. Belgium, nevertheless, asked the Court to limit its jurisdiction to those issues that are the subject of the Congo's final submissions, in particular not to pronounce on the scope and content of the law relating to universal jurisdiction.

3. Thus, since both Parties are in agreement that the subject-matter of the dispute is whether the arrest warrant issued against the Minister for Foreign Affairs of the Congo violates international law, and the Court is asked to pronounce on the question of universal jurisdiction only in so far as it relates to the question of the immunity of a Foreign Minister in office, both Parties had therefore relinquished the issue of universal jurisdiction; this entitled the Court to apply its well-established principle that it has a "duty . . . not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). In other words, according to the jurisprudence of the Court, it rules on the *petitum*, or the subject-matter of the dispute as defined by the claims of the Parties in their submissions; the Court is not bound by the grounds and arguments advanced by the Parties in support of their claims, nor is it obliged to address all such claims, as long as it provides a complete answer to the submissions. And that position is also in accordance with the submissions of the Parties.

4. This approach is all the more justified in the present case, which has generated much public interest and where two important legal principles would appear to be in competition, when in fact no such competition exists. The Court came to the conclusion, and rightly in my view, that the issue in contention is not one pitting the principle of universal jurisdiction against the immunity of a Foreign Minister. Rather, the dispute before it is whether the issue and international

circulation of the arrest warrant by Belgium against the incumbent Minister for Foreign Affairs of the Congo violated the immunity of the Foreign Minister, and hence the obligation owed by Belgium to the Congo. The Court is asked to pronounce on the issue of universal jurisdiction only in so far as it relates to the question of the immunity of the Foreign Minister. This, in spite of appearances to the contrary, is the real issue which the Court is called upon to determine and not which of those legal principles is pre-eminent, or should be regarded as such.

5. Although immunity is predicated upon jurisdiction — whether national or international — it must be emphasized that the concepts are not the same. Jurisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and the exemption from the jurisdiction or competence of the courts and tribunals of a foreign State and is an essential characteristic of a State. Accordingly, jurisdiction and immunity must be in conformity with international law. It is not, however, that immunity represents freedom from legal liability as such, but rather that it represents exemption from legal process. The Court was therefore justified that in this case, in its legal enquiry, it took as its point of departure one of the issues directly relevant to the case for determination, namely whether international law permits an exemption from immunity of an incumbent Foreign Minister and whether the arrest warrant issued against the Foreign Minister violates international law, and came to the conclusion that international law does not permit such exemption from immunity.

6. In making its determination, as it pointed out in the Judgment, the Court took into due consideration the pertinent conventions, judicial decisions of both national and international tribunals, resolutions of international organizations and academic institutes before reaching the conclusion that the issue and circulation of the warrant is contrary to international customary law and violated the immunity of the Minister for Foreign Affairs. The paramount legal justification for this, in my opinion, is that immunity of the Foreign Minister is not only of functional necessity but increasingly these days the Foreign Minister represents the State, even though his or her position is not assimilable to that of Head of State. While it would have been interesting if the Court had done so, the Court did not consider it necessary to undertake a disquisition of the law in order to reach its decision. In acknowledging that the Court refrained from carrying out such an undertaking, in reaching its conclusion, perhaps not wanting to tie its hands when not compelled to do so, the Judgment cannot be said to be juridically constraining or not to have responded to the submissions. The Court's Judgment by its nature may not be as expressive or exhaustive of all the underlying legal principles pertaining to a case, so long as it provides a reasoned and complete answer to the submissions.

7. In the present case, the approach taken by the Court can also be viewed as justified and apposite on practical and other grounds. The Minister for Foreign Affairs of the Congo was sued in Belgium, on the basis of Belgian law. According to that law, immunity does not represent a bar to prosecution, even for a Minister for Foreign Affairs in office, when certain grave breaches of international humanitarian law are alleged to have been committed. The immunity claimed by the Foreign Minister is from Belgian national jurisdiction based on Belgian law. The Judgment implies that while Belgium can initiate criminal proceedings in its jurisdiction against anyone, an incumbent Minister for Foreign Affairs of a foreign State is immune from Belgian jurisdiction. International law imposes a limit on Belgium's jurisdiction where the Foreign Minister in office of a foreign State is concerned.

8. On the other hand, in my view, the issue and circulation of the arrest warrant show how seriously Belgium views its international obligation to combat international crimes. Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office. It is

unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation.

9. Against this background, the Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide. The Court did not rule on universal jurisdiction, because it was not indispensable to do so to reach its conclusion, nor was such submission before it. This, to some extent, provides the explanation for the position taken by the Court.

10. With regard to the Court's findings on remedies, the Court's ruling that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom that warrant was circulated is a legal and an appropriate response in the context of the present case. For, in the first place, it was the issue and circulation of the arrest warrant that triggered and constituted the violation not only of the Foreign Minister's immunity but also of the obligation owed by the Kingdom to the Republic. The instruction to Belgium to cancel the warrant should cure both violations, while at the same time repairing the moral injury suffered by the Congo and restoring the situation to the *status quo ante* before the warrant was issued and circulated (*Factory at Chorzów, P.C.I.J., Merits, Judgment No. 13, 1928, Series A, No. 17*, p. 47).

11. In the light of the foregoing, any attempt to qualify the Judgment as formalistic, or to assert that the Court avoided the real issue of the commission of heinous crimes is without foundation. The Court cannot, and in the present case, has not taken a neutral position on the issue of heinous crimes. Rather, the Court's ruling should be seen as responding to the question asked of it. The ruling ensures that legal concepts are consistent with international law and legal tenets, and accord with legal truth.

(Signed) Abdul G. KOROMA.

JOINT SEPARATE OPINION OF JUDGES HIGGINS, KOOIJMANS & BUERGENTHAL

Necessity of a finding on jurisdiction ¾ Reasoning on jurisdiction not precluded by ultra petita *rule.*

Status of universal jurisdiction to be tested by reference to the sources of international law ¾ Few examples of universal jurisdiction within national legislation or case law of national courts ¾ Examination of jurisdictional basis of multilateral treaties on grave offences do not evidence established practice of either obligatory or voluntary universal criminal jurisdiction ¾ Aut dedire aut prosequi *¾ Contemporary trends suggesting universal jurisdiction* in absentia *not precluded ¾ The* "Lotus" *case ¾ Evidence that national courts and international tribunals intended to have parallel roles in acting against impunity ¾ Universal jurisdiction not predicated upon presence of accused in territory, nor limited to piracy ¾ Necessary safeguards in exercising such a jurisdiction ¾ Rejection of Belgium's argument that it had in fact exercised no extraterritorial criminal jurisdiction.*

The immunities of an incumbent Minister for Foreign Affairs and their role in society ¾ Rejection of assimilation with Head of State immunities ¾ Trend to preclude immunity when charged with international crimes ¾ Immunity not precluded in the particular circumstances of this case ¾ Role of international law to balance values it seeks to protect ¾ Narrow interpretation to be given to "official acts" when immunities of an ex-Minister for Foreign Affairs under review.

No basis in international law for Court's order to withdraw warrant.

*

* *

1. We generally agree with what the Court has to say on the issues of jurisdiction and admissibility and also with the conclusions it reaches. There are, however, reservations that we find it necessary to make, both on what the Court has said and what it has chosen not to say when it deals with the merits. Moreover, we consider that the Court erred in ordering Belgium to cancel the outstanding arrest warrant.

*

* *

2. In its Judgment the Court says nothing on the question of whether — quite apart from the status of Mr. Yerodia at the relevant time — the Belgian magistracy was entitled under international law to issue an arrest warrant for someone not at that time within its territory and pass it to Interpol. It has, in effect, acceded to the common wish of the Parties that the Court should not pronounce upon the key issue of jurisdiction that divided them, but should rather pass immediately to the question of immunity as it applied to the facts of this case.

3. In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. "Immunity" is the common shorthand phrase for "immunity from jurisdiction". If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that "immunity" is a free-standing topic of international law. It is not. "Immunity" and "jurisdiction" are inextricably linked. Whether there is "immunity" in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.

4. While the notion of "immunity" depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In bypassing the issue of jurisdiction the Court has encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to conflate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one — immunity — can arise only if the other — jurisdiction — exists) can the larger picture be seen. One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it. But through choosing to look at half the story — immunity — it is not in a position to do so.

6. As Mr. Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction. Indeed, both it and the enabling legislation of 1993 and 1999 expressly say so. Moreover, Mr. Yerodia himself was outside of Belgium at the time the warrant was issued.

7. In its Application instituting proceedings (p. 7), the Democratic Republic of the Congo complained that Article 7 of the Belgian Law:

> *"establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of 'serious violations of international humanitarian law', without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory.*
>
> *It is clearly this unlimited jurisdiction which the Belgian State confers upon itself which explains the issue of the arrest warrant against Mr. Yerodia Ndombasi, against whom it is patently evident that no basis of territorial or* in personam *jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked."*

In its Memorial, the Congo denied that

> "international law recognised such an enlarged criminal jurisdiction as that which Belgium purported to exercise, namely in respect of incidents of international

> humanitarian law when the accused was not within the prosecuting State's territory". (Memorial of Congo, para. 87.)

In its oral submissions the Congo once again stated that it was not opposed to the principle of universal jurisdiction *per se*. But the assertion of a universal jurisdiction over perpetrators of crimes was not an obligation under international law, only an option. The exercise of universal jurisdiction required, in the Congo's view, that the sovereignty of the other State be not infringed and an absence of any breach of an obligation founded in international law (CR 2001/6, p. 33). Further, according to the Congo, States who are not under any obligation to prosecute if the perpetrator is not present on their territory, nonetheless are free to do so in so far as this exercise of jurisdiction does not infringe the sovereignty of another State and is not in breach of international law (CR 2001/6, p. 33). The Congo stated that it had no intention of discussing the existence of the principle of universal jurisdiction, nor of placing obstacles in the way of any emerging custom regarding universal jurisdiction *(ibid.)*. As the oral proceedings drew to a close, the Congo acknowledged that the Court might have to pronounce on certain aspects of universal jurisdiction, but it did not request the Court to do so, as the question did not interest it directly (CR 2001/10, p. 11). It was interested to have a ruling from the Court on Belgium's obligations to the Congo in the light of Mr. Yerodia's immunity at the relevant time. The final submissions as contained in the Application were amended so as to remove any request for the Court to make a determination on the issue of universal jurisdiction.

8. Belgium in its Counter-Memorial insisted that there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option (Counter-Memorial of Belgium, para. 3.3.25). No territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community (Counter-Memorial of Belgium, paras. 3.3.44-3.3.52). In Belgium's view an investigation or prosecution mounted against a person outside its territory did not violate any rule of international law, and was accepted both in international practice and in the internal practice of States, being a necessary means of fighting impunity (Counter-Memorial of Belgium, paras. 3.3.28-3.3.74).

9. These submissions were reprised in oral argument, while noting that the Congo "no longer contested the exercise of universal jurisdiction by default" (CR 2001/9, pp. 8-13). Belgium, too, was eventually content that the Court should pronounce simply on the immunity issue.

10. That the Congo should have gradually come to the view that its interests were best served by reliance on its arguments on immunity, was understandable. So was Belgium's satisfaction that the Court was being asked to pronounce on immunity and not on whether the issue and circulations of an international arrest warrant required the presence of the accused on its territory. Whether the Court should accommodate this consensus is another matter.

11. Certainly it is not required to do so by virtue of the *ultra petita* rule. In the Counter-Memorial Belgium quotes the *locus classicus* for the *non ultra petita* rule, the *Asylum (Interpretation)* case:

> "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from *deciding* issues not included in those submissions" (*I.C.J. Reports 1950*, p. 402; Counter-Memorial of Belgium, para. 2.75; emphasis added).

It also quotes Rosenne who said:

> "It does not confer jurisdiction on the Court or detract jurisdiction from it. It limits the extent to which the Court may go in its decision." (Counter-Memorial of Belgium, para. 2.77.)

12. Close reading of these quotations shows that Belgium is wrong it if wishes to convey to the Court that the *non ultra petita* rule would bar it from *addressing* matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions. As Sir Gerald Fitzmaurice said:

> " unless certain distinctions are drawn, there is a danger that [the *non ultra petita* rule] might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by compelling it to neglect juridically relevant factors" (*The Law and Procedure of the International Court of Justice*, 1986, Vol. II, pp. 529-530).

13. Thus the *ultra petita* rule can operate to preclude a finding of the Court, in the *dispositif*, on a question not asked in the final submissions by a party. But the Court should not, because one or more of the parties finds it more comfortable for its position, forfeit necessary steps on the way to the finding it *does* make in the *dispositif*. The Court has acknowledged this in paragraph 43 of the present Judgment. But having reserved the right to deal with aspects of universal jurisdiction in its reasoning, "should it deem this necessary or desirable", the Court says nothing more on the matter.

14. This may be contrasted with the approach of the Court in the Advisory Opinion request put to it in the *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962*, pp. 156-157. (The Court was constrained by the request put to it, rather than by the final submissions of the Applicant, but the point of principle remains the same.) The Court was asked by the General Assembly whether the expenditures incurred in connection with UNEF and ONUC constituted "expenses of the organization" for purposes of Article 17, paragraph 2, of the Charter.

15. France had in fact proposed an amendment to this request, whereby the Court would have been asked to consider whether the expenditures in question were made in conformity with the provisions of the Charter, before proceeding to the question asked. This proposal was rejected. The Court stated

> "The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter', if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to follow or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*Ibid.*, p. 157.)

The Court further stated that it

> "has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the

obligation incumbent upon it unless it examined in some detail various problems raised by the question which the General Assembly has asked" (*ibid.*, p. 158).

16. For all the reasons expounded above, the Court should have "found it appropriate" to deal with the question of whether the issue and international circulation of a warrant based on universal jurisdiction in the absence of Mr. Yerodia's presence on Belgian territory was unlawful. This should have been done before making a finding on immunity from jurisdiction, and the Court should indeed have "examined in some detail various problems raised" by the request as formulated by the Congo in its final submissions.

17. In agreeing to pronounce upon the question of immunity without addressing the question of a jurisdiction from which there could be immunity, the Court has allowed itself to be manoeuvred into answering a hypothetical question. During the course of the oral pleadings Belgium drew attention to the fact that Mr. Yerodia had ceased to hold any ministerial office in the Government of the Democratic Republic of the Congo. In Belgium's view, this meant that the Court should declare the request to pronounce upon immunity to be inadmissible. In Belgium's view the case had become one "about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge" (CR 2001/8, p. 26, para. 43). The dispute was "a difference of opinion of an abstract nature" (CR 2001/8, p. 36, para. 71). The Court should not "*entrer dans un débat qui risque fort de lui apparaître comme essentiellement académique*" (CR 2001/9, pp. 6-7, paras. 3-4).

18. In its Judgment the Court rightly rejects those contentions (see Judgment, paras. 30-32). But nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist. It is regrettable that the Court has not followed the logic of its own findings in the *Certain Expenses* case, and in this Judgment addressed in the necessary depth the question of whether the Belgian authorities could legitimately have invoked universal jurisdiction in issuing and circulating the arrest warrant for the charges contained therein, and for a person outside the territorial jurisdiction at the moment of the issue of the warrant. Only if the answer to these is in the affirmative does the question arise: "Nevertheless, was Mr. Yerodia immune from such exercise of jurisdiction, and by reference to what moment of time is that question to be answered?"

*

* *

19. We therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory. The necessary point of departure must be the sources of international law identified in Article 38, paragraph 1 *(c)*, of the Statute of the Court, together with obligations imposed upon all United Nations Members by Security Council resolutions, or by such General Assembly resolutions as meet the criteria enunciated by the Court in the case concerning *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (*I.C.J. Reports 1996*, p. 226, para. 70).

20. Our analysis may begin with national legislation, to see if it evidences a State practice. Save for the Belgian legislation of 10 February 1999, national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences. Various examples typify

the more qualified practice. The Australian War Crimes Act of 1945, as amended in 1988, provides for the prosecution in Australia of crimes committed between 1 September 1939 and 8 May 1945 by persons who were Australian citizens or residents at the times of being charged with the offences (ss. 9 and 11). The United Kingdom War Crimes Act of 1991 enables proceedings to be brought for murder, manslaughter or culpable homicide, committed between 1 September 1935 and 5 June 1945, in a place that was part of Germany or under German occupation, and in circumstances where the accused was at the time, or has become, a British citizen or resident of the United Kingdom. The statutory jurisdiction provided for by France, Germany and (in even broader terms) the Netherlands, refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect. It should be noted, however, that the German Government on 16 January 2002 has submitted a legislative proposal to the German Parliament, section 1 of which provides:

> "This Code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany]."

The Criminal Code of Canada 1985 allows the execution of jurisdiction when at the time of the act or omission the accused was a Canadian citizen or "employed by Canada in a civilian or military capacity"; or the "victim is a Canadian citizen or a citizen of a State that is allied with Canada in an armed conflict**"**, or when "at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada" (Art. 7).

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so far as reliance on universal jurisdiction is concerned. In the *Pinochet* case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule being met by English and Spanish legislation (the English courts had to decide whether to agree to an extradition request from Spain which itself had a victim/nationality link). In Australia the Federal Court referred to a group of crimes over which international law granted universal jurisdiction, even though national enabling legislation would also be needed (*Nulyarimma*, 1999: genocide). The High Court confirmed the authority of the legislature to confer jurisdiction on the courts to exercise a universal jurisdiction over war crimes (*Polyukovich*, 1991). In Austria (whose Penal Code emphasizes the double-criminality requirement), the Supreme Court found that it had jurisdiction over persons charged with genocide, given that there was not a functioning legal system in the State where the crimes had been committed nor a functioning international criminal tribunal at that point in time (*Cvjetkovic*, 1994). In France it has been held by a *juge d'instruction* that the Genocide Convention does not provide for universal jurisdiction (*in re Javor*, reversed in the *Cour d'Appel* on other grounds. The *Cour de Cassation* ruling equally does not suggest universal jurisdiction). The *Munyeshyaka* finding by the *Cour d'Appel* (1998) relies for a finding — at first sight inconsistent — upon cross-reference into the Statute of the International Tribunal for Rwanda as the jurisdictional basis. In the *Qaddafi* case the *Cour d'Appel* relied on passive personality and not on universal jurisdiction (in the *Cour de Cassation* it was immunity that assumed central importance).

23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an "extraterritorial jurisdiction" could be exercised over a non-national. However, in the *Hoge Raad*, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany). And the case law of the United States has been somewhat more ready to invoke "universal jurisdiction", though considerations of passive personality have also been of key importance (*Yunis*, 1988; *Bin Laden*, 2000).

25. An even more ambiguous answer is to be derived from a study of the provisions of certain important treaties of the last 30 years, and the obligations imposed by the parties themselves.

26. In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. (See the interesting recent article of Luis Benvenides "The Universal Jurisdiction Principle; Nature and Scope", *Annuario Mexicano de Derecho Internacional*, Vol. 1, p. 58 (2001).) This is doubtful.

27. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, provides:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

This is an obligation to assert territorial jurisdiction, though the *travaux préparatoires* do reveal an understanding that this obligation was not intended to affect the right of a State to exercise criminal jurisdiction on its own nationals for acts committed outside the State (A/C 6/SR, 134; p. 5). Article VI also provides a potential grant of non-territorial competence to a possible future international tribunal — even this not being automatic under the Genocide Convention but being restricted to those Contracting Parties which would accept its jurisdiction. In recent years it has been suggested in the literature that Article VI does not prevent a State from exercising universal jurisdiction in a genocide case. (And see, more generally, *Restatement (Third) of the Foreign Relations Law of the United States (1987)*, §404.)

28. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

29. Article 85, paragraph 1, of the First Additional Protocol to the 1949 Geneva Convention incorporates this provision by reference.

30. The stated purpose of the provision was that the offences would not be left unpunished (the extradition provisions playing their role in this objective). It may immediately be noted that this is an early form of the *aut dedere aut prosequi* to be seen in later conventions. But the obligation to prosecute is primary, making it even stronger.

31. No territorial or nationality linkage is envisaged, suggesting a true universality principle (see also Henzelin, *Le principe de l'universalité en droit pénal international* : *Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (2000), pp. 354-6). But a different interpretation is given in the authoritative Pictet Commentary: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply a permission to prosecute in absentia, if the search had no result?

32. As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I.

33. The Single Convention on Narcotics and Drugs, 1961, provides in Article 36, paragraph 2, that:

> "*(a)*(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given."

34. Diverse views were expressed as to whether the State where the offence was committed should have first right to prosecute the offender (E/CN.7/AC.3/9, 11 Sept. 1958, p. 17, fn. 43; cf. E/CN.7/AC.3/9 and Add.1, E/CONF.34/1/Add.1, 6 Jan. 1961, p. 32). Nevertheless, the principle of "primary universal repression" found its way into the text, notwithstanding the strong objections of States such as the United States, New Zealand and India that their national laws only envisaged the prosecution of persons for offences occurring within their national borders. (The development of the concept of "impact jurisdiction" or "effects jurisdiction" has in more recent years allowed continued reliance on territoriality while stretching far the jurisdictional arm.) The compromise reached was to make the provisions of Article 36, paragraph 2 (iv) "subject to the constitutional limitations of a Party, its legal system and domestic law". But the possibility of a universal jurisdiction was not denounced as contrary to international law.

35. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, making preambular reference to the "urgent need" to make such acts "punishable as an offence and to provide for appropriate measures with respect to prosecution and extradition of offenders", provided in Article 4 (1) for an obligation to take such measures as may be necessary to establish jurisdiction over these offences and other acts of violence against passengers or crew:

"*(a)* when the offence is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State".

Article 4 (2) provided for a comparable obligation to establish jurisdiction where the alleged offender was present in the territory and if he was not extradited pursuant to Article 8 by the territory. Thus here too was a treaty provision for *aut dedere aut prosequi*, of which the limb was in turn based on the principle of "primary universal repression". The jurisdictional bases provided for in Articles 4 (1) *(b)* and 4 (2), requiring no territorial connection beyond the landing of the aircraft or the presence of the accused, were adopted only after prolonged discussion. The *travaux préparatoires* show States for whom mere presence was an insufficient ground for jurisdiction beginning reluctantly to support this particular type of formula *because of the gravity of the offence*. Thus the representative of the United Kingdom stated that his country "would see great difficulty in assuming jurisdiction merely on the ground that an aircraft carrying a hijacker had landed in United Kingdom territory". Further,

> "normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence . . . he was prepared to support . . . [the proposal on mandatory jurisdiction on the part of the State where a hijacker is found]." (Hague Conference, p. 75, para. 18.)

36. It is also to be noted that Article 4, paragraphs 1 and 2, provides for the mandatory exercise of jurisdiction in the absence of extradition; but does not preclude criminal jurisdiction exercised on alternative grounds of jurisdiction in accordance with national law (though those possibilities are not made compulsory under the Convention).

37. Comparable jurisdictional provisions are to be found in Articles 5 and 8 of the International Convention against the Taking of Hostages of 17 December 1979. The obligation enunciated in Article 8 whereby a State party shall "without exception whatsoever and whether or not the offence was committed in its territory", submit the case for prosecution if it does not extradite the alleged offender, was again regarded as necessary by the majority, given the nature of the crimes (Summary Record, *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages (A/AC.188/SR.5, 7, 8, 11, 14, 15, 16, 17, 23, 24 and 35)). The United Kingdom cautioned against moving to universal criminal jurisdiction (*ibid.*, A/AC.188/SR.24, para. 27) while others (Poland, para. 18; Mexico, para. 11) felt the introduction of the principle of universal jurisdiction to be essential. The USSR observed that no State could exercise jurisdiction over crimes committed in another State by nationals of that State without contravening Article 2, paragraph 7, of the Charter. The Convention provisions were in its view to apply only to hostage taking that was a manifestation of international terrorism — another example of initial and understandable positions on jurisdiction being modified in the face of the exceptional gravity of the offence.

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

"*(a)* When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate."

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted *a contrario*. (See J. H. Burgers and H. Danelius, *The United Nations Convention against Torture, 1988*, p. 133.)

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of "primary universal repression" came now to be widely referred to by delegates as "universal jurisdiction" — moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an "offence against the law of nations". (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United Kingdom eventually dropped their objection that "universal jurisdiction" over torture would create problems under their domestic legal systems. (See E/CN.4/1984/72.)

40. This short historical survey may be summarized as follows:

41. The parties to these treaties agreed both to grounds of jurisdiction and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4 (1) Hague Convention; Article 3 (1) Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found, shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as "universal jurisdiction", though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

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42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, *inter partes or*, whether it is now, *at least as regards the offences articulated in the treaties*, an obligation of customary international law was pleaded by the Parties in this case but not addressed in any great detail.

43. Nor was the question of whether any such general obligation applies to crimes against humanity, given that those too are regarded everywhere as comparably heinous crimes. Accordingly, we offer no view on these aspects.

44. However, we note that the inaccurately termed "universal jurisdiction principle" in these treaties is a principle of *obligation*, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose.

If a dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised, the writings of eminent jurists are much more mixed. The large literature contains vigorous exchanges of views (which have been duly studied by the Court) suggesting profound differences of opinion. But these writings, important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom. And the policy arguments advanced in some of the writings can certainly suggest why a practice or a court decision should be regarded as desirable, or indeed lawful; but contrary arguments are advanced, too, and in any event these also cannot serve to substantiate an international practice where virtually none exists.

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. Further, many countries have no national legislation for the exercise of well recognized forms of extraterritorial jurisdiction, sometimes notwithstanding treaty obligations to enable themselves so to act. National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law, — that is, State practice — is neutral as to exercise of universal jurisdiction.

46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. (See, e.g., Cherif Bassiouni, *International Criminal Law, Volume III: Enforcement*, 2nd Edition, (1999), p. 228; Theodore Meron "Internationalization of Internal Atrocities" 89 *AJIL* (1995), at 576.)

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. "Effects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

48. In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Torts Claim Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.

49. Belgium — and also many writers on this subject — find support for the exercise of a universal criminal jurisdiction *in absentia* in the "*Lotus*" case. Although the case was clearly decided on the basis of jurisdiction over damage to a vessel of the Turkish navy and to Turkish nationals, it is the famous dictum of the Permanent Court which has attracted particular attention. The Court stated that:

> "[T]he first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." (*P.C.I.J., Series A, No. 10*, pp. 18-19.)

The Permanent Court acknowledged that consideration had to be given as to whether these principles would apply equally in the field of criminal jurisdiction, or whether closer connections might there be required. The Court noted the importance of the territorial character of criminal law but also the fact that all or nearly all systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. After examining the issue the Court finally concluded that for an exercise of extraterritorial criminal jurisdiction (other than within the territory of another State) it was equally necessary to "prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation".

50. The application of this celebrated dictum would have clear attendant dangers in some fields of international law. (See, on this point, Judge Shahabudeen's dissenting opinion in the case concerning *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, I.C.J. Reports 1996*, pp. 394-396.) Nevertheless, it represents a continuing potential in the context of jurisdiction over international crimes.

51. That being said, the dictum represents the high water mark of *laissez-faire* in international relations, and an era that has been significantly overtaken by other tendencies. The underlying idea of universal jurisdiction properly so-called (as in the case of piracy, and possibly in the Geneva Conventions of 1949), as well as the *aut dedire aut prosequi* variation, is a common endeavour in the face of atrocities. The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted. And those States and academic writers who claim the right to act unilaterally to assert a universal criminal jurisdiction over persons committing such acts, invoke the concept of acting as "agents for the international community". This vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the "*Lotus*" case.

At the same time, the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly-established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis. (See Article 4 (3) Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Article 5 (3) International Convention Against Taking of Hostages, 1979; Article 5 (3) Convention Against Torture; Article 9, Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 19, Rome Statute of the International Criminal Court.)

52. We may thus agree with the authors of the Oppenheim, 9th Edition, at page 998, that:

> "While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect."

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53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. The fact that in the past the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy, *outside of any territorial jurisdiction*, is not determinative. The only prohibitive rule (repeated by

the Permanent Court in the *"Lotus"* case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.

55. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to *any* extraterritoriality, including those that are well established and not just to universal jurisdiction.

56. Some jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.

57. On what basis is it claimed, alternatively, that an arrest warrant may not be issued for non-nationals in respect of offences occurring outside the jurisdiction? The textual provisions themselves of the 1949 Geneva Convention and the First Additional Protocol give no support to this view. The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of *aut dedere aut prosequi*. *Definitionally, this envisages presence on the territory.* There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario so as to exclude a* voluntary exercise of a universal jurisdiction.

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

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59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction *in absentia*, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or *juge d'instruction*. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

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60. It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.

61. Piracy is the classical example. This jurisdiction was, of course, exercised on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State. But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas. War crimes (already since 1949 perhaps a treaty-based provision for universal jurisdiction) may be added to the list. The specification of their content is largely based upon the 1949 Conventions and those parts of the 1977 Additional Protocols that reflect general international law. Recent years have also seen the phenomenon of an alignment of national jurisdictional legislation on war crimes, specifying those crimes under the statutes of the ICTY, ICTR and the intended ICC.

62. The substantive content of the concept of crimes against humanity, and its status as crimes warranting the exercise of universal jurisdiction, is undergoing change. Article 6 *(c)* of the Charter of the International Military Tribunal of 8 August, 1945, envisaged them as a category linked with those crimes over which the Tribunal had jurisdiction (war crimes, crimes against the peace). In 1950 the International Law Commission defined them as murder, extermination, enslavement, deportation or other inhuman acts perpetrated on the citizen population, or persecutions on political, racial or religious grounds if in exercise of, or connection with, any crime against peace or a war crime (*YILC* 1950, Principle VI *(c)*, pp. 374-377). Later definitions of crimes against humanity both widened the subject-matter, to include such offences as torture and rape, and de-coupled the link to other earlier established crimes. Crimes against humanity are now regarded as a distinct category. Thus the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission at its 48th session, provides that crimes against humanity

> *"means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group:*
>
> *(a)* Murder;
>
> *(b)* Extermination;
>
> *(c)* Torture;

(d) Enslavement;

(e) Persecution on political, racial, religious or ethnic grounds;

(f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(g) Arbitrary deportation or forcible transfer of population;

(h) Arbitrary imprisonment;

(i) Forced disappearance of persons;

(j) Rape, enforced prostitution and other forms of sexual abuse;

(k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm".

63. The Belgian legislation of 1999 asserts a universal jurisdiction over acts broadly defined as "grave breaches of international humanitarian law", and the list is a compendium of war crimes and the Draft Codes of Offences listing of crimes against humanity, with genocide being added. Genocide is also included as a listed "crime against humanity" in the 1968 Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, as well as in the ICTY, ICTR and ICC Statutes.

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. "Racial hatred" would need to be assimilated to "persecution on racial grounds", or, on the particular facts, to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome Statute for the ICC. However, Article 7 (l) of the ICTY and Article 6 (l) of the ICTR do stipulate that "any person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to [in the relevant articles: crimes against humanity being among them] shall be individually responsible for the crime". In the *Akayesu* Judgment (96-4-T) a Chamber of the ICTR has held that liability for a crime against humanity includes liability through incitement to commit the crime concerned (paras. 481-482). The matter is dealt with in a comparable way in Article 25 (3) of the Rome Statute.

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of "crimes against humanity" and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

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66. A related point can usefully be dealt with at this juncture. Belgium contended that, regardless of how international law stood on the matter of universal jurisdiction, it had in fact exercised no such jurisdiction. Thus, according to Belgium, there was neither a violation of any immunities that Mr Yerodia might have, nor any infringement of the sovereignty of the Congo. To this end, Belgium, in its Counter-Memorial, observed that immunity from enforcement of the warrant was carefully provided for "representatives of foreign States who visit Belgium on the basis of any official invitation. In such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium" (Counter-Memorial of Belgium, para. 1.12). Belgium further observed that the arrest warrant

> "has no legal effect at all either in or as regards the DRC. Although the warrant was circulated internationally for information by Interpol in June 2000, it was not the subject of a Red Notice. Even had it been, the legal effect of Red Notices is such that, for the DRC, it would not have amounted to a request for provisional arrest, let alone a formal request for extradition." (Counter-Memorial of Belgium, para. 3.1.12.)

67. It was explained to the Court that a primary purpose in issuing an international warrant was to learn the whereabouts of a person. Mr. Yerodia's whereabouts were known at all times.

