Case No. 837

Case Concerning the Arrest Warrant of 11 April 2000: Democratic Republic of the Congo v. Belgium (2002)

Applicant: Democratic Republic of the Congo

Respondent: Kingdom of Belgium

Case No. 837 is a closed case. The enclosed record contains the only references permissible to bring forth before the United Nations International Court of Justice. Mention of materials outside this record constitute grounds for dismissal.

Table of Contents

Case Brief

Statement of Fact

Questions before the Court

Opinions of the Court
- Summary of Opinions
- Judgment (Majority Opinion)
- Dissenting Opinion, Judge Van Den Wyngaert

Appendix I: Universal Declaration of Human Rights

Case Brief

Citation. I.C.J. 2002 I.C.J. 3.

Synopsis of Rule of Law. Where a foreign minister is suspected of humanitarian violations, such a minister enjoys full immunity from criminal jurisdiction in another state's court.

Facts. The Belgian law provides for universal jurisdiction in the case of grave breaches of the Geneva Conventions, crimes against humanity and other serious offenses. Relying on this law, a Belgian judge issued an international arrest warrant for the foreign minister of the D.R.C (P) on the premise of grave violations of humanitarian laws to be tried in Belgium. The Belgium law also denotes that any immunity which is conferred by an individual's official capacity does not curtail the application of universal jurisdiction.

The arrest warrant was circulated internationally and the International Criminal Police Organization (Interpol) was also notified. This action of Belgium was therefore the basis of D.R.C. (P) suit against it at the International Court of Justice (I.C.J.). The D.R.C. (P) asserted that the warrant against its foreign minister was a clear violation of international law because Belgium purported by this act to exercise jurisdiction over its foreign minister.

D.R.C. (P) also claimed that its minister should also enjoy immunity equivalent to that enjoyed by diplomats and heads of states. In addition to this, the plaintiff also sought an order of provisional measures of protection on the ground that the warrant effectively curtailed the foreign minister from leaving the D.R.C. (p). The I.C.J. thus gave its judgment on this case.

Issue. Where a foreign minister is suspected of humanitarian violations, does such a minister enjoy full immunity from criminal jurisdiction in another state's court?

Held. Yes. Where a foreign minister is suspected of humanitarian violations and even war crimes, such a minister enjoys full immunity from criminal jurisdiction in another state's court. Acting as the state's representative in international meeting and negotiations, travelling internationally and overseeing the smooth running of the state's diplomatic activities are duties which a foreign minister performs. The foreign minister also has the power to bind the state in the course of his duties and he must be in constant communication with his state and its diplomatic missions around the world as well as with representatives of other states. Hence, because of the office he holds

and not because of his person, a minister is recognized under international law as a representative of the state.

Drawing from this submission, it can therefore be established that an acting Minister of Foreign Affairs enjoys full immunity from criminal jurisdiction and inviolability so that he or she may not be hindered in the discharge of his or her duties. The safety nest provided by this immunity is regardless of whether the purported crimes were committed in the minister's "official or private" capacity and regardless of when the offense occurred. Hence on this premise, the argument of Belgium that immunities is not applicable to foreign ministers when they are accused of committing war crimes or crimes against humanity is nullified.

However and with much emphasis, immunity from jurisdiction which a serving minister enjoys does not imply that such minister take pleasure for the crimes he or she commits of have committed. As jurisdictional immunity is procedural, so too is criminal responsibility a matter of substantive law, so that jurisdictional immunity does not operate to exempt the minister who may under certain circumstances, be held accountable for his crimes.

The minister may thus be brought before the courts in his/her own state and may lose his/her immunity once his/her state waives it. The minister also do not enjoy such immunity after he vacates office and may subsequently be charged for acts committed prior to or subsequent to the time he/she was in office as well as in respect of acts committed during the time he/she was in office in a private capacity. The International criminal courts may also try the minister where they have the jurisdiction to do so.

CaseBriefs

Statement of Fact

On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant in abstentia" 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.

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 \vas circulated internationally.

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 1 and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 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 "[immunity attaching to the official capacity of a person shall not prevent the application of the present Law".

At the hearing, 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 nu~nber 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".

On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragi aph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued o~i 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".

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).

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.

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 Parti-s 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.

Although the Application of the Congo originally advanced two separate legal grounds, 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.”

Questions before the Court

1. Does the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constitute a violation of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo?

2. If the issue constitutes a violation, must the Kingdom of Belgium, 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?

Opinions of the Court

Summary of Opinions

ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO *v*. BELGIUM) (MERITS)

Judgment of 14 February 2002

In its Judgment in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), the Court found, by thirteen votes to three, 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.

It also found, by ten votes to six, 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. The Court reached these findings after having found, by 15 votes to 1, that it had jurisdiction, that the Application of the Democratic Republic of the Congo ("the Congo") was not without object (and the case accordingly not moot) and that the Application was admissible, thus rejecting the objections which the Kingdom of Belgium ("Belgium") had raised on those questions.

The Court was composed as follows: 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.

*

* *

President Guillaume appended a separate opinion to the Judgment of the Court; Judge Oda appended a dissenting opinion to the Judgment of the Court; Judge Ranjeva appended a declaration to the Judgment of the Court; Judge Koroma appended a separate opinion to the Judgment of the Court; Judges Higgins, Kooijmans and Buergenthal appended a joint separate opinion to the Judgment of the Court; Judge Rezek appended a separate opinion to the Judgment of the Court; Judge Al-Khasawneh appended a dissenting opinion to the Judgment of the Court; Judge ad hoc Bula-Bula appended a separate opinion to the Judgment of the Court; Judge ad hoc Van den Wyngaert appended a dissenting opinion to the Judgment of the Court.

*

* *

The full text of the operative paragraph of the Judgment reads as follows:

"78. For these reasons,

THE COURT,

Continued on next page

(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."

*

* *

History of the proceedings and submissions of the Parties
(paras. 1-12)

The Court recalls that on 17 October 2000 the Democratic Republic of the Congo (hereinafter "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter "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, insofar as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

The Court further recalls that on the same day, the Congo also filed a request for the indication of a provisional measure; and that by an 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".

