The PRESIDENT: Please be seated. The sitting is open. The Court meets today under Article 74, paragraph 3, of the Rules of Court to hear the observations of the Parties on the request for the indication of a provisional measure submitted by the Democratic Republic of the Congo in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*.

Before recalling the principal phases of the present proceedings, it is necessary to complete the composition of the Court.

Each of the Parties in the present case, the Democratic Republic of the Congo and the Kingdom of Belgium, has availed itself of the possibility conferred on it by Article 31 of the Statute to choose a judge *ad hoc*. The Democratic Republic of the Congo has chosen Mr. Sayeman Bula-Bula and the Kingdom of Belgium Ms Christine Van den Wyngaert.

Article 20 of the Statute of the Court provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". By Article 31, paragraph 6, of the Statute, that provision applies to judges *ad hoc*. I shall first say a few words about the career and qualifications of each of the two judges who will be making the required declaration. I shall then invite them, in order of precedence, to make their declaration.

Mr. Sayeman Bula-Bula, of Congolese nationality, is *professeur ordinaire* at the Law Faculty of the University of Kinshasa, where he teaches international law, specializing in the law of the sea, environmental law, the law of peace and of international security, human rights, and international humanitarian law. He has also served as expert or consultant to the Congolese Government and to various international organizations and learned bodies, in addition to having held important administrative positions at the University of Kinshasa and its Law Faculty.

Ms Christine Van den Wyngaert, of Belgian nationality, is Professor of Law at the University of Antwerp, where she teaches international criminal law, Belgian criminal law and procedure and comparative criminal law. She has also been a Visiting Fellow at the University of Cambridge. Ms Van den Wyngaert has also served as an expert, in particular with the Belgian Government, notably as Vice-chair of the Commission for the Reform of the Criminal Procedure Code, and with the European Commission as well as various learned bodies.

I shall now invite each of these two judges to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Mr. Bula-Bula.

Mr. BULA-BULA: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Ms Van den Wyngaert.

Ms VAN DEN WYNGAERT: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Please be seated. I take note of the solemn declarations made by Mr. Bula-Bula and Ms Van den Wyngaert, and declare them duly installed as judges *ad hoc* in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*.

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* *

The proceedings were instituted on 17 October 2000 by the filing in the Registry of the Court of an Application by the Democratic Republic of the Congo against the Kingdom of Belgium. In that Application the Government of the Democratic Republic of the Congo cites, as basis for the Court's jurisdiction, the fact that "Belgium has accepted the jurisdiction of the Court and [that], in so far as may be required, the present Application signifies acceptance of that jurisdiction by the Democratic Republic of the Congo".

The Democratic Republic of the Congo refers in its Application to 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 . . ., seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law'".

The Congo further states that,

> "under the very terms of the arrest warrant, the investigating judge claims jurisdiction in respect of offences purportedly committed on the territory of the Democratic Republic of the Congo by a national of that State, without any allegation that the victims were of Belgian nationality or that these acts constituted violations of the security or dignity of the Kingdom of Belgium".

The Democratic Republic of the Congo refers in its Application to certain provisions of the "[Belgian] Law of 16 June 1993 as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law". It contends that

> "Article 5, paragraph 2, . . . is manifestly in breach of international law in so far as it claims to derogate from diplomatic immunity, as is the arrest warrant issued pursuant thereto against the Minister for Foreign Affairs of a sovereign State".

It maintains that Article 7, which "establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of 'serious violations of international humanitarian law', without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory", and the "arrest warrant issued by the Belgian investigating judge . . . [,] are in breach of international law". I shall now ask the Registrar to read out the decision requested of the Court, as formulated under head II of the Application of the Democratic Republic of the Congo.

The REGISTRAR:

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

The PRESIDENT: Immediately following the filing of the Application, on 17 October 2000, the Agent of the Democratic Republic of the Congo filed in the Registry of the Court a request for the indication of a provisional measure, citing Article 41, paragraph 1, of the Statute of the Court. In its request, the Democratic Republic of the Congo states that the "disputed arrest warrant effectively bars the Minister for Foreign Affairs of the Democratic Republic of the Congo from leaving that State in order to go to any other State which his duties require him to visit and, hence, from carrying out those duties".

I shall now ask the Registrar to read out the passage from the request specifying the provisional measure which the Government of the Democratic Republic of the Congo is asking the Court to indicate.

The REGISTRAR: "This request seeks an order for the immediate discharge of the disputed arrest warrant."

The PRESIDENT: Immediately on receipt of the text of the request for the indication of a provisional measure, the Registrar, in accordance with Article 73, paragraph 2, of the Rules of Court, transmitted a certified copy thereof to the Belgian Government. He also notified the Secretary-General of the United Nations.

According to Article 74 of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases. The date of the hearing must be fixed in such a way as to afford the parties an opportunity of being represented at it. Consequently, by communications dated 20 October 2000, the Parties were informed that the date for the opening of the oral proceedings contemplated in Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the request for the indication of a provisional measure, had been set at 20 November 2000, at 10 a.m.