68. We have not found persuasive the answers offered by Belgium to a question put to it by Judge Koroma, as to what the *purpose* of the warrant was, if it was indeed so carefully formulated as to render it unenforceable

69. We do not feel it can be said that, given these explanations by Belgium, there was no exercise of jurisdiction as such that could attract immunity or infringe the Congo's sovereignty. If a State issues an arrest warrant against the national of another State, that other State is entitled to treat it as such — certainly unless the issuing State draws to the attention of the national State the clauses and provisions said to vacate the warrant of all efficacy. Belgium has conceded that the purpose of the international circulation of the warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". An international arrest warrant, even though a Red Notice has not yet been linked, is analogous to the locking-on of radar to an aircraft: it is already a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium's choosing. Even if the action of a third State is required, the ground has been prepared.

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70. We now turn to the findings of the Court on the impact of the issue of circulation of the warrant on the inviolability and immunity of Mr. Yerodia.

71. As to the matter of immunity, although we agree in general with what has been said in the Court's Judgment with regard to the specific issue put before it, we nevertheless feel that the approach chosen by the Court has to a certain extent transformed the character of the case before it. By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a

jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.

72. An example is the evolution the concept of State immunity in civil law matters has undergone over time. The original concept of absolute immunity, based on status *(par in parem non habet imperium)* has been replaced by that of restrictive immunity; within the latter a distinction was made between *acta iure imperii* and *acta iure gestionis* but immunity is granted only for the former. The meaning of these two notions is not carved in stone, however; it is subject to a continuously changing interpretation which varies with time reflecting the changing priorities of society.

73. A comparable development can be observed in the field of international criminal law. As we said in paragraph 49, a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extraterritorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development not only has led to the establishment of new international tribunals and treaty systems in which new competences are attributed to national courts but also to the recognition of other, non-territorially based grounds of national jurisdiction (see paragraph 53 above).

74. The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.

75. These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.

76. Such is the backdrop of the case submitted to the Court. Belgium claims that under international law it is permitted to initiate criminal proceedings against a State official who is under suspicion of having committed crimes which are generally condemned by the international community; and it contends that because of the nature of these crimes the individual in question is

no longer shielded by personal immunity. The Congo does not deny that a Foreign Minister is responsible in international law for all of his acts. It asserts instead that he has absolute personal immunity from criminal jurisdiction as long as he is in office and that his status must be assimilated in this respect to that of a Head of State (Memorial of Congo, p. 30).

77. Each of the Parties, therefore, gives particular emphasis in its argument to one set of interests referred to above: Belgium to that of the prevention of impunity, the Congo to that of the prevention of unwarranted outside interference as the result of an excessive curtailment of immunities and an excessive extension of jurisdiction.

78. In the Judgment, the Court diminishes somewhat the significance of Belgium's arguments. After having emphasized — and we could not agree more — that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed (para. 60), the Court goes on to say that these immunities do not represent a bar to criminal prosecution in certain circumstances (para. 61). We feel less than sanguine about examples given by the Court of such circumstances. The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare; moreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister. This alternative, however, can also be easily forestalled by an unco-operative government that keeps the Minister in office for an as yet indeterminate period.

79. We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.

80. Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he or she symbolised. Whereas State practice in this regard is extremely scarce, the immunities to which other high State officials (like Heads of Government and Ministers for Foreign Affairs) are entitled have generally been considered in the literature as merely functional. (Cf. Arthur Watts, "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers", *Recueil des Cours 1994-III*, Vol. 247, pp. 102-103.)

81. We have found no basis for the argument that Ministers of Foreign Affairs are entitled to the same immunities as Heads of State. In this respect, it should be pointed out that paragraph 3.2 of the International Law *Commission's Draft Articles on Jurisdictional Immunities of States and their Property* of 1991, which contained a saving clause for the privileges and immunities of Heads of State, failed to include a similar provision for those of Ministers for Foreign Affairs (or Heads of Government). In its commentary, the ILC, stated that mentioning the privileges and immunities of Ministers for Foreign Affairs would raise the issues of the basis and the extent of their jurisdictional immunity. In the opinion of the ILC these immunities were clearly not identical to those of Heads of State.

82. The Institut de droit international took a similar position in 2001 with regard to Foreign Ministers. Its resolution on the Immunity of Heads of State, based on a thorough report on all relevant State practice, states expressly that these "shall enjoy, in criminal matters, immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity". But the Institut, which in this resolution did assimilate the position of Head of Government to that of Head of State, carefully avoided doing the same with regard to the Foreign Minister.

83. We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States (Judgment, para. 53). During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and wherever engaged in the functions required by his office and when in transit therefor.

84. Whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear. Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled. The arrest warrant of 11 April 2000 was directly enforceable in Belgium and would have obliged the police authorities to arrest Mr. Yerodia had he visited that country for non-official reasons. The very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minister for Foreign Affairs of the Congo.

85. Nonetheless, that immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for "official" acts. It is now increasingly claimed in the literature (see e.g., Andrea Bianchi "Denying State Immunity to Violations of Human Rights", 46 *Austrian Journal of Public and International Law* (1994), p. 229) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform: (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of *1° Congreso del Partido* (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case; Supreme Court, 29 May 1962, 36 *International Law Reports*, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in *R* v. *Bartle and the Commissioner of Police for the Metropolis and Others*, ex parte Pinochet

("Pinochet III"); and of Lords Steyn and Nicholls of Birkenhead in "Pinochet I", as well as the judgment of the Court of Appeal of Amsterdam in the *Bouterse* case (*Gerechtshof Amsterdam*, 20 November 2000, para. 4.2.)

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86. We have voted against paragraph (3) of the *dispositif* for several reasons.

87. In paragraph (3) of the *dispositif*, the Court "finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom the warrant was circulated". In making this finding, the Court relies on the proposition enunciated in the *Factory at Chorzów* case pursuant to which "reparation must, as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would . . . have existed if the act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47). Having previously found that the issuance and circulation of the warrant by Belgium was illegal under international law, the Court concludes that it must be withdrawn because "the warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs".

88. We have been puzzled by the Court's reliance on the *Factory at Chorzów* case to support its finding in paragraph (3) of the *dispositif*. It would seem that the Court regards its order for the cancellation of the warrant as a form of *restitutio in integrum*. Even in the very different circumstances which faced the Permanent Court in the *Factory at Chorzów* case, *restitutio* in the event proved impossible. Nor do we believe that restoration of the *status quo ante* is possible here, given that Mr. Yerodia is no longer Minister for Foreign Affairs.

89. Moreover — and this is more important — the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility, A/56/10 (2001), p. 216). However, the Court's finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law, although it may well be that a misnamed arrest warrant, which is all it now is, may be deemed to be defective as a matter of Belgian domestic law; but that is not and cannot be of concern to this Court. Accordingly, we consider that the Court erred in its finding on this point.

(Signed) Rosalyn HIGGINS.

(Signed) Pieter KOOIJMANS.

(Signed) Thomas BUERGENTHAL.

OPINION INDIVIDUELLE DE M. REZEK

Préséance logique des questions de compétence sur les questions d'immunités ¾ Effet de l'exclusion des questions de compétence des conclusions finales du Congo ¾ Territorialité et défense de certains biens juridiques comme règles élémentaires de compétence ¾ Nationalité active et passive comme règle de compétence complémentaire ¾ Exercice de la compétence pénale sans aucune circonstance de rattachement au for non encore autorisée en droit international ¾ Système international de coopération pour la répression du crime.

1. Je suis persuadé que j'écris en ce moment une *opinion dissidente*, bien qu'elle doive être classée parmi les *opinions individuelles* du fait que son auteur a voté en faveur de l'ensemble du dispositif de l'arrêt. J'approuve, comme la majorité des membres de la Cour, tout ce qui est dit dans le dispositif, car le traitement de la question de l'immunité me paraît conforme à l'état du droit. Je regrette pourtant qu'une majorité ne se soit pas formée sur le point essentiel du problème posé à la Cour.

2. Aucune immunité n'est absolue, dans aucun ordre juridique. Toute immunité s'inscrit forcément dans un cadre donné, et aucun sujet de droit ne saurait bénéficier d'une immunité dans l'abstrait. Ainsi peut-on invoquer une immunité vis-à-vis d'une juridiction nationale donnée et non pas à l'égard d'une autre. De même, une immunité peut déployer ses effets vis-à-vis de juridictions internes, mais pas à l'égard d'une juridiction internationale. Dans le cadre d'un ordre juridique donné, une immunité peut être invoquée à l'encontre de la juridiction pénale mais pas de la juridiction civile, ou bien à l'encontre de la juridiction ordinaire mais pas d'un for spécial.

3. La question de la compétence précède donc nécessairement celle de l'immunité. Les deux questions ont en outre fait largement l'objet du débat, tant au niveau des pièces écrites que lors de la procédure orale, entre les Parties. Le fait que, dans ses conclusions finales, le Congo se soit limité à inviter la Cour à rendre une décision fondée sur l'immunité de son ancien ministre vis-à-vis du for interne de la Belgique ne justifie pas l'abandon par la Cour de ce qui constitue une prémisse inexorable à l'examen de la question de l'immunité. Il n'est ici aucunement question de *retenir l'ordre* des questions soumises à l'examen de la Cour mais d'observer l'ordre logique qui, en toute rigueur, s'impose. Autrement, on glisse vers un règlement par la Cour de la question de savoir si l'immunité existerait ou non *au cas où la justice belge serait compétente…*

4. En statuant au préalable sur la question de la compétence, la Cour aurait eu l'occasion de rappeler que l'exercice de la juridiction pénale interne, sur la seule base du principe de la justice universelle, présente nécessairement un caractère subsidiaire et qu'il y a de substantielles raisons pour cela. D'abord, il est admis qu'aucun for n'est aussi qualifié pour conduire à son terme, comme il convient, un procès pénal, que celui du lieu des faits, ne serait-ce que par la proximité des preuves, la connaissance plus approfondie des inculpés et des victimes, la perception plus nette de toutes les circonstances du cadre délictueux. Ce sont des raisons d'ordre plus politique que pratique qui conduisent plusieurs systèmes internes à placer juste après le principe de la *territorialité* un autre fondement de compétence pénale qui s'affirme sans égard au lieu des faits, celui de la *défense de certains biens juridiques* particulièrement chers à l'Etat : la vie et l'intégrité du souverain, le patrimoine public, l'administration publique.

5. En dehors de ces deux principes élémentaires, la complémentarité devient la règle : dans la plupart des pays, l'action pénale est possible sur la base des principes de la *nationalité active* ou *passive*, lorsque l'on est en présence de crimes commis à l'étranger, ayant pour auteurs ou pour victimes des ressortissants de l'Etat du for, mais à la condition que, dans les cas susmentionnés, le procès n'ait pas eu lieu ailleurs, dans un Etat dont la compétence pénale s'imposerait tout naturellement, et que l'accusé se trouve sur le territoire de l'Etat du for, dont il est lui-même un ressortissant, ou bien que tel soit le cas de ses victimes.

6. L'activisme qui pourrait mener un Etat à rechercher hors de son territoire, par la voie d'une demande d'extradition ou d'un mandat d'arrêt international, une personne qui aurait été accusée de crimes définis en termes de droit des gens, mais *sans aucune circonstance de rattachement au for*, n'est aucunement autorisé par le droit international en son état actuel. C'est avec une forte dose de présomption qu'est posée la question de savoir si la Belgique ne serait pas «obligée» d'engager l'action pénale dans l'espèce. Ce qui n'est pas autorisé ne peut pas, à fortiori, être obligatoire. Le défendeur n'a pas apporté la preuve qu'il existe un seul autre Etat qui, dans de pareilles circonstances, aurait déjà donné libre cours à une action pénale, même si l'on fait abstraction du problème de l'immunité de l'inculpé. Il n'y a pas de «droit coutumier en formation» qui découle de l'action isolée d'un Etat; il n'y a pas, à l'état embryonnaire, de règle coutumière en gestation, même si la Cour, en traitant la question de la compétence, acceptait de donner suite à la demande du défendeur qui la prie de ne pas enrayer le processus de formation du droit.

7. L'article 146 de la convention de Genève de 1949 (IV), sur la protection des personnes civiles en temps de guerre (article qui se trouve aussi dans les trois autres conventions de 1949), est, de toutes les normes du droit conventionnel existant, celle dont le texte serait le plus susceptible de conforter le point de vue du défendeur lorsqu'il fonde l'exercice de la juridiction pénale sur la seule base du principe de la compétence universelle. Cette disposition invite les Etats à rechercher, livrer ou juger les personnes inculpées des crimes prévus dans les conventions en cause. Néanmoins, à part le fait que le cas d'espèce échappe au strict champ d'application des conventions de 1949, Mme Chemillier-Gendreau a rappelé, pour comprendre le sens de la norme, l'enseignement d'un des plus notables spécialistes du droit pénal international (et du droit international pénal), le doyen Claude Lombois :

> «Là où cette condition n'est pas formulée, on ne peut que la sous-entendre : comment un Etat pourrait-il rechercher un criminel sur un autre territoire que le sien ? Le livrer, s'il n'est pas présent sur son territoire ? Recherche comme livraison supposent des actes de contrainte, liés à des prérogatives de puissance publique souveraine, qui ont le territoire pour limite spatiale.»[1]

8. En 1998, la justice espagnole a demandé au Royaume-Uni l'extradition du général Augusto Pinochet, contre qui une action pénale avait été engagée pour des crimes prévus dans des conventions internationales. A ces conventions étaient parties un grand nombre d'Etats, y compris le Chili, dont l'inculpé était, à l'époque des faits, le président et de toute évidence le responsable direct d'une politique répressive qui a fait d'innombrables victimes parmi les Chiliens, mais aussi parmi des étrangers de nationalités diverses. La compétence alors affirmée par le juge Baltasar Garzon avait pour base le principe de la nationalité passive, dès lors que plusieurs victimes

[1] CR 2001/6, p. 31.

avaient été des Espagnols, au nom desquels l'accusation avait saisi l'instance. Il n'y a pas d'équivalence possible entre l'affirmation de compétence par la justice espagnole dans l'affaire *Pinochet* et l'affirmation de compétence de la justice belge dans l'espèce. Dans le premier cas, à part la circonstance — non décisive, mais non négligeable — que l'accusation portait sur des faits nettement plus graves que la prononciation télévisée d'un discours dont le langage aurait incité le peuple à commettre des crimes, il faut considérer que l'ancien chef d'Etat chilien avait quitté temporairement son pays pour des raisons d'ordre privé et se trouvait sur le territoire d'un Etat qui fait partie, avec l'Espagne, d'un espace communautaire régional caractérisé par un niveau appréciable d'intégration juridique; et surtout que la compétence de la justice espagnole avait pour fondement le principe de la nationalité passive, qui peut justifier — bien que ce ne soit pas le cas de la totalité, peut-être même pas d'une majorité d'Etats — l'engagement de l'action pénale *in absentia*, donnant lieu de ce chef à l'émission d'un mandat d'arrêt international et à la demande d'extradition.

9. Il est impératif que tout Etat se demande, avant d'essayer de faire avancer le droit des gens dans une direction qui va à l'opposé de certains principes qui régissent encore de nos jours les relations internationales, quelles seraient les conséquences de la conversion d'autres Etats, éventuellement d'un grand nombre d'autres Etats à une pareille pratique. Cela n'est pas sans raison que les Parties ont discuté devant la Cour la question de savoir quelle serait la réaction de certains pays européens si un juge du Congo avait inculpé leurs gouvernants pour des crimes supposés commis par eux ou sur leurs ordres en Afrique[2].

10. Une hypothèse encore plus adéquate pourrait servir de contrepoint au cas d'espèce. Il y a bien des juges dans l'hémisphère Sud, non moins qualifiés que M. Vandermeersch et comme lui imbus de bonne foi et d'un amour profond des droits de l'homme et des droits des peuples, qui n'hésiteraient point à lancer des actions pénales contre plusieurs gouvernants de l'hémisphère Nord au titre d'épisodes militaires récents, survenus tous au nord de l'équateur. Leur connaissance des faits n'est pas moins complète ni moins impartiale que celle que le for de Bruxelles entend posséder sur les événements de Kinshasa. Pourquoi ces juges font-ils preuve de retenue ? Parce qu'ils ont conscience de ce que le droit international n'autorise pas l'affirmation d'une compétence pénale dans un tel cadre. Parce qu'ils savent que leurs gouvernements nationaux, à la lumière de cette réalité juridique, n'appuieraient jamais, sur le plan international, de telles initiatives. Si l'application du principe de la compétence universelle ne présuppose pas la présence de la personne accusée sur le territoire de l'Etat du for, toute coordination devient impossible et c'est bien le système international de coopération pour la répression du crime qui s'effondre[3]. Il importe que le règlement, sur le plan interne, de questions de cet ordre et par conséquent la conduite des autorités de chaque Etat s'accordent avec l'idée d'une société internationale décentralisée, fondée sur le principe de l'égalité de ses membres et appelant nécessairement la coordination de leurs efforts. En dehors d'une telle discipline, toute politique adoptée au nom des droits de l'homme risque de desservir cette cause au lieu de la renforcer.

11. L'examen préalable de la question de la compétence aurait dû, à mon avis, dispenser la Cour de toute délibération sur la question de l'immunité. Je m'associe en tout cas aux conclusions de la majorité de mes collègues sur ce point. J'estime que le for interne de la Belgique n'est pas compétent, dans les circonstances de l'espèce, pour l'action pénale, faute d'une base de

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[2] CR 2001/6, p. 28 (Chemillier-Gendreau); CR 2001/9, p. 12-13 (Eric David).

[3] Notez, pour ce qui est du stade actuel du principe de la compétence universelle, que les Etats négociateurs du traité de Rome ont évité d'attacher à ce principe la compétence du futur Tribunal pénal international.

compétence autre que le seul principe de la compétence universelle et faute, à l'appui de celui-ci, de la présence de la personne accusée sur le territoire belge, qu'il ne serait pas légitime de forcer à comparaître. Mais je pense que, si la compétence de la justice belge pouvait être admise, l'immunité du ministre congolais des affaires étrangères aurait interdit l'engagement de l'action pénale ainsi que l'expédition par le juge, avec le soutien par le Gouvernement belge, du mandat d'arrêt international.

(Singé) Francisco REZEK.

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DISSENTING OPINION OF JUDGE AL-KHASAWNEH

Immunity of a Foreign Minister functional ¾ Its extent is not clear ¾ Different from diplomatic representatives ¾ Also different from Heads of State ¾ Ministers entitled to immunity from enforcement when on official missions ¾ But not on private visits ¾ Belgian warrant did not violate Mr. Yerodia's immunity ¾ Express language on non-enforceability when on official mission ¾ Circulation of warrant not accompanied by Red Notice ¾ More fundamental question is whether there are exceptions in the case of grave crimes ¾ Immunity and impunity ¾ Distinction between procedural and substantive aspects of immunity artificial ¾ Cases postulated by the Court do not address questions of impunity adequately ¾ Effective combating of grave international crimes has assumed a jus cogens *character ¾ Should prevail over rules on immunity ¾ Development in the field of jurisdictional immunities relevant ¾ Two faulty premises ¾ Absolute immunity ¾ No exception ¾ Dissent.*

1. As a general proposition it may be said without too much fear of contradiction that the effective conduct of diplomacy — the importance of which for the maintenance of peaceful relations among States needs hardly to be demonstrated — requires that those engaged in such conduct be given appropriate immunities from — *inter alia ¾* criminal proceedings before the courts of other States. The nature and extent of such immunities has been clarified in the case of diplomatic representatives in the 1961 Vienna Convention, as well as in extensive jurisprudence since the adoption of that Convention. By contrast, and this is not without irony, the nature and extent of immunities enjoyed by Foreign Ministers is far from clear, so much so that the ILC Special Rapporteur on Jurisdictional Immunities of States and Their Property expressed the opinion that the immunities of Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law. To be sure the Convention on Special Missions — the status of which as a reflection of customary law is however not without controversy — covers the immunities of Foreign Ministers who are on official mission, but reserves the extent of those immunities under the unhelpful formula:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law" (Article 21, para. 2).

Nor is the situation made any clearer by the total absence of precedents with regard to the immunities of Foreign Ministers from criminal process. What is sure however is that the position of Foreign Ministers cannot be assimilated to diplomatic representatives for in the case of the latter the host State has a discretion regarding their accreditation and can also declare a representative *persona non grata*, which in itself constitutes some sanction for wrongful conduct and more importantly opens the way — assuming good faith of course — for subsequent prosecution in his/her home State. A Minister for Foreign Affairs accused of criminal conduct — and for that matter criminal conduct that infringes the interests of the community of States as a whole in terms of the gravity of the crimes he is alleged to have committed, and the importance of the interests that the community seeks to protect and who is furthermore not prosecuted in his home State — is hardly under the same conditions as a diplomatic representative granted immunity from criminal process.

2. If the immunities of a Minister for Foreign Affairs cannot be assimilated to a diplomatic representative, can those immunities be established by assimilating him to a Head of a State? Whilst a Foreign Minister is undoubtedly an important personage of the State and represents it in

the conduct of its foreign relations, he does not, in any sense, personify the State. As Sir Arthur Watts correctly puts it:

> "heads of governments and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally" (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours*, 1994, III, pp. 102-103).

3. Moreover, it should not be forgotten that immunity is by definition an exception from the general rule that man is responsible legally and morally for his actions. As an exception, it has to be narrowly defined.

4. A Minister for Foreign Affairs is entitled to immunity from enforcement when on official mission for the unhindered conduct of diplomacy would suffer if the case was otherwise, but the opening of criminal investigations against him can hardly be said by any objective criteria to constitute interference with the conduct of diplomacy. A faint-hearted or ultra-sensitive Minister may restrict his private travels or feel discomfort but this is a subjective element that must be discarded. The warrant issued against Mr. Yerodia goes further than a mere opening of investigation and may arguably be seen as an enforcement measure but it contained express language to the effect that it was not to be enforced if Mr. Yerodia was on Belgian territory on an official mission. In fact press reports — not cited in the Memorials or the oral pleadings — suggest that he had paid a visit to Belgium after the issuance of the warrant and no steps were taken to enforce it. Significantly also the circulation of the international arrest warrant was not accompanied by a Red Notice requiring third States to take steps to enforce it (which only took place after Mr. Yerodia had left office) and had those States acted they would be doing so at their own risk. A breach of an obligation presupposes the existence of an obligation and in the absence of any evidence to suggest a Foreign Minister is entitled to absolute immunity, I cannot see why the Kingdom of Belgium, when we have regard to the terms of the warrant and the lack of an Interpol Red Notice was in breach of its obligations owed to the Democratic Republic of Congo.

5. A more fundamental question is whether high State officials are entitled to benefit from immunity even when they are accused of having committed exceptionally grave crimes recognized as such by the international community. In other words, should immunity become *de facto* impunity for criminal conduct as long as it was in pursuance of State policy? The Judgment sought to circumvent this morally embarrassing issue by recourse to an existing but artificially drawn distinction between immunity as a substantive defence on the one hand and immunity as a procedural defence on the other. The artificiality of this distinction can be gleaned from the ILC commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, which states: "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings" — and it should not be forgotten that the draft was intended to apply to national or international courts — "is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."

6. Having drawn this distinction, the Judgment then went on to postulate four cases where, in an attempt at proving that immunity and impunity are not synonymous, a Minister, and by analogy a high-ranking official, would be held personally accountable for:

(a) Prosecution in his/her home State;

(b) Prosecution in other States if his/her immunity had been waived;

(c) After he/she leaves office except for official acts committed while in office;

(d) Prosecution before an international court.

This paragraph (Judgment, para. 61) is more notable for the things it does not say than for the things it does: As far as prosecution at home and waiver are concerned, clearly the problem arises when they do not take place. With regard to former high-ranking officials the question of impunity remains with regard to official acts, the fact that most grave crimes are definitionally State acts makes this more than a theoretical lacuna. Lastly with regard to existing international courts their jurisdiction *ratione materiae* is limited to the two cases of the former Yugoslavia and Rwanda and the future international court's jurisdiction is limited *ratione temporis* by non-retroactivity as well as by the fact that primary responsibility for prosecution remains with States. The Judgment cannot dispose of the problem of impunity by referral to a prospective international criminal court or existing ones.

7. The effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail. Even if we are to speak in terms of reconciliation of the two sets of rules, this would suggest to me a much more restrictive interpretation of the immunities of high-ranking officials than the Judgment portrays. Incidentally, such a restrictive approach would be much more in consonance with the now firmly-established move towards a restrictive concept of State immunity, a move that has removed the bar regarding the submission of States to jurisdiction of other States often expressed in the maxim *par in parem non habet imperium.* It is difficult to see why States would accept that their conduct with regard to important areas of their development be open to foreign judicial proceedings but not the criminal conduct of their officials.

8. In conclusion, this Judgment is predicated on two faulty premises.

(a) That a Foreign Minister enjoys absolute immunity from both jurisdiction and enforcement of foreign States as opposed to only functional immunity from enforcement when on official mission, a preposition which is neither supported by precedent, *opinio juris*, legal logic or the writings of publicists.

(b) That as international law stands today, there are no exceptions to the immunity of high-ranking State officials even when they are accused of grave crimes. While, admittedly, the readiness of States and municipal courts to admit of exceptions is still at a very nebulous stage of development, the situation is much more fluid than the Judgment suggests. I believe that the move towards greater personal accountability represents a higher norm than the rules on immunity and should prevail over the latter. In consequence, I am unable to join the majority view.

(Signed) Awn AL-KHASAWNEH.

OPINION INDIVIDUELLE DE M. BULA-BULA

Rétablissement des faits, médiats et immédiats — Décolonisation — Droit des peuples à disposer d'eux-mêmes — Egalité souveraine des Etats — Intervention dans les affaires intérieures — Agression armée — Droit international humanitaire — Immunités du ministre des affaires étrangères — Immunité et impunité — Objet et persistance du différend — Recevabilité d'une requête — Allégation de compétence universelle — Règle non ultra petita *— Droit international coutumier — Exception —* Opinio juris *et pratique internationale — Fait internationalement illicite — Conception africaine — Dignité d'un peuple — Responsabilité internationale — Dommage moral — Réparation — Bonne foi — Développement du droit international — Communauté internationale — Enseignement du droit international.*

* * *

1. Puisque l'arrêt de principe du 14 février 2002 dit le droit et tranche le différend qui opposait la République démocratique du Congo (ci-après dénommée le «Congo») au Royaume de Belgique (ci-après dénommé la «Belgique»), puisque cette décision judiciaire sans précédent en la matière codifie et développe le droit international contemporain, puisque la Cour vient ainsi d'imposer la force du droit contre le droit de la force au sein de la «communauté internationale» qu'elle s'attache à construire au fil des ans; j'appuie pleinement sans réserve tout le dispositif de l'arrêt.

2. Néanmoins, je voudrais ici souligner d'autres motifs de fait et de droit qui me paraissent compléter et conforter cette œuvre collective. Mon opinion se justifie aussi par le devoir particulier que me dicte ma qualité de juge *ad hoc*. Il n'est pas certain qu'une «opinion» obéisse à des règles rigides. Sans doute ne doit-elle pas traiter des questions sans rapport avec l'une ou l'autre partie de l'arrêt. Sous cette réserve, la liberté semble caractériser la pratique judiciaire. Non seulement il arrive que le volume du propos excède la longueur de l'arrêt lui-même[1]; mais encore il peut se fixer divers objectifs[2]. Sans verser dans de tels travers, il m'est ainsi loisible de développer de manière raisonnable mon argumentation juridique. D'une part, il me paraît que le raccourci des faits présentés par les Parties en litige ne laisse apparaître que la face visible de l'iceberg. Il expose à une lecture en surface d'une affaire relevant d'un vaste contentieux. D'autre part, les circonstances immédiates ainsi présentées ont, en partie, conduit la Cour à ne pas examiner en profondeur la question fondamentale de l'indépendance du Congo, ancienne et unique colonie de la Belgique, vis-à-vis de cette dernière. La mention relative à l'égalité souveraine, martelée successivement à l'occasion de la phase conservatoire et lors de la phase du fond par deux conseils du Congo,

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[1] Comp. l'arrêt du 5 février 1970 en l'affaire de la *Barcelona Traction, Light and Power Company, Limited* (51 pages) avec l'opinion de MM. Ammoun (46 pages), Tanaka (46 pages), Fitzmaurice (49 pages) et Jessup (59 pages); l'avis du 21 juin 1971 en l'affaire du *Sud-Ouest africain* (58 pages) avec l'opinion de Fitzmaurice (102 pages); l'arrêt du 27 juin 1986 en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)* (150 pages), avec l'opinion de S. M. Schwebel (208 pages); l'arrêt du 16 juin 1992 sur *Certaines terres à phosphate à Nauru* (29 pages) avec l'opinion de M. Shahabuddeen (30 pages); l'arrêt du 3 juin 1993 en l'affaire de la *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège)* (82 pages) avec l'opinion de M. Shahabuddeen (80 pages); l'arrêt du 24 février 1982 en l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* (94 pages) avec l'opinion S. Oda (120 pages); l'arrêt du 12 décembre 1996 en l'affaire des *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique)* (18 pages) avec l'opinion de M. Shahabuddeen (29 pages).

[2] Voir sur ce point, Charles Rousseau, «Les rapports conflictuels», *Droit international public*, t. I, Paris, Sirey, 1983, p. 463.

membres du gouvernement, invite à regarder les choses en profondeur. Elle est réitérée dans les conclusions finales. N'est-elle pas à la base de la désignation des juges *ad hoc*, d'abord par le défendeur, ensuite par le demandeur !

3. La doctrine impose particulièrement aux juges *ad hoc* le fardeau de contribuer au rétablissement objectif et impartial des faits ainsi que de présenter la conception juridique de chaque partie au différend[3]. De l'avis de E. Lauterpacht, il incombe au juge *ad hoc* de «veiller à ce que, dans toute la mesure possible, chacun des arguments pertinents de la partie qui l'a désigné ait été pleinement pris en considération au cours de l'examen collégial et soit, en fin de compte, reflété — à défaut d'être accepté — dans sa propre opinion individuelle ou dissidente»[4].

4. Se plier à une telle obligation ne rapproche guère le juge *ad hoc* d'un représentant d'un Etat[5]. Au demeurant, il ne s'agit point d'une représentation nationale mais d'une «présence nationale»[6] par ailleurs permanente pour les membres permanents du Conseil de sécurité. Regardant le rôle du juge *ad hoc*, J. G. Mesrills estime que l'institution *«provides an important link betweem the parties and the Court»*. Dans ces conditions *«the institution of the ad hoc juge is too useful to be dispensed with»*[7].

5. Naturellement, je suis d'accord, en ma qualité de juge *ad hoc* avec *«at least the basic stance of the appointing State juridiction, admissibility, fundamentals of the merits»*[8]. Autrement, comment aurais-je accepté la proposition de cette charge ? Le consentement donné à cette dernière signifie bien sûr que *«there is a certain understanding ... for the case that has been put in front»*[9]. D'autre part, il m'a paru intéressant, comme juge *ad hoc* d'exprimer mon opinion dans les deux phases qu'a connues cette affaire[10]. Il en résulte à mon sens une meilleure intelligence de l'analyse.

6. A grandes enjambées et par respect pour la Cour et sa méthodologie de travail, je me bornerai à rappeler très succinctement à partir des sources belges, congolaises, transnationales et internationales, quelques données factuelles médiates et immédiates qui constituent la toile de fond de l'affaire du *Mandat d'arrêt du 11 avril 2000*. A travers ces mentions brèves, je souhaite conjurer le passé d'une part et promouvoir entre l'Etat demandeur et l'Etat défendeur, intimement liés par l'histoire, la mise en œuvre effective du principe de *l'égalité souveraine entre les Etats.*

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[3] Nguyen Quoc Dinh, Patrick Daillier et Alain Pellet, *Droit international public*, Paris, Librairie générale de droit et de jurisprudence, p. 855, par. 541, 1999; E. Mc Whinney, *Les Nations Unies et la formation du droit*, Pédone, Unesco, Paris, 1986, p. 150.

[4] M. Lauterpacht, opinion individuelle jointe à l'ordonnance du 17 décembre 1997 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Yougoslavie), C.I.J. Recueil 1970*, p. 278.

[5] Voir la communication de E. Lauterpacht, *The role of ad hoc judges, Increasing the Effectiveness of the International Court of Justice*, Kluwer Law International, The Hague, 1997, p. 370.

[6] Voir le commentaire de Krzystof Skubisevski, *ibid*., p. 378.

[7] S. G. Mesrills, *International Dispute Settlement, 2nd edition*, 1996. p. 125.

[8] Voir le commentaire de Krzystof Skubisevski, *Increasing the Effectiveness of the International Court of Justice, loc. cit*., p. 378.

[9] Voir l'intervention de Hugh W. B. Thirlway, *ibid*., p. 393.