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. After the pleadings had been filed within the time limits as subsequently extended, public hearings were held from 15 to 19 October 2001.

At the oral proceedings, the following final 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 cooperation 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."

Background to the case
(paras. 13-21)

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. The arrest warrant was circulated internationally through Interpol.

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

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").

On 17 October 2000, the Congo instituted proceedings before the International Court of Justice, requesting the Court "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". After the proceedings were instituted, Mr. Yerodia ceased to hold office as Minister for Foreign Affairs, and subsequently ceased to hold any ministerial office.

In its Application instituting proceedings, the Congo relied 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". 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". However, the Congo's Memorial and its final submissions 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".

Objections of Belgium relating to jurisdiction, mootness and admissibility
(paras. 22-44)

Belgium's first objection
(paras. 23-28)

The Court begins by considering the first objection presented by Belgium, which 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."

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.

The Court then finds that, on 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 Article 36, paragraph 2, of the Statute of the Court: 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. The Court further observes that it is, moreover, 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. The Court accordingly concludes that at the time that it was seized of the case it had jurisdiction to deal with it, and that it still has such jurisdiction, and that Belgium's first objection must therefore be rejected.

Belgium's second objection
(paras. 29-32)

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."

The Court notes that it 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. However, the Court considers that this is not such a case. It finds that 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 is accordingly rejected.

Belgium's third objection
(paras. 33-36)

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."

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". 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". 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 is accordingly rejected.

Belgium's fourth objection
(paras. 37-40)

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."

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. The Court finds that, 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. Under settled jurisprudence, the critical date for determining the admissibility of an application is

the date on which it is filed. 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 is accordingly rejected.

Belgium's subsidiary argument concerning the non ultra petita rule
(paras. 41-43)

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 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. According to Belgium, the Congo now confines itself to arguing the latter point, and the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

The Court recalls 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". The Court observes that, while it 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.

Merits of the case
(paras. 45-71)

As indicated 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.

The Court observes that, 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 first addresses 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.

Immunity and inviolability of an incumbent Foreign Minister in general
(paras. 47-55)

The Court observes 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.

The Court notes that a certain number of treaty instruments were cited by the Parties in this regard, including the Vienna Convention on Diplomatic Relations of 18 April 1961 and the New York Convention on Special Missions of 8 December 1969. The Court finds that these Conventions provide useful guidance on certain aspects of the question of immunities, but that they do not 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.

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. After an examination of those functions, the Court concludes that they are 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. 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.

The Court finds that 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. 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.

The Court then addresses 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.

The Court states that it has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords in the United Kingdom or the French Court of Cassation, and 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. The Court adds that it 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), and that it finds that these rules likewise do not enable it to conclude that any such exception exists in customary international law in regard to national courts. Finally, the Court observes that 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. The Court accordingly does not accept Belgium's argument in this regard.

It further notes 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. 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. 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. 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. The Court refers to circumstances where such persons are tried in their own countries, where the State which they represent or have represented decides to waive that immunity, where such persons no longer enjoy all of the immunities accorded by international law in other States after ceasing to hold the office of Minister for Foreign Affairs, and where such persons are subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

The issue and circulation of the arrest warrant of 11 April 2000
(paras. 62-71)

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 then considers 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."

After examining the terms of the arrest warrant, the Court notes that its *issuance*, as such, 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 in it to "all bailiffs and agents of public authority ... to execute this arrest warrant" 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 considers itself 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.

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 Court finds that, 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. 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 inviolability then enjoyed by him under international law.

Remedies
(paras. 72-77)

The Court then addresses the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. (Cf. the second, third and fourth submissions of the Congo reproduced above.)

The Court observes that it has already concluded 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.

However, the Court goes on to observe that, 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 re-establish 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).

The Court finds that, 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.

The Court sees no need for any further remedy: in particular, the Court points out that it 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 finds that it cannot therefore accept the Congo's submissions on this point.

Separate opinion of Judge Guillaume, President

In his separate opinion, President Guillaume subscribes to the Judgment of the Court and sets out his position on one question which the Judgment had not addressed: whether the Belgian judge has jurisdiction to issue an international arrest warrant against Mr. Yerodia Ndombasi.

He recalls that the primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. He adds that classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad, but he emphasizes that the exercise of that jurisdiction is not without its limits, as the Permanent Court stated in the "*Lotus*" case as long ago as 1927.

He continues by making it clear that, 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.

Additionally, States may exercise jurisdiction in cases of piracy and in the situation of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. However, apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.

Thus, President Guillaume concludes that, if the Court had addressed these questions, it ought 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.

Dissenting opinion of Judge Oda

Judge Oda voted against all of the provisions of the operative part of the Court's Judgment in this case. In his dissenting opinion, Judge Oda stresses that the Court should have declared ex officio that it lacked jurisdiction to entertain the Congo's Application of 17 October 2000 because there was at the time no legal dispute between the Parties of the kind required under Article 36, paragraph 2, of the Court's Statute. In his dissenting opinion, Judge Oda reiterates the arguments he made in his declaration appended to the Court's Order of 8 December 2000

concerning the request for indication of preliminary measures, and he addresses four main points.

First, Judge Oda stresses that a belief by the Congo that the 1993 Belgian Law violated international law is not enough to create a legal dispute between the Parties. In its Application, the Congo asserted that Belgium's 1993 Law, as amended in 1999, concerning the Punishment of Serious Violations of International Humanitarian Law ("the 1993 Belgian Law"), contravenes international law. The Congo also argued that Belgium's prosecution of Mr. Yerodia, Foreign Minister of the Congo, violated the diplomatic immunity granted under international law to Ministers for Foreign Affairs. This argument was not supported by proof that Mr. Yerodia himself had suffered or would suffer anything more than some moral injury. Because of this, the case did not concern a *legal* dispute, but instead amounted to a request from the Congo for the Court to render a legal *opinion* on the lawfulness of the 1993 Belgian Law and actions taken under it. Judge Oda expresses grave concern that the Court's finding that there was a legal dispute could lead to an excessive number of cases being referred to the Court without any real injury being evidenced, a state of affairs which could cause States to withdraw their acceptance of the Court's compulsory jurisdiction.

