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.

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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.

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

"78. For these reasons,

THE COURT,

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(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."

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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.