[10] Selon le commentaire d'A. Pellet, *ibid*., «judges *ad hoc* are very appreciated if they express their opinions during the various phases of the case», p. 395.

7. S'adressant aux Congolais à Kinshasa, le 30 juin 1991, quarante et unième anniversaire de l'indépendance du pays, le premier ministre belge déclara :

> «Vous êtes une part importante de notre passé. Des liens particuliers très forts unissent nos deux pays. Des liens fondés sur des rapports tantôt douloureux, tantôt prometteurs; tantôt circonspects... Ce qui nous unit, vous le savez, nous le savons, relève de ce miroir extérieur qui est notre bonne ou notre mauvaise conscience, cette frontière entre le bien et le mal, entre la bonne intention et la maladresse... Je veux dire au peuple congolais, où qu'il se trouve sur ce grand territoire, que nous savons sa douleur et les épreuves endurées.»

Rarement de tels propos ont été publiquement tenus par le chef du gouvernement d'une ancienne puissance coloniale quatre décennies après la décolonisation. A tort ou à raison, il faut peut-être chercher dans les conditions d'une décolonisation singulière aux séquelles toujours présentes, y compris dans la présente affaire, la justification de ce propos.

8. La relecture de l'histoire du Congo décolonisé[11] à laquelle s'est livrée l'une de la quarantaine des conférences politiques de réconciliation[12] nous apprend :

> «Victorieux des élections législatives, Patrice Emery Lumumba, après consultation des principaux partis et personnalités politiques de l'époque, forma le gouvernement.
>
> En date du 23 juin 1960, il obtient la confiance du Parlement, et ce bien avant l'élection par celui-ci du chef de l'Etat Kasavubu grâce à la majorité lumumbiste.
>
> En moins d'une semaine après le 30 juin 1960, soit le 4 juillet, éclate la mutinerie de la force publique. Suite à l'équation provocatrice du général Janssens aux militaires, savoir, «après l'indépendance égale avant l'indépendance», les troubles s'attisent. Le Katanga proclame sa sécession le 11 juillet 1960 et le Sud-Kasaï son autonomie le 8 août 1960. Il y a effondrement de l'administration territoriale et militaire ainsi que manque des ressources financières. La souveraineté populaire est hypothéquée.
>
> En dépit des accords de coopération signés entre le royaume de Belgique et la jeune République, le 29 juin 1960, la crise est aggravée par l'intervention intempestive des troupes belges. Face à cette situation, le 15 juillet, le chef de l'Etat Kasavubu, garant de l'intégrité territoriale et le premier ministre et ministre de la défense nationale Lumumba signent conjointement le télégramme faisant appel aux troupes des Nations Unies à New York …. les manœuvres diplomatiques belges feront que les Nations Unies hésitent d'intervenir…»[13]

9. A juste titre ou non, le rapport met aussi en cause la responsabilité de la Belgique dans l'éviction du premier ministre Lumumba :

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[11] Les événements tragiques qui ont marqué la décolonisation du Congo ont amené l'Organisation des Nations Unies à mettre à contribution la Cour. Voir S. Rosenne, «La Cour internationale de Justice en 1961», *Revue générale de droit international public*, 3e série, t. XXX III, octobre-décembre 1962, no 4, p. 703.

[12] Dénommée «conférence nationale souveraine», le forum s'est tenu de novembre 1991 à décembre 1992. Il fut organisé par le gouvernement alors en place, sous pression de ses principaux partenaires et financé par ceux-ci, y compris la Belgique.

[13] Conférence nationale souveraine, rapport de la commission des assassinats et des violations des droits de l'homme, p. 18-19.

> «Après l'accession de notre pays à l'indépendance … le président Kasavubu et le premier ministre Lumumba travaillaient en harmonie. Ils avaient même effectué une tournée ensemble à Elisabethville. Je pense que les Belges étaient contre cette harmonie. C'est pourquoi ils avaient créé cette tension de division … Moi, j'ai téléphoné à Lumumba pour lui en faire part. A son tour, il a contacté le président Kasavubu. J'ai cru qu'ils avaient pris des précautions contre ces manœuvres. J'étais surpris d'entendre à la radio vers le 5 septembre 1960, la révocation de Lumumba et le même jour aussi celle de Kasavubu par Lumumba.»[14]

10. A en croire le rapport **:** «L'ambassadeur belge à Léo suscite la création de l'Etat autonome du Sud-Kasaï. Le 8 août 1960, c'était chose faite.»[15]. Sur l'assassinat du premier ministre Lumumba et de ses compagnons, il est notamment dit : «Le 16 janvier 1961, se tient une réunion à l'aéroport de Ndjili. Y prennent part MM. Nendaka, Damien Kandolo, Ferdinand Kazadi, Lahaye et les représentants de la Sabena». Un témoin, M. Gabriel Kitenge, dira que :

> «à l'arrivée de l'avion, il n'a reconnu, des trois colis, que M. Lumumba qui, très tuméfié, tentait de s'agripper à une muraille. Tous les trois ont débarqué vivants à Elisabethville. Conduits peu après à la villa Brouwez à quelques kilomètres de l'aéroport, ils s'entretiendront avec MM. Godefroid Munongo et Jean-Baptiste Kibwe en compagnie de quelques militaires blancs…
>
> Ils seront exécutés en brousse à un kilomètre de la villa. Sous le commandement d'un officier blanc, les soldats noirs tireront d'abord sur Okito pour enfin terminer avec Lumumba
>
> Sont présents : MM. Munongo, Kitenge, Sapwe, Muke, quatre belges… Sur l'ordre d'un commissaire de police belge, les trois détenus seront fusillés chacun à son tour et jetés dans une fosse commune préalablement creusée.»[16]

11. En définitive, le rapport de la conférence a proposé «l'ouverture du procès». Elle a proposé que :

> «Les assassinats de Lumumba, Mpolo et Okito, bien que n'entrant pas dans les catégories définies actuellement par les Nations Unies, devraient être assimilés aux *crimes contre l'humanité*, car, il s'agit des persécutions et assassinats pour des raisons politiques».

La proposition peut ainsi stimuler la réflexion des auteurs qui décèlent des incertitudes sur le concept de crime contre l'humanité[17]. La conférence a établi la responsabilité de plusieurs personnes tant physiques que morales, nationales et étrangères. Au nombre desquelles il suffit de retenir dans le cadre de la présente affaire :

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[14] *Ibid.*, témoignage de M. Cléophas Kamitatu, alors président provincial de Léopoldville (Kinshasa).

[15] *Ibid.*, p. 26.

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

[17] Voir G. Abi-Saab, «International Criminal Tribunals», *Mélanges Bedjaoui*, Kluwer, La Haye, 1999, p. 651. Voir aussi E. Roucounas, «Time limitations for claims and actions under international law», *ibid.*, p. 223-240.

«*Le Gouvernement du Royaume de Belgique* en tant que puissance de tutelle de n'avoir pas su contenir la sécurité bilatérale d'une indépendance bâclée par elle-même intentionnellement. L'ambiguïté de la loi fondamentale fait foi. En dépit des accords du 29 juin 1960, il n'a pas offert aux autorités légitimes qu'il avait installées au Congo une assistance technique et militaire qui aurait permis d'éviter le pire.

. . . . . .

Le soutien du Gouvernement belge à la sécession du Katanga par sa reconnaissance officielle comme Etat indépendant avec ouverture d'un consulat général constitue autant d'acte infractionnel contre le peuple du Congo. Sur intervention du ministre belge des affaires africaines, M. Harold Aspremont, le président Tshombe, acceptera en date du 16 janvier 1961, le transfert des colis.»[18]

Répondant en quelque sorte anticipativement à l'Etat défendeur, la conférence a décidé de :

«alerter l'opinion internationale que ceux-là même qui nous enseignent le respect des droits de l'homme et du citoyen contenues dans la Déclaration des Nations Unies, ne puissent *in futurum* rééditer les mêmes erreurs qui ne cadrent pas avec l'opinion dans le monde»[19].

12. Six ans plus tôt, le groupement transnational dit «tribunal permanent des peuples» appelé à statuer sur le cas du Zaïre (Congo) a dit :

«Lorsque le droit du peuple de poursuivre librement son développement économique, social et culturel est méprisé par un Etat se personnalisant en des oligarchies complices, otages ou agents de l'étranger, mises en place ou maintenues par sa volonté, cet Etat ne saurait constituer un écran derrière lequel s'annule le droit du peuple à l'autodétermination.»[20]

Car cette «juridiction» a estimé que

«dans ce cas-là, on se trouve devant un phénomène semblable dans son essence, à la situation coloniale opposant un peuple asservi à une puissance étrangère, les autorités gouvernementales jouant un rôle de courroie de transmission et n'apparaissant guère différentes, dans leurs fonctions, des anciens agents coloniaux (vice-rois, gouverneurs, préfets, etc.) ou des potentats locaux au service de la métropole»[21].

Le jury a aussi soutenu que :

«La violation des droits du peuple zaïrois perpétrée par un Etat aliéné soulève le problème de la responsabilité d'autres gouvernements et notamment de ceux qui défendent les intérêts au profit desquels la souveraineté du peuple zaïrois est aliénée.»[22]

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[18] *Ibid.*, p. 55-56

[19] *Ibid.*, p. 55-56

[20] Voir la *Sentence du Tribunal permanent des peuples*, Rotterdam, le 20 septembre 1982. p. 29.

[21] Voir *ibid*.

[22] Voir, *ibid*., p. 30.

C'est ainsi qu'il a été établi, entre autres, «la responsabilité … de la Belgique»[23]. Le dispositif conclut que nombre des faits jugés «constituent des crimes contre le peuple zaïrois»[24]. Examinant entre autres, la valeur juridique des décisions de ce tribunal d'opinion, des auteurs concluent que «such a condemnation is a first of reparation»[25].

13. Plus récemment, la commission de l'Organisation des Nations Unies chargée d'enquêter sur l'exploitation illégale des ressources naturelles du Congo a mis en cause, entre autres, des sociétés belges en territoires occupés**.** La «neutralité» revendiquée par les autorités belges en place face à l'agression armée[26] subie par le Congo depuis le 2 août 1998 ne pourrait-elle pas être mise à mal par la participation des groupements privés ou des organismes parastataux belges au pillage des ressources naturelles du Congo d'après une enquête de l'ONU[27] ? D'autant plus que la commission établit un lien entre cette exploitation illégale et la poursuite[28] de la guerre.

14. Les circonstances immédiates qui ont occasionné l'émission du mandat ont été amplement présentées de manière contradictoire par les Parties. Il serait futile d'y revenir. Néanmoins, il est des questions pertinentes que soulève cette affaire. Pourquoi la quasi-totalité des personnalités prévenues devant la justice belge, y compris M. Abdulaye Yerodia Ndombasi, appartiennent essentiellement à une tendance politique évincée en 1960 et réapparue au pouvoir en 1997 à la faveur de circonstances diverses ? Pourquoi l'Etat défendeur n'exerce-t-il pas sa compétence territoriale en poursuivant les sociétés belges établies sur son sol suspectées d'activités illicites en zones d'occupation étrangère au Congo ?

15. Tels sont quelques éléments de fait arpentés sur plus de quatre décades qui permettent de juger du comportement respectif des Parties au litige tranché. Ils doivent être mis en regard avec la plaidoirie finale de la Belgique. Lorsque l'Etat défendeur conclut brillamment sa plaidoirie par l'invocation de la démocratie et des droits de l'homme qui guideraient son comportement[29], il rouvre tout de même l'une des pages les plus honteuses de la décolonisation. Dans les années soixante, de la main gauche, il a semblé octroyer l'indépendance au Congo et, de la main droite, il a en même temps virtuellement précarisé cette souveraineté et la démocratie congolaise naissante. L'écrivain Joseph Ki-Zerbo a pu écrire qu'au Congo «l'indépendance fut jetée comme un os aux indigènes pour mieux exploiter leurs divisions», soit le «modèle des indépendances empoisonnées»[30].

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[23] Voir, *ibid.*., p. 32

[24] Voir *ibid.*, p. 34.

[25] B. H. Weston, R. A. Falk, A. d'Amato, *International Law and World Order, 2nd edition*, West Publishing Co., St Paul Minn., p. 1286

[26] Au sens de l'article 51 de la Charte de l'Organisation des Nations Unies, précisée par l'article 3 de la résolution 3314 du 14 décembre 1974, confirmé en tant que norme coutumière par l'arrêt de la Cour du 27 juin 1986 en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, par. 195.

[27] Voir *Report of the Panel of Experts on the illegal Exploitation of Natural Ressources and other Forms of Wealth of the Democratic Republic of Congo*. Sont aussi cités, les sociétés belges suivantes : Cogem, Muka-Entreprise pour la cassitérite, Soges, Chimie-Pharmacie, Sogem, Cogecom, Cogea, Tradement, Fining Ltd., Cicle International, Special Metal, Mbw et Transitra, pour le coltan, la cassitérite. Source : http://www.un.org/News/dh/latest/drcongo.htm

[28] Voir, *ibid.*, par. 109 et suiv. *Links between, the exploitation of natural ressources and the continuation of conflict*.

[29] Voir plaidoiries de la Belgique, CR 2001/11, p. 17-18, par. 8, 9 et 11.

[30] Joseph Ki-Zerbo, «préface à l'ouvrage de Ahamadou A. Dicko, *Journal d'une défaite. Autour du référendum du 28 septembre 1958 en Afrique noire*, Paris, l'Harmattan, Dag Hammarskjöld Foundation, 1992, p. XIV.

16. Parmi les points âprement débattus de manière contradictoire par les Parties figure la perte, à l'heure actuelle, de toute fonction gouvernementale par M. A. Yerodia Ndombasi. La situation est mise en avant par le défendeur afin d'obtenir un non-lieu de la part de la Cour. Elle serait sans effet pour l'instance de l'avis du demandeur.

17. A mon sens, l'argument tiré de la perte (et non de l'absence) de fonction gouvernementale actuellement exercée par M. Ndombasi est moralement indécent. Mais la Cour ne tranche pas les litiges sur la base d'une morale internationale chère à Nicolas Politis[31]. Juridiquement cependant ce moyen invoqué devrait se retourner contre le défendeur. Puisque ce dernier lève ainsi un coin du voile sur la cause de cette situation dont le défendeur exploite à fond les effets, rien que les effets. Il est juridiquement incorrect de chercher à asseoir solidement son argumentation principale sur une grave violation du droit international (la censure de la composition du Gouvernement congolais équivaut à l'ingérence dans les affaires intérieures d'autrui) qui s'ajoute à l'atteinte portée primitivement aux immunités et à l'inviolabilité pénales de la personne du ministre des affaires étrangères. Les écritures et les plaidoiries du demandeur (lors de la phase «conservatoire» et lors de la phase du fond) ont dénoncé ce fait sans être véritablement contredites par le défendeur. La Cour a été témoin de cette déchéance d'un organe de l'Etat congolais survenu non seulement après la saisine (17 octobre 2000); mais encore le limogeage a eu lieu le jour de l'ouverture des audiences de la phase conservatoire (le 20 novembre 2000) et le départ du gouvernement peu après (14 avril 2001). Depuis toute nomination nouvelle de l'intéressé, pourtant sans cesse annoncée par la presse, est repoussée apparemment à cause des pressions illicites du défendeur.

18. Il est du devoir de la Cour, garant de l'intégrité du droit international[32], de sanctionner ce double comportement illicite du défendeur stigmatisé par le demandeur dans ses conclusions finales.

19. Il est possible de reconnaître deux acceptions à l'expression organe d'intégrité du droit international. Pour certains, il s'agirait du *«duty to preserve the intensity of law as a discipline — distinct from considerations of politics, morality, expediency and son on»*[33]. A mon avis, la formule devrait aussi signifier que la Cour a l'obligation d'assurer le respect de la totalité du droit international. Quant à la spécificité de la mission d'un organe judiciaire par rapport au mandat d'un organe politique, tel que le Conseil de sécurité, la jurisprudence y relative est déjà abondante.

20. Je partage ainsi l'opinion de Manfred Lachs selon laquelle «la Cour est la gardienne de la légalité pour la communauté internationale dans son ensemble»[34].

21**.** On imagine mal que la Cour puisse projeter un regard soutenu sur la perte actuelle des fonctions gouvernementales de M. Ndombasi et fermer les yeux sur les raisons évidentes de cette situation à la lumière des événements qui lui ont été suffisamment exposés dès la phase de demande de mesures conservatoires jusqu'à la clôture de la phase de fond. D'autant plus que la

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[31] Nicolas Politis, *La morale internationale*, éditions de la Baconnière, Neuchâtel, 1943 (179 pages).

[32] Affaire du *Détroit de Corfou, C.I.J. Recueil 1949*, p. 35.

[33] Voir l'opinion de M. H. Mendelson, «Formation of International Law and the Observational Standjoint», au sujet de «The Formation of Rules of Customary (General) International Law», *International Law Association, Report of the Sixty-Third Conference*, p. 944, Warsaw, *August 21st to August 27th*, 1988.

[34] Voir M. Lachs, opinion individuelle jointe à l'ordonnance du 14 avril 1992 en l'affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), C.I.J. Recueil 19*92, p. 26.

transgression des immunités en cause n'est qu'un fait révélateur de la méconnaissance du principe de l'égalité souveraine d'un Etat décolonisé par la Belgique. Là-dessus, la Cour ne s'est guère trompée. Elle a plus d'une fois dans les motifs sanctionné de manière élégante la pratique illicite du défendeur.

22. Outre l'attention de la Cour qu'attire l'argument de perte de fonction officielle que brandit l'auteur du comportement fondamentalement illicite, il y a cet effet juridique inexistant recherché par l'Etat défendeur dans la nouvelle situation de M. A. Yerodia Ndombasi. Dès l'instant où l'atteinte aux immunités du ministre des affaires étrangères a été portée, la violation du droit international a été réalisée. Et le Congo a commencé et a continué à exiger, jusqu'à la clôture des débats, que le constat de l'infraction soit fait par la Cour et que celle-ci lui octroie réparation consécutive. Elle n'a jamais cru et n'a jamais dit qu'un de ses citoyens avait été victime d'un fait illicite belge. Le demandeur a toujours été convaincu et a toujours déclaré que ce dernier le visait en tant qu'entité souveraine désireuse de s'organiser librement, y compris de conduire ses relations extérieures par le ministre de son choix. Mais elle a subi et continue de subir des entraves de fait résultant de l'émission, du maintien, de la diffusion du mandat et des tentatives de lui donner plus d'effets par la Belgique.

23. La pertinence de la perte des fonctions gouvernementales de M. A Yerodia Ndombasi réside dans la lumière toute crue qu'elle projette sur la flagrante immixtion dans les affaires intérieures du Congo par la Belgique. En témoigne encore l'identité de certains plaignants congolais, membres d'un parti politique congolais d'opposition[35], que le défendeur tait obstinément pour des raisons dites de sécurité devant la Cour. Par quelque bout qu'on la prenne, cette affaire montre bien l'ingérence du défendeur dans les affaires intérieures du demandeur. Et, en définitive, la grave méconnaissance de l'égalité souveraine des Etats, derrière l'atteinte aux immunités du ministre des affaires étrangères. La pertinence de la perte de responsabilité gouvernementale est nulle relativement à l'odyssée personnelle de M. A. Yerodia Ndombasi qui essuya, à l'exclusion curieuse des autres personnalités congolaises inculpées et d'autres autorités étrangères, le mandat insolite en tant que ministre des affaires étrangères, appelé à entretenir le contact permanent avec le principal partenaire étranger du Congo.

24. Tant qu'existera l'authentique Etat indépendant du Congo, issu de la décolonisation — à ne pas confondre avec l'entité étatique fictive dite «Etat indépendant du Congo» portée aux fonds baptismaux par les puissances berlinoises[36] — cette dette subsistera. Il ne s'agit pas de la créance d'un gouvernement en place donné, au demeurant appelé à passer un jour comme tout gouvernement. Mais il est question d'un dû au peuple congolais librement organisé en Etat souverain qui réclame le respect de sa dignité.

25. Or, la dignité n'a pas de prix. Elle relève précisément du domaine extrapatrimonial, impossible à évaluer en argent. Lorsqu'une personne juridique, physique ou morale, a renoncé à sa dignité, elle a perdu l'essentiel de son être physique ou moral. La dignité du peuple congolais, victime du désordre néocolonial imposé au lendemain de la décolonisation, dont les tragiques événements en cours constituent largement l'expression continue, est de celle-là.

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[35] Selon le demandeur, il s'agirait de représentants d'un parti d'opposition fonctionnant à Bruxelles ! (Voir compte rendu d'audience publique du 22 novembre 2000, CR 2000/34, p. 20). En revanche, le défendeur excipe des «raisons de sécurité» devant la Cour (alors que le huis clos est permis) pour ne pas révéler l'identité des plaignants de nationalité congolaise (voir compte rendu de l'audience publique du 21 novembre 2000, CR 2000/33, p. 23).

[36] Les quatorze puissances coloniales réunies à Berlin (14 novembre 1884 - 26 février 1885) avalisèrent le projet colonial du roi Léopold II dénommé «Etat indépendant du Congo».

26. La perte de fonction d'une de ses autorités ne pouvait pas mettre un terme à l'illicéité du mandat belge, pas plus qu'elle ne pouvait le transformer en acte licite. Afin de comprendre qu'il n'y a guère extinction de l'illicéité en raison de la perte des fonctions gouvernementales par M. A. Yerodia Ndombasi, j'émets deux hypothèses. Lorsqu'un représentant d'un Etat étranger est tué par des agents de l'ordre d'un pays donné[37], ce diplomate cesse par le fait même de son décès d'exercer ses fonctions. Peut-on soutenir que l'illicéité de l'acte s'est effacée avec la mort du représentant de l'Etat étranger ? Il me semble que l'illicéité demeure. Prenons un autre cas. A supposer que ce diplomate n'ait été que grièvement blessé. Evacué vers son pays d'envoi, il est déclaré inapte pour le service diplomatique. Peut-on affirmer que le fait illicite a disparu étant donné que la victime des coups et blessures n'est plus représentant de son pays à l'étranger ? Je ne le pense pas.

27. La question du défaut d'objet de la demande congolaise aurait pu se poser si la Belgique avait adopté un comportement radicalement opposé consistant à respecter l'indépendance du Congo. Elle aurait dû reconnaître la violation du droit international commise par elle, avant de mettre à néant son mandat et de s'empresser de demander aux pays étrangers auxquels elle avait adressé son acte de lui réserver une fin de non-recevoir. Toute cette panoplie de mesures aurait été communiquée au Congo et vaudrait expression de regrets et présentation d'excuses. Rien de semblable ne s'est produit. La demande du Congo a ainsi conservé pleinement son objet.

28. Le Congo admet que «ces demandes diffèrent quelque peu de ... celles qui furent formulées dans sa requête introductive» eu égard à la nouvelle situation de M. A. Yerodia Ndombasi. Mais elle ajoute que «dès l'instant où ils prennent appui sur les mêmes faits que ceux mentionnés dans cette requête, aucune difficulté ne saurait surgir à cet égard»[38]. A bon droit la Cour a confirmé sa pratique constante de laisser aux parties la faculté de préciser exactement leur demande depuis le dépôt de la requête introductive d'instance jusqu'à la soumission des conclusions finales à la fin de la procédure orale. Il n'y a là rien de reprochable dès lors que ces modifications ultérieures s'appuient sur les faits identiques déjà mentionnés dans la demande initiale.

29. D'autre part, la recevabilité de la requête du Congo, selon la jurisprudence constante de la Cour, s'apprécie à «la seule date pertinente» qu'est son dépôt au Greffe de la Cour[39]. Que le défendeur se soit par la suite comporté de manière à ce que la requête soit vidée de sa substance est inopérant. La demande était déjà déposée telle quelle le 17 octobre 2000. Au demeurant, sa substance reposant sur la violation de la souveraineté du Congo face à l'émission du mandat qui appelle réparation demeure intacte.

30. La tentative du défendeur de faire opérer une mutation de l'action judiciaire interétatique propre du Congo, initiée et poursuivie en tant que telle par le demandeur à la suite de l'atteinte aux immunités et à l'inviolabilité pénales d'un de ses plus hauts représentants, en exercice de protection diplomatique d'un de ses ressortissants quelconque, mérite une fin de non-recevoir polie qui interdit tout commentaire de ma part.

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[37] Le cas est arrivé à Lomé (Togo) en octobre-novembre 1995 où un diplomate allemand a été tué par des agents de l'ordre à un barrage routier en début de soirée. L'incident avait gravement détérioré les relations germano-togolaises.

[38] Mémoire de la République démocratique du Congo, p. 6, par. 8.

[39] Voir affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), C.I.J. Recueil 1998*, p. 130, par. 43.

31. Les conclusions finales du Congo ont-elles empêché la Cour de se prononcer sur la question de la compétence dite universelle ?

32. Il est vrai que les «conclusions finales» du Congo passent complètement sous silence cette question. Elles visent à obtenir de la Cour le respect de la «règle de droit international coutumier relative à l'inviolabilité et l'immunité pénale absolues *du ministre des affaires étrangères en exercice*; que ce faisant [le défendeur] a porté atteinte au principe de l'égalité souveraine entre les Etats»[40].

33. C'est une question relative à la procédure judiciaire qui se pose. Le revirement spectaculaire opéré par le demandeur sur ce point obligeait-il la Cour à ne pas trancher dans son dispositif la compétence dite universelle ? Certainement. Il lui serait reproché de statuer *ultra petita.* C'est dire autre chose que de ne pas prendre position collectivement là-dessus. De toute manière, si les motifs de l'arrêt l'omettaient, les opinions y reviendraient.

34. Au demeurant quatorze pages sur soixante-quatre du mémoire du Congo n'ont-elles pas été réservées à cette question[41]. Au cours des plaidoiries, le Congo a déclaré par la voie de son conseil, M. Rigaux, que «cela ne [l']intéresse pas» quoiqu'elle l'ait évoqué dans sa requête initiale[42]. Mais de guerre lasse ou par stratégie judiciaire, elle a concédé à la Cour l'examen des

> «*problèmes suscités en droit international par la compétence universelle*, mais elle ne le fera pas à la requête de la Partie demanderesse, elle y est *entraînée* en quelque sorte par le système de défense de la Partie défenderesse, parce que la Partie défenderesse semble affirmer non seulement qu'il est licite d'exercer cette compétence, mais en plus qu'il serait obligatoire de le faire et que, par conséquent, l'*exercice de cette compétence pourrait valablement contrebalancer le respect des immunités*».

Et de conclure :

> «[j]e crois donc que la Cour devra se *prononcer sur certains aspects*, en tout cas, de la compétence universelle mais j'insiste, ce n'est pas à la requête de la Partie demanderesse que cette question n'intéresse pas *directement*»[43].

Et de renvoyer aux conclusions à lire du Congo. Pour sa part, un autre conseil du Congo, Mme Chemillier-Gendreau précisera :

> «que l'extension de cette compétence à l'hypothèse où *l'intéressé n'est pas sur le territoire est actuellement sans fondement juridique confirmé, ce qui est très différent de dire, comme veut nous le faire dire le professeur David, que nous ne contesterions plus la compétence universelle par défaut*».

Le conseil du Congo poursuit :

> «La Belgique souhaiterait à la lumière de cette affaire que la Cour, en se prononçant en faveur d'*une compétence universelle ainsi étendue*, intervienne dans le processus de création du droit et lui donne une reconnaissance du bien-fondé de sa politique.»

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[40] CR 2001/10, p. 26; les italiques sont de moi.

[41] Mémoire de la République démocratique du Congo, p. 47-61.

[42] Voir CR 2001/10, p. 11.

[43] Voir CR 2001/10, p. 11; les italiques sont de moi.

Et de conclure :

> «Nous soutenons pour notre part que le point sur lequel il est *nécessaire* que la Cour *se prononce, relativement à la compétence universelle*, comme vient de le dire le professeur Rigaux, *est limité à son usage lorsqu'elle passe outre à une immunité de juridiction d'un ministre des affaires étrangères en exercice. Et nous lui demandons alors de dire que cet usage, tel qu'il résulte de l'action de la Belgique, est contraire au droit international*.»[44]

35. Pour sa part, la Belgique a fondamentalement construit son système de défense sur la compétence dite universelle sur laquelle se baseraient et sa loi controversée et son mandat contesté. Mais étant donné que le Congo a ignoré dans ses conclusions finales ladite compétence alléguée, la Belgique en a tiré comme conséquence que la Cour, conformément à la règle *non ultra petita*, voyait ainsi sa compétence limitée aux seuls points litigieux figurant dans les conclusions finales. Le défendeur s'est appuyé sur la jurisprudence de la Cour[45]. Celle-ci «a le devoir de répondre aux demandes des parties telles qu'elles s'expriment dans leurs conclusions finales, mais aussi celui de *s'abstenir de statuer sur des points non compris dans lesdites demandes ainsi exprimées*»[46].

36. Lors de ses plaidoiries, la Partie défenderesse s'est aussi déclarée

> «réticente, non parce qu'elle a des doutes sur la légalité de sa position ou la solidité de ses arguments mais plutôt parce qu'elle aurait préféré que les accusations contre M. Yerodia Ndombasi aient été traitées par les autorités compétentes en République Démocratique du Congo»[47].

Elle a également affirmé que «les principes de compétence universelle et l'absence d'immunité en cas d'allégations de violations graves du droit international humanitaire sont bien fondés en droit...»[48]

37. A mon sens, il y a là un point de désaccord majeur entre les Parties que la Cour pouvait trancher si la règle *non ultra petita* ne lui avait pas été opposée. A peine de verser dans l'*excès de pouvoir*, la Cour ne pouvait statuer *ultra petita*. On a pu dire justement que «si l'arbitre est juge de sa compétence, il n'en est pas le maître»[49]. L'examen de points qui ne figureraient pas dans les demandes congolaises aurait exposé la Cour à des reproches semblables. Dans ses conclusions finales muettes, le Congo ne s'est cependant pas montré hostile à une prise de position par la Cour à ce sujet dans sa motivation.

38. D'autre part, la Belgique n'a pas voulu que la Cour se prononce au fond relativement aux allégations ci-dessus qu'elle estimait pourtant établies en droit :

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[44] Voir CR 2001/10, p. 16-17; les italiques sont de moi.

[45] Affaire du *Détroit de Corfou, fixation du montant des réparations, arrêt du 15 décembre 1949, C.I.J. Recueil 1949*, p. 249; affaire relative à la *Demande d'interprétation de l'arrêt du 20 novembre 1950 en l'affaire du droit d'asile, (Colombie c. Pérou), arrêt du 27 novembre 1950, C.I.J. Recueil 1950*, p. 402.

[46] Affaire de la *Barcelona Traction, Light and Power Company, Limited, deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 37, par. 49; contre-mémoire de la Belgique, par. 0.25, 2.74, 2.79, 2.81, 10.2.

[47] CR 2001/8, p. 8.

[48] CR 2001/8, p.31, par. 54.

[49] Charles Rousseau, «Les rapports conflictuels», *Droit international public*, t. V, Paris, Sirey, 1983, p. 326.

> «Si l'on considère le droit comme un processus évolutif et s'il faut s'en remettre finalement à la décision de la Cour en la matière, la question est de savoir *s'il serait souhaitable que la Cour se prononce au fond*. La Belgique, malgré tout le respect dû au rôle que joue la Cour dans le développement du droit international, pense pour sa part que la *réponse est négative*. Elle considère en effet que, sauf motif impérieux — par exemple parce qu'il subsiste un litige concret entre deux Etats nécessitant un règlement — le fait pour la Cour de statuer au fond risque de figer le droit au moment précis où les Etats, auxquels la responsabilité du développement du droit revient en premier lieu, *cherchent en tâtonnant une solution* qui leur soit propre. De l'avis de la Belgique, il n'est pas opportun à ce stade de figer le droit dans un sens extensif ou restrictif.»[50]

39. Il va sans dire qu'il n'appartient pas à un plaideur d'apprendre au juge son métier. Les appréhensions de ce dernier sur les effets cristallisants éventuels d'une décision judiciaire internationale manquent de fondement. Particulièrement dans l'ordre coutumier international, il est prouvé que la jurisprudence internationale n'a pas pour effet de figer absolument le droit. Il en est de même dans une certaine mesure du droit conventionnel lui-même élaboré par les Etats. Enfin, dire que ces derniers ont la responsabilité première de bâtir le droit revient à reconnaître implicitement la responsabilité d'autres organes ou entités dont la Cour de s'acquitter d'autres tâches. La doctrine le constate quasi-unanimement.