Second, Judge Oda believes that the Congo changed the subject matter of the proceedings between the time it filed its Application of 17 October 2000 and submitted its Memorial on 15 May 2001. The questions the Congo originally raised — whether a State has extraterritorial jurisdiction over crimes amounting to serious violations of humanitarian law regardless of where they were committed and by whom, and whether a Foreign Minister is exempt from such jurisdiction — were transformed into questions concerning the issuance and international circulation of an arrest warrant against a Foreign Minister and the immunities of incumbent Foreign Ministers. This transformation of the basic issues of the case, Judge Oda believes, did not come within the scope of the right the Congo reserved in its Application "to argue further the grounds of its Application". Judge Oda agrees with the Court's determination that the alleged dispute (which he does not agree was a *legal dispute*), was the one existing in October 2000, and he believes, therefore, that the Court was correct to reject Belgium's objections relating to "jurisdiction, mootness and admissibility".

Third, Judge Oda turns to the question of whether the present case involves any legal issues on which the Congo and Belgium hold conflicting views. In response, he notes that the Congo appears to have abandoned its assertion, made in its Application, that the 1993 Belgian Law was itself contrary to the principle of sovereign equality under international law. In this regard, Judge Oda finds that extraterritorial criminal jurisdiction has been expanded in recent decades, and that universal jurisdiction is being increasingly recognized. Judge Oda believes that the Court wisely refrained from finding on this issue, since the law is not sufficiently developed in this area, and because the Court was not requested to take a decision on this point. Judge Oda also stresses his belief that the issuance and circulation of an arrest warrant, without any action concerning the warrant by third States, does not have any legal impact. Regarding diplomatic immunity, Judge Oda divides the question presented by this case into two main issues: first, whether in principle a Foreign Minister is entitled to the same immunity as diplomatic agents; and second, whether diplomatic immunity can be claimed in respect of serious breaches of humanitarian law. The Court, he indicates, has not sufficiently answered these questions, and should not have made the broad finding it appears to make, according Ministers for Foreign Affairs absolute immunity.

Finally, Judge Oda believes that there is no practical significance to the Court's order that Belgium cancel the arrest warrant of April 2000, since Belgium can presumably issue a new arrest warrant against Mr. Yerodia as a *former* Minister for Foreign Affairs. If the Court believes that the sovereign dignity of the Congo was violated in 2000, the harm done cannot be remedied by the cancellation of the arrest warrant; the only remedy would be an apology by Belgium. For his part, Judge Oda does not believe that the Congo suffered any injury, since no action was ever taken against Mr. Yerodia pursuant to the warrant. In closing, Judge Oda states that he finds the case "not only unripe for adjudication at this time but also fundamentally inappropriate for the Court's consideration".

Declaration of Judge Ranjeva

In his declaration, Judge Ranjeva expresses agreement with both the operative part and the Court's approach in refraining from consideration of the issue of the merit of the extremely broad interpretation given to universal jurisdiction *in absentia* by the organs of the Belgian State. The withdrawal of the Congo's original first submission from its final submissions resulted in excluding universal jurisdiction from the scope of the claims.

This change in the Applicant's litigation strategy obscured the heart of the problem underlying the present case as seen in the light of evolving opinion and international law concerning the suppression of the most heinous international crimes. The author points out that customary international law, as codified by the law of the sea conventions, recognizes one situation in which universal jurisdiction may be exercised: maritime piracy. The development of conventional law is marked by the gradual establishment of national courts' jurisdiction to punish, progressing as it has from the affirmation of the obligation to prevent and punish, without however establishing jurisdiction to punish, towards the enshrinement in treaty-made law of the principle *aut judicare aut dedere*.

Judge Ranjeva finds Belgium's interpretation of the "*Lotus*" case, which in its view lays down the principle that jurisdiction exists in the absence of an explicit prohibition, to be unreasonable given the facts and circumstances of the case on which the Permanent Court of International Justice was called to adjudicate. Judge Ranjeva is of the opinion that, leaving aside the compelling obligation to give effect

to the punishment and prevention called for by international law and without it being necessary to condemn the Belgian Law, it would have been difficult under current positive law not to uphold the Congo's original first submission.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma stated that the choice of technique or method of responding to the final submissions put to the Court by the Parties is the prerogative of the Court so long as the Judgment provides a complete answer to the submissions. On the other hand, in the context of the present case, the Court decided not to engage in a legal discourse or exegesis to reach its conclusion, since it did not consider it necessary, interesting though it may have been. The Judgment cannot therefore be juridically queried on this ground.

Judge Koroma maintained that the Court was entitled, in responding to submissions, to take as its point of departure the determination of whether international law permits an exemption of immunity from the jurisdiction of an incumbent Minister for Foreign Affairs without delving into the issue of universal jurisdiction, particularly as both Parties had relinquished the issue and had asked the Court to pronounce on it only insofar as it relates to the question of the immunity of a Foreign Minister in office. Thus, in his view, and despite appearances to the contrary, what the Court is called upon to decide is not which of the principles of either immunity or universal jurisdiction is pre-eminent, but rather whether the issue and circulation of the warrant violated the immunity of a Foreign Minister in office. Judge Koroma pointed out that jurisdiction and immunity are different concepts.

According to him, the method chosen by the Court is also justified on practical grounds; in that the arrest warrant had been issued in Belgium on the basis of Belgian law, it was therefore appropriate for the Court to determine the impact of that law on an incumbent Foreign Minister. The Court has ruled that while Belgium is entitled to initiate criminal proceedings against anyone in its jurisdiction, this did not extend to an incumbent Foreign Minister of a foreign State who is immune from such jurisdiction. In the Judge's opinion, the Judgment should be seen as responding to that issue, the paramount legal justification for which is that a Foreign Minister's immunity is not only of functional necessity but increasingly nowadays he or she represents the State, even though this position is not assimilable to that of Head of State. However, in the Judge's view, the Judgment should not be considered either as a validation or a rejection of the principle of universal jurisdiction, particularly when no such submission was before the Court.

On the other hand, the Judge stated that, by issuing and circulating the warrant, Belgium had demonstrated how seriously it took its international obligation to combat international crimes, yet it is unfortunate that the wrong case would appear to have been chosen to do this. It is his opinion that today, together with piracy, universal jurisdiction is available for certain crimes such as war crimes, crimes against humanity including the slave trade and genocide.

Finally, on the issue of remedies, Judge Koroma considered that the Court's instruction to Belgium to cancel the arrest warrant should repair the moral injury suffered by the Congo and restore the situation *status quo ante* before the warrant was issued and circulated. This should restore legal peace between the Parties.

Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal

In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal agree with the Court's holding on jurisdiction and admissibility, and with much of what the Court has to say regarding immunities of incumbent Foreign Ministers. They consider, however, that the Court should also have addressed the issue of universal jurisdiction since the issue of immunities depends, conceptually, upon a pre-existing jurisdiction. The *ultra petita* rule bars only a ruling on universal jurisdiction in the *dispositif*, not its elucidation. Such elucidation was necessary because immunities and universal jurisdiction are closely interrelated in this case and bear on the maintenance of stability in international relations without perpetuating impunity for international crimes.

Turning to universal jurisdiction, Judges Higgins, Kooijmans and Buergenthal ask whether States are entitled to exercise such jurisdiction over persons accused of serious international crimes who have no connection with the forum State and are not present in the State's territory. Although they find no established practice indicating the exercise of such jurisdiction, neither do they find evidence of an *opinio juris* that deems it illegal.

Moreover, the growing number of multilateral treaties for the punishment of serious international crimes tend to be drafted with great care so as not to preclude the exercise of universal jurisdiction by national courts in these type of cases. Thus, while there may be no general rule specifically authorizing the right to exercise universal jurisdiction, the absence of a prohibitive rule and the growing international consensus on the need to punish crimes regarded as most heinous by the international community, indicate that the warrant for the arrest of Mr. Yerodia did not as such violate international law.

Judges Higgins, Kooijmans and Buergenthal agree in general with the Court's finding regarding Mr. Yerodia's immunity. They share the Court's view that the immunity of a Foreign Minister must not be equated with impunity and that procedural immunity cannot shield the Minister from personal responsibility once the Minister is no longer in office.

However, they consider as too expansive the scope of the immunities the Court attributes to Foreign Ministers and too restrictive the limits it appears to impose on the scope of the personal responsibility of such officials and where they may be tried. In their view, serious crimes under international law engage the personal responsibility of high

State officials. For purposes of immunities, the concept of official acts must be narrowly defined.

Judges Higgins, Kooijmans and Buergenthal voted against the Court's finding in paragraph (3) of the *dispositif* that Belgium must cancel the arrest warrant. They consider that the Court's reliance on the dictum in the *Factory at Chorzów* case is misplaced because the restoration of the *status quo ante* is not possible as Mr. Yerodia is no longer Foreign Minister. Moreover, since Mr. Yerodia no longer holds this office, the illegality attaching to the warrant ceased and with it the continuing illegality that would justify an order for its withdrawal.

Separate opinion of Judge Rezek

Judge Rezek voted in favour of all paragraphs of the operative part of the Judgment. He nonetheless regrets that the Court did not rule on the issue of the jurisdiction of the Belgian courts. The fact that the Congo confined itself to inviting the Court to render a decision based on immunity does not justify, in Judge Rezek's view, the Court's dropping of what represents an inevitable logical premise to the examination of the issue of immunity.

Judge Rezek considers that an examination of international law demonstrates that, as it currently stands, that law does not permit the exercise of criminal jurisdiction by domestic courts in the absence of some connecting circumstance with the forum State. *A fortiori*, it follows that Belgium cannot be considered as having been "obliged" to institute criminal proceedings in this case. Judge Rezek notes in particular that the Geneva Conventions do not enshrine any notion of universal jurisdiction *in absentia*, and that such jurisdiction has never been claimed by the Spanish courts in the *Pinochet* case.

Judge Rezek concludes by noting the importance of restraint in the exercise of criminal jurisdiction by domestic courts; a restraint in line with the notion of a decentralized international community, founded on the principle of the equality of its members and necessarily requiring mutual coordination.

Dissenting opinion of Judge Al-Khasawneh

Judge Al-Khasawneh dissented because, in his opinion, incumbent Ministers for Foreign Affairs enjoy only limited immunity, i.e., immunity from enforcement when on an official mission. He arrived at this conclusion on the bases that: immunity is an exception to the rule that man is legally and morally responsible for his actions and should therefore be construed narrowly; that unlike diplomats, the immunities of Foreign Ministers are not clear in terms of their basis or extent and unlike Heads of State, Foreign Ministers do not personify the State and are therefore not entitled to immunities and privileges attaching to their person. While the Belgian warrant went beyond jurisdiction, it contained express language regarding unenforceability if the Minister was on Belgian soil on official mission, similarly the circulation of the warrant was not accompanied — while Mr. Yerodia was still in office — by a Red Notice asking other States to take enforcement steps.

Judge Al-Khasawneh also dealt with the question of exceptions in the case of high-ranking State officials accused of grave crimes from the protection afforded by immunities. In this regard he felt that the morally embarrassing problem of impunity was not adequately dealt with in the Judgment which tried to circumvent the problem by an artificial distinction between "procedural immunity" on the one hand and "substantive immunity" on the other, and by postulating four situations where immunity and impunity would not be synonymous, i.e., (*a*) prosecution in the home State, (*b*) waiver and (*c*) prosecution after leaving office, except for official acts and (*d*) before international courts. Having considered these four situations he nevertheless felt that a lacuna still existed. Lastly, he argued that the need for effective combating of grave crimes — recognized as such by the international community — represents a higher norm than the rules on immunity and in case of conflict should prevail, even if one is to speak of reconciliation of opposing norms and not of the triumph of one over the other, this would suggest a more restrictive approach to immunity — which would incidentally bring immunity from criminal process into consonance with the now firmly established régime of restrictive immunities of States — than the Judgment portrays.