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40. En définitive, quel sort aurait dû être réservé à la compétence dite universelle eu égard à la discrétion des conclusions finales du Congo à ce sujet et au peu d'empressement manifesté par la Belgique à voir la Cour se prononcer là-dessus ? La prudence extrême du Congo n'était pas justifiée puisque cet Etat sollicitait que le litige soit totalement vidé. La résistance de la Belgique également n'était pas fondée. La Partie défenderesse, qui alléguait agir en vertu du droit international, avait l'opportunité de faire sanctionner positivement sa pratique jugée par elle licite. A mon sens, la Cour avait la *responsabilité principale de trancher* si oui ou non comme le prétendait le demandeur les règles coutumières relatives aux immunités et à l'inviolabilité personnelle pénales du ministre des affaires étrangères du Congo, M. Yerodia Ndombasi, ont été violées par le défendeur. Et puisque c'est au nom d'une compétence dite universelle, mal conçue et mal appliquée, à mon avis, que cette transgression est intervenue, le dispositif de l'arrêt sanctionne implicitement malgré tout cette prétention. Mais la Cour n'aurait-elle pas dû dans l'exposé des motifs, en tant qu'organe garant de l'intégrité du droit international, *se prononcer* aussi nettement sur la validité *ratione loci* et *ratione personae* des prétentions belges aussi manifestement illicites ? La motivation de l'arrêt n'aurait-elle pas dû comporter une mention pertinente sur l'une des questions les plus controversées actuellement en droit international. Aurait-on reproché à la Cour d'avoir dit le droit sur ce point ? Cependant, il demeure que la Cour a bien choisi, en accord avec les Parties «des motifs essentiels»[51] pour trancher le litige. Elle a, à cette occasion, codifié et développé le droit des immunités. La nébuleuse question de compétence dite universelle, telle que présentée dans cette affaire, a aussi été réglée.

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[50] CR 2001/8, p. 31, par. 54.

[51] Voir Tanaka, opinion individuelle jointe à l'arrêt du 24 juillet 1964 en l'affaire de *Barcelona Traction, Light and Power Company, Limited, C.I.J. Recueil 1964*, p. 65.

41. Que les ministres des affaires étrangères jouissent des immunités et de l'inviolabilité pénale de leur personne physique en droit international coutumier devant les juridictions nationales ne fait l'ombre d'aucun doute. Celles-là correspondent à des restrictions imposées par le droit international à l'expression du droit interne. En termes précis, tout droit national cesse de se manifester contre la présence de l'organe supérieur de l'Etat étranger. Aucune entité souveraine ne saurait en droit soumettre à son autorité tout autre Etat également souverain ainsi représenté. Tel est l'état actuel du droit international positif qu'une enquête, à l'échelle mondiale, devrait confirmer.

42. Le défendeur s'est évertué à entretenir la confusion dans l'esprit de l'homme du commun. Il ne pouvait le faire à l'égard d'un homme de droit. La Belgique a déployé toutes ses énergies pour faire croire qu'immunité équivaut à *impunité*. Nul juriste ne s'y égarerait pour qu'il faille montrer que la responsabilité pénale personnelle de l'auteur d'une infraction éventuelle est intacte nonobstant les immunités dont il est couvert. Encore ne faut-il pas perdre son latin de pénaliste au point d'oublier le principe de présomption d'innocence de l'inculpé ! A la limite, examiner les immunités du ministre serait une banalité n'eut été l'invocation de «certains développements récents»[52]. A tort. Les défenseurs des Etats législateurs, face à la Cour, tentent d'ériger une certaine doctrine en législateur, après avoir refusé à la haute juridiction cette qualité.

43. Il ne fait pas de doute que les immunités et leur corollaire l'inviolabilité de la personne physique du ministre en examen, revêtent un caractère fonctionnel. Elles se fondent sur l intérêt de la fonction que doit assumer librement, sans entrave, l'organe éminent représentant l'autre Etat égal à soi-même. C'est pourquoi les prérogatives en matière de maintien de l'ordre, de la défense et de la justice, entre autres, de l'Etat hôte, doivent être exercées de manière à faciliter davantage l'activité du ministre des affaires étrangères d'autrui. Comme le commentent des auteurs : «the immunity representatives of Foreign states enjoy is a function of the nature of their office»[53].

44. La doctrine américaine rappelle :

> «*According to the Restatement, immunity extended to :*
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> (a) *the State itself;*
>
> (b) *its head of State;*
>
> (c) *its government or any governmental agency;*
>
> (d) *its head of government;*
>
> (e) *its foreign minister;*
>
> (f) *any other public minister, official, or agent of the State with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the State.»*[54]

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[52] Contre-mémoire de la Belgique, p. 109, par. 3.4.1.

[53] Louis Henkin, Richard Crawford, Oscar Schachter, Hans Smit, *International Law*, West Publishing Co., 1990, p. 1188.

[54] *Ibid.*, p. 1191.

45. Quoique ni dans ses écritures, ni dans ses plaidoiries, le Congo n'ait pu montrer suffisamment l'entrave faite à l'exercice libre de ses fonctions de ministre des affaires étrangères du Congo par la Belgique, je peux signaler quelques exemples. Le ministre congolais des affaires étrangères n'a pas pu participer, au lendemain de l'émission du mandat aux réunions ministérielles des Etats ACP avec l'Union européenne à Bruxelles, ses immunités et son inviolabilité pénales n'étant pas garanties. Il n'a pas pu prendre part aussi à la réunion de Paris sur l'évaluation du sommet de la francophonie. M. A. Yerodia Ndombasi n'a pas pu effectuer une visite officielle à Tokyo (Japon), en octobre 2000, au motif que les autorités japonaises ont déclaré n'être pas en mesure de l'assurer que ses immunités et son inviolabilité pénales lui seraient garanties.

46. Outre des missions officielles manquées, le ministre a dû se séparer de son chef de l'Etat, selon les itinéraires, et arriver en retard à la même destination. Il en est résulté des coûts de voyage plus élevés, des pertes de bagages, des arrivées tardives aux réunions internationales, tel qu'au sommet de Maputo au départ de la Chine. Il va sans dire qu'à la suite des missions officielles manquées ou réalisées avec tant de désagréments, le ministre des affaires étrangères n'a pu assumer normalement ses fonctions aux côtés du chef de l'Etat ou en dehors de celui-ci. En définitive, la conjugaison de divers facteurs, particulièrement son caractère indésirable aux yeux de certaines autorités belges, conduira à son limogeage le 20 novembre 2000, date d'ouverture des audiences de la phase conservatoire de cette affaire.

47. L'Etat défendeur allègue l'existence d'une exception aux immunités de la personne du ministre des affaires étrangères et à la règle de l'inviolabilité pénale en cas de commission de «crimes de droit international». Il ne l'a guère prouvée. Cela participe tout simplement de sa stratégie de défense. Tantôt n'a-t-il pas cherché à contourner la qualité officielle alors revêtue par M. A. Yerodia Ndombasi en arguant qu'il n'a visé que la personne privée de ce dernier, tantôt n'a-t-il pas tenté d'inventer une exception inexistante en droit international coutumier ?

48. L'existence d'une règle fermement établie suivie obligatoirement par la majorité d'environ cent quatre-vingt-dix Etats appartenant à l'Afrique, l'Asie, l'Amérique, l'Europe et l'Océanie, en vertu de laquelle le ministre des affaires étrangères en fonction bénéficie d'une immunité et d'une inviolabilité pénales absolues n'est pas contestable. Le constat en est fait par la doctrine[55].

49. Néanmoins, quelques voix dissonantes, à priori animées de certaines préoccupations morales, s'expriment afin que ces représentants qualifiés des Etats soient dépouillés de ces protections juridiques absolues en cas de commission de certaines infractions internationales. Plus que dans nombre de régions du monde, ces dispositions ne peuvent qu'être les bienvenues dans des pays victimes traditionnelles de crimes contre l'humanité. Dès sa naissance, la Cour permanente de Justice internationale, notre devancière, s'est reconnue la responsabilité

> «dans l'accomplissement de sa tâche de *connaître elle-même le droit international*, elle [la Cour] ne s'est pas bornée à cet examen, mais a étendu ses recherches à tous *les précédents* et *faits* qui lui étaient accessibles et qui auraient, le cas échéant, pu révéler l'existence d'un des principes du droit international visé par le compromis»[56].

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[55] Voir notamment Jean Salmon, *Manuel de droit diplomatique*, Bruxelles, Bruylant, 1994, p. 539 : le ministre des affaires étrangères jouit «des privilèges et immunités analogues à ceux du chef de gouvernement»; Joe Verhoeven, *Droit international public*, Bruxelles, Larcier, 2000, p. 123 : «Il existe une tendance, au moins doctrinale, à accorder au chef du gouvernement, voire au ministre des affaires étrangères, la protection reconnue au chef de l'Etat.»

[56] Affaire du Lotus, *arrêt n° 9, 1927, C.P.J.I. Recueil série A n° 10*, p. 31.

50. C'est sur le terrain du *droit coutumier* que les assertions belges et leur pendant, les dénégations congolaises se situent. Le Gouvernement belge a peut-être escompté, à la manière de la proclamation Truman sur le plateau continental de 1945, que sa revendication nouvelle formulée au moment où des idées humanitaires connaissent un regain d'intérêt, serait suivie (massivement) par d'autres Etats. Il donne l'impression d'avoir surestimé son poids sur l'échiquier mondial. Peu importe. Le grief principal qui doit être articulé à l'encontre du défendeur est d'user de l'argument humanitaire à des fins de domination politique. Comme au XIX^{e} siècle[57] ! Au point d'inventer une entorse au droit international des immunités parfaitement inexistantes en droit international.

51. Sommairement, la revendication belge ne peut, à l'origine, que violer le droit existant. Nonobstant la publicité dont a bénéficié le mandat du 11 avril 2000, elle n'a été suivie par aucun autre Etat. Nul membre de la société internationale ne lui a prêté main forte en vue de son exécution. Bien au contraire, plusieurs Etats, spécialement des Etats africains, l'ont ignoré. Le fâcheux précédent belge est donc demeuré isolé. Si la Belgique a le titre juridique de contribuer à la formation du droit international général; elle ne saurait, à elle seule, créer ce dernier. La pratique internationale lui fait donc défaut. En revanche, l'Etat victime de ce fait, le Congo, s'est fermement opposé à l'application de la mesure belge. Au motif qu'elle est illicite.

52. D'autre part, le Gouvernement belge montre, par son comportement, qu'il n'est pas sûr de la licéité de son acte contesté. La correspondance adressée au demandeur en cours d'instance judiciaire le prouve[58]. Le défendeur prétend envisager la révision de sa loi querellée afin de respecter les immunités des hauts représentants des Etats étrangers. Au milieu de tant de contradictions, d'attitudes incertaines qui marquent fondamentalement cette pratique unilatérale et solitaire — sauf l'initiative yougoslave du 21 septembre 2000 passée curieusement sous silence par la Belgique nulle norme coutumière ne saurait émerger. Comme l'*opinio juris* dans le chef du défendeur lui-même n'est apparemment guère établie.

53. A dire vrai, l'Etat défendeur s'est évertué à s'appuyer sur quelques opinions de publicistes pour alléguer l'apparition d'une norme coutumière dérogatoire. Il n'a pas rapporté la preuve de son existence. On sait que la doctrine constitue un moyen de détermination de la règle de droit. Elle doit se fonder sur une pratique générale correspondant à l'*opinio juris sive necessitas*. Rien de pareil à ce jour. A mon sens, il n'a pas été malaisé pour la Cour de relever le caractère non fondé des allégations du défendeur. La mise en œuvre du droit international humanitaire serait-elle affectée d'un coefficient de *normativité relative*, pour paraphraser P. Weil ? Sinon, comment justifier juridiquement la suspension des poursuites contre l'organe d'un Etat du Proche-Orient et le maintien obstiné des poursuites contre l'ancien ministre congolais des affaires étrangères ?

54. Evoquant les rapports entre crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes, Pierre-Marie Dupuy estime à la suite de la décision de la Chambre des lords en l'affaire *Pinochet* : «Pour autant il convient d'être prudent dans l'affirmation d'une nouvelle coutume, dont la décision des Lords, au demeurant fondée sur des considérations souvent hétérogènes, ne saurait, *à elle seule*, entraîner la consolidation.»[59] Et de rappeler que

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[57] Le préambule de l'Acte général de Berlin du 26 février 1885 rassure sur l'objet et le but du traité : «le bien-être moral et matériel des populations indigènes».

[58] Voir, la communication belge du 14 février 2001 à laquelle le Congo a répondu le 22 juin 2001.

[59] Pierre-Marie Dupuy, «Crimes et immunités», *Revue générale de droit international public*, t. 105, 1999, n^{o} 2, p. 289-296; les italiques sont de moi.

> «la coutume procède de l'opinion juridique des Etats telle qu'elle ressort de leur pratique. Or celle-ci est encore loin d'être unifiée et manifeste en tout cas la persistance des réticences étatiques à la réduction des immunités des agents supérieurs de l'Etat.» Il n'y a pas de comportement «*généralement*» adopté «par la pratique des Etats.»[60]

Ainsi que l'a dit notre Cour,

> «la présence [des normes coutumières] dans l'*opinio juris* des Etats se prouve par la voie d'induction en partant de l'analyse d'une pratique suffisamment étoffée et convaincante *et non pas par voie de déduction en partant d'idées préconstituées à priori*»[61].

Point de nombreuses décisions des cours et tribunaux de l'ensemble des Etats du globe, à tout le moins d'un nombre significatif, dans l'optique belge. Bien au contraire. Très récemment, la Cour a émis un avis dans l'affaire relative au *Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme*, en ces termes : «les tribunaux malaisiens avaient l'obligation de traiter la question de l'immunité de juridiction comme une *question préliminaire* à trancher dans les meilleurs délais»[62].

55. Auparavant, elle avait constaté que

> «la *High Court* de Kuala Lumpur n'a pas statué *in limine litis* sur l'immunité ... mais a rendu un jugement par lequel elle s'est déclarée compétente pour connaître au fond de l'affaire dont elle était saisie; y compris pour déterminer si M. Cumaraswamy pouvait se prévaloir d'une quelconque immunité»[63].

Semblable obligation pèse aussi et surtout sur les Etats dans leurs rapports mutuels. Aussi, par analogie, conjuguée avec l'argument à fortiori entre sujets primaires du droit international et les organes particulièrement qualifiés que sont les ministres des affaires étrangères, cette règle rappelée par la Cour devrait s'appliquer à la présente espèce.

56. Les changements de statut qu'a connus successivement M. A. Yerodia Ndombasi n'ont pas de conséquence fâcheuse sur l'affaire sinon de souligner davantage l'atteinte à la souveraineté du Congo par la Belgique en raison de ses ingérences continues (voir ci-dessus).

57. D'autre part, centrée qu'elle l'est sur la violation des immunités du ministre des affaires étrangères au moment de l'émission et de la notification du mandat, le statut antérieur et les statuts postérieurs revêtus par M. A. Yerodia Ndombasi n'affectent en rien la plainte congolaise. Dès lors que les poursuites illicites sont exercées au moment où il a cette qualité d'organe spécialisé dans les relations extérieures d'un Etat et, en conséquence, couvert d'immunités et d'inviolabilité personnelle pénales absolues, la violation du droit international au préjudice du Congo subsiste; la Belgique ayant contracté une dette à l'égard non pas d'un individu en transgressant la norme du droit international coutumier régissant les relations interétatiques, mais vis-à-vis d'un Etat, le Congo, dont l'organe en charge des relations internationales s'est vu infligé une mesure téméraire,

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[60] *Ibid.*, p. 293

[61] Affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine, nomination d'expert, arrêt du 12 octobre 1984, C.I.J. Recueil 1984*, p. 299; les italiques sont de moi.

[62] *Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme*, paragraphe 67, 2 *b)* du dispositif de l'avis consultatif du 29 avril 1999; les italiques sont de moi.

[63] *Ibid.*, par. 17.

vexatoire et illicite, qui appelle réparation. Or, face à ces allégations bien fondées du demandeur, le défendeur prétend ne pas porter atteinte aux droits de souveraineté de sa victime. Bien au contraire, la Belgique affirme exercer un droit à elle conféré ou accomplit une obligation à elle imposée par le droit international. D'où le refus d'anéantir le mandat et en conséquence de réparer le préjudice subi. L'odyssée personnelle de M. A. Yerodia Ndombasi ne vide en rien le différend interétatique.

58. Il est significatif que le défendeur reconnaisse implicitement le manque de solidité de ses moyens en ces termes :

> «Même dans l'éventualité où la Cour devrait, contrairement aux conclusions de la Belgique, confirmer l'immunité de M. A. Yerodia Ndombasi, en sa qualité de ministre des affaires étrangères du Congo dans les circonstances considérées, il n'en découlerait pas qu'il demeurerait au bénéfice de l'immunité, même en occupant le poste de ministre pour ses activités de caractère privé...»[64]

59. A moins de soutenir que l'infraction commise par la Belgique a été prescrite au bout de deux ans. A priori, rien de pareil comme règle en droit international, encore moins dans la *conception africaine* du droit. En Afrique, un différend ne se dissout pas. Il se transmet, comme une dette, de succession en succession. Il en est ainsi de l'objet du litige qui est ineffaçable tant que la reconnaissance de la faute commise par l'auteur et la réparation du préjudice subi par sa victime n'ont pas eu lieu. Les dénégations non fondées du défendeur me poussent à formuler une proposition théorique.

60. Prenons l'hypothèse d'une personnalité assumant les fonctions de conseiller aux affaires africaines à la présidence ou à la primature d'une puissance donnée. Elle ordonne à ce titre la répression d'une insurrection populaire ou d'une manifestation estudiantine dans un «pays ami»[65] qui entraîne mort d'hommes. Par la suite, ce conseiller accède aux fonctions de ministre des affaires étrangères ou de secrétaire d'Etat de la puissance en question.

61. Un Etat tiers délivre alors un mandat contre le ministre ou secrétaire d'Etat au motif qu'il avait donné des ordres, en tant que conseiller, qui, dans leur mise en œuvre, ont causé des violations massives et systématiques des droits humains. La question est de savoir si pareil mandat affecte ou n'affecte pas les immunités et l'inviolabilité personnelle pénales du ministre ou du secrétaire d'Etat. A mon avis, la réponse est affirmative. C'est l'organe de l'Etat, chargé de le représenter internationalement, qui est victime de la mesure à ce moment-là.

62. A la suite d'un changement d'administration ou de gouvernement, le ministre des affaires étrangères ou le secrétaire d'Etat perd son poste (ce qui est différent du cas Yerodia en raison des pressions extérieures). L'Etat auteur du mandat maintient son acte. Cette mesure continue-t-elle d'affecter le conseiller aux affaires africaines, le ministre des affaires étrangères ou le secrétaire d'Etat ou touche la personne désormais libérée de toute charge gouvernementale ? Je pense que c'est la date de l'émission du mandat qui définit le moment précis de la violation du droit international et la qualité en ce temps-là du destinataire de l'acte qui indique la personnalité violée dans son intégrité morale. C'est le ministre des affaires étrangères ou le secrétaire d'Etat au jour et

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[64] Contre-mémoire, p. 116, par. 3.4.15.

[65] Jean-Pierre Cot, *A l'épreuve du pouvoir. Le tiers-mondisme. Pour quoi faire ?* Editions du Seuil, Paris, 1984, p. 85. L'auteur signale que, alors qu'il était ministre de la coopération, il a donné des ordres afin que les coopérants militaires français ne soient pas mêlés à la répression de la manifestation estudiantine de juin 1981 à Kinshasa.

à l'heure de l'émission du mandat qui fut atteint. Il ne s'agit ni d'un acte d'instruction émis contre une personne privée que l'ancien secrétaire d'Etat ou ministre des affaires étrangères est devenu, ni d'une mesure frappant à l'époque le conseiller aux affaires africaines. L'intangibilité des faits se dresse, impassible comme un sphinx.

63. Le principe d'une compétence dite universelle par une partie de la doctrine ne saurait être sérieusement contesté aux termes des dispositions genevoises pertinentes. Quelques réserves que je puisse avoir d'abord sur une terminologie peu heureuse au plan du droit international. Car, la *summa divisio* correcte, à mon sens, devrait retenir 1) la compétence territoriale, 2) la compétence personnelle, et 3) la compétence à raison de services publics.

64. Je ne qualifierais pas de «compétence universelle» l'autorité exercée par un Etat, soit à l'égard de ses nationaux à l'étranger, qui relève de sa compétence personnelle, soit à l'égard de ressortissants étrangers en haute mer auteurs d'actes de piraterie maritime, qui rentre dans le cadre de la compétence à raison de services publics, soit à l'égard de toute personne se trouvant sur son territoire ayant porté atteinte à son ordre public, qui tombe ainsi dans le champ de sa compétence territoriale. Il en est de même de la compétence en matière de répression de certaines violations de dispositions conventionnelles que se reconnaissent les Etats. On conçoit aisément qu'une entité universelle, encore inexistante, l'Organisation des Nations Unies elle-même et son principal organe judiciaire, étant plutôt quasi universelle, puisse se prévaloir d'un pouvoir juridique universel. On sait qu'en vertu des traités spécifiques auxquels ils sont parties, les membres de la communauté quasi universelle se reconnaissent le pouvoir de réprimer certaines infractions commises au-delà de leur territoire dans des conditions bien définies. Matériellement ensuite, semblable pouvoir juridique n'est pas universel. Peut-être sous l'influence peu heureuse des conceptions pénalistes[66], une partie de la doctrine internationaliste s'y réfère comme l'exercice d'une compétence universelle. Cette expression paraît impropre dans l'ordre international actuel[67]. Au moment où une fraction importante des Etats tend à promouvoir un mécanisme institutionnel répressif à vocation universelle, la promotion de la compétence dite universelle ne constituerait-elle pas une régression juridique ?

65. Le principe d'une «compétence universelle» ainsi entendue est affirmé notamment à l'article 49 de la première convention de Genève du 8 août 1945[68]. Mais sa conception et surtout son application par le défendeur dans le cas d'espèce s'éloignent de l'état du droit en vigueur.

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[66] L'absence de mention de «compétence universelle» n'est pas aussi rare dans les travaux des pénalistes eux-mêmes. Voir par exemple André Huet et René Koering-Joulin, *Droit pénal international*, Paris, PUF, 1994.

[67] C'est du droit international pénal, branche embryonnaire aux règles éparses et fragmentaires, que ressortit la compétence improprement dite universelle. Cette dernière ne saurait s'affranchir des marques qui caractérisent sa matrice. D'où le caractère quelque peu nébuleux d'un pouvoir juridique ancien, limité à quelques curiosités historiques telle que la répression de la traite des esclaves, étendu timidement au milieu des XX^{e} siècle à la répression des infractions au droit international humanitaire. C'est de ce dernier que la doctrine et la jurisprudence spécialisées (Tribunal pénal international pour l'ex-Yougoslavie) s'efforcent de lui conférer une autonomie. Puisque la «compétence universelle» telle que revendiquée par la Belgique intéresse la mise en œuvre coercitive des règles humanitaires genevoises. Que le droit international positif autorise les Etats à sanctionner des infractions commises en dehors de leur territoire lorsque certaines conditions de rattachement à leur souveraineté territoriale sont réunies n'est pas contestable. Que cette compétence répressive doive être interprétée de manière stricte comme l'exige le droit pénal n'est pas non plus douteux.

[68] L'article 49 dispose :

> «Chaque partie contractante aura l'obligation de rechercher les personnes prévenues d'avoir commis, ou d'avoir ordonné de commettre l'une ou l'autre de ces infractions, et elle devra les déférer à ses propres tribunaux, quelle que soit leur nationalité.»

66. Selon l'interprétation autorisée de la stipulation conventionnelle ci-dessus, le système se fonde sur trois obligations essentielles qui sont mises à la charge de chaque partie contractante, à savoir : «promulguer une *législation spéciale*; *rechercher* toute personne prévenue d'une violation de la convention; *juger* une telle personne ou, si la partie contractante le préfère, la *remettre* pour jugement à un autre Etat intéressé»[69].

67. Il faut savoir gré à la Partie défenderesse d'avoir, en principe, satisfait à la première obligation, sans préjudice pour l'heure de la portée de sa législation spéciale. Il convient aussi d'apprécier le souci qui semble l'animer, à priori, de rechercher toute personne présumée avoir violé les dispositions conventionnelles pertinentes.

68. Le *satisfecit* qu'on peut adresser au défendeur sur le plan des principes laisse place à des *reproches légitimes* en raison de la portée de sa législation et de ses mesures d'application. Le mandat semble correspondre à ces dernières.

1. Législation spéciale

69. Aucun des deux Etats (Suisse et Yougoslavie) cités dans le commentaire ci-dessus n'avait adopté une législation aussi géographiquement universelle que le texte belge. Les développements du commentaire ne reflètent que le souci de la répression des infractions. Le commentaire prévient même qu'«aucune allusion n'est faite à la responsabilité que pourraient encourir des personnes qui ne sont pas *intervenues pour empêcher une infraction ou la faire cesser*». Face au «silence de la convention on doit admettre que c'est à la législation nationale qu'il appartient de régler cette matière»[70].

2. Recherche et poursuite des auteurs

70. Non seulement le commentaire met l'accent sur une répression des inculpés sans égard à leur nationalité, mais encore il retient le rattachement territorial. Rien de plus normal dans l'état du droit international classique ainsi codifié à Genève :

> «A partir du moment où l'une des Parties contractantes «a connaissance du fait qu'une personne *se trouvant sur son territoire* aurait commis une telle infraction, son devoir est de veiller à ce qu'elle soit arrêtée et poursuivie rapidement». Ce n'est donc pas seulement sur la demande d'un Etat que l'on devra entreprendre les recherches policières nécessaires, mais aussi spontanément.»[71]

Au-delà du territoire national qui limite en principe l'exercice de l'autorité de l'Etat qu'elle soit législative, exécutive ou judiciaire, à mon avis, le commentaire désigne tout naturellement le *mécanisme de coopération judiciaire* qu'est l'extradition dans la mesure où «des charges suffisantes» sont retenues contre l'inculpé[72]. Non seulement il n'y a pas de traité d'extradition entre les Parties en présence relativement à la matière, mais encore le Congo dit appartenir à la conception juridique qui refuse d'extrader ses nationaux. Argument décisif, il ajoute ne pouvoir poursuivre M. A. Yerodia Ndombasi faute de charge à son égard, puisqu'il ne lui reproche rien.

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[69] Jean Pictet, (dir. pub.), *Commentaire de la convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne*, Genève, *CICR*, 1952, p. 407.

[70] *Ibid.*, p. 409.

[71] *Ibid.*, p. 411.

[72] *Ibid.*

71. L'exercice de la compétence dite universelle suppose donc l'existence de «charges suffisantes», selon les termes des conventions humanitaires[73]. Y en a-t-il dans le cas d'espèce ? L'Etat demandeur les a rejetées[74]. Des bâtonniers congolais ont soutenu devant les médias locaux, au lendemain de la notification du mandat le 12 juillet 2000, que «le dossier était vide». L'Etat défendeur n'a pas rapporté dans son mandat des charges suffisantes hormis l'affirmation qui reste à démontrer que son inculpé a «activement et directement» participé à la commission des infractions graves de droit international humanitaire.

72. D'autre part, quel est le critère objectif qui autoriserait l'exercice de la compétence universelle par défaut par un Etat devant plusieurs situations de non-exercice ? Est-ce le *core crimes* ? Il y en aurait plusieurs. D'où la légitimité du critère territorial qui départage les compétences entre Etats en présence. Sinon, le critère politique d'opportunité triompherait. On comprend alors que les conséquences des événements tragiques au Congo en août 1998 aient offert l'alibi au mandat du 11 avril 2000. Mais que l'*extermination* de plus de deux millions et demi de Congolais depuis la même date par les agresseurs rwandais, ougandais et burundais, demeure, jusque là impunie.

73. La partie défenderesse s'est acharnée, dans la droite ligne de son esprit singulier, à criminaliser le comportement du demandeur. Elle s'est évertuée jusqu'au bout, à chercher à troubler la conscience des juges. Non seulement elle s'est trompée de prétoire — la Cour n'étant en rien une juridiction de fond relativement à une responsabilité pénale individuelle éventuelle — mais encore elle n'a pas rapporté la preuve de cette dernière. Il convient de rappeler que *actori incumbit probatio* mais aussi *allegans probat.*

74. L'ancienne colonie modèle du Congo belge doit-elle, sans *preuve*, poursuivre l'un des dirigeants congolais, qui s'est dressé, comme partout ailleurs, contre des envahisseurs étrangers et leurs auxiliaires congolais ? L'idée selon laquelle un Etat aurait le pouvoir juridique de connaître des infractions éventuelles commises à l'étranger, par des étrangers, contre des étrangers, alors même que le suspect éventuel se trouve en territoire étranger, est contraire à la conception du droit international.

75. L'article 129, alinéa 2 de la troisième convention genevoise énonçant le principe *aut dedere aut judicare* en matière de sanctions pénales pose l'exigence de «charges suffisantes». Il n'a aucunement envisagé une compétence dite universelle par défaut *(in absentia).* Puisque le commentaire y relatif vise expressément l'hypothèse où l'inculpé «se trouve sur son territoire» (de l'Etat partie).

76. C'est en vain qu'on explorerait dans la pratique récente, soit un texte législatif, soit une jurisprudence interne aussi osée. Par son *«War crimes Act 1945 amended in 1988»*, l'*Australie* dit que *«only an Australian citizen or* resident *can be charged under the 1988 Act»* (section 11 de la

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[73] Voir par exemple l'article 129, al. 2 de la troisième convention de Genève du 10 août 1949.

[74] Mémoire de la République démocratique du Congo, p. 38, par. 57 «abusivement interprétées…» par [les autorités publiques belges] … [sans] aucune mise en contexte, ni historique, ni culturelle … alors que le lien de causalité entre ces paroles et certains actes inqualifiables de violence … est loin d'être clairement établi». Quant au contre-mémoire du Royaume de Belgique, il reprend (page 11, paragraphe 1.10) les faits tels que repris dans le mandat du 11 avril 2000 après avoir annoncé : «il n'est pas nécessaire d'approfondir ces faits qui seront traités brièvement dans la partie III».

loi ci-dessus). La Hight Court de l'Australie avait reconnu, à l'occasion de l'affaire *Polyakhovich* v. *The Commonwealth*, que la juridiction australienne avait le pouvoir d'exercer *«a juridiction recognized by international law as* universal jurisdiction» à l'égard des crimes de guerre[75].

77. Le rattachement territorial est aussi visé par l'article 65.7.20 du Code pénal de l'Australie pour la poursuite des crimes internationaux tel que le génocide (voir application dans l'affaire *Busko Cvjekovic* du 13 juillet 1994). Le rattachement personnel ou territorial est aussi requis par l'article 7 du Code pénal du Canada, tel que revisé en 1985. Il a été appliqué dans l'affaire *R V Finta*. La France prévoit aussi ce rattachement «si [la personne] *se trouve en France*»[76]. Il serait fastidieux de multiplier les exemples.

78. S'il est permis de recourir au *raisonnement par analogie*, on relèvera que dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond*, la Cour avait précisément déclaré au sujet des droits humains :

> «[Q]uand les droits de l'homme sont protégés par des conventions internationales, cette protection se traduit par des dispositions prévues dans le texte des conventions elles-mêmes et qui sont destinées à vérifier ou à assurer le respect de ces droits.»[77]

Les instruments genevois ont bien circonscrit à l'époque les droits et les obligations des Etats sur ce point. Il est certain que les auteurs de ces textes n'ont nullement envisagé l'interprétation excessive belge. D'autre part, la pratique ultérieure ne montre guère une évolution de la norme conventionnelle au plan coutumier dans cette perspective. Elle aurait pu être codifiée dans la convention de Rome du 28 juillet 1998. Tel n'est pas le cas. Aussi la Belgique a, une année après l'adoption de celle-ci, innové radicalement et solitairement. Sentiments humanitaires obligent !