Separate opinion of Judge Bula-Bula

By conducting itself unlawfully, the Kingdom of Belgium, a sovereign State, committed an internationally wrongful act to the detriment of the Democratic Republic of the Congo, likewise a sovereign State.

Judge Bula-Bula fully supports the decision of the Court, which upholds the rule of law against the law of the jungle. In this regard, he has also indicated other grounds of fact and law which will render further substance to a Judgment of interest to the entire international community.

Dissenting opinion of Judge Van den Wyngaert

Judge Van den Wyngaert has voted against the Court's decision on the merits. She disagrees with the Court's conclusion that there is a rule of customary international law granting immunity to incumbent Foreign Ministers. She believes that Belgium has not violated a legal obligation it owed in this respect to the Congo. Even assuming, *arguendo*, that there was such a rule, there was no violation in the present case as the warrant could not be and was not executed, neither in the country where it was *issued* (Belgium) nor in the countries to which it was *circulated*. The warrant was not an "international arrest warrant" in a legal sense: it could and did not have this effect, neither in Belgium nor in third countries. Judge Van den Wyngaert believes that 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

terms *iniuria* and *capitis diminutio* used by counsel for the Congo) was irrelevant for the dispute.

On the subject of *immunities*, Judge Van den Wyngaert finds no legal basis under international law for granting immunity to an incumbent Minister for Foreign Affairs. There is no conventional international law on the subject. There is no customary international law on the subject either. Before reaching the conclusion that Ministers for Foreign Affairs enjoy a *full* immunity from foreign jurisdiction under *customary* international law, the International Court of Justice should have satisfied itself of the existence of State practice (*usus*) and *opinio juris* establishing an international custom to this effect. A "negative" practice, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence for an *opinio juris* (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28), and abstinence can be attributed to many other factors, including practical and political considerations. Legal opinion does not support the Court's proposition that Ministers for Foreign Affairs are immune from the jurisdiction of other States under customary international law. Moreover, the Court reaches this conclusion 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 but also in the field of criminal law, when there are allegations of war crimes and crimes against humanity. Belgium may have acted contrary to international comity, but it has not infringed international law. Judge Van den Wyngaert therefore believes that the whole Judgment is based on flawed reasoning.

On the subject of *(universal) jurisdiction*, on which the Court did not pronounce itself in the present Judgment, Judge Van den Wyngaert believes that Belgium was perfectly entitled to apply its legislation to the war crimes and crimes against humanity allegedly committed by Mr. Yerodia in the Congo. Belgium's War Crimes Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. 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. Universal jurisdiction is not contrary to the *principle of complementarity in the Rome Statute for an International Criminal Court*. The International Criminal Court will only be able to act if States that 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. 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.

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. 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 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.

Judge Van den Wyngaert regrets that the Court has not addressed the dispute from this perspective and has instead focused on the *very narrow technical question* of immunities for 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. In legal doctrine, there is a plethora of recent scholarly writings on the subject. Major scholarly organizations and non-governmental organizations have taken clear positions on the subject of international accountability. The latter may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in the formation of customary international law today. She highly regrets that the Court fails to acknowledge this development, and instead 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.

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 suspected of 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 legal status of the principle of international accountability under international law. Other courts, for example, the House of Lords in the *Pinochet* case and the European Court of Human Rights in the *Al-Adsani* case have given more thought and consideration to the

balancing of the relative normative status of international *ius cogens* crimes and immunities.

Judge Van den Wyngaert disagrees with the Court's proposition that immunity does not lead to *impunity of incumbent Foreign Ministers*. This may be true in theory, but not in practice. It is, in theory, true that an incumbent or former Foreign Minister can always be prosecuted in his own country or in other States if the State whom he represents waves immunity, as the Court asserts. However, this is precisely 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 what happened in the present case. 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. The Congo did not come to the Court with clean hands: it blamed Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself.

In addition, Judge Van den Wyngaert finds the Judgment highly unsatisfactory where it states that immunity does not lead to *impunity of former Foreign Ministers*: according to the Court, the lifting of full immunity, in this case, is only for acts committed prior or subsequent to his or her period of office and 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. Judge Van den Wyngaert finds it extremely regrettable that the International Court of Justice has not, like the House of Lords in the *Pinochet* case, qualified this statement. 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.

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 1969 Special Missions Convention, 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. Judge Van den Wyngaert feels that taking immunities further than this may even lead to *conflict with international human rights* rules, particularly the right of access to court, as appears from the recent *Al-Adsani* case of the European Court of Human Rights.

According to Judge Van den Wyngaert, 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. In the present dispute, however, 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 it 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. Judge Van den Wyngaert observes that 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 fide*

governments may appoint persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes.

Judge Van den Wyngaert concludes by saying that the International Court of Justice, in its effort to close one *box of Pandora* for fear of chaos and abuse, may have opened another one: that of granting immunity and thus de facto impunity to an increasing number of government officials.

INTERNATIONAL COURT OF JUSTICE

YEAR 2002

14 February 2002

2002
14 February
General List
No. 121

CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

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

Facts of the case — 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 International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

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

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

Subsidiary argument of Belgium Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-*

* * *

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.

* *

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.

*

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, for

example, Article 7, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives 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.

* *

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 *ratione 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.

*

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".

* * *

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

International Court of Justice, Case No. 837, 29

"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".

*

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. Yero-

dia'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.

* * *

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

aucun effet de droit. Le Congo observe que sa demande a pour objet la réparation du dommage causé, réparation qui imposerait que soit restauré l'état qui aurait selon toute probabilité existé si ce fait n'avait pas été commis. Il précise que, dans la mesure où le fait illicite consistait en un acte juridique interne, seul le «retrait» et la «mise à néant» de celui-ci pourraient dès lors constituer une réparation appropriée.

Le Congo souligne par ailleurs qu'il ne demande nullement à la Cour de procéder elle-même au retrait ou à la mise à néant du mandat, ni de déterminer le moyen par lequel la Belgique devrait se conformer à son arrêt. Il explique qu'un tel retrait et qu'une telle mise à néant du mandat, par les moyens que la Belgique estimera les plus appropriés, «ne constitue[raient] pas des moyens d'exécution de l'arrêt de la Cour mais la mesure même de réparation-restitution juridique en nature sollicitée». Le Congo soutient que, par voie de conséquence, la Cour est seulement priée de dire que la Belgique, au titre de la réparation du dommage causé aux droits du Congo, est tenue de procéder, par le moyen de son choix, au retrait et à la mise à néant de ce mandat d'arrêt.

74. La Belgique estime quant à elle que l'éventuelle constatation, par la Cour, d'une violation de l'immunité dont bénéficiait M. Yerodia en tant que ministre des affaires étrangères n'implique aucunement qu'il y ait lieu d'annuler le mandat d'arrêt. Elle expose que ce dernier continue à produire ses effets et que «[r]ien n'indique qu'il porte aujourd'hui atteinte à l'immunité du ministre des affaires étrangères» du Congo. La Belgique considère que ce que sollicite en réalité le Congo par ses troisième et quatrième conclusions c'est que la Cour dicte à la Belgique la manière dont celle-ci devrait donner effet à un arrêt de la Cour constatant que le mandat d'arrêt a violé l'immunité du ministre des affaires étrangères du Congo.

*

75. La Cour a déjà conclu ci-dessus (voir paragraphes 70 et 71) que l'émission et la diffusion, par les autorités belges, du mandat d'arrêt du 11 avril 2000 avaient méconnu l'immunité du ministre des affaires étrangères en exercice du Congo et, plus particulièrement, violé l'immunité de juridiction pénale et l'inviolabilité dont jouissait alors M. Yerodia en vertu du droit international. Ces actes ont engagé la responsabilité internationale de la Belgique. La Cour estime que les conclusions auxquelles elle est ainsi parvenue constituent une forme de satisfaction permettant de réparer le dommage moral dont se plaint le Congo.

76. Cependant, ainsi que la Cour permanente de Justice internationale l'a dit dans son arrêt du 13 septembre 1928 en l'affaire relative à l'*Usine de Chorzów*:

> «[l]e principe essentiel, qui découle de la notion même d'acte illicite et qui semble se dégager de la pratique internationale, notamment de la jurisprudence des tribunaux arbitraux, est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite

> quences 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.

DISSENTING OPINION OF JUDGE VAN DEN WYNGAERT

[English Original Text]

Immunities under customary international law — Not applicable to Minister for Foreign Affairs — Principle of international accountability for war crimes and crimes against humanity — Role of civil society in the formation of opinio juris — *Impunity — Extraterritorial jurisdiction for war crimes and crimes against humanity — Universal jurisdiction for such crimes —* "Lotus" *test applied to such crimes — Prescriptive jurisdiction — Rome Statute for an International Criminal Court — Complementarity principle — Internationally wrongful act — Enforcement jurisdiction — (International) arrest warrants — Remedies before the International Court of Justice — Abuse of immunities and Pandora's box.*

TABLE OF CONTENTS

	Paragraphs
I. Introductory Observations	1-7
II. Immunities	8-39
1. There is no rule of customary international law granting immunity to incumbent Foreign Ministers	11-23
2. Incumbent Foreign Ministers are not immune from the jurisdiction of other States when charged with war crimes and crimes against humanity	24-38
(a) The distinction between immunity as a procedural defence and immunity as a substantive defence is not relevant for the purposes of this dispute	29-33
(b) The Court's proposition that immunity does not necessarily lead to impunity is wrong	34-38
3. Conclusion	39
III. Universal Jurisdiction	40-67
1. Universal jurisdiction for war crimes and crimes against humanity is compatible with the "*Lotus*" test	48-62
(a) International law does not prohibit universal jurisdiction for war crimes and crimes against humanity	52-58
(b) International law permits universal jurisdiction for war crimes and crimes against humanity	59-62

2. Universal jurisdiction is not contrary to the complementarity principle in the Statute for an International Criminal Court 63-66

3. Conclusion 67

IV. Existence of an Internationally Wrongful Act 68-80

1. The *issuance* of the disputed arrest warrant in Belgium was not in violation of international law 72-75

2. The *international circulation* of the disputed arrest warrant was not in violation of international law 76-79

3. Conclusion 80

V. Remedies 81-84

VI. Final Observations 85-87

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

---

[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 December 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 November 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 24 March 1999, [1999] 2 All ER 97, HL, p. 97), the *Qaddafi* case in France (Cour de cassation, 13 March 2001, http://courdecassation.fr/agenda/arrets/arrets/00-87215.htm) and the *Bouterse* case in the Netherlands (Hof Amsterdam, No. R 97/163/12 Sv and R 97/176/12 Sv, 20 November 2000; Hoge Raad, Strafkamer, Zaaknr. 00749/01 CW 2323, 18 September 2001, http://www.rechtspraak.nl).

[6] ECHR (European Commission of Human Rights), *Al-Adsani* v. *United Kingdom*, 21 November 2001, http://www.echr.coe.int.

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 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.

---

[7] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.*
[8] See further *infra*, footnote 98.
[9] *Infra*, para. 41.

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."

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

[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, para. 184.

[12] Cour de cassation (Fr.), 13 March 2001 (*Qaddafi*).

[13] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 25 November 1998, [1998] 4 All ER 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, State of Hawaii), 9 September 1963, 58 *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 paragraph 1 of the "Suggestion of Interest Submitted on Behalf of the United States", *ibid.*). Another case where immunity was recognized, not of a Minister but of a prince, was in the case of *Kilroy* v. *Windsor (Prince Charles, Prince of Wales)*, US District Court for the ND of Ohio, 7 December 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.)

is under an international obligation to refrain from instituting such proceedings against an incumbent Foreign Minister?

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]

---

[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 *Karadzić* case (*Kadić* v. *Karadzić*, 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*, 844 F. Supp. 128 (EDNY 1994), noted in 88 *AJIL*, 1994, pp. 528-532), the *Marcos* cases (*Estate of Silme G. Domingo* v. *Ferdinand Marcos*, No. C82-1055V, 77 *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.), 82 *AJIL*, 1988, p. 596), 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 de La Haye*, 1994, Vol. 247, 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", 12 *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 I. C. McGibbon, "Customary International Law and Acquiescence", *BYBIL*, 1957, p. 129.