79. En décidant à l'article 7 de la loi du 16 juin 1993, telle qu'amendée le 10 février1999, que «[l]es juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu *où celles-ci auront été commises*», la Belgique a adopté une législation totalement *insolite*. Elle s'est autoproclamée sinon procureur de l'humanité, au sens transtemporel et transpatial que R. J. Dupuy attribuait à ce mot, mais au moins justicier sans frontières d'après la doctrine du «sans frontiérisme». A la limite, cette revendication dépasse le droit international lui-même puisque ce dernier règle essentiellement les relations entre des structures aux frontières définies : les Etats. Mais selon une appréciation minimale, l'Etat défendeur viole le droit international. Il ne saurait, en l'état actuel, superbement le transcender. Ainsi des chefs d'Etat en fonction, Laurent Gbagbo (Côte d'Ivoire), le 26 juin 2001, Saddam Hussein, le 29 juin 2001, Fidel Castro (Cuba), le 4 octobre 2001, Denis Sassou Nguesso (Congo-Brazzaville), le 4 octobre 2001, Yasser Arafat, le 27 novembre 2001, un premier ministre, Ariel Sharon (Israël), le 1er juillet 2001, un ministre des affaires étrangères en fonction, Abdulaye Yerodia Ndombasi, le 11 avril 2000, font l'objet de plaintes ou de poursuites judiciaires devant les juridictions belges pour divers «crimes internationaux». La liste est loin d'être

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[75] *Polyakhovich* v. *Commonwealth of Australia* (1991) 172 CLR 581.

[76] Article 629 du Code de procédure pénale.

[77] *C.I.J. Recueil 1986*, p. 134, par. 267.

exhaustive, si on y ajoute en décembre 2001 le président Paul Biya (Cameroun). Joe Verhoeven[78] a eu raison de craindre l'instauration d'un chaos, par définition le contraire de l'ordre déjà difficile, dans le milieu international. La Cour ne pouvait qu'être interpellée.

80. On mentionnera de manière appuyée que seul apparemment M. A. Yerodia Ndombasi s'est vu infligé un «mandat d'arrêt international». Très curieux. Il convient de souligner aussi que les poursuites contre M. Ariel Sharon, suivies attentivement de par le monde, auraient été suspendues, au bas mot, que la Belgique cherche en faveur de ce dernier une porte de sortie honorable à coup d'*arguties juridiques*, que depuis les plus hautes autorités politiques du pays se sont répandues en conférences dans les universités (ULB) pour dénoncer soudainement les absurdités de cette loi, que l'un des conseils de la Belgique a revisé sa doctrine d'enseignement à l'issue des plaidoiries de novembre 2001 dans le sens d'un rattachement territorial *sine qua non*. Telle est la loi belge à l'épreuve des rapports de force internationaux. On peut parier que les poursuites initiées à la suite d'une plainte de «justiciables impénitents» contre M. A. Sharon sont mort-nées.

81. Ni au titre d'obligation examinée plus haut, ni au titre d'une prérogative à elle attribuée par le droit international, la Belgique ne saurait se poser en procureur de l'humanité, à savoir prétendre assumer le malheur des hommes au-delà des frontières étatiques et au-delà des générations. La pratique des Etats signalée ci-dessus vaut également pour les présents développements. Pour autant il ne s'agit nullement de couvrir une impunité quelle qu'elle soit dans le temps et dans l'espace, y compris lors des guerres de conquête coloniale et de reconquête néocoloniale en Afrique, en Amérique, en Asie, en Europe et en Océanie.

82. Victime de la violence[79] des agresseurs et du cortège d'infractions graves au droit international humanitaire, telle que la prise en otage du barrage d'Inga entraînant la coupure d'électricité et d'eau, notamment à Kinshasa, ville de plus de cinq millions d'habitants d'où il en résulta plusieurs morts, le peuple congolais n'a de cesse d'exiger le retrait des forces armées régulières d'occupation de l'Ouganda, du Rwanda et du Burundi. Il sollicite en outre l'établissement d'un tribunal pénal international sur le Congo. Ce dernier jugerait toutes les personnes, auteurs, coauteurs ou complices, Africains et non-Africains, ayant commis des crimes de guerre, des crimes contre l'humanité, comme l'extermination de plus de deux millions cinq cent mille Congolais[80] dans les régions sous occupation étrangère depuis le 2 août 1998. A priori, ces victimes là n'intéressent pas (encore) la Belgique. Elle, dont le passé colonial[81] et néocolonial[82]

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[78] Joe Verhoeven, «M. Pinochet, la coutume internationale et la compétence universelle», *Journal des Tribunaux*, 1999, p. 315 et du même auteur «Vers un ordre répressif universel ? Quelques observations», *Annuaire français de droit international*, 1999, p. 55. D'autre part, «Que se passerait-il si un plaignant poursuivait devant les tribunaux belges M. Chirac qui a servi durant la guerre d'Algérie où des massacres ont été commis par l'armée française ?» aurait interrogé un haut fonctionnaire israélien à la suite de la plainte déposée par M. Sharon, premier ministre d'Israël (*The Washington Post*, 30 avril 2001, *Washington Post Foreign Service*, Karl Vick, p. 101 : «Death toll in Congo War may approche 3 million»).

[79] Voir. S. Oda, déclarations jointes à l'ordonnance du 9 avril 1998 en l'affaire relative à la *Convention de Vienne sur les relations consulaires*, p. 260, par. 2 et à l'ordonnance du 3 mars 1999, p. 18, par. 2, en l'affaire *LaGrand (Allemagne c. Etats-Unis d'Amérique)*, sur la nécessité de tenir compte des droits des victimes d'actes de violence (aspect qui a souvent été négligé).

[80] Source : International Rescue Committee (USA), www.the IRC.org/mortality.htm

[81] Adam Horschild, *Le fantôme du Roi Léopold. Un holocauste oublié*, Belfond, Paris, 1998, p. 264-274; Daniel Vangroenweghe, *Du sang sur les lianes. Léopold II et son Congo*, Didier Hâtier, Paris, 1986, p. 18-123; Barbara Emerson, *Léopold II. Le Royaume et l'Empire*, éditions Soufflot, Paris / éditions Duculot, Gembloux, 1980, p. 248-251.

est, à tort ou à raison, jugé tristement célèbre dans le domaine des droits humains au Congo. Là perdure une situation de violations graves, systématiques et massives des droits humains qui doivent interpeller l'opinion internationale. Pour emprunter les mots justes de l'ambassadeur de France à Kinshasa :

> «devant pareil enjeu, les choses doivent être dites clairement. On ne peut jouer indéfiniment dans la sémantique lorsqu'un peuple entier est en train d'agoniser.» Car, «c'est le temps de guerre et ... les armées d'occupation se trouvent sur le sol congolais en dépit des injonctions de la communauté internationale.»[83]

83. Il suffit maintenant de signaler quelques vues doctrinales qui montrent peut-être l'ampleur de la controverse sur la question. A en croire P. M. Dupuy, «encore rarement reconnue en droit coutumier, la compétence universelle ne l'est alors que de *façon facultative*»[84]. L'auteur s'appuie sur le fait que la Cour de cassation française «a confirmé le refus de la Cour d'appel de voir dans les conventions de Genève de 1949 une base de droit pour l'invocation d'une telle compétence»[85]. Enfin, il relève que «la convention de Rome n'institue ... pas vraiment une compétence universelle, puisqu'elle s'établit en fonction de celle de l'Etat de nationalité du criminel et/ou celle de l'Etat où l'infraction a été commise»[86]. Quant à François Rigaux, il préfère ne pas se prononcer «sur un thème actuel et controversé»[87]. A l'opposé, Mario Bettati est d'avis que «la compétence universelle ... fonde n'importe quel Etat à poursuivre des crimes d'autant plus graves qu'ils mêlent parfois ceux commis contre les lois de la guerre et ceux accomplis contre l'humanité»[88]. L'affirmation n'est guère suivie de démonstration. A l'opposé, Nguyen Quoc Dinh, Patrick Dailler et Alain Pellet la signale comme «un principe controversé»[89]. Olivier T. Covey l'admet que si l'auteur de l'infraction «est par la suite retrouvé sur le territoire national»[90]. Les partisans de la compétence universelle reconnaissent cette dernière à condition que l'inculpé, «se trouve sur son territoire»[91]. Pour leur part, Jean Combacau et Serge Sur soulignent que «les Etats restent fidèles aux critères territorial et personnel et s'abstiennent de tout recours à une compétence universelle ou réelle»[92]. Quant à Philippe Weckel, observant la mention dans le préambule du

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[82] Voir CR 2000/34, p. 16, sur la plaidoirie acérée du Congo et Noam Chomsky, «Autopsie des terrorismes», Paris, *Le Serpent à Plumes*, 2001, p. 12-13. «Les puissances européennes menaient la conquête d'une grande partie du monde, avec une brutalité extrême. A de très rares exceptions, ces puissances n'ont pas été en retour attaquées par leurs victimes..., ni la Belgique par le Congo...»

[83] Voir discours de M. Gildas Le Lidec, ambassadeur de France à Kinshasa, le 14 juillet 2001 à l'occasion de la fête nationale de la République française, *Le Palmarès*, n° 2181, du 16 juillet 2001, p. 8.

[84] Pierre-Marie Dupuy, *loc. cit.*, p. 293.

[85] *Ibid.*, p. 294.

[86] *Ibid.*, p. 29.

[87] François Rigaux, «Le concept de territorialité : un fantasme en quête de réalité», *in Mélanges Bedjaoui*, La Haye, Kluwer Law International, 1999, p. 210.

[88] Mario Bettati, *Le droit d'ingérence. Mutation de l'ordre international*, Paris, Odile Jacob, 1996, p. 269.

[89] Nguyen Quoc Dinh, Patrick Dailler et Alain Pellet, *Droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1999, p. 689.

[90] Olivier T. Covey, «La compétence des Etats», *Droit international. Bilan et perspectives*, Paris, Pédone, Unesco, 1991, p. 336.

[91] Brigitte Stern, «A propos de la compétence universelle», *Mélanges Bedjaoui*, p. 748.

[92] Jean Combacau et Serge Sur, *Droit international public*, Paris, Montchrestien, 1993, p. 351

traité de Rome du 28 juillet 1998 de la compétence universelle, il note néanmoins l'omniprésence de la «souveraineté judiciaire des Etats»; car comme le démontre déjà la pratique de la Belgique, «une compétence universelle ... s'exercerait en définitive de manière unilatérale»[93].

84. Le mandat du 11 avril 2000 a produit des effets juridiques tant sur le plan interne belge que sur le plan international.

85. Au plan interne d'abord. Juridiquement, il paraît évident que l'émission du mandat à l'encontre du ministre des affaires étrangères constitue un fait illicite puisqu'elle viole les immunités et l'inviolabilité pénales attachées à ce dernier. Au plan formel, il s'agit d'un acte coercitif par nature. Sous l'angle matériel, la teneur de cet instrument ne fait guère mystère du sort réservé à l'organe étranger. Il est exigé des agents de l'autorité publique belge d'appréhender physiquement un ministre des affaires étrangères d'un autre Etat souverain ! Du point de vue téléologique, il vise à anéantir la liberté d'aller et de venir ainsi que la dignité inhérente à un organe d'un pays indépendant. Sous l'angle organique, le juge d'instruction, qui a agi à l'encontre du ministre en question, ne se confond pas avec un agent du protocole d'Etat. A bon droit, la Cour dit au sujet du mandat :

> «[sa] seule émission … portait atteinte à l'immunité... La Cour en conclut que l'émission dudit mandat a constitué une violation d'une obligation de la Belgique à l'égard du Congo, en ce qu'elle a méconnu l'immunité [dont bénéficiait] ce ministre … en vertu du droit international.» (Par. #70.)

86. Tels sont les éléments objectifs qui attestent de la production des effets juridiques par le mandat insolite. Qu'il n'ait pas été exécuté matériellement est une autre question. Il était susceptible de l'être. Que l'Etat défendeur puisse mépriser vis-à-vis d'un pair les règles de courtoisie élémentaires entre Etats dits civilisés passe encore en droit. Le mandat a bel et bien jeté le discrédit sur les organes de l'Etat congolais traités de manière aussi discourtoise et illicite. Il y a davantage.

87. Au plan international, qui nous préoccupe le plus, s'agissant d'une atteinte flagrante au droit international coutumier des immunités, il convient de rappeler l'analyse esquissée dès la phase de l'examen de la demande de mesures conservatoires. Au demeurant, la motivation de l'arrêt semble bien faire ressortir le préjudice juridique ainsi subi[94].

88. Ainsi que je l'ai indiqué en la phase de demande de mesures conservatoires, le mandat querellé a causé un préjudice à la diplomatie congolaise. Si son chef a néanmoins pu se déplacer sans entrave dans l'hémisphère sud en vue de participer à des rencontres diplomatiques tendant à mettre un terme au conflit armé au Congo, il n'a pu par contre effectuer de tels déplacements dans d'autres régions qui comptent beaucoup pour le règlement du conflit. Quand bien même si l'Etat congolais y a pu être représenté, il l'a été à un échelon inférieur. La substance des pourparlers de

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[93] Ph. Weckel, «La Cour pénale internationale», *Revue générale de droit international public*, t. 102, n° 4, 1998, p. 886, 989. D'après les vues d'un pénaliste du Congo, Nyabirungu Mwene Songa, *Droit pénal général*, Kinshasa, éditions Droit et société, 1995, p. 77 et 79, le «système dit de compétence universelle de la loi pénale donne au juge du *lieu d'arrestation* le pouvoir de juger».

[94] Voir par. 70 et 71.

paix au niveau des ministres des affaires étrangères en a été affectée en raison de la règle de préséance diplomatique. En fin de compte, les prérogatives de souveraineté internationale du Congo ont subi des dommages[95].

89. En particulier le fonctionnement régulier et continu du service public des affaires étrangères a pu être perturbé par cette ingérence politico-judiciaire dès lors que son chef a subi une «quarantaine arbitraire». D'autre part, l'émission du mandat a porté atteinte à l'indépendance politique du Congo. Comme montré plus haut, elle a contraint un Etat faible, davantage affaibli par une agression armée, à modifier malgré lui, selon l'un des conseils du Congo, membre du gouvernement de ce pays[96], la composition de l'équipe gouvernementale pour plaire à l'Etat défendeur. La Belgique n'a guère contesté cette déclaration.

90. Il ne fait pas l'ombre d'un doute que le comportement de la Belgique a discrédité le Congo. Il a eu pour effet d'accabler, à priori par un jugement sommaire, un Etat agressé au moment où les Etats d'Afrique centrale réunis à Libreville (Gabon) le 24 septembre 1998 ont «condamné l'agression contre la République démocratique du Congo et les ingérences caractérisées dans les affaires intérieures de ce pays»[97]. Les poursuites pénales ainsi intentées contre un organe de cet Etat agressé constituent des accusations infamantes au sein de la «communauté internationale». Elles ont affecté les droits extrapatrimoniaux à l'honneur, à la dignité du peuple congolais représenté par son Etat[98].

91. Que l'Etat défendeur ait, par l'émission, la diffusion et le maintien du mandat d'arrêt du 11 avril 2000 commis un fait internationalement illicite a été montré plus haut. Il a opéré une rupture de ses engagements internationaux en droit international général.

92. Pour l'heure, me paraît tout instructive l'opinion suivante de Paul Guggenheim :

> «Contrairement à une opinion répandue, ce n'est pas seulement au moment où il est véritablement appliqué que le droit interne peut *violer le droit international*. Il y a *délit international* du fait même de la promulgation — ou de la non-promulgation — d'une norme générale susceptible d'être appliquée directement et causant par là même un dommage. La promulgation d'une norme contraire au droit international donne lieu à des sanctions...»[99]

C'est en conséquence un argument à fortiori qu'il faudrait appliquer s'agissant du mandat, mesure d'application d'un simple fait, mieux d'une voie de fait, de l'avis d'un conseil du Congo.

93. A serrer de plus près, le mandat belge ne constitue pas en droit international un acte juridique. Comme l'a relevé l'un des conseils du Congo, il s'agit d'un fait internationalement illicite. L'opinion selon laquelle : «Au regard du droit international et de la Cour qui en est

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[95] Voir aussi : S. Bula-Bula, opinion dissidente jointe à l'ordonnance du 8 décembre 2000, par. 16.

[96] Voir plaidoirie du 22 novembre 2000, CR 2000/34, p. 10.

[97] Voir *Le Phare*, n° 818 du 28 septembre 1988, p. 3.

[98] Voir aussi : S. Bula-Bula, opinion dissidente jointe à l'ordonnance du 8 décembre 2000, par. 17.

[99] Paul Guggenheim, *Traité de droit international public*, t. I, p. 7-8, cité par Krystyna Marek, «Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour permanente de Justice internationale», *Revue générale de droit international public*, t. XXXIII, 1962, p. 276.

l'organe, les lois nationales sont de simples faits, manifestations de la volonté et de l'activité des Etats, au même titre que les décisions judiciaires ou les mesures administratives.»[100] trouve bien sa place ici.

94. D'où le raisonnement qui tendrait à distinguer d'un côté l'*instrumentum* et de l'autre côté, le *negotium* ne vaut pas. L'illicéité ne s'estompe pas parce que l'organe de l'Etat a changé. Puisque à travers ledit organe, c'est bien sûr l'Etat qui a été visé. Cela est encore plus manifeste dans le cas d'espèce où plusieurs membres du gouvernement étaient sur la liste dressée par le juge belge, y compris le chef de l'Etat ! D'autre part, un mandat illicite n'est pas *ipso facto* illégal. Tel est précisément le cas ici. De manière générale, il existe en droit international (droits de l'homme, droit de la mer, etc.) des mesures nationales parfaitement légales, mais qui demeurent illicites. Elles engagent la responsabilité de leurs auteurs. Mais le constat de l'illicéité par un organe international n'emporte pas en lui-même l'anéantissement de la mesure nationale. C'est à l'Etat transgresseur du droit international qu'incombe l'obligation d'extinction de son acte illicite.

95. Le défendeur a commis une infraction au droit international des immunités dès le 11 avril 2000 par l'émission du mandat. Il a, par la suite, confirmé son comportement illicite en diffusant ce dernier au plan international. Le fait illicite a été communiqué au demandeur le 12 juillet 2000. L'infraction consommée, dès le 11 avril 2000, le défendeur s'est évertué, d'après lui, à tenter de transmettre par voie diplomatique le 15 septembre 2000, le prétendu dossier judiciaire au demandeur. Non seulement il n'a apporté aucune preuve de ce repentir actif mais tardif, par ailleurs contesté par l'un des conseils du Congo; mais encore la tentative de blanchiment du fait illicite répudiée par l'Etat requérant, à bon droit, est dénuée de tout effet.

96. Pire, il y a un élément majeur qui montre le comportement résolument illicite de la Belgique au cours du procès. Comment qualifier autrement la demande de notice rouge formulée le 12 septembre 2001 par le défendeur ? Actionné devant la justice internationale, ce dernier n'arrête pas de poursuivre la mise en œuvre de son acte unilatéral illicite au moyen de la notice rouge. Non seulement la Belgique a ainsi fait preuve de manière éloquente de manque de *bonne foi* dans la poursuite de la procédure judiciaire internationale; mais encore, n'a-t-elle pas commis «un empiétement sur les fonctions de la Cour»[101] ?

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97. Alors que les Etats puissants — notion relative dans le temps et l'espace — ont parfois tendance à invoquer le droit international pour justifier à posteriori leur comportement, les Etats faibles — concept également relatif selon les mêmes facteurs — inclinent souvent à conformer leur conduite au droit international. Puisque ce dernier est leur unique force.

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[100] Affaire relative à *Certains intérêts allemands en Haute-Silésie polonaise, fond, arrêt n° 7, 1926, C.P.J.I. série A n° 7*, p. 19.

[101] Je m'inspire ainsi de l'avis de M. Tarazi, opinion dissidente jointe à l'arrêt du 24 mai 1980, affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran, C.I.J. Recueil 1980*, p. 64.

98. Sans égards aux immunités et à l'inviolabilité pénales du ministre des affaires étrangères du Congo, le Royaume de Belgique a émis un mandat d'arrêt contre cet organe éminent d'un Etat souverain au nom d'allégations de commission de «crimes internationaux» lors de l'agression armée du 2 août 1998 contre le Congo.

99. Non seulement le Congo a démontré à la face de la «communauté internationale», sa qualité de sujet de droit international capable d'ester en justice; mais encore cet Etat agressé s'est comporté en tant qu'Etat de droit, à savoir une entité respectueuse du droit international.

100. Le peuple congolais, à travers son Etat, a pu ainsi exprimer sa personnalité internationale. Il s'est aussi affirmé libre. Sous ce rapport, l'Etat défendeur s'est-il trompé de génération et d'époque ? Lorsqu'en 1989, le gouvernement en place à Kinshasa a envisagé de saisir la Cour du *contentieux belgo-congolais*, son initiative s'est arrêtée net à l'acceptation de la juridiction obligatoire de celle-ci. Par la suite, il y eut l'accord de Rabat de juin 1989 qui a abasourdi la brouille entre princes. Tel n'est pas le cas aujourd'hui.

101. Alors que M. R. Aron maintenait en 1984 «l'exemple du Congo suggère que, dans la masse, la conscience tribale l'emporte encore, sur la conscience nationale...»[102], à la même période, Paul Reuter et Jean Combacau n'hésitaient pas à établir un parallélisme entre le processus de formation de la nation parmi «des Etats européens les plus centralisés d'aujourd'hui» et le procès suivi par le Congo en ces termes : «il en est ainsi d'un Etat africain étendu et peuplé comme le Zaïre pour lequel la constitution progressive d'une nation zaïroise s'établit quotidiennement aux dépens des communautés ethniques dont le destin aurait pu être différent»[103]. Il nous est apparu qu'«on sous-estime, pour des raisons inavouées, le vouloir-vivre collectif des Zaïrois forgé par des ans de résistance tantôt ouverte, tantôt silencieuse, à l'un des régimes politiques les plus féroces qu'ait connu le XX^{e} siècle»[104].

102. Comme les deux faces de Janus, l'arrêt constitue, d'un côté, l'acte de répudiation des relations malsaines dites d'amitié et de coopération entre un Etat dominateur et un Etat dominé, dès le lendemain d'une décolonisation bâclée; il forme, d'un autre côté, l'acte susceptible de fonder des relations saines, d'amitié et de coopération durable mutuellement avantageuses entre partenaires souverains liés par l'histoire. Tôt ou tard pareils rapports s'instaureront. Mieux vaudrait maintenant. Il faut souhaiter que les Parties, spécialement l'Etat défendeur, saisissent la signification profonde de la présente décision. La contribution de la Cour au règlement pacifique du différend aura été très féconde. Pourvu que le défendeur adopte une nouvelle vision abandonnant ses conceptions surannées entretenues par des pesanteurs historiques et les rapports de force inégaux. A titre d'exemple, à la veille de la mise en orbite d'un de ces gouvernements inspirés par la Belgique, des universitaires conseilleurs de leur pays alertèrent ce dernier en ces termes :

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[102] Raymond Aron, *Paix et guerre entre les nations*, Paris, Calman-Levy, 1984, p. 389.

[103] Paul Reuter et Jean Combacau, *Institutions et relations internationales*, Paris, PUF, Coll. Themis, 1988, p. 24.

[104] Sayeman Bula-Bula, «La doctrine d'ingérence humanitaire revisitée», *Revue africaine de droit international et comparé* (Londres), t. 9, n° 3, septembre 1997, p. 626, note 109.

> «Si elle ne se met pas en mesure, ne revendique pas, et n'obtient pas de jouer un rôle déterminant dans la revitalisation de l'économie du pays, la Belgique risque l'affaiblissement de son leadership au Zaïre et la perte de son principal atout en même temps que celle de son outil le plus efficace d'expression de politique extérieure. *C'est d'abord le Zaïre qui nous permet d'émerger sur le plan international et d'être assis, à maintes occasions, à la table des plus grands.*»[105]

104. Les Etats africains notamment qui se manifestent de plus en plus comme les plaideurs «ordinaires» devant la Cour ont des raisons de confier au corps des juristes éminents, indépendants et intègres[106] leurs différends. Je pense ainsi particulièrement à des plaintes analogues à celle contre le Congo introduites auprès d'un juge national au cas où le défendeur poursuivrait sa politique de deux poids, deux mesures. D'autant plus que le grand nombre de dirigeants afro-latino-asiatiques traduits devant la justice belge laisserait croire, à tort, que les violations présumées du droit international humanitaire, notamment les crimes contre la paix, les crimes contre l'humanité et les crimes de guerre constituent le monopole de l'Afrique, l'Amérique latine et l'Asie.

105. C'est là où la compétence dite universelle apparaît sous son vrai jour de compétence à géométrie variable exercée sélectivement contre certains Etats à l'exclusion d'autres. Il ne faut pas être grand clerc pour constater, à priori, que la rumeur publique sur des violations graves de droits humains ne s'abat pas, à l'échelle mondiale, que sur la brochette de personnalités accusées auprès du juge bruxellois.

106. Sans doute la mission de la Cour consiste à trancher les litiges interétatiques que lui soumettent les parties. Elle ne consiste pas à enseigner le droit. Néanmoins, par le règlement des différends, il peut résulter des enseignements précieux. Au demeurant, dès la fin des plaidoiries, l'un des conseils de la Belgique a revisé sa copie. L'un des mérites de l'arrêt est d'avoir contribué à l'enseignement du droit international. Les appréhensions que nous avions ainsi exprimées lors de la phase de demande des mesures conservatoires[107] n'ont plus de raison d'être à ce niveau. C'est un chapitre du droit international des immunités du ministre des affaires étrangères que vient d'ébaucher la Cour[108]. A ce titre, il enrichit certainement les manuels de droit international public. Intervenant au beau milieu des débats doctrinaux, comme le montrent les travaux de l'Institut de droit international, de la session de Vancouver, en août 2001, l'arrêt apporte beaucoup de lumière sur cette question.

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[105] Voir Société nationale d'investissement et administration générale de la coopération au développement, *Zaïre, Secteur des parastataux, réactivation de l'économie. Contribution d'entreprise du portefeuille de l'Etat*, rapport réalisé par M. Moll et J. P. Couvreur et M. Norro, professeurs à l'Université catholique de Louvain, Bruxelles, le 29 avril 1994, p. 231.

[106] Voir article 2 du Statut de la Cour internationale de Justice.

[107] Voir Sayeman Bula-Bula, opinion dissidente jointe à l'ordonnance du 8 décembre 2000 rendue en l'affaire du *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, demande en indication de mesures conservatoires, par. 4.

[108] D'après Dominique Carreau, *Droit international*, t. I, Paris, Pédone, 2001, p. 653, la Cour accomplit un «rôle majeur» dans «le développement du droit international contemporain».

107. La question de «l'articulation juridique entre la compétence dite universelle, et les immunités»[109] qui suscitait ma curiosité a été aussi réglée implicitement au profit de celles-ci[110]. Sans préjudice du caractère établi de la catégorie juridique alléguée, hors la compétence de répression de certaines violations de dispositions conventionnelles reconnue entre Etats parties.

108. La Cour a établi l'existence en droit international coutumier des règles relatives à l'immunité et l'inviolabilité pénales du ministre des affaires étrangères. Elle les a appliquées au cas d'espèce parce que M. A. Yerodia Ndombasi était ministre des affaires étrangères au moment des faits. Puisque le différend international portait sur des prétentions contradictoires entre les immunités en question et la compétence dite universelle, par sa décision, la Cour a *implicitement* rejeté l'allégation de cette compétence dans la présente affaire. Elle a ainsi jugé la compétence dite universelle, si elle était établie en droit international, de toute manière inopérante à l'égard des immunités et de l'inviolabilité pénales du ministre des affaires étrangères, quels que soient les prétendus crimes allégués. Le requérant n'a guère sollicité un arrêt déclaratoire[111]. Il a été demandé à la Cour de trancher un litige concret en disant le droit et en l'appliquant effectivement au différend. Mais, une réflexion générale, abstraite et donc impersonnelle de cette compétence controversée et non sollicitée par l'Etat demandeur ne s'imposait pas[112], encore qu'il aurait été désirable, à mon avis, que le Congo maintînt aussi ce point dans ses demandes finales écrites et orales. Puisque le demandeur sollicitait que la Cour dise le droit et tranche le litige, ne lui appartenait-il pas de pourchasser tous les alibis possibles, dits universels, humanitaires et autres ? Une chose est certaine, le prétexte tiré du prétendu infléchissement des immunités a été rejeté dans le dispositif. Tout autre alibi qui s'appuierait sur d'autres bases du «sans frontiérisme» est aussi virtuellement sanctionné dans les motifs. Face à «une saine économie judiciaire»[113], observée par notre institution, il revenait aux opinions d'«éclairer en contrepoint la motivation de l'arrêt», de manière que «l'on puisse extraire toute la substance de cette décision judiciaire et saisir tout ce qu'elle a apporté à la jurisprudence»[114].

109. En définitive, on se rend compte que le Congo semble aussi avoir agi en manière de «dédoublement fonctionnel» de Georges Scelle. Il a intenté une action judiciaire internationale non seulement en son nom et pour son compte, mais aussi au profit de la «communauté internationale». N'a-t-elle pas permis à la Cour de réaffirmer et de développer le mécanisme juridique des immunités qui facilite le commerce juridique entre l'universalité des Etats quel que soit l'alibi avancé ?

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[109] Sayeman Bula-Bula, opinion dissidente jointe à l'ordonnance du 8 décembre 2000 rendue en l'affaire du *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, demande en indication de mesures conservatoires, par. 7.

[110] Paragraphes 70 et 71 de l'arrêt.

[111] Voir affaire du *Plateau continental de la mer du Nord, C.I.J. Recueil 1969*, p. 6 et suiv.

[112] Certains font remonter la «compétence universelle» au Moyen Age européen. En cette matière, il faut peut-être se garder de prendre pour universel ce qui n'est probablement que régional. Ainsi, selon E. Ogueri II *«the rules of conduct which, for example, governed relations between Ghana and Nigeria in Africa, or between nations in other parts of Africa and Asia, were regarded as universally, recognised customary laws»* avant la colonisation. Voir E. Ogueri II, Intervention, *International Law Association Report*, session de Varsovie, 1988, p. 969.

[113] Voir Manfred Lachs, opinion individuelle jointe à l'arrêt du 24 mai 1980 rendu dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran, C.I.J. Recueil 1980*, p. 47.

[114] Mohammed Bedjaoui, La «fabrication» des arrêts de la Cour internationale de Justice, *Mélanges Virally*, Paris, Pédone, 1991, p. 105.

110. Il y a fort à parier que l'arrêt, petit par son volume, mais grand par sa substance juridique, sera accueilli favorablement par la «communauté internationale». Bien entendu, si on entend par là l'ensemble des Etats, des organisations internationales et d'autres entités publiques internationales. Quelles que soient les divergences d'intérêt, la disparité du niveau de développement et la diversité des cultures; il y a là un dénominateur commun à tous qui a été réaffirmé.

111. La décision devrait aussi interpeller les manipulateurs de l'opinion auxquels doit être dénié le pouvoir de fait d'exploiter, à des fins inavouées, «le malheur des autres»[115].

112. Elle devrait enfin appeler à plus de modestie les nouveaux croisés de l'intégrisme à prétention humanitaire «habiles à mal poser les problèmes pour justifier les odieuses solutions qu'on préconise»[116], y compris un certain courant du militantisme juridique[117].

(Signé) Sayeman BULA BULA.

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[115] Voir Bernard Kouchner, *Le malheur des autres*, Paris, Editions Odile Jacob, 1991 (241 pages).

[116] Voir Aimé Césaire, *Discours sur le colonialisme*, Paris, Présence africaine, 1995, p. 8.

[117] Sur le militantisme juridique, voir J. Combacau et Serge Sur, *Droit international public*, Paris, Montchrestien, 1993, p. 46; Nguyen Quoc Dinh, Patrick Dallier et Alain Pellet, *Droit international public*, Paris, *LGDJ*, 1992, p. 79. Les auteurs discernent un courant occidental du militantisme qui serait représenté par l'Anglais Georg Schwarzenberger et les Américains Myres S. McDougal, Richard Falk et M. Reisman ainsi que l'Anglaise Rosalyn Higgins; un courant oriental sans en préciser les auteurs et un courant du vieux monde avec comme figures de proue, entre autres, Mohammed Bedjaoui, George Abi-Saab et Taslim Olawale Elias. A dire vrai, il y a toujours une coloration idéologique, donc militante, dans les travaux de chaque auteur. Pour ne citer que certains, J. Combacau et S. Sur, *op. cit.*, p. XI ont beau avertir le lecteur sur leur choix du «positivisme juridique»; ils ne montrent pas moins leur inclination idéologique libérale. Voir par exemple au moment de la réunion du nombre des ratifications requises par la convention sur le droit de la mer, ils spéculent encore «à supposer même qu'elle entre en vigueur» (p. 452-453); ainsi que l'affirmation selon laquelle cette convention aurait inversé sur «des bases purement formelles l'équilibre réel des intérêts et de la puissance» (p. 446) ou encore l'affirmation selon laquelle ce texte ne serait pas «à l'instar des conventions de Genève de 1958, une convention de codification mais plutôt de développement progressif...» (P. 452.) Voir aussi Nguyen Quoc Dinh *et al.*, *op. cit.*, p. 1093 évoquant «l'entrée en vigueur éventuelle de la convention».