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 "a straightforward analogy"[19].

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

[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 de La Haye*, 1994, Vol. 247, 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. *[Translation by the Registry]*

[20] Convention on Diplomatic Relations, Vienna, 18 April 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 August 2001, and "Prosecution of New Ambassador?", *The Copenhagen Post*, 7 November 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.

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.

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 (Article 8 of the Draft Code) or co-operating mutually by extraditing or prosecuting alleged perpetrators of international crimes (Article 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,

[23] See *supra*, footnotes 12 and 13.
[24] Convention on Diplomatic Relations, Vienna, 18 April 1961, *UNTS*, Vol. 500, p. 95, and Convention on Consular Relations, Vienna, 24 April 1963, *UNTS*, Vol. 596, p. 262.

[25] *Yearbook of the International Law Commission (YILC)*, 1989, Vol. II (2), Part 2, para. 446.
[26] A. Watts, *op. cit.*, p. 107.
[27] See *infra*, paras. 24 *et seq.* and particularly para. 32.

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].

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

[28] United Nations Convention on Special Missions, New York, 16 December 1969, Annex to UNGA res. 2530 (XXIV) of 8 December 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*, 1994, p. 546.

[30] See also *infra*, para. 75 (inviolability).

[31] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, New York, 14 December 1973, 78 *UNTS*, p. 277.

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. de 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

---

[32] L. Oppenheim and H. Lauterpacht (eds.), *International Law, a Treatise*, Vol. I, 1955, p. 358. See also the Ninth (1992) Edition (Jennings and Watts, eds.) at p. 1046.

[33] A. Cavaglieri, *Corso di Diritto Internazionale*. 2nd ed., pp. 321-322.

[34] P. Cahier, *Le droit diplomatique contemporain*. 1962, pp. 359-360.

[35] J. Salmon. *Manuel de droit diplomatique*. 1994, p. 539.

[36] B. S. Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order*, 1989, pp. 333-334.

[37] J. S. de Erice y O'Shea. *Derecho Diplomático*, 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." (Emphasis added.)

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]

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 inter-

---

[39] A. Watts, *op. cit.*, p. 109.

[40] See the Report of J. Verhoeven, *supra*, footnote 19 (draft resolutions) and the final resolutions adopted at the Vancouver meeting on 26 August 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", 51 *ICLQ*, 2002, pp. 119-125.

[41] *Supra*, para. 18.

national human rights rules as appears from the recent *Al-Adsani* case of the European Court of Human Rights[42].

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.

[42] ECHR, *Al-Adsani* v. *United Kingdom*, 21 November 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 Vajić 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 (paragraph 60 of the judgment, as interpreted by the dissenting judges in paragraph 4 of their opinion).

[43] *Supra*, footnote 22.

[44] *Infra*, paras. 24 *et seq.*

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 subparagraph).

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 subparagraph).

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. 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

[45] In paragraph 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 January 1946. See also Article 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind.

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 subsections *(a)* and *(b)* of this section, 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 resolu-

[46] Nuremberg Principles, Geneva, 29 July 1950, *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, United Nations doc. A/1316 (1950).

[47] Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 December 1948, *UNTS*, Vol. 78, p. 277. See also Art. 7 of the Nuremberg Charter (Charter of the International Military Tribunal, London, 8 August 1945, *UNTS*, Vol. 82, p. 279); Art. 6 of the Tokyo Charter (Charter of the Military Tribunal for the Far East, Tokyo, 19 January 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 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 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 November 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).

tions[48] and reports[49] on the subject of international accountability for war crimes and crimes against humanity.

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 Interna-

[48] See, for example, Sub-Commission on Human Rights, res. 2000/24, *Role of Universal or Extraterritorial Competence in Preventive Action against Impunity*, 18 August 2000, E/CN.4/SUB.2/RES/2000/24; Commission on Human Rights, res. 2000/68, *Impunity*, 26 April 2000, E/CN.4/RES/2000/68; Commission on Human Rights, res. 2000/70, *Impunity*, 25 April 2001, E/CN.4/RES/2000/70 (taking note of Sub-Commission res. 2000/24).

[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 October 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 September 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 Offences: 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*, September 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 October 2001, available on http://www.asf.be.

tional 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 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

[57] K. Roth, "The Case for Universal Jurisdiction", *Foreign Affairs*, September/October 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/August 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 November 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).

[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 November 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 September 1997, *ILM*, 1997, p. 1507.

[62] The International Campaign to Ban Landmines (ICBL) is a coalition of non-governmental organizations, with Handicap International, Human Rights Watch, Medico International, Mines Advisory Group, Physicians for Human Rights and Vietnam Veterans of America Foundation as founding members.

Foreign 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 *jus 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 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 *jus 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

[63] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 24 March 1999, [1999] 2 All ER 97, HL.

[64] *Al-Adsani* case: ECHR, *Al-Adsani* v. *United Kingdom*, 21 November 2001, http://www.echr.coe.int.

[65] See: American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States*, Vol. 1, para. 404, Comment; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989; T. Meron, "International Criminalization of Internal Atrocities", 89 *AJIL*, 1995, p. 558; A. H. J. Swart, *De berechting van internationale misdrijven*, 1996, p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Tadić*, paras. 96-127 and 134 (common Article 3).

[66] M. C. Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", 59 *Law and Contemporary Problems*, 1996, Issue 4, pp. 63-74; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 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", 66 *Texas Law Review*, 1988, pp. 829-832; ICTY, Judgment, 10 December 1998, *Furundzija*, para. 153 (torture).

ground of immunities for incumbent Foreign Ministers, which are probably not part of *jus 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 Crimes 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 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

[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 December 1948, *UNTS*, Vol. 78, p. 277.
[70] Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission, 1996, United Nations doc. A/51/10, p. 59.
[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 November 1994, *ILM*, 1994, p. 1598.
[72] Rome Statute of the International Criminal Court, Rome, 17 July 1998, *ILM*, 1998, p. 999.
[73] *Supra*, footnote 46.

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.