DISSENTING OPINION OF JUDGE VAN DEN WYNGAERT

Immunities under customary international law ¾ Not applicable to Minister for Foreign Affairs ¾ Principle of international accountability for war crimes and crimes against humanity ¾ Role of civil society in the formation of opinio juris *¾ Impunity ¾ Extraterritorial jurisdiction for war crimes and crimes against humanity ¾ Universal jurisdiction for such crimes ¾* "Lotus" *test applied to such crimes ¾ Prescriptive jurisdiction ¾ Rome Statute for an International Criminal Court ¾ Complementarity principle ¾ Internationally wrongful act ¾ Enforcement jurisdiction ¾ (International) arrest warrants ¾ Remedies before the International Court of Justice ¾ Abuse of immunities and Pandora's box.*

CONTENTS

I. INTRODUCTORY OBSERVATIONS

1. I have voted against paragraphs (2) and (3) of the *dispositif* of this Judgment. International law grants no immunity from criminal process to incumbent Foreign Ministers suspected of war crimes and crimes against humanity. There is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international legal obligation (Judgment, para. 78 (2)).

Surely, the warrant based on charges of war crimes and crimes against humanity, cannot infringe rules on immunity *today*, given the fact that Mr. Yerodia has now ceased to be a Foreign Minister and has become an ordinary citizen. Therefore, the Court is wrong when it finds, in the last part of its *dispositif*, that Belgium must cancel the arrest warrant and so inform the authorities to which the warrant was circulated (Judgment, para. 78 (3)).

I will develop the reasons for this dissenting view below. Before doing so, I wish to make some general introductory observations.

2. The case was about an arrest warrant based on acts allegedly committed by Mr. Yerodia in 1998 when he was not yet a Minister. These acts included various speeches inciting racial hatred, particularly virulent remarks, allegedly having the effect of inciting the population to attack Tutsi residents in Kinshasa, dragnet searches, manhunts and lynchings. Following complaints of a number of victims who had fled to Belgium, a criminal investigation was initiated in 1998, which eventually, in April 2000, led to the arrest warrant against Mr. Yerodia, who had meanwhile become a Minister for Foreign Affairs in the Congo. This warrant was not enforced when Mr. Yerodia visited Belgium on an official visit in June 2000, and Belgium, although it circulated the warrant internationally via an Interpol Green Notice, did not request Mr. Yerodia's extradition as long as he was in office. The request for an Interpol Red Notice was only made in 2001, *after* Mr. Yerodia had ceased to be a Minister.

3. Belgium has, at present, very broad legislation that allows victims of alleged war crimes and crimes against humanity to institute criminal proceedings in its courts. This triggers negative reactions in some circles, while inviting acclaim in others. Belgium's conduct (by its Parliament,

judiciary and executive powers) may show a lack of *international courtesy*. Even if this were true, it does not follow that Belgium actually violated (customary or conventional) international law. *Political wisdom* may command a change in Belgian legislation, as has been proposed in various circles[1]. *Judicial wisdom* may lead to a more restrictive application of the present statute, and may result from proceedings that are pending before the Belgian courts[2]. This does not mean that Belgium has acted in violation of international law by applying it in the case of Mr. Yerodia. I see no evidence for the existence of such a norm, not in conventional or in customary international law for the reasons set out below[3].

4. The Judgment is shorter than expected because the Court, which was invited by the Parties to narrow the dispute, did not decide the question of (universal) jurisdiction, and has only decided the question of immunity from jurisdiction, even though, logically the question of jurisdiction would have preceded that of immunity[4]. In addition, the Judgment is very brief in its reasoning and analysis of the arguments of the Parties. Some of these arguments were not addressed, others in a very succinct manner, certainly in comparison with recent judgments of national[5] and international courts[6] on issues that are comparable to those that were before the International Court of Justice.

5. This case was to be a test case, probably the first opportunity for the International Court of Justice to address a number of questions that have not been considered since the famous *"Lotus"* case of the Permanent Court of International Justice in 1927[7].

In technical terms, the dispute was about an arrest warrant against an incumbent Foreign Minister. The warrant was, however, based on charges of war crimes and crimes against humanity, which the Court even fails to mention in the *dispositif*. In a more principled way, the case was

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[1]The Belgian Foreign Minister, the Belgian Minister of Justice, and the Chairman of the Foreign Affairs Commission House of Representatives, have made public statements in which they called for a revision of the Belgian Act of 1993/1999. The Government referred the matter to the Parliament, where a bill was introduced in Dec. 2001 (*Proposition de loi modifiant, sur le plan de la procédure, la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, Doc. Parl. Chambre 2001-2002*, No. 1568/001, available at http://www.lachambre.be/documents_parlementaires.html).

[2]A. Winants, *Le Ministère Public et le droit pénal international, Discours prononcé à l'occasion de l'audience solennelle de rentrée de la Cour d'Appel de Bruxelles du 3 septembre 2001*, p. 45.

[3]*Infra*, paras. 11 *et seq.*

[4]See further *infra*, para. 41.

[5]Prominent examples are the *Pinochet* cases in Spain and the United Kingdom (*Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena*, 5 Nov. 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html; R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 24 Mar. 1999, *All. ER* (1999), p. 97), the *Qaddafi* case in France (Cour de Cassation, 13 Mar. 2001, http://courdecassation.fr/agenda/arrets/arrets/00-87215.htm) and the *Bouterse* case in the Netherlands (Hof Amsterdam, nr. R 97/163/12 Sv and R 97/176/12 Sv, 20 Nov. 2000; Hoge Raad, Strafkamer, Zaaknr. 00749/01 CW 2323, 18 Sep. 2001, http://www.rechtspraak.nl).

[6]ECHR (European Commission of Human Rights), Al-Adsani *v.* United Kingdom, 21 Nov. 2001, http://www.echr.coe.int.

[7]*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.*

about how far States can or must go when implementing modern international criminal law. It was about the question what international law requires or allows States to do as "agents" of the international community when they are confronted with complaints of victims of such crimes, given the fact that international criminal courts will not be able to judge *all* international crimes. It was about balancing two divergent interests in modern international (criminal) law: the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity and the principle of sovereign equality of States, which presupposes a system of immunities.

6. The Court has not addressed the dispute from this perspective and has instead focused on the very narrow question of immunities of incumbent Foreign Ministers. In failing to address the dispute from a more principled perspective, the International Court of Justice has missed an excellent opportunity to contribute to the development of modern international criminal law.

Yet international criminal law is becoming a very important branch of international law. This is manifested in conventions, in judicial decisions of national courts, international criminal tribunals and of international human rights courts, in the writings of scholars and in the activities of civil society. There is a wealth of authority on concepts such as universal jurisdiction, immunity from jurisdiction and international accountability for war crimes and crimes against humanity[8]. It is surprising that the International Court of Justice does not use the term international criminal law and does not acknowledge the existence of these authorities.

7. Although, as a matter of logic, the question of jurisdiction comes first[9], I will follow the chronology of the reasoning of the Judgment and deal with immunities first.

II. IMMUNITIES

8. The Court starts by observing that, in the absence of a general text defining the immunities of Ministers for Foreign Affairs, it is on the basis of customary international law that it must decide the questions relating to the immunities of Ministers for Foreign Affairs raised by the present case (Judgment, para. 52 *in fine*). It immediately continues by stating that "In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States" (Judgment, para. 53). The Court then compares the functions of Foreign Ministers with those of Ambassadors and other diplomatic agents on the one hand, and those of Heads of State and Heads of Governments on the other, whereupon it reaches the following conclusion (Judgment, para. 54):

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

[8] See further *infra*, footnote 98.

[9] *Infra*, para. 41.

9. On the other hand, the Court, looking at State practice in the field of war crimes and crimes against humanity (Judgment, para. 58), decides that:

> "It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."

10. I disagree with the reasoning of the Court, which can be summarized as follows: *(a)* there is a rule of customary international law granting "full" immunity to incumbent Foreign Ministers (Judgment, para. 54), and *(b)* there is no rule of customary international law departing from this rule in the case of war crimes and crimes against humanity (Judgment, para. 58). Both propositions are wrong.

First, there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity.

Secondly, international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the alleged perpetrator holds an official position in another State.

Consequently, Belgium has not violated an obligation under international law by issuing and internationally circulating the arrest warrant against Mr. Yerodia. I will explain the reasons for this conclusion in the following two paragraphs.

1. There is no rule of customary international law granting immunity to incumbent Foreign Ministers

11. I disagree with the proposition that incumbent Foreign Ministers enjoy immunities on the basis of customary international law for the simple reason that there is no evidence in support of this proposition. Before reaching this conclusion, the Court should have examined whether there is a rule of customary international law to this effect. It is not sufficient to compare the *rationale* for the protection from suit in the case of diplomats, Heads of State and Foreign Ministers to draw the conclusion that there is a rule of customary international law protecting Foreign Ministers: identifying a common *raison d'être* for a protective rule is one thing, elevating this protective rule to the status of customary international law is quite another thing. The Court should have first examined whether the conditions for the formation of a rule of customary law were fulfilled in the case of incumbent Foreign Ministers. In a surprisingly short decision, the Court immediately reaches the conclusion that such a rule exists. A more rigorous approach would have been highly desirable.

12. In the brevity of its reasoning, the Court disregards its own case law on the subject on the formation of customary international law. In order to constitute a rule of customary international law, there must be evidence of state practice *(usus)* and *opinio juris* to the effect that this rule exists.

In one of the leading precedents on the formation of customary international law, the *Continental Shelf* case, the Court stated the following:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremony and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[10]

In the *Nicaragua* case, the Court held that:

> "Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice . . . The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."[11]

13. In the present case, there is no settled practice *(usus)* about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be limited State practice about immunities for current[12] or former Heads of State[13] in national courts, but there is no such practice about Foreign Ministers. On the contrary, the practice rather seems to be that there are hardly any examples of Foreign Ministers being granted immunity in foreign jurisdictions[14]. Why this is so is a matter of speculation. The question, however, is what to infer from this "negative practice". Is this the expression of an *opinio juris* to the effect that international law prohibits criminal proceedings or, concomitantly, that Belgium is under an international obligation to refrain from instituting such proceedings against an incumbent Foreign Minister?

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[10] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 97-98.

[12] Cour de Cassation (Fr.), 13 Mar. 2001 (Qaddafi).

[13] R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 25 Nov. 1998, *All. ER* (1998), p. 897.

[14] Only one case has been brought to the attention of the Court: Chong Boon Kim *v.* Kim Yong Shik and David Kim, Circuit Court (First Circuit), 9 Sep. 1963, *AJIL* 1964, pp. 186-187. This case was about an incumbent Foreign Minister against whom process was served while he was on an *official visit* in the United States (see para. 1 of the "Suggestion of Interest Submitted on behalf of the United States", *ibid.*). Another case where immunity was recognised, not of a Minister but of a prince, was in the case of Kilroy *v.* Windsor (Prince Charles, Prince of Wales), District Court, 7 Dec. 1978, *International Law Reports*, Vol. 81, 1990, pp. 605-607. In that case, the judge observes:

> "The Attorney-General . . . has determined that the Prince of Wales is immune from suit in this matter and has filed a 'suggestion of immunity' with the Court . . . [T]he doctrine, being based on foreign policy considerations and the Executive's desire to maintain amiable relations with foreign States, applies with even more force to live persons representing a foreign nation *on an official visit*." (Emphasis added.)

A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns and lack of extraterritorial criminal jurisdiction[15]. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law. An important precedent is the 1927 *"Lotus"* case, where the French Government argued that there was a rule of customary international law to the effect that Turkey was *not* entitled to institute criminal proceedings with regard to offences committed by foreigners abroad[16]. The Permanent Court of International Justice rejected this argument and held:

> "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom"[17].

14. In the present case, the Judgment of the International Court of Justice proceeds from a mere analogy with immunities for diplomatic agents and Heads of State. Yet, as Sir Arthur Watts observes in his lectures published in the *Recueil des Cours de l'Académie de droit international* on the legal position in international law of Heads of States, Heads of Governments and Foreign Ministers: "analogy is not always a reliable basis on which to build rules of law"[18]. Professor Joe Verhoeven, in his report on the same subject for the Institut de droit international likewise makes the point that courts and legal writers, while comparing the different categories, usually refrain from making "une analogie pure et simple"[19].

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[15]In some States, for example, the United States, victims of extraterritorial human rights abuses can bring *civil* actions before the Courts. See, for example, the *Karadzic* case (Kadic *v.* Karadzic, 70 F. 3d 232 (2d Cir. 1995)). There are many examples of civil suits against incumbent or former Heads of State, which often arose from criminal offences. Prominent examples are the *Aristeguieta* case (Jimenez *v.* Aristeguieta, *ILR* 1962, p. 353), the *Aristide* case (Lafontant *v.* Aristide, WL 20798 (EDNY), noted in *AJIL* 1994, pp. 528-532), the *Marcos* cases (Estate of Silme G. Domingo *v.* Ferdinand Marcos, No. C82-1055V, *AJIL* 1983, p. 305: Republic of the Philippines *v.* Marcos and Others (1986), *ILR* 81, p. 581 and Republic of the Philippines *v.* Marcos and others, 1987, 1988, *ILR* 81, pp. 609 and 642) and the *Duvalier* case (Jean-Juste *v.* Duvalier, No. 86-0459 Civ (US District Court, SD Fla.), *AJIL* 1988, p. 594), all mentioned and discussed by Watts (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de l'Académie de droit international*, 1994, III, pp. 54 *et seq.*). See also the American *1996 Antiterrorism and Effective Death Penalty Act* which amended the *Foreign Sovereign Immunities Act* (FSIA), including a new exception to State immunity in case of torture for civil claims. See J. F. Murphy, "Civil liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", *Harvard Human Rights Journal*, 1999, pp. 1-56.

[16]See also *infra*, para. 48.

[17]*"Lotus"*, *supra*, footnote 7, p. 28. For a commentary, see McGibbon, "Customary international law and acquiescence", *BYBIL*, 1957, p. 129.

[18]A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de l'Académie de droit international* 1994, III, p. 40.

[19]J. Verhoeven, "L'immunité de juridiction et d'exécution des chefs d'Etat et anciens chefs d'Etat", *Report of the 13th Commission of the Institut de droit international*, p. 46, para. 18.

15. There are fundamental differences between the circumstances of diplomatic agents, Heads of State and Foreign Ministers. The circumstances of *diplomatic agents* are comparable, but not the same as those of Foreign Ministers. Under the 1961 Vienna Convention on Diplomatic Relations[20], diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State. However, diplomats reside and exercise their functions on the territory of the receiving States whereas Ministers normally reside in the State where they exercise their functions. Receiving States may decide whether or not to accredit foreign diplomats and may always declare them *persona non grata*. Consequently, they have a "say" in what persons they accept as a representative of the other State[21]. They do not have the same opportunity vis-à-vis Cabinet Ministers, who are appointed by their governments as part of their sovereign prerogatives.

16. Likewise, there may be an analogy between *Heads of State*, who probably enjoy immunity under customary international law[22], and Foreign Ministers. But the two cannot be assimilated for the only reason that their functions may be compared. Both represent the State, but Foreign Ministers do not "impersonate" the State in the same way as Heads of State, who are the State's alter ego. State practice concerning immunities of (incumbent and former) Heads of State[23] does not, *per se*, apply to Foreign Ministers. There is no State practice evidencing an *opinio juris* on this point.

17. Whereas the International Law Commission (ILC), in its mission to codify and progressively develop international law, has managed to codify customary international law in the case of diplomatic and consular agents[24], it has not achieved the same result regarding Heads of State or Foreign Ministers. It is noteworthy that the International Law Commission's Special Rapporteur on Jurisdictional Immunities of States and their Property, in his 1989 report, expressed the view that privileges and immunities enjoyed by Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law[25]. This, according to Sir Arthur Watts, may explain why doubts as to the extent of jurisdictional immunities of Heads of Government and Foreign Ministers under customary international law have survived in the final version of the International Law Commission's 1991 Draft Articles on Jurisdictional Immunities of States and their Property[26], which in Article 3, paragraph 2, only refer to Heads of State, not to Foreign Ministers.

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[20]Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, United Nations, *Treaty Series (UNTS)*, Vol. 500, p. 95.

[21]See, for example, the Danish hesitations concerning the accreditation of a new ambassador for Israel in 2001, after a new government had come to power in that State: *The Copenhagen Post*, 29 July 2001; *The Copenhagen Post*, 31 July 2001; *The Copenhagen Post*, 24 Aug. 2001 and "Prosecution of New Ambassador?", *The Copenhagen Post*, 7 Nov. 2001 (all available on the Internet: http://cphpost.periskop.dk).

[22]In civil and administrative proceedings this immunity is, however, not absolute. See A. Watts, *op. cit.*, pp. 36 and 54. See also *supra*, footnote 15.

[23]See *supra*, footnotes 12 and 13.

[24]Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, *UNTS*, Vol. 500, p. 95 and Convention on Consular Relations, Vienna, 24 Apr. 1963, *UNTS*, Vol. 596, p. 262.

[25]*YILC* 1989, Vol. II (2), Part 2, para. 146.

[26]A. Watts, *op. cit.*, p. 107.

In the field of the criminal law regarding international core crimes such as war crimes and crimes against humanity, the International Law Commission clearly adopts a restrictive view on immunities, which is reflected in Article 7 of the 1996 Draft Code of Offences against the Peace and Security of Mankind. These Articles are intended to apply, not only to *international* criminal courts, but also to *national* authorities exercising jurisdiction (Art. 8 of the Draft Code) or co-operating mutually by extraditing or prosecuting alleged perpetrators of international crimes (Art. 9 of the Draft Code). I will further develop this when addressing the problem of immunities for incumbent Foreign Ministers charged with war crimes and crimes against humanity[27].

18. The only text of conventional international law, which may be of relevance to answer this question of the protection of Foreign Ministers, is the 1969 Convention on Special Missions[28]. Article 21 of this Convention clearly distinguishes between Heads of State (para. 1) and Foreign Ministers (para. 2):

> "1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law
>
> 2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law . . ."

Legal opinion is divided on the question to what extent this Convention may be considered a codification of customary international law[29]. This Convention has not been ratified by the Parties to the dispute. It links the "facilities, privileges and immunities" of Foreign Ministers' *official visits* (when they take part in a special mission of the sending State). There may be some political wisdom in the proposition that a Foreign Minister should be accorded the same privileges and immunities as a Head of State, but this may be a matter of courtesy, and does not necessarily lead to the conclusion that there is a rule of customary international law to this effect. It certainly does not follow from the text of the Special Missions Convention. Applying this to the dispute between the Democratic Republic of the Congo and Belgium, the only conclusion that follows from the Special Missions Convention, were it to be applicable between the two States concerned, is that an arrest warrant against an incumbent Foreign Minister cannot be enforced when he is on an official visit (immunity from execution)[30].

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[27]See *infra*, paras. 24 *et seq.* and particularly para. 32.

[28]United Nations Convention on Special Missions, New York, 16 Dec. 1969, Ann. to UNGA res. 2530 (XXIV) of 8 Dec. 1969.

[29]J. Salmon observes that the limited number of ratifications of the Convention can be explained because of the fact that the Convention sets all special missions on the same footing, according the same privileges and immunities to Heads of State on a official visit and to the members of an administrative commission which comes negotiating over technical issues. See J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, 1994, p. 546.

[30]See also *infra*, para. 75 (inviolability).

19. Another international Convention that mentions Foreign Ministers is the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons[31]. This Convention indeed defines "internationally protected persons" so as to include Heads of State, Heads of Government and Foreign Ministers and other representatives of the State, and may hereby create the impression that the different categories mentioned can be assimilated (Art. 1). This assimilation, however, is not relevant for the purposes of the present dispute. The 1973 Convention is not about immunities from criminal proceedings in another State, but about the protection of the high foreign officials it enumerates when they are *victims* of certain acts of terrorism such as murder, kidnapping or other attacks on their person or liberty (Art. 2). It is not about procedural protections for these persons when they are themselves accused of being *perpetrators* of war crimes and crimes against humanity.

20. There is hardly any support in legal doctrine for the International Court of Justice's postulated analogy between Foreign Ministers and Heads of State on the subject of immunities. Oppenheim and Lauterpacht write: "members of a Government have not the exceptional position of Heads of States . . ."[32]. This view is shared by A. Cavaglieri[33], P. Cahier[34], J. Salmon[35], B. S. Murty[36] and J. S. Erice Y. O'Shea[37].

Sir Arthur Watts is adamant in observing that principle "suggests that a head of government or Foreign Minister who visits another State *for official purposes* is immune from legal process *while there*"[38]. Commenting further on the question of "private visits", he writes:

> "Although it may well be that a Head of State, when on a private visit to another State, still enjoys certain privileges and immunities, it is much less likely that the same is true of heads of governments and foreign ministers. Although they may be accorded certain special treatment by the host State, this is more likely to be a matter of courtesy and respect for the seniority of the visitor, than a reflection of any belief that such a treatment is required by international law."[39]

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[31]Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, New York, 14 Dec. 1973, 78 *UNTS*, p. 277.

[32]L. Oppenheim, and H. Lauterpacht, (eds.), *International Law, a Treatise*, Vol. I, 1955, p. 358. See also the 1992 Edition (by Jennings and Watts) at p. 1046.

[33]A. Cavaglieri, *Corso di Diritto Internazionale*, Second Edition, pp. 321-322.

[34]P. Cahier, *Le droit diplomatique contemporain*, 1964, pp. 359-360.

[35]J. Salmon, *Manuel de droit diplomatique*, 1994, p. 539.

[36]B. S. Murty, *The International Law of Diplomacy*, 1989, pp. 333-334.

[37]J. S. de Erice Y O'Shea, *Derecho Diplomatico*, 1954, pp. 377-378.

[38]A. Watts, *op. cit.*, p. 106 (emphasis added). See also p. 54 "So far as concerns criminal proceedings, a Head of State's immunity is generally accepted as being *absolute*, as it is for ambassadors, and as provided in Article 31 (1) of the Convention on Special Missions for Heads of States coming within its scope."

[39]A. Watts, *op. cit.*, pp. 109.

21. More recently, the Institut de droit international, at its 2001 Vancouver session, addressed the question of the immunity of Heads of State and Heads of Government. The draft resolution explicitly assimilated Heads of Government *and* Foreign Ministers with Heads of State in Article 14, entitled "Le Chef de gouvernement et le ministre des Affaires étrangères". This draft Article does not appear in the final version of the Institut de droit international resolution. The final resolution only mentions Heads of Government, not Foreign Ministers. The least one can conclude from this difference between the draft resolution and the final text is that the distinguished members of the Institut considered, but did not decide to place Foreign Ministers on the same footing as Heads of State[40].

The reasons behind the final version of the resolution are not clear. It may or may not reflect the Institut de droit international's view that there is no customary international law rule that assimilates Heads of State and Foreign Ministers. Whatever may be the Institut de droit international's reasons, it was a wise decision. Proceeding to assimilations of the kind proposed in the draft resolution would dramatically increase the number of persons that enjoy international immunity from jurisdiction. There would be a potential for abuse. *Male fide* governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States.

22. Victims of such violations bringing legal action against such persons in third States would face the obstacle of immunity from jurisdiction. Today, they may, by virtue of the application of the principle contained in Article 21 of the 1969 Special Missions Convention[41], face the obstacle of immunity from execution while the Minister is on an official visit, but they would not be barred from bringing an action altogether. Taking immunities further than this may even lead to conflict with international human rights rules as appears from the recent *Al-Adsani* case of the European Court of Human Rights[42].

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[40]See the Report of J. Verhoeven, *supra,* footnote 19 (draft resolutions) and the final resolutions adopted at the Vancouver meeting on 26 Aug. 2001 (publication in the *Yearbook* of the Institute forthcoming). See further H. Fox, "The Resolution of the Institute of International Law on the Immunities of Heads of State and Government", *ICLQ* 2002, p. 119-125.

[41]*Supra*, para. 18.

[42]ECHR, Al-Adsani *v.* United Kingdom, 21 Nov. 2001, http://www.echr.coe.int. In that case, the Applicant, a Kuwaiti/British national, claimed to have been the victim of serious human rights violations (torture) in Kuwait by agents of the Government of Kuwait. In the United Kingdom, he complained about the fact that he had been denied access to court in Britain because the courts refused to entertain his complaint on the basis of the 1978 State Immunity Act. Previous cases before the ECHR had usually arisen from human rights violations committed on the territory of the respondent State and related to acts of torture allegedly committed by the authorities of the respondent State itself, not by the authorities of third States. Therefore, the question of international immunities did not arise. In the *Al-Adsani* case, the alleged human rights violation was committed abroad, by authorities of another State and so the question of immunity did arise. The ECHR (with a 9/8 majority), has rejected Mr. Al-Adsani's application and held that there has been no violation of Article 6, paragraph 1, of the Convention (right of access to court). However, the decision was reached with a narrow majority (9/8 and 8 dissenting opinions) and was itself very narrow: it only decided the question of immunities in a *civil* proceeding, leaving the question as to the application of immunities in a *criminal* proceeding unanswered. Dissenting judges, Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajiæ and also Loucaides read the decision of the majority as implying that the court would have found a violation had the proceedings in the United Kingdom been criminal proceedings against an individual for an alleged act of torture (para. 60 of the judgment, as interpreted by the dissenting judges in para. 4 of their opinion).

23. I conclude that the International Court of Justice, by deciding that incumbent Foreign Ministers enjoy *full* immunity from foreign criminal jurisdiction (Judgment, para. 54), has reached a conclusion which has no basis in positive international law. Before reaching this conclusion, the Court should have satisfied itself of the existence of *usus* and *opinio juris*. There is neither State practice nor *opinio juris* establishing an international custom to this effect. There is no treaty on the subject and there is no legal opinion in favour of this proposition. The Court's conclusion is reached without regard to the general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the *par in parem* principle has become more and more restricted and deprived of its mystique[43], but also in the field of criminal law, when there are allegations of serious international crimes[44]. Belgium may have acted contrary to international comity, but has not infringed international law. The Judgment is therefore based on flawed reasoning.

2. Incumbent Foreign Ministers are not immune from the jurisdiction of other States when charged with war crimes and crimes against humanity

24. On the subject of war crimes and crimes against humanity, the Court reaches the following decision: it holds that it is unable to decide that there exists under customary international law any form of exception to the rule according immunity from criminal process and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity (Judgment, para. 58, first alinea).

It goes on by observing that there is nothing in the rules concerning the immunity or the criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals that enables it to find that such an exception exists under customary international law before national criminal tribunals (Judgment, para. 58, second alinea).

This immunity, it concludes, "remain[s] opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions" (Judgment, para. 59 *in fine*).

25. I strongly disagree with these propositions. To start with, as set out above, the Court starts from a flawed premise, assuming that incumbent Foreign Ministers enjoy full immunity from jurisdiction under customary international law. This premise taints the rest of the reasoning. It leads to another flaw in the reasoning: in order to "counterbalance" the postulated customary international law rule of "full immunity", there needs to be evidence of another customary international law rule that would negate the first rule. It would need to be established that the principle of international accountability has also reached the status of customary international law.

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[43] *Supra*, footnote 22.

[44] *Infra*, paras. 24 *et seq.*

The Court finds no evidence for the existence of such a rule in the limited sources it considers[45] and concludes that there is a violation of the first rule, the rule of immunity.

26. Immunity from criminal process, the International Court of Justice emphasizes, does not mean the impunity of a Foreign Minister for crimes that he may have committed, however serious they may be. It goes on by making two points showing its adherence to this principle: *(a)* jurisdictional immunity, being procedural in nature, is not the same as criminal responsibility, which is a question of substantive law and the person to whom jurisdictional immunity applies is not exonerated from all criminal responsibility (Judgment, para. 60); *(b)* immunities enjoyed by an incumbent Foreign Minister under international law do not represent a bar to criminal prosecution in four sets of circumstances, which the Court further examines (Judgment, para. 61).

This is a highly unsatisfactory rebuttal of the arguments in favour of international accountability for war crimes and crimes against humanity, which moreover disregards the higher order of the norms that belong to the latter category. I will address both points in the next two subparagraphs below. Before doing so, I wish to make a general comment on the approach of the Court.

27. Apart from being wrong in law, the Court is wrong for another reason. The more fundamental problem lies in its general approach, that disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes. The Court does not completely ignore this, but it takes an extremely minimalist approach by adopting a very narrow interpretation of the "no immunity-clauses" in international instruments.

Yet, there are many codifications of this principle in various sources of law, including the Nuremberg Principles[46] and Article IV of the Genocide Convention[47]. In addition, there are several United Nations resolutions[48] and reports[49] on the subject of international accountability for war crimes and crimes against humanity.

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[45]In para. 58 of the Judgment, the Court only refers to instruments that are relevant for *international* criminal tribunals (the statutes of the Nuremberg and the Tokyo tribunals, statutes of the *ad hoc* criminal tribunals and the Rome Statute for an International Criminal Court). But there are also other instruments that are of relevance, and that refer to the jurisdiction of *national* tribunals. A prominent example is Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 Jan. 1946. See also Art. 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind.

[46]Nuremberg Principles, Geneva, 29 July 1950, UNGAOR, 5th Session, Supp. No. 12, United Nations doc. A/1316 (1950).

[47]Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 Dec. 1948, *UNTS*, Vol. 78, p. 277. See also Art. 7 of the Nuremberg Charter (Charter of the International Military Tribunal, London, 8 Aug. 1945, *UNTS*, Vol. 82, p. 279); Art. 6 of the Tokyo Charter (Charter of the Military Tribunal for the Far East, Tokyo, 19 Jan. 1946, *TIAS*, No. 1589); Art. II (4) of the Control Council Law No. 10 (Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Berlin, 20 Dec. 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 Jan. 1946); Art. 7, para. 2, of the ICTY Statute (Statute of the International Tribunal for the Former Yugoslavia, New York, 25 May 1993, *ILM* 1993, p. 1192); Art. 6, para. 2, of the ICTR Statute (Statute of the International Tribunal for Rwanda, New York, 8 Nov. 1994, *ILM* 1994, p. 1598); Art. 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind (Draft Code of Crimes against the Peace and Security of Mankind, Geneva, 5 July 1996, *YILC* 1996, Vol. II (2)) and Art. 27 of the Rome Statute for an International Criminal Court (Statute of the International Criminal Court, Rome, 17 July 1998, *ILM* 1998, p. 999).

[48]See, for example, Sub-Commission on Human Rights, Res. 2000/24, *Role of Universal or Extraterritorial Competence in Preventive Action against Impunity*, 18 Aug. 2000, E/CN.4/SUB.2/RES/2000/24; Commission on Human Rights, Res. 2000/68, *Impunity*, 27 Apr. 2000, E/CN.4/RES/2000/68; Commission on Human Rights, Res. 2000/70, *Impunity*, 25 Apr. 2001, E/CN.4/RES/2000/70 (taking note of Sub-Commission Res. 2000/24).

In legal doctrine, there is a plethora of recent scholarly writings on the subject[50]. Major scholarly organizations, including the International Law Association[51] and the Institut de droit international have adopted resolutions[52] and newly established think tanks, such as the drafters of the "Princeton principles"[53] and of the "Cairo principles"[54] have made statements on the issue. Advocacy organizations, such as Amnesty International[55], Avocats sans Frontières[56], Human Rights Watch, The International Federation of Human Rights Leagues (FIDH) and the International Commission of Jurists[57], have taken clear positions on the subject of international accountability[58]. This may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in

[49]Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, 2 Oct. 1997, E/CN.4/Sub.2/1997/20/Rev.1; Commission on Human Rights, *Civil and political rights, including the questions of: independence of the judiciary, administration of justice, impunity, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission res. 1999/33*, E/CN.4/2000/62.

[50]See infra, footnote 98.

[51]International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, 2000.

[52]See also the *Institut de droit international*'s Resolution of Santiago de Compostela, 13 Sep. 1989, commented by G. Sperduti, "Protection of human rights and the principle of non-intervention in the domestic concerns of States. Rapport provisoire", *Yearbook of the Institute of International Law*, Session of Santiago de Compostela, 1989, Vol. 63, Part I, pp. 309-351.

[53]Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, 23 July 2001, with a foreword by Mary Robinson, United Nations High Commissioner for Human Rights, http://www.princeton.edu/~lapa/unive_jur.pdf. See M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, pp. 1-100.

[54]Africa Legal Aid (AFLA), *Preliminary Draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective*, Cairo, 31 July 2001, http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm.

[55]Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, Sep. 2001, AI Index IOR 53/2001.

[56]Avocats sans frontières, "Débat sur la loi relative à la répression des violations graves de droit international humanitaire", discussion paper of 14 Oct. 2001, available on http://www.asf.be.

[57]K. Roth, "The Case For Universal Jurisdiction", *Foreign Affairs*, Sep./Oct. 2001, responding to an article written by an ex Minister of Foreign Affairs in the same review (Henry Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs*, July/Aug. 2001).

[58]See the joint Press Report of Human Rights Watch, the International Federation of Human Rights Leagues and the International Commission of Jurists, "Rights Group Supports Belgium's Universal Jurisdiction Law", 16 Nov. 2000, available at http://www.hrw.org/press/2000/11/world-court.htm or http://www.icj.org/press/press01/english/belgium11.htm. See also the efforts of the International Committee of the Red Cross in promoting the adoption of international instruments on international humanitarian law and its support of national implementation efforts (http://www.icrc.org/eng/advisory_service_ihl; http://www.icrc.org/eng/ihl).

the formation of customary international law today. In several cases, civil society organizations have set in motion a process that ripened into international conventions[59]. Well-known examples are the 1968 Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[60], which can be traced back to efforts of the International Association of Penal law, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, probably triggered by Amnesty International's Campaign against Torture, the 1997 Treaty banning Landmines[61], to which the International Campaign to Ban Landmines gave a considerable impetus[62] and the 1998 Statute for the International Criminal Court, which was promoted by a coalition of non-governmental organizations.

28. The Court fails to acknowledge this development, and does not discuss the relevant sources. Instead, it adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the — wrongly postulated — rule of immunity for incumbent Ministers under customary international law (Judgment, para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the status of the principle of international accountability under international law. As a result, the Court does not further examine the status of the principle of international accountability. Other courts, for example the House of Lords in the *Pinochet* case[63] and the European Court of Human Rights in the *Al-Adsani* case[64], have given more thought and consideration to the balancing of the relative normative status of international *ius cogens* crimes and immunities.

Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that

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[59]M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, p. 92.

[60]Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 Nov. 1968, *ILM* 1969, p. 68.

[61]Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Oslo, 18 Sep. 1997, *ILM* 1997, p. 1507.

[62]The International Campaign to Ban Landmines (ICBL) is a coalition of non-governmental organisations, with Handicap International, Human Rights Watch, Medico International, Mines Advisory Group, Physicians for Human Rights, and Vietnam Veterans of America Foundation as founding members.

[63]R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 24 Mar. 1999, *All. ER* (1999), p. 97.

[64]*Al-Adsani* case: ECHR, Al-Adsani *v.* United Kingdom, 21 Nov. 2001, http://www.echr.coe.int.

there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes[65]? Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are *ius cogens* crimes[66], which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the ground of immunities for incumbent Foreign Ministers, which are probably not part of *ius cogens*[67].

Having made these general introductory observations, I will now turn to the two specific propositions of the International Court of Justice referred to above, i.e., the distinction between substantive and procedural defences and the idea that immunities are not a bar to prosecution[68].

(a) The distinction between immunity as a procedural defence and immunity as a substantive defence is not relevant for the purposes of this dispute

29. The distinction between jurisdictional immunity and criminal responsibility of course exists in all legal systems in the world, but is not an argument in support of the proposition that incumbent Foreign Ministers cannot be subject to the jurisdiction of other States when they are suspected of war crimes and crimes against humanity. There are a host of sources, including the 1948 Genocide Convention[69], the 1996 International Law Commission's Draft Code of Offences against the Peace and Security of Mankind[70], the Statutes of the *ad hoc* international criminal tribunals[71] and the Rome Statute for an International Criminal Court[72]. All these sources confirm

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[65]See: American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States*, St. Paul, Minn., American Law Institute Publishers, Vol. 1, para. 404, Comment; M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague, Kluwer Law International, 1999, p. 610; T. Meron, *Human Rights and Humanitarian Norms As Customary Law*, Oxford, Clarendon Press, 1989, p. 263; T. Meron, "International Criminalization of Internal Atrocities", *AJIL* 1995, p. 558; A. H. J. Swart, *De berechting van internationale misdrijven*, Deventer, Gouda Quint, 1996, p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *Tadic*, paras. 96-127 and 134 (common Art. 3).

[66]M. C. Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", 59 *Law and Contemporary Problems*, 1996, pp. 63-74; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law*, The Hague, Kluwer Law International, 1999, pp. 210-217; C. J. R. Dugard, *Opinion In: Re Bouterse*, para. 4.5.5, to be consulted at: http://www.icj.org/objectives/opinion.htm; K. C. Randall, "Universal Jurisdiction Under International Law", *Texas Law Review*, 1988, pp. 829-832; ICTY, Judgment, 10 Dec. 1998, *Furundzija*, para. 153 (torture).

[67]See the conclusion of Professor J. Verhoeven in his Vancouver report for the Institut de droit international, *supra*, footnote 19, p. 70.

[68]See also *supra*, para. 26.

[69]Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 Dec. 1948, *UNTS*, Vol. 78, p. 277.

[70]"Draft Code of Crimes against the Peace and Security of Mankind", *ILCR* 1996, United Nations doc. 1/51/10.

[71]Statute of the International Tribunal for the former Yugoslavia, New York, 25 May 1993, *ILM* 1993, p. 1192; Statute of the International Tribunal for Rwanda, 8 Nov. 1994, *ILM* 1994, p. 1598.

[72]Rome Statute of the International Criminal Court, Rome, 17 July 1998, *ILM* 1998, p. 999.

the proposition contained in the Principle 3 of the Nuremberg principles[73] which states: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law".

30. The Congo argued that these sources only address substantive immunities, not procedural immunities and that therefore they offer no exception to the principle that incumbent Foreign Ministers are immune from the jurisdiction of other States. Although some authorities seem to support this view[74], most authorities do not mention the distinction at all and even reject it.

31. Principle 3 of the Nuremberg principles (and the subsequent codifications of this principle), in addition to addressing the issue of (procedural or substantive) immunities, deals with the *attribution* of criminal acts to individuals. International crimes are indeed not committed by abstract entities, but by individuals who, in many cases, may act on behalf of the State[75]. Sir Arthur Watts very pertinently writes:

> "States are artificial legal persons: they can only act through the institutions and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice."[76]

At the heart of Principle 3 is the debate about individual versus State responsibility, not the discussion about the procedural or substantive nature of the protection for government officials. This can only mean that, where international crimes such as war crimes and crimes against humanity are concerned, immunity cannot block investigations or prosecutions to such crimes, regardless of whether such proceedings are brought before national or before international courts.

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[73] *Supra*, footnote 46.

[74] See e.g., Principle 5 of *The Princeton Principles on Universal Jurisdiction*. The Commentary states that "There is an extremely important distinction, however, between 'substantive' and 'procedural' immunity", but goes on by saying that "None of these statutes [Nuremberg, ICTY, ICTR] addresses the issue of procedural immunity." (*supra*, footnote 53, pp. 48-51).

[75] See the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, *Nuremberg Trial Proceedings*, Vol. 22, p. 466 "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

[76] A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de l'Académie de droit international*, 1994, III, p. 82.

32. Article 7 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind[77], which is intended to apply to both national and international criminal courts, only confirms this interpretation. In its Commentary to this Article, the International Law Commission states:

> "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."[78]

33. In adopting the view that the non-impunity clauses in the relevant international instruments only address substantive, not procedural immunities, the International Court of Justice has adopted a purely doctrinal proposition, which is not based on customary or conventional international law or on national practice and which is not supported by a substantial part of legal doctrine. It is particularly unfortunate that the International Court of Justice adopts this position without giving reasons.

***(b)* The Court's proposition that immunity does not necessarily lead to impunity is wrong**

34. I now turn to the Court's proposition that immunities protecting an incumbent Foreign Minister under international law are not a bar to criminal prosecution in certain circumstances, which the Court enumerates. The Court mentions four cases where an incumbent or former Minister for Foreign Affairs can, despite his immunities under customary international law, be prosecuted: (1) he can be prosecuted in his own country; (2) he can be prosecuted in other States if the State whom he represents waives immunity; (3) he can be prosecuted after he ceases being a Minister for Foreign Affairs; and (4) he can be prosecuted before an international court (Judgment, para. 61).

In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to *de facto* impunity. All four cases mentioned by the Court are highly hypothetical.

35. Prosecution in the *first two cases* presupposes a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same.

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[77] See also *supra*, para. 17.

[78] Draft Code of Crimes against the Peace and Security of Mankind, *ILCR* 1996, United Nations doc. A/51/10, at p. 41.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime goes unpunished. And this is precisely what happened in the case of Mr. Yerodia. The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect[79].

The Congo was ill placed when accusing Belgium of exercising universal jurisdiction in the case of Mr. Yerodia. If the Congo had acted appropriately, by investigating charges of war crimes and crimes against humanity allegedly committed by Mr. Yerodia in the Congo, there would have been no need for Belgium to proceed with the case. Belgium repeatedly declared, and again emphasized in its opening and closing statements[80] before the Court, that it had tried to transfer the *dossier* to the Congo, in order to have the case investigated and prosecuted by the authorities of the Congo. Nowhere does the Congo mention that it has investigated the allegations of war crimes and crimes against humanity against Mr. Yerodia. Counsel for the Congo even perceived this Belgian initiative as an improper pressure on the Congo[81], as if it were adding insult to injury.

The Congo did not come to the Court with clean hands[82]. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith. It pretends to be offended and morally injured by Belgium by suggesting that Belgium's exercise of "excessive universal jurisdiction" (Judgment, para. 42) was incompatible with its dignity. However, as Sir Hersch Lauterpacht observed in 1951, "the dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it"[83]. The International Court of Justice should at least have made it explicit that the Congo should have taken up the matter itself.

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[79] *Supra*, footnotes 48 and 49.

[80] CR 2001/8, para. 5; CR 2001/11, paras. 3 and 11.

[81] CR 2001/10, p. 7.

[82] G. Fitzmaurice, "The General Principles of International Law Considered from the standpoint of the Rule of Law", *Recueil des Cours de l'Académie de droit international* 1957, II (Vol. 92), p. 119 writes:

> "'He who comes to equity for relief must come with clean hands.' Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality — in short were provoked by it."

See also S. M. Schwebel, "Clean Hands in the Court", in Brown, E. Weiss, *et al.* (eds.), *The World Bank, International Financial Institutions, and the Development of International Law*, American Society of International Law, 1999, pp. 74-78 and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, dissenting opinion of Judge Schwebel, pp. 382-384 and 392-394.

[83] H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", *BYBIL*, 1951, p. 232.

36. The *third case* mentioned by the Court in support of its proposition that immunity does not necessarily lead to impunity is where the person has ceased to be a Foreign Minister (Judgment, para. 61, "Thirdly"). In that case, he or she will no longer enjoy all of the immunities accorded by international law in other States. The Court adds that the lifting of full immunity, in this case, is only for "acts committed prior or subsequent to his or her period of office". For acts committed during that period of office, immunity is only lifted "for acts committed during that period of office in a private capacity". Whether war crimes and crimes against humanity fall into this category the Court does not say[84].

It is highly regrettable that the International Court of Justice has not, like the House of Lords in the *Pinochet* case, qualified this statement[85]. It could and indeed should have added that war crimes and crimes against humanity can never fall into this category. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than "official" acts. Immunity should never apply to crimes under international law, neither before international courts nor national courts. I am in full agreement with the statement of Lord Steyn in the first *Pinochet* case, where he observed that:

> "It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as head of state. That is where the reasoning of the Divisional Court inexorably leads."[86]

The International Court of Justice should have made it clearer that its Judgment can never lead to this conclusion and that such acts can never be covered by immunity.

37. The *fourth case* of "non-impunity" envisaged by the Court is that incumbent or former Foreign Ministers can be prosecuted before "certain international criminal courts, where they have jurisdiction" (Judgment, para. 61, "Fourthly").

The Court grossly overestimates the role an international criminal court can play in cases where the State on whose territory the crimes were committed or whose national is suspected of the crime are not willing to prosecute. The current *ad hoc* international criminal tribunals would only have jurisdiction over incumbent Foreign Ministers accused of war crimes and crimes against humanity in so far as the charges would emerge from a situation for which they are competent, i.e., the conflict in the former Yugoslavia and the conflict in Rwanda.

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[84]See also para. 55 of the Judgment, where the Court says that, from the perspective of his "full immunity", no distinction can be drawn between acts performed by a Minister of Foreign Affairs in an "official capacity" and those claimed to have been performed in a "private capacity".

[85]See *supra*, footnotes 12 and 13.

[86]R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte, 25 Nov. 1998, *All. ER* (1998) 4, p. 945.

The jurisdiction of an International Criminal Court, set up by the Rome Statute, is moreover conditioned by the principle of complementarity: primary responsibility for adjudicating war crimes and crimes against humanity lies with the States. The International Criminal Court will only be able to act if States which have jurisdiction are unwilling or unable genuinely to carry out investigation or prosecution (Art. 17).

And even where such willingness exists, the International Criminal Court, like the *ad hoc* international tribunals, will not be able to deal with *all* crimes that come under its jurisdiction. The International Criminal Court will not have the capacity for that, and there will always be a need for States to investigate and prosecute core crimes[87]. These States include, but are not limited to, national and territorial States. Especially in the case of sham trials, there will still be a need for third States to investigate and prosecute[88].

Not *all* international crimes will be justiciable before the permanent International Criminal Court. It will only be competent to try cases arising from criminal behaviour occurring *after* the entry into force of the Rome Statute. In addition, there is uncertainty as to whether certain acts of international terrorism or certain gross human rights violations in non-international armed conflicts would come under the jurisdiction of the Court. Professor Tomuschat has rightly observed that it would be a "fatal mistake" to assert that, in the absence of an international criminal court having jurisdiction, Heads of State and Foreign Ministers suspected of such crimes would only be justiciable in their own States, and nowhere else[89].

38. My conclusion on this point is the following: the Court's arguments in support of its proposition that immunity does not, in fact, amount to impunity, are very unconvincing.

3. Conclusion

39. My general conclusion on the question of immunity[90] is as follows: the immunity of an incumbent Minister for Foreign Affairs, if any, is not based on customary international law but at most on international comity. It certainly is not "full" or absolute and does not apply to war crimes and crimes against humanity.

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[87]See for example the trial of four Rwandan citizens by a Criminal Court in Brussels: *Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capitale, Arrêt du 8 juin 2001*, not published.

[88]See also *infra*, para. 65.

[89]C. Tomuschat, Intervention at the Institut de droit international's meeting in Vancouver, Aug. 2001, commenting on the draft resolution on Immunities from jurisdiction and Execution of Heads of State and of Government in International law, and giving the example of Iraqi dictator *Sadam Hussein*: Report of the 13th Commission of the Institut de droit international, Vancouver, 2001, p. 94, see further *supra*, footnote 19 and corresponding text.

[90]On the subject of inviolability, see *infra*, para. 75.

III. UNIVERSAL JURISDICTION

40. Initially, when the Congo introduced its request for the indication of a provisional measure in 2000, the dispute addressed two questions: *(a) universal jurisdiction* for war crimes and crimes against humanity; and *(b) immunities* for incumbent Foreign Ministers charged with such crimes (see Judgment, paras. 1 and 42.). In the proceedings on the merits in 2001, the Congo reduced its case to the second point only (see Judgment, paras. 10-12), with no objection from Belgium, which even asked the Court not to judge *ultra petita* (Judgment, para. 41). The Court could, for that reason, not have made a ruling on the question of universal jurisdiction in general.

41. For their own reasons, the Parties thus invited the International Court of Justice to shortcut its decision and to address the question of the immunity from jurisdiction only. The Court, conceding that, as a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, nevertheless decided to address the second question only. It addressed this question assuming, for the purposes of its reasoning, that Belgium had jurisdiction under international law to issue and circulate the arrest warrant (Judgment, para. 46 *in fine*).

42. While the Parties did not request a general ruling, they nevertheless developed extensive arguments on the subject of (universal) jurisdiction. The International Court of Justice, though it was not asked to rule on this point in its *dispositif*, could and should nevertheless have addressed this question as part of its reasoning. It confines itself to observing "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction" (Judgment, para. 59, first sentence). It goes on by observing that various international conventions impose an obligation on States either to extradite or to prosecute, "requiring them to extend their criminal jurisdiction", but immediately adds that "such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs" (Judgment, para. 59, second sentence).

Adopting this narrow perspective, the Court does, again, not need to look at instruments giving effect to the principle of international accountability for war crimes and crimes against humanity. Yet most of the arguments of either Party to this dispute were based on these instruments. By not touching the subject of (universal) jurisdiction at all, the Court did not reply to these arguments and leaves the questions unanswered. I wish to briefly address them here.

43. The Congo accused Belgium of the "exercise of an *excessive* universal jurisdiction" (Judgment, para. 42; emphasis added) because, apart from infringing the rules on international immunities, Belgium's legislation on universal jurisdiction can be applied regardless of the presence of the offender on Belgian territory. This flows from Article 7 of the Belgian Act concerning the Punishment of Grave Breaches of International Humanitarian Law (hereinafter

1993/1999 Act)[91]. The Congo found that this was excessive because Belgium in fact exercised its jurisdiction *in absentia* by issuing the arrest warrant of 11 September 2000 in the absence of Mr. Yerodia.

To this accusation, Belgium answered it was entitled to assert jurisdiction in the present case because international law does not prohibit and even permits States to exercise extraterritorial jurisdiction for war crimes and crimes against humanity.

44. There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways[92]. Although there are many examples of States exercising extraterritorial jurisdiction for international crimes such as war crimes and crimes against humanity and torture, it may often be on other jurisdictional grounds such as the nationality of the victim. A prominent example was the *Eichmann* case which was in fact based, not on universal jurisdiction but on passive personality[93]. In the Spanish *Pinochet* case, an important connecting factor was the Spanish nationality of some of the victims[94]. Likewise, in the case against Mr. Yerodia, some of the complainants were of Belgian nationality[95], even if there were,

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[91]Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, *Moniteur belge* 5 août 1993, as amended by Loi du 10 février 1999, *Moniteur belge* 23 mars 1999; an English translation has been published in *ILM* 1999, pp. 921-925. See generally: A. Andries, C. Van den Wyngaert, E. David, and J. Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", *Rev. Dr. Pén.*, 1994, pp. 1114-1184; E. David, "La loi belge sur les crimes de guerre", *RBDI*, 1995, pp. 668-684; P. d'Argent, "La loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire", *Journal des Tribunaux* 1999, pp. 549-555; L. Reydams, "Universal Jurisdiction over Attrocities in Rwanda: Theory and Practice", *European Journal of Crime, Criminal Law and Criminal Justice*, 1996, pp. 18-47; D. Vandermeersch, "La répression en droit belge des crimes de droit international", *RIDP*, 1997, pp. 1093-1135; Vandermeersch, "Les poursuites et le jugement des infractions de droit international humanitaire en droit belge" in D. H. Bosly *et al.*, *Actualité du droit international humanitaire*, Bruxelles, La Charte, 2001, pp. 123-180; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *Annuaire Français de Droit International*, 1999, pp. 55-71.

[92]For a survey of the implementation of the principle of universal jurisdiction for international crimes in different countries, see, *inter alia*: Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, Sep. 2001, AI Index IOR 53/2001; International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, Ann., 2000; Redress, *Universal Jurisdiction in Europe. Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 June 1999: http://www.redress.org/inpract.html; see also "Crimes internationaux et juridictions nationales" to be published by the Presses Universitaires de France (in print).

[93]Attorney-General of the Government of Israel *v.* Eichmann, 36 *ILR* 1961 p. 5. See also US *v.* Yunis (No. 2), District Court, DC, 12 Feb. 1988, *ILR* 1990, Vol. 82, p. 343; Court of Appeals, DC, 29 January 1991, *ILM* 1991, Vol. 3, p. 403.

[94]*Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena, 5 Nov. 1998*, http://www.derechos.org/nizkor/chile/juicio/audi.html. See also M. Marquez Carrasco and J. A. Fernandez, "Spanish National Court, Criminal Division (Plenary Session). Case 19/97, 4 Nov. 1998, Case 1/98, 5 Nov. 1998", *AJIL* 1999, pp. 690-696.

[95]CR 2001/8, p. 16.

apparently, no Belgian nationals that were victims[96] of the *violence* that allegedly resulted from the hate speeches of which Mr. Yerodia was suspected (Judgment, para. 15)[97].

45. Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning[98] and its legal status under international law[99]. This is not the place to discuss them. What matters for the present dispute is the way in which Belgium has codified universal jurisdiction in its domestic legislation and whether it is, as applied in the case of Mr. Yerodia, compatible with international law.

Article 7 of the 1993/1999 Belgian Act, which is at the centre of the dispute, states the following: "The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed . . ."[100].

46. Despite uncertainties that may exist concerning the definition of universal jurisdiction, one thing is very clear: the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its *raison d'être* is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third

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[96]Some confusion arose over the difference between the notion of "victim" and the notion of "complainant" *(partie civile)*. Belgian law does not provide an *actio popularis*, but only allows victims and their relatives to trigger criminal investigations through the procedure of a formal complaint *(constitution de partie civile)*. On the Belgian system, see C. Van den Wyngaert, "Belgium", in C. Van den Wyngaert, *et al.* (ed.), *Criminal Procedure Systems in the Member States of the European Community*, Butterworth, 1993.

[97]The notion "victim" is wider than the *direct* victim of the crime only, and also includes indirect victims (e.g. the relatives of the assassinated person in the case of murder). Moreover, for crimes such as those with which Mr. Yerodia has been charged (incitement to war crimes and crimes against humanity), death or injury of the (direct) victim is not a constituent element of the crime. Not only those who were effectively killed or injured after the alleged hate speeches are victims, but all persons against whom the incitements were directed, including the victims of Belgian nationality who brought the case before the Belgian investigating judge by lodging a *constitution de partie civile* action. By focusing on the victims of the *violence* in para. 15 of the Judgment, the International Court of Justice seems to adopt a very narrow definition of the notion of victim.

[98]For a very thorough recent analysis of the various positions, diachronically and synchronically, see M. Henzelin, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, Brussel, Bruylant, 2000, p. 527. Other recent publications are M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law* 2001, Vol. 42, pp. 1-100; L. Benavides, "The Universal Jurisdiction Principle", *Annuario Mexicano de Derecho Internacional* 2001, pp. 20-96; J. I. Charney, "International Criminal Law and the Role of Domestic Courts", *AJIL* 2001, pp. 120-124; G. de La Pradelle, "La Compétence Universelle", in H. Ascensio, *et al*. (eds.), *Droit International Pénal*, Paris, A. Pedone, 2000, pp. 905-918; A. Hays Butler, "Universal Jurisdiction: A Review of the Literature", *Criminal Law Forum* 2000, pp. 353-373; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", *LJIL* 2000, pp. 815-854. See also the proceedings of the symposium on Universal Jurisdiction: myths, realities, and prospects, *New England Law Review* 2001, Vol. 35.

[99]For example, some writers hold the view that an independent theory of universal jurisdiction exists with respect to *jus cogens* international crimes. See, for example, M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, p. 28.

[100]"Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu où celles-ci auront été commises." See footnote 91 for further reference.

countries. Scholarly organizations that participated in the debate have emphasized this, for example in the Princeton principles[101], the Cairo principles[102] and the Kamminga report on behalf of the International Law Association[103].

47. It may not have been the International Court of Justice's task to define universal jurisdiction in abstract terms. What it should, however, have considered is the following question: was Belgium under international law, entitled to assert *extraterritorial* jurisdiction against Mr. Yerodia (apart from the question of immunity) in the present case? The Court did not consider this question at all.

1. Universal jurisdiction for war crimes and crimes against humanity is compatible with the "*Lotus*" test

48. The leading case on the question of extraterritorial jurisdiction is the 1927 "*Lotus*" case. In that case, the Permanent Court of International Justice was asked to decide a dispute between France and Turkey, which arose from a criminal proceeding in Turkey against a French national. This person, the captain of a French ship, was accused of involuntary manslaughter causing Turkish casualties after a collision between his ship and a Turkish ship on the high seas. Like in the present dispute, the question was whether the respondent State, Turkey, was entitled to conduct criminal proceedings against a foreign national for crimes committed outside Turkey. France argued that Turkey was not entitled to prosecute the French national before its domestic courts because there was no permission, and indeed a prohibition under customary international law for a State to assume extraterritorial jurisdiction. Turkey argued that it was entitled to exercise jurisdiction under international law.

49. The Permanent Court of International Justice decided that there was no rule of conventional or customary international law prohibiting Turkey from asserting jurisdiction over facts committed outside Turkey. It started by saying that, as a matter of principle, jurisdiction is territorial and that a State cannot exercise jurisdiction outside its territory without a permission derived from international custom or from a convention. It however immediately added a qualification to this principle in a famous dictum that students of international law know very well:

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[104]

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[101] *Supra*, footnote 53.

[102] *Supra*, footnote 54.

[103] *Supra*, footnote 51.

[104] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

A distinction must be made between prescriptive jurisdiction and enforcement jurisdiction. The above-mentioned *dictum* concerns *prescriptive jurisdiction*: it is about what a State may do *on its own territory* when investigating and prosecuting crimes committed abroad, not about what a State may do on the territory of other States when prosecuting such crimes. Obviously, a State has no *enforcement jurisdiction* outside its territory: a State may, failing permission to the contrary, not exercise its power on the territory of another State. This is "the first and foremost restriction imposed by international law upon a State"[105]. In other words, the permissive rule only applies to prescriptive jurisdiction, not to enforcement jurisdiction: failing a prohibition, State A *may*, on its own territory, prosecute offences committed in State B *(permissive rule)*; failing a permission, State A *may not* act on the territory of State B.

50. Does the arrest warrant of 11 April 2000 come under the first species of jurisdiction, under the second, or under both? In other words: has Belgium, by asserting jurisdiction in the form of the issuing and circulation of an arrest warrant on charges of war crimes and crimes against humanity against a foreign national for crimes committed abroad, engaged in prescriptive jurisdiction, in enforcement jurisdiction, or in both?

Given the fact that the warrant has never been enforced, the dispute is in the first place about prescriptive jurisdiction. However, the title of the warrant ("*international* arrest warrant") gave rise to questions about enforcement jurisdiction also.

I believe that Belgium, by issuing and circulating the warrant, violated neither the rules on prescriptive jurisdiction nor the rules on enforcement jurisdiction. My views on enforcement jurisdiction will be part of my reasoning in Section IV, where I will consider whether there was an internationally wrongful act in the present case[106]. In the present Section, I will deal with prescriptive jurisdiction. I will measure the statutory provision that is at the centre of the dispute, Article 7 of the 1993/1999 Belgian Act, against the yardstick of the *"Lotus"* test on *prescriptive* jurisdiction.

51. It follows from the *"Lotus"* case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law. I believe that there is *no prohibition* under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad.

It has often been argued, not without reason, that the *"Lotus"* test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today[107]. In the *Nuclear Weapons* case, there were two groups of

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

[106] See *infra*, paras. 68 *et seq.*

[107] Cf. American Law Institute, Restatement (Third) Foreign Relations Law of the United States, (1987), pp. 235-236; I. Cameron, *The Protective Principle of International Criminal Jurisdiction*, Aldershot, Dartmouth, 1994, p. 319; F. A. Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des Cours de l'Académie de droit international* Vol. 111, 1964, I, p. 35; R. Higgins, *Problems and Process. International Law and How We Use It*, Oxford, Clarendon Press, 1994, p. 77. See also Council of Europe, *Extraterritorial jurisdiction in criminal matters*, Strasbourg, 1990, pp. 20 *et seq.*

States each giving a different interpretation of *"Lotus"* on this point[108] and President Bedjaoui, in his separate opinion, expressed hesitations about *"Lotus"*[109]. Even under the more restrictive view, Belgian legislation stands. There is ample evidence in support of the proposition that international law clearly *permits* States to provide extraterritorial jurisdiction for such crimes.

I will give reasons for both propositions in the next paragraphs. I believe that *(a)* international law does *not prohibit* universal jurisdiction for war crimes and crimes against humanity *(b)* clearly permits it.

(a) International law does not prohibit universal jurisdiction for war crimes and crimes against humanity

52. The Congo argued that the very concept of universal jurisdiction presupposes the presence of the defendant on the territory of the prosecuting State. Universal jurisdiction *in absentia*, it submitted, was contrary to international law. This proposition needs to be assessed in the light of conventional and customary international law and of legal doctrine.

53. As a preliminary observation, I wish to make a linguistic comment. The term "universal jurisdiction" does not necessarily mean that the suspect should be present on the territory of the prosecuting State. Assuming the presence of the accused, as some authors do, does not necessarily mean that it is a legal requirement. The term may be ambiguous, but precisely for that reason one should refrain from jumping to conclusions. The Latin maxims that are sometimes used, and that seem to suggest that the offender must be present *(judex deprehensionis ¾ ubi te invenero ibi te judicabo)* have no legal value and do not necessarily coincide with universal jurisdiction.

54. There is no rule of *conventional international law* to the effect that universal jurisdiction *in absentia* is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IVth Geneva Convention of 1949[110], which lays down the principle *aut dedere aut judicare*[111]. A textual interpretation of this Article does not logically presuppose the presence of the offender, as the Congo tries to show. The Congo's reasoning in this respect is

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[108] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* 1996, pp. 16-17, para. 21.

[109] *I.C.J. Reports 1996*, p. 270, para. 12.

[110] Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 287. See also Art. 49 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 31; Art. 50 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 85; Art. 129 Convention relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 135; Art. 85 (1) Protocol Additional (I) to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, *UNGAOR*, doc. A/32/144, 15 Aug. 1977.

[111] See further *infra*, para. 62.

interesting from a doctrinal point of view, but does not logically follow from the text. For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect. Reading into Article 146 of the IVth Geneva Convention a limitation on a State's right to exercise universal jurisdiction would fly in the face of a *teleological interpretation* of the Geneva Conventions. The purpose of these Conventions, obviously, is not to restrict the jurisdiction of States for crimes under international law.

55. There is no *customary international law* to this effect either. The Congo submits there is a State practice, evidencing an *opinio juris* asserting that universal jurisdiction, *per se*, requires the presence of the offender on the territory of the prosecuting State. Many national systems giving effect to the obligation *aut dedere aut judicare* and/or the Rome Statute for an International Criminal Court indeed require the presence of the offender. This appears from legislation[112] and from a number of national decisions including the Danish *Saric* case[113], the French *Javor* case [114] and the German *Jorgic* case[115]. However, there are also examples of national systems that do not require the presence of the offender on the territory of the prosecuting State[116]. Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State[117].

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[112]See, e.g., the Swiss Penal Code, Art. 6bis, 1; the French Penal Code, Art. 689-1; the Canadian Crimes against Humanity and War Crimes Act (2000), Art. 8.

[113]Public Prosecutor *v.* T., Supreme Court (Hojesteret), Judgment, 15 Aug. 1995, *Ugeskrift for Retsvaesen*, 1995, p. 838, reported in *Yearbook of International Humanitarian Law*, 1998, p. 431 and in R. Maison, "Les premiers cas d'application des dispositions pénales des Conventions de Genève: commentaire des affaires danoise et française", *EJIL* 1995, p. 260.

[114]Cour de Cassation (Fr.), 26 Mar. 1996, *Bull. Crim.*, 1996, pp. 379-382.

[115]Bundesgerichtshof 30 Apr. 1999, 3 StR 215/98, *NStZ* 1999, p. 396. See also the critical note (*Anmerkung*) by Ambos, *ibid*., pp. 405-406, who doesn't share the view of the judges that a "legitimizing link" is required to allow Germany to exercise its jurisdiction over crimes perpetrated outside its territory by foreigners against foreigners, even if these amount to serious crimes under international law (*in casu* genocide). In a recent judgment concerning the application of the Geneva Conventions, the Court, however, decided that such a link was not required, since German jurisdiction was grounded on a binding norm of international law instituting a duty to prosecute, so there could hardly be a violation of the principle of non-intervention (Bundesgerichtshof, 21 Feb. 2001, 3 StR 372/00, retrievable on http://www.hrr-strafrecht.de).

[116]See, for example, the prosecutions instituted in Spain on the basis of Art. 23.4 of the *Ley Orgánica del Poder Judicial* (Law 6/1985 of 1 July 1985 on the Judicial Power) against Senator Pinochet and other South-American suspects whose extradition was requested. In New Zealand, proceedings may be brought for international "core crimes" regardless of whether or not the person accused was in New Zealand at the time a decision was made to charge the person with an offence (Sec. 8, (1) *(c)* (iii) of the International Crimes and International Criminal Court Act 2000).