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

[74] See, for example, 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", pp. 48-51 (*supra*, footnote 53).

[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 de La Haye*, 1994, Vol. 247, p. 82.

[77] See also *supra*, para. 17.

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.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime

[78] Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission, 1996, United Nations doc. A/51/10, p. 41.

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

---

[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 de La Haye*, 1957, 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 E. Brown Weiss *et al.* (eds.), *The World Bank, International Financial Institutions, and the Development 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.

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.

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

[83] H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", 28 *BYBIL*, 1951, p. 232.

[84] See also paragraph 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 for 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 November 1998, [1998] 4 All ER 897, p. 945.

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.

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

[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.

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.

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" (Judgment, para. 70)
>
> "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, para. 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 dis-

senting 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. 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].

74. These are the only *objective elements* the Court should have looked

[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 for Foreign Affairs in *De Standaard*, 7 July 2000) and also in a question that was put in Parliament to the Minister of Justice. See oral question put by Mr. Tony Van Parys to the Minister of Justice concerning "the political intervention by the Government in the proceedings against the Congolese Minister for Foreign Affairs Mr. Yerodia" *[translation by the Registry]. Chambre des représentants de la Belgique, compte rendu intégral avec compte rendu analytique*. Commission de la Justice, 14 November 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.

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 *injuria* 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 be 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.

---

[143] CR 2001/5, p. 14.
[144] CR 2000/32.
[145] Convention on Diplomatic Relations, Vienna, 18 April 1961, *UNTS*, Vol. 500, p. 95.
[146] J. Salmon, *Manuel de droit diplomatique*, 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

---

[148] See *supra*, para. 49.

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 *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

---

[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 December 2001, 14867/1/01 REV 1 COPEN 79 CATS 50.

[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 Zeitung*, 21 November 1998, and "Die Bundesregierung verzichtet endgültig auf die Auslieferung des Kurdenführers Öcalan", *Frankfurter Allgemeine Zeitung*, 28 November 1998.

[151] Interpol, General Secretariat, *Rapport sur la valeur juridique des notices rouges*, ICPO-Interpol, General Assembly, 66th Session, New Delhi, 15-21 October 1997, AGN/66/RAP/8, No. 8 Red Notices, as amended pursuant to resolution No. AGN/66/RES/7.

un visa, ou refuser de les accréditer si elles sont proposées pour un poste diplomatique[152], mais, là encore, c'est une affaire interne propre à chaque Etat tiers, et non la conséquence automatique d'un mandat d'arrêt décerné par un juge.

79. Dans le cas de M. Yerodia, la Belgique a transmis le mandat d'arrêt à Interpol (fin juin 2000), mais elle ne lui a pas demandé d'émettre une notice rouge avant septembre 2001, date à laquelle M. Yerodia avait cessé d'exercer toute fonction ministérielle. Il s'ensuit que la Belgique n'a jamais demandé à aucun pays d'arrêter provisoirement M. Yerodia aux fins d'extradition pendant qu'il était ministre des affaires étrangères. Le Congo affirme que M. Yerodia a vu sa liberté de mouvement restreinte par le mandat d'arrêt belge. Il ne fournit toutefois aucun élément de preuve à l'appui de cette affirmation. Il semble, au contraire, que M. Yerodia ait effectué un certain nombre de voyages à l'étranger après la diffusion du mandat par le biais d'Interpol (en 2000), notamment pour assister à titre officiel à une conférence des Nations Unies. Lors des audiences, il a été dit que, au cours de ce voyage à New York, M. Yerodia avait choisi le plus court trajet entre l'aéroport et le bâtiment des Nations Unies, parce qu'il craignait d'être arrêté[153]. Cette crainte, qu'il peut avoir éprouvée, tenait à des raisons psychologiques et non pas à des motifs juridiques. Aux termes de la convention des Nations Unies de 1969 sur les missions spéciales, M. Yerodia ne pouvait pas être arrêté dans un pays tiers pendant un voyage officiel. Lors des voyages officiels qu'il a effectués à l'étranger, il n'a fait l'objet d'aucune mesure de contrainte en application du mandat d'arrêt belge.

3. *Conclusion*

80. Le mandat d'arrêt n'était exécutoire — et, de fait, n'a pas été exécuté — ni dans le pays où il a été *émis* (la Belgique), ni dans les pays où il a été *diffusé*. Il n'a pas été exécuté *en Belgique* lors de la visite officielle de M. Yerodia en juin 2000. Cet Etat n'a pas formulé de demande d'extradition auprès de *pays tiers*, ni de demande d'arrestation provisoire aux fins d'extradition. Le mandat n'était pas un «mandat d'arrêt international», malgré les mots employés par le juge belge. Il ne pouvait pas produire cet effet, ni en Belgique ni dans des pays tiers, et cela n'a pas été le cas. Le fait internationalement illicite reproché à la Belgique était une mesure purement interne, sans effet *effectif* extraterritorial.

V. Les remèdes

81. La République démocratique du Congo a sollicité de la Cour deux mesures de réparation différentes: *a)* un jugement déclaratoire consta-

[152] Voir les comptes rendus publiés dans la presse danoise à propos des hésitations du Gouvernement danois concernant l'accréditation d'un ambassadeur d'Israël, voir ci-dessus la note 21.

[153] CR 2001/10/20.

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 "de-circulation" of the disputed arrest warrant. Even assuming, *arguendo*, that the arrest warrant was illegal in the year 2000, it was no longer illegal at 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 "decirculate" 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.

[154] See Article 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 . . ."

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

[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, 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, Judgment, 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 paragraphs 53 (1) and (2) is that the relevant date for the assessment of both jurisdiction and admissibility is the date of the filing of the Application. The Court did not make such a statement in relation to mootness.

Court would take its own reasoning about immunities to its logical conclusion (the temporal linkage between the protection 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 IV 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

[157] See *supra*, para. 35.
[158] This expression is not synonymous with *de minimis non curat praetor* in civil law systems. See *Black's Law Dictionary*.

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.

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 bring-

[159] See *supra*, para. 37.
[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.

ing 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 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 Pandora's box 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.

Appendix I: Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association.

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right of equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

UN Archive