[117]The German Government very recently reached agreement on a text for an "International Crimes Code" (*Völkerstrafgesetzbuch*) (see Bundesministerium der Justiz, *Mitteillung für die Presse 02/02*, Berlin, 16 Jan. 2002). The new code would allow the German Public Ministry to prosecute cases without any link to Germany and without the presence of the offender on the national territory. The Prosecutor would only be obliged to defer prosecution in such a case when an International Court or the Courts of a State basing its jurisdiction on territoriality or personality were in fact prosecuting the suspect (see: Bundesministerium der Justiz, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, pp. 19 and 89, to be consulted on the Internet: http://www.bmj.bund.de/images/11222.pdf).

And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. National decisions should be read with much caution. In the *Bouterse* case, for example, the Dutch Supreme Court did not state that the requirement of the presence of the suspect was a requirement under international law, but only under domestic law. It found that, *under Dutch law*, there was no such jurisdiction to prosecute Mr. Bouterse but did not say that exercising such jurisdiction would be contrary to *international law*. In fact, the Supreme Court did *not* follow the Advocate General's submission on this point[118].

56. The "*Lotus"* case is not only an authority on jurisdiction, but also on the formation of customary international law as was set out above. A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Only if this abstinence was based on a conscious decision of the States in question can this practice generate customary international law[119]. As in the case of immunities, such abstinence may be attributed to other factors than the existence of an *opinio juris*. There may be good political or practical reasons for a State not to assert jurisdiction in the absence of the offender.

It may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.

A *practical* consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system. This was stated by the Court of Appeal in the United Kingdom in the *Al-Adsani* case[120] and seems to have been an explicit reason for the Assemblée nationale in France to refrain from introducing universal jurisdiction *in absentia* when adopting universal jurisdiction over the crimes falling within the Statute of the Yugoslavia Tribunal[121]. The concern for a linkage with the national order thus seems to be more of a pragmatic than of a juridical nature. It is not, therefore, necessarily the expression of an *opinio juris* to the effect that this form of universal jurisdiction is contrary to international law.

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[118]See *supra*, footnote 5. The Court of Appeal of Amsterdam had, in its judgment of 20 Nov. 2000, decided, *inter alia*, that Mr. Bouterse could be prosecuted *in absentia* on charges of torture (facts committed in Surinam in 1982). This decision was reversed by the Dutch Supreme Court on 18 Sep. 2001, *inter alia* on the point of the exercise of universal jurisdiction *in absentia*. The submissions of the Dutch Advocate General are attached to the judgment of the Supreme Court, *loc. cit*., paras. 113-137 and especially para. 138.

[119]See *supra*, para. 13.

[120]ECHR, Al-Adsani *v.* United Kingdom, 21 Nov. 2001, para. 18 and the concurring opinions of Judges Pellonpää and Bratza, retrievable at: http://www.echr.coe.int. See the discussion in Marks, "Torture and the Jurisdictional Immunities of Foreign States", *CLJ* 1997, pp. 8-10.

[121]See *Journal Officiel de l'Assemblée nationale*, 20 décembre 1994, 2e séance, p. 9446.

57. There is a massive literature of learned scholarly writings on the subject of universal jurisdiction[122]. I confine myself to three studies, which emanate from groups of scholars: the Princeton principles[123], the Cairo principles[124] and the Kamminga report on behalf of the ILA[125], and look at one point: do the authors support the Congo's proposition that universal jurisdiction *in absentia* is contrary to international law? The answer is: no[126].

58. I conclude that there is no conventional or customary international law or legal doctrine in support of the proposition that (universal) jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant is present on the territory of the prosecuting State.

(b) International law permits universal jurisdiction for war crimes and crimes against humanity

59. International law clearly permits universal jurisdiction for war crimes and crimes against humanity. For both crimes, permission under international law exists. For crimes *against humanity*, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction[127]. In the case of *war crimes*, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 of the IVth Geneva Convention[128], which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians[129].

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[122]For recent sources see *supra*, footnote 98.

[123]*Supra*, footnote 53.

[124]*Supra*, footnote 54.

[125]*Supra*, footnote 51.

[126]Although the wording of Princeton Principle 1 (2) may appear somewhat confusing, the authors definitely did not want to prevent a State from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition when the accused is not present, as is confirmed by Principle 1 (3). See the Commentary on the Princeton Principles at p. 44.

[127]On the subject of genocide and the Genocide Convention of 1948, the International Court of Justice held that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" and "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996* (II), p. 616, para. 31.

[128]See supra, footnote 110.

[129]See International Committee of the Red Cross, *National Enforcement of International Humanitarian Law: Universal Jurisdiction Over War Crimes*, retrievable at: http://www.icrc.org/; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", *LJIL* 2000, pp. 815-854.

From the perspective of the drafting history of international criminal law conventions, this is probably one of the first codifications of this principle, which, in legal doctrine, goes back at least to Hugo Grotius but has probably much older roots[130]. However, it had not been codified in conventional international law until 1949. There are older Conventions such as the 1926 Slavery Convention[131] or the 1929 Convention on Counterfeiting[132], which require States to lay down rules on *jurisdiction* but which do not provide an *aut dedere aut judicare* obligation. The 1949 Conventions are probably the first to lay down this principle in an article that is meant to cover both jurisdiction and prosecution.

Subsequent Conventions have refined this way of drafting and have laid down distinctive provisions on *jurisdiction* on the one hand and on prosecution *(aut dedere aut judicare)* on the other. Examples are the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Arts. 4 and 7 respectively)[133] and the 1984 Convention against Torture (Arts. 5 and 7 respectively)[134].

60. In order to assess the "permissibility" of universal jurisdiction for international crimes, it is important to distinguish between *jurisdiction* clauses and *prosecution (aut dedere aut judicare)* clauses in international criminal law conventions.

61. The *jurisdiction* clauses in these Conventions usually oblige States to provide extraterritorial jurisdiction, but do not exclude States from exercising jurisdiction under their national laws. Even where they do not provide universal jurisdiction, they do not exclude it either, nor do they require States to refrain from providing this form of jurisdiction under their domestic law. The standard formulation of this idea is that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with national law". This formula can be found in a host of Conventions, including the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Art. 4, para. 3) and the 1984 Convention against Torture (Art. 5, para. 3).

62. The *prosecution* clauses *(aut dedere aut judicare)*, however, sometimes link the prosecution obligation to extradition, in the sense that a State's duty to prosecute a suspect only exists "if it does not extradite him". Examples are Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and Article 7 of the 1984 Convention against Torture. This, however, does not mean that prosecution is *only* possible in cases where extradition has been refused.

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[130]G. Guillaume, "La compétence universelle. Formes anciennes et nouvelles", X, *Mélanges offerts à Georges Levasseur*, Parijs, Editions Litec, 1992, p. 27.

[131]Slavery Convention, Geneva, 25 Sep. 1926, 60 League of Nations, *Treaty Series (LNTS)*, p. 253.

[132]International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 Apr 1929, *LNTS*, p. 371, para. 112.

[133]Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 Dec. 1970, *ILM* 1971, p. 134.

[134]Convention against Torture and other Cruel, Inhuman of Degrading Treatment of Punishment, New York, 10 Dec. 1984, *ILM* 1984, p. 1027, with changes in *ILM* 1985, p. 535.

Surely, this formula cannot be read into Article 146 of the IVth Geneva Convention which according to some authors even prioritizes prosecution over extradition: *primo prosequi, secundo dedere*[135]. Even if one adopts the doctrinal viewpoint that the notion of universal jurisdiction assumes the presence of the offender, there is nothing in Article 146 that warrants the conclusion that this is an actual requirement.[136].

2. Universal jurisdiction is not contrary to the complementarity principle in the Statute for an International Criminal Court

63. Some argue that, in the light of the Rome Statute for an International Criminal Court, it will be for the International Criminal Court, and not for States acting on the basis of universal jurisdiction, to prosecute suspects of war crimes and crimes against humanity. National statutes providing universal jurisdiction, like the Belgian Statute, would be contrary to this new philosophy and could paralyse the International Criminal Court. This was also the proposition of the Congo in the present dispute[137].

64. This proposition is wrong. The Rome Statute does not prohibit universal jurisdiction. It would be absurd to read the Rome Statute in such a way that it limits the jurisdiction for core crimes to either the national State or the territorial State or the International Criminal Court. The relevant clauses are about the preconditions for the International Criminal Court to exercise jurisdiction (Art. 17, Rome Statute — the complementarity principle), and cannot be construed as containing a general limitation for third States to investigate and prosecute core crimes. Surely, the Rome Statute does not preclude third States (other than the territorial State and the State of nationality) from exercising universal jurisdiction. The preamble, which unequivocally states the objective of avoiding impunity, does not allow this inference. In addition, the *opinio juris*, as it appears from United Nations resolutions[138], focuses on impunity, individual accountability and the responsibility of *all* States to punish core crimes.

65. An important practical element is that the International Criminal Court will not be able to deal with *all* crimes; there will still be a need for States to investigate and prosecute core crimes. These States include, but are not limited to, national and territorial States. As observed previously, there will still be a need for third States to investigate and prosecute, especially in the case of sham trials. Also, the International Criminal Court will not have jurisdiction over crimes committed before the entry into force of its Statute (Art. 11, Rome Statute). In the absence of other mechanisms for the prosecution of these crimes, such as national courts exercising universal jurisdiction, this would leave an unacceptable source of impunity[139].

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[135]The Geneva Conventions of 1949 are unique in that they provide a mechanism which goes further than the *"aut dedere, aut judicare"* model and which can be described as *"aut judicare, aut dedere"*, or, even more poignantly, as *"primo prosequi, secundo dedere"*. See, respectively, R. van Elst, *loc. cit.*, pp. 818-819; M. Henzelin, *op. cit.*, p. 353, para. 1112.

[136]See M. Henzelin, *op. cit.*, p. 354, para. 1113.

[137]See Memorial of the Congo, p. 59, "Obligation de ne pas priver le Statut de la C.P.I. de son objet et de son but".

[138]See footnotes 48 and 49.

[139]See also *supra*, para. 37.

66. The Rome Statute does not establish a *new* legal basis for third States to introduce universal jurisdiction. It does not prohibit it but does not authorize it either. This means that, as far as crimes in the Rome Statute are concerned (war crimes, crimes against humanity, genocide and in the future perhaps aggression and other crimes), pre-existing sources of international law retain their importance.

3. Conclusion

67. Article 7 of Belgium's 1993/1999 Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. International law does not prohibit States from asserting prescriptive jurisdiction of this kind. On the contrary, international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens. It is not in conflict with the principle of complementarity in the Statute for an International Criminal Court.

IV. EXISTENCE OF AN INTERNATIONALLY WRONGFUL ACT

68. Having concluded that incumbent Ministers for Foreign Affairs are fully immune from foreign criminal jurisdiction (Judgment, para. 54), even if charged with war crimes and crimes against humanity (Judgment, para. 58), the International Court of Justice examines whether the issuing and circulating of the warrant of 11 April 2000 constituted a violation of those rules. On the subject of the *issuance* and the *circulation* of the warrant respectively, the Court concludes:

> "that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.
>
> . . . . . .
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> that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law." (Judgment, paras. 70-71.)

69. As stated at the outset, I find it highly regrettable that neither of these crucial sentences in the Court's reasoning mention the fact that the arrest warrant was about war crimes and crimes against humanity. The *dispositif* (para. 78 (2)) also fails to mention this fact.

70. I disagree with the conclusion that there was a violation of an obligation of Belgium towards the Congo, because I reject its premise. Mr. Yerodia was not immune from Belgian jurisdiction for war crimes and crimes against humanity for the reasons set out above. As set out

before, this may be contrary to international courtesy, but there is no rule of customary or conventional international law granting immunity to incumbent Foreign Ministers who are suspected of war crimes and crimes against humanity.

71. Moreover, Mr. Yerodia was never actually arrested in Belgium, and there is no evidence that he was hindered in the exercise of his functions in third countries. Linking the foregoing with my observations on the question of universal jurisdiction in the preceding section of my dissenting opinion, I wish to distinguish between the two different "acts" that, in the International Court of Justice's Judgment, constitute a violation of customary international law: on the one hand, the *issuing* of the disputed arrest warrant, on the other its *circulation*.

1. The *issuance* of the disputed arrest warrant in Belgium was not in violation of international law

72. Mr. Yerodia was never arrested, either when he visited Belgium officially in June 2000[140] or thereafter. Had it applied the only relevant provision of conventional international law to the dispute, Article 21, paragraph 2, of the Special Missions Convention, the Court could not have reached its decision. According to this article, Foreign Ministers "when they take part in a special mission of the sending State, shall enjoy in the receiving State or in third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law"[141]. In the present dispute, this could only lead to the conclusion that there was no violation: the warrant was never executed, either in Belgium, or in third countries.

73. Belgium accepted, as a matter of international courtesy, that the warrant could not be executed against Mr. Yerodia were he to have visited Belgium officially (immunity from execution, Judgment, para. 49). This was explicitly mentioned in the warrant: the warrant was not enforceable and was in fact not served on him or executed when Mr. Yerodia came to *Belgium* on an official visit in June 2001. Belgium thus respected the principle, contained in Article 21 of the Special Missions Convention that is not a statement of customary international law but only of international courtesy[142].

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[140]Mr. Yerodia's visit to Belgium is not mentioned in the judgment because the parties were rather unclear on this point. Yet, it seems that Mr. Yerodia effectively visited Belgium on 17 June 2000. This was reported in the media (see the statement by the Minister of Foreign Affairs in *De Standaard*, 7 July 2000) and also in a question that was put in Parliament to the Minister of Justice. See Question orale de M. Tony Van Parys au ministre de la Justice sur "l'intervention politique du gouvernement dans le dossier à charge du ministre congolais des Affaires étrangères, M. Yerodia", *Chambre des représentants de la Belgique, Compte Rendu Intégral avec compte rendu analytique*, Commission de la Justice, 14 Nov. 2000, CRIV 50 COM 294, p. 12. Despite the fact that this fact is not, as such, recorded in the documents that were before the International Court of Justice, I believe the Court could have taken judicial notice of it.

[141]*Supra*, para. 18.

[142]See the statement of the International Law Commission's special rapporteur, referred to *supra*, para. 17.

74. These are the only *objective elements* the Court should have looked at. The *subjective* elements, i.e., whether the warrant had a psychological effect on Mr. Yerodia or whether it was perceived as offensive by the Congo (cf. the term *iniuria* used by Maître Rigaux throughout his pleadings in October 2001[143] and the term *capitis diminutio* used by Maître Vergès during his pleadings in November 2000[144]) was irrelevant for the dispute. The warrant only had a potential legal effect on Mr. Yerodia as a private person in case he would have visited Belgium privately, *quod non*.

75. In its *dispositif* (Judgment, para. 78 (2)), the Court finds that Belgium failed to respect the immunity from criminal jurisdiction *and inviolability* for incumbent Foreign Ministers. I have already explained why, in my opinion, there has been no infringement of the rules on *immunity* from criminal jurisdiction. I find it hard to see how, *in addition* (the Court using the word "and"), Belgium could have infringed the *inviolability* of Mr Yerodia by the mere issuance of a warrant that was never enforced.

The Judgment does not explain what is meant by the word "inviolability", and simply juxtaposes it to the word "immunity". This may give rise to confusion. Does the Court put the *mere issuance* of an order on the same footing as the *actual enforcement* of the order? Would this also mean that the mere act of investigating criminal charges against a Foreign Minister would be contrary to the principle of inviolability?

Surely, in the case of diplomatic agents, who enjoy absolute immunity and inviolability under the 1961 Vienna Convention on Diplomatic Relations[145], allegations of criminal offences may be investigated as long as the agent is not interrogated or served with an order to appear. This view is clearly stated by Jean Salmon[146]. Jonathan Brown notes that, in the case of a diplomat, the issuance of a charge or summons is probably contrary to the diplomat's *immunity*, whereas its execution would be likely to infringe the agent's *inviolability*[147].

If the Court's *dispositif* were to interpreted as to mean that mere investigations of criminal charges against Foreign Ministers would infringe their *inviolability*, the implication would be that Foreign Ministers enjoy greater protection than diplomatic agents under the Vienna Convention. This would clearly go beyond what is accepted under international law in the case of diplomats.

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[143]CR 2001/5, p. 14.

[144]CR 2000/32.

[145]Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, *UNTS*, Vol. 500, p. 95.

[146]J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, 1994, p. 304.

[147]J. Brown, "Diplomatic immunity: State Practice Under the Vienna Convention on Diplomatic Relations", 37 *ICLQ* 1988, p. 53.

2. The *international circulation* of the disputed arrest warrant was not in violation of international law

76. The question of the circulation of the warrant may be somewhat different, because it might be argued that circulating a warrant internationally brings it within the realm of *enforcement* jurisdiction, which, under the "*Lotus"* test, is in principle prohibited. Under that test, States can only act on the territory of other States if there is permission to this effect in international law. This is the "first and foremost restriction" that international law imposes on States[148].

77. Even if one would accept, together with the Court, the premise there is a rule under customary law protecting Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process of other States, it still remains to be established that Belgium actually infringed this rule by asserting enforcement jurisdiction. Much confusion arose from the title that was given to the warrant, which was called "*international* arrest warrant" on the document issued by the Belgian judge. However, this is a very misleading term both under Belgian law and under international law. International arrest warrants do not exist as a special category under Belgian law. It is true that the title of the document was misleading, but giving a document a misleading name does not actually mean that this document also has the effect that it suggests it has.

78. The term *international* arrest warrant is misleading, in that it suggests that arrest warrants can be enforced in third countries without the validation of the local authorities. This is not the case: there is always a need for a validation by the authorities of the State where the person, mentioned in the warrant, is found. Accordingly, the Belgian arrest warrant against Mr. Yerodia, even after being circulated in the Interpol system, could not be automatically enforced in all Interpol member States. It may have caused an inconvenience that was perceived as offensive by Mr. Yerodia or by the Congolese authorities. It is not *per se* a limitation of the Congolese Foreign Minister's right to travel and to exercise his functions.

I know of no State that automatically enforces arrest warrants issued in other States, not even in regional frameworks such as the European Union. Indeed, the discussions concerning the *European arrest warrant* were about introducing something that does not exist at present: a rule by which member States of the European Union would automatically enforce each other's arrest warrants[149]. At present, warrants of the kind that the Belgian judge issued in the case of Mr. Yerodia are not automatically enforceable in Europe.

In inter-State relations, the proper way for States to obtain the presence of offenders who are not on their territory is through the process of *extradition*. The discussion about the legal effect of the Belgian arrest warrant in third States has to be seen from that perspective. When a judge issues an arrest warrant against a suspect whom he believes to be abroad, this warrant may lead to an

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[148] *Supra*, para. 49.

[149] See the *Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States*, COM(2001)522, available on the Internet: http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0522.pdf. An amended version can be found in: Council of the European Union, Outcome of proceedings, 10 Dec. 2001, 14867/1/01 REV 1 COPEN 79 CATS 50.

extradition request. This is not automatic: it is up to the Government whether or not to request extradition[150]. Extradition requests are often preceded by a request for *provisional arrest for the purposes of extradition.* This is what the *Interpol Red Notices* are about. Red Notices are issued by Interpol on the request of a State which wishes to have the person named in the warrant provisionally arrested in a third State for the purposes of extradition. Not all States, however, give this effect to an Interpol Red Notice[151].

Requests for the provisional arrest are, in turn, often preceded by an *international tracing request*, which aims at localizing the person named in the arrest warrant. This "communication" does not have the effect of a Red Notice, and does not include a request for the provisional arrest of the person named in the warrant. Some countries may refuse access to a person whose name has been circulated in the Interpol system or against whom a Red Notice has been requested. This is, however, a question of domestic law.

States may also prohibit the official visits of persons who are suspected of international crimes refusing a visa, or by refusing accreditation if such persons are proposed for a diplomatic function[152], but this, again, is a domestic matter for third States to consider, and not an automatic consequence of a judge's arrest warrant.

79. In the case of Mr. Yerodia, Belgium communicated the warrant to Interpol (end of June 2000), but did not request an Interpol Red Notice until September 2001, which was when Mr. Yerodia had ceased to be a Minister. It follows that Belgium never requested any country to arrest Mr. Yerodia provisionally for the purposes of extradition while he was a Foreign Minister. The Congo claims that Mr. Yerodia was, in fact, restricted in his movements as a result of the Belgian arrest warrant. Yet, it fails to adduce evidence to prove this point. It appears, on the contrary, that Mr. Yerodia has made a number of foreign travels after the warrant had been circulated in the Interpol system (2000), including an official visit to the United Nations. During the hearings, it was said that, when attending this United Nations Conference in New York, Mr. Yerodia chose the shortest way between the airport and the United Nations building, because he feared being arrested[153]. This fear, which he may have had, was based on psychological, not on legal grounds. Under the 1969 Special Missions Convention, he could not be arrested in third countries when on an official visit. On his official visits in third States, no coercive action was taken against him on the basis of the Belgian warrant.

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[150]Often, governments refrain from requesting extradition for political reasons, as was shown in the case of Mr. Ocalan, where Germany decided not to proceed to request Mr. Ocalan's extradition from Italy. See Press Reports: "Bonn stellt Auslieferungsersuchen für Öcalan zurück", *Frankfurter Allgemeine*, 21 Nov. 1998 and "Die Bundesregierung verzichtet endgültig auf die Auslieferung des Kurdenführers Öcalan", *Frankfurter Allgemeine*, 28 Nov. 1998.

[151]Interpol, Secretariat général, *Rapport sur la valeur juridique des notices rouges*, ICPO — Interpol — General Assembly, 66th Session, New Delhi, 15-21 Oct. 1997, AGN/66/RAP/8, No. 8 Red Notices, as amended pursuant to res. No. AGN/66/RES/7.

[152]See the Danish hesitations concerning the accreditation of an Ambassador for Israel, *supra*, footnote 21.

[153]CR 2001/10/20.

3. Conclusion

80. The warrant could not be and was not executed in the country where it was *issued* (Belgium) or in the countries to which it was *circulated*. The warrant was not executed *in Belgium* when Mr. Yerodia visited Belgium officially in June 2000. Belgium did not lodge an extradition request to *third countries* or a request for the provisional arrest for the purposes of extradition. The warrant was not an "international arrest warrant", despite the language used by the Belgian judge. It could and did not have this effect, neither in Belgium nor in third countries. The allegedly wrongful act was a purely domestic act, with no *actual* extraterritorial effect.

V. REMEDIES

81. On the subject of remedies, the Congo asked the Court for two different actions: *(a)* a declaratory judgment to the effect that the warrant and its circulation through Interpol was contrary to international law and *(b)* a decision to the effect that Belgium should withdraw the warrant and its circulation. The Court granted both requests: it decided *(a)* that the issue and international circulation of the arrest warrant were in breach of a legal obligation of Belgium towards the Congo (Judgment, para. 78 (2) of the *dispositif*) and *(b)* that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom the warrant was issued (Judgment, para. 78 (3) of the *dispositif*).

82. I have, in Sections II (Immunities), III (Jurisdiction) and IV (Existence of an internationally wrongful act) of my dissenting opinion, given the reasons why I voted against paragraph 78 (2) of the *dispositif* relating to the illegality, under international law, of the arrest warrant: I believe that Belgium was not, under positive international law, obliged to grant immunity to Mr. Yerodia on suspicions of war crimes and crimes against humanity and, moreover, I believe that Belgium was perfectly entitled to assert extraterritorial jurisdiction against Mr. Yerodia for such crimes.

83. I still need to give reasons for my vote against paragraph 78 (3) of the *dispositif*, calling for the cancellation and the "decirculation" of the disputed arrest warrant. Even assuming, *arguendo*, that the arrest warrant was illegal in the year 2000, it was no longer illegal on the moment when the Court gave Judgment in this case. Belgium's alleged breach of an international obligation did not have a continuing character: it may have lasted as long as Mr. Yerodia was in

office, but it did not continue in time thereafter[154]. For that reason, I believe the International Court of Justice cannot ask Belgium to cancel and "de-circulate" an act that is not illegal today.

84. In its Counter-Memorial and pleadings, Belgium formulated three preliminary objections based on Mr. Yerodia's change of position. It argued that, due to Mr. Yerodia's ceasing to be a Minister today, the Court *(a)* no longer had jurisdiction to try the case, *(b)* that the case had become moot, and *(c)* that the Congo's Application was inadmissible. The Court dismissed all these preliminary objections.

I voted with the Court on these three points. I agree with the Court that Belgium was wrong on the points of *jurisdiction* and *admissibility*. There is well-established case law to the effect that the Court's jurisdiction to adjudicate a case and the admissibility of the Application must be determined on the date on which the Application was filed (when Mr. Yerodia was still a Minister), not on the date of the Judgment (when Mr. Yerodia had ceased to be a Minister). This follows from several precedents, the most important of which is the *Lockerbie* case[155]. I therefore agree with paragraph 78 (1) *(B)* and *(D)* of the Judgment.

I was, however, more hesitant on the subject of *mootness*, where the Court held that the Congo's Application was "not without object" (Judgment, para. 78 (1) *(C)*). It does not follow from *Lockerbie* that the question of mootness must be assessed on the date of the filing of the application[156]. An event subsequent to the filing of an application can still render a case moot. The question therefore was whether, given the fact that Mr. Yerodia is no longer a Foreign Minister today, there was still a case for the respondent State to answer. I think there was, for the following reason: it is not because an allegedly illegal act has ceased to continue in time that the illegality disappears. From that perspective, I think the case was not moot. This, however, is only true for the Congo's first claim (a declaratory Judgment solemnly declaring the illegality of Belgium's act). However, I think the case might have been moot regarding the Congo's second claim, given the fact that Mr. Yerodia is no longer a Minister today.

If there was an infringement of international law in the year 2000 (which I do not think exists, for the reasons set out above), it has certainly ceased to exist today. Belgium's alleged breach of an international obligation, if such an obligation existed — which I doubt — was in any event a breach of an obligation not of a continuing character. If the Court would take its own reasoning about immunities to its logical conclusion (the temporal linkage between the protection

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[154]See Art. 14 of the 2001 ILC Draft Articles on State Responsibility, United Nations doc. A/CN.4/L.602/Rev.1, concerning the extension in time of the breach of an international obligation, which states the following:

> "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation . . ."

[155]*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1998*, p. 23, para. 38 (jurisdiction) and p. 26, para. 44 (admissibility). See further, S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II, The Hague, Martinus Nijhoff Publishers, 1997, pp. 521-522.

[156]In the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)* case the Court only decided on the points of jurisdiction (*ibid., Preliminary Objections, I.C.J. Reports 1998*, p. 30, para. 53 (1)) and admissibility (*ibid.*, para. 53 (2)), not on mootness (*ibid.*, p. 31, para. 53 (3)). The *ratio decidendi* for paras. 53 (1) and (2) is that the relevant date for the assessment of both jurisdiction and admissibility are the date of the filing of the Application. The Court did not make such a statement in relation to mootness.

of immunities and the function of the Foreign Minister), then it should have reached the conclusion that the Congo's third and fourth submissions should have been rejected. This is why I have voted with the Court on paragraph 78 (1) *(C)* concerning Belgium's preliminary objection regarding mootness, but against the Court on paragraph 78 (3) of the *dispositif*.

I also believe, assuming again that there has been an infringement of an international obligation by Belgium, that the declaratory part of the Judgment should have sufficed as reparation for the moral injury suffered by Congo. If there *was* an act constituting an infringement, which I do not believe exists (a Belgian arrest warrant that was not contrary to customary international law and that was moreover never enforced), it was trivial in comparison with the Congo's failure to comply with its obligation under Article 146 of the IVth Geneva Convention (investigating and prosecuting charges of war crimes and crimes against humanity committed on its territory). The Congo did not come to the International Court with clean hands[157], and its Application should have been rejected. *De minimis non curat lex*[158].

VI. FINAL OBSERVATIONS

85. For the reasons set out in this opinion, I think the International Court of Justice has erred in finding that there is a rule of customary international law protecting incumbent Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process in other States. No such rule of customary international law exists. The Court has not engaged in the balancing exercise that was crucial for the present dispute. Adopting a minimist and formalistic approach, the Court has *de facto* balanced in favour of the interests of States in conducting international relations, not the international community's interest in asserting international accountability of State officials suspected of war crimes and crimes against humanity.

86. The Belgian 1993/1999 Act may go too far and it may be politically wise to provide procedural restrictions for foreign dignitaries or to restrict the exercise of universal jurisdiction. Proposals to this effect are under study in Belgium. Belgium may be naive in trying to be a forerunner in the suppression of international crimes and in substantiating the view that, where the territorial State fails to take action, it is the responsibility of third States to offer a forum to victims. It may be politically wrong in its efforts to transpose the "sham trial" exception to complementarity in the Rome Statute for an International Criminal Court (Art. 17)[159] into *"aut dedere aut judicare"* situations. However, the question that was before the Court was not whether Belgium is naive or has acted in a politically wise manner or whether international comity would command a stricter application of universal jurisdiction or a greater respect for foreign dignitaries. The question was whether Belgium had violated an obligation under international law to refrain from issuing and circulating an arrest warrant on charges of war crimes and crimes against humanity against an incumbent Foreign Minister.

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[157] See *supra*, para. 35.

[158] This expression is not synonymous to *de minimis non curat praetor* in civil law systems. See *Black's Law Dictionary*, West Publishing Co.

[159] See supra, para. 37.

87. An implicit consideration behind this Judgment may have been a concern for abuse and chaos, arising from the risk of States asserting unbridled universal jurisdiction and engaging in abusive prosecutions against incumbent Foreign Ministers of other States and thus paralysing the functioning of these States. The *"monstrous cacophony"* argument[160], was very present in the Congo's Memorial and pleadings. The argument can be summarized as follows: if a State would prosecute members of foreign governments without respecting their immunities, chaos will be the result; likewise, if States exercise unbridled universal jurisdiction without any point of linkage to the domestic legal order, there is a danger for political tensions between States.

In the present dispute, there was no allegation of abuse of process on the part of Belgium. Criminal proceedings against Mr. Yerodia were not frivolous or abusive. The warrant was issued after two years of criminal investigations and there were no allegations that the investigating judge who issued it acted on false factual evidence. The accusation that Belgium applied its War Crimes Statute in an offensive and discriminatory manner against a Congolese Foreign Minister was manifestly ill founded. Belgium, rightly or wrongly, wishes to act as an agent of the world community by allowing complaints brought by foreign victims of serious human rights abuses committed abroad. Since the infamous *Dutroux* case (a case of child molestation attracting great media attention in the late 1990s), Belgium has amended its laws in order to improve victims' procedural rights, without discriminating between Belgian and foreign victims. In doing so, Belgium has also opened its courts to victims bringing charges based on war crimes and crimes against humanity committed abroad. This new legislation has been applied, not only in the case against Mr. Yerodia but also in cases against Mr. Pinochet, Mr. Sharon, Mr. Rafzanjani, Mr. Hissen Habré, Mr. Fidel Castro, etc. It would therefore be wrong to say that the War Crimes Statute has been applied against a Congolese national in a discriminatory way.

In the abstract, the chaos argument may be pertinent. This risk may exist, and the Court could have legitimately warned against this risk in its Judgment without necessarily reaching the conclusion that a rule of customary international law exists to the effect of granting immunity to Foreign Ministers. However, granting immunities to incumbent Foreign Ministers may open the door to other sorts of abuse. It dramatically increases the number of persons that enjoy international immunity from jurisdiction. Recognizing immunities for other members of government is just one step further: in present-day society, all cabinet members represent their countries in various meetings. If Foreign Ministers need immunities to perform their functions, why not grant immunities to other cabinet members as well? The International Court of Justice does not state this, but doesn't this flow from its reasoning leading to the conclusion that Foreign Ministers are immune? The rationale for assimilating Foreign Ministers with diplomatic agents and Heads of State, which is at the centre of the Court's reasoning, also exists for other Ministers who represent the State officially, for example, Ministers of Education who have to attend UNESCO conferences in New York or other Ministers receiving honorary doctorates abroad. *Male*

[160] J. Verhoeven, "M. Pinochet, la coutume internationale et la compétence universelle", *Journal des Tribunaux*, 1999, p. 315; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *AFDI* 1999, p. 55.

fide governments may appoint persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes. Perhaps the International Court of Justice, in its effort to close one box of Pandora for fear of chaos and abuse, has opened another one: that of granting immunity and thus *de facto* impunity to an increasing number of government officials.

(Signed) Christine VAN DEN WYNGAERT.