I note the presence before the Court of the Agents and counsel of the two Parties. The Court will first hear the Democratic Republic of the Congo, which is the Applicant on the merits and has submitted the request for the indication of a provisional measure. Belgium will take the floor tomorrow, Tuesday 21 November 2000, at 10 a.m. For the purposes of this first round of oral arguments, each of the Parties will have available to it a full three-hour sitting, and both have been informed accordingly. The Court has also indicated to the Parties that, if necessary, it would hold two additional sittings in order to hear their replies. The Democratic Republic of the Congo has expressed its wish for those hearings to be arranged. It will therefore have the floor again on Wednesday 22 November at 10 a.m., and Belgium will take the floor in turn on Thursday 23 November at 10 a.m. Each of the Parties will have a maximum time of one-and-a-half hours in which to present its reply and, once again, both of them have been informed accordingly.

I therefore now give the floor to His Excellency Mr. Jacques Masangu-a-Mwanza, Agent of the Democratic Republic of the Congo.

Mr. MASANGU-A-MWANZA: Mr. President, Members of the Court, the honour falls to me, as Agent, to introduce to the Court the delegation of the Democratic Republic of the Congo which will be putting the case during the hearings in connection with the Application which I filed on 17 October 2000. The composition of the delegation is as follows:

Mr. Ntumba Luaba, Professor, Vice-Minister of Justice and Parliamentary Affairs;

Maître Jacques Vergès, *avocat à la cour*;

Maître Nkulu Kilombo, *avocat à la cour de Kinshasa*; and

Mr. Samba Kaputo, Professor, Principal Private Secretary [*directeur de cabinet*] to the Minister for Foreign Affairs.

I should also like to take this opportunity to thank the Court for responding so promptly to this Application, in which the Court is requested to declare that the Kingdom of Belgium shall annul international arrest warrant No. 40/95/BR30.9937/99, issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels *Tribunal de première instance* against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Yerodia Abdulaye Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting "serious violations of international humanitarian law", that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000.

Under the very terms of the arrest warrant, the investigating judge claims jurisdiction in respect of offences purportedly committed on the territory of the Democratic Republic of the Congo by a national of that State, without

any allegation that the victims were of Belgian nationality or that these acts constituted violations of the security or dignity of the Kingdom of Belgium.

The Democratic Republic of the Congo attaches to its Application a request for a provisional measure pursuant to Article 41, paragraph 1, of the Statute of the Court. This request seeks an order for the immediate discharge of the disputed arrest warrant. The present request is based on other precedents which counsel and the lawyers assisting me will endeavour to put forward in their arguments.

Mr. President, Members of the Court, the Belgian State confers upon itself unlimited jurisdiction, which explains the issue of the arrest warrant against Mr. Yerodia Abdulaye Ndombasi, against whom neither territorial or *in personam* jurisdiction nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium was invoked, whereas it should clearly not have done so.

- Violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all member States of the United Nations (see Article 2, paragraph 1, of the Charter of the United Nations); and

- Violation 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 the Vienna Convention of 18 April 1961 on Diplomatic Relations.

The two essential conditions for the indication of a provisional measure according to the jurisprudence of the Court, namely urgency and the existence of irreparable harm, are clearly satisfied in this case.

Thus the disputed arrest warrant effectively bars the Minister for Foreign Affairs of the Democratic Republic of the Congo from leaving that State in order to go to any other State which his duties require him to visit and, hence, from carrying out his duties.

You will agree with me, Mr. President, Members of the Court, that the consequences of this bar on travel by the diplomatic representative *par excellence* of the Congolese State for an indefinite period are, by their very nature, such that they cannot be made good.

Consequently, the Democratic Republic of the Congo requests the Court to apply the law and have this warrant annulled.

Thank you.

The PRESIDENT: Thank you. I now give the floor to Maître Jacques Vergès.

Mr. VERGES: Thank you, Mr. President, for giving me the floor. Mr. President, distinguished Members of the Court, the honour falls to me today to take the floor for the first time before you, the world's highest judicial authority. I do so on behalf of the Democratic Republic of the Congo regarding the arrest warrant issued by a Belgian judge against the Minister for Foreign Affairs of the Democratic Republic of the Congo. As you will have understood, it is not the defence of a private individual before a criminal court that I intend to plead before you today but the violation of the sovereignty of one State by another. There will be several parts to my statement. I should like first to set out the facts, which are constituted by that warrant and by the Law on which the warrant claims to base itself. This will be followed by an exposition of the grounds of our request, namely urgency, irreparability and, although this is not in issue today, of the serious substantive arguments we advance against the Belgian Law. And we shall be dealing with the present conduct of the Kingdom of Belgium, namely its attitude to the universal jurisdiction it has conferred upon itself and its original interpretation of the Vienna Convention.

Statement of the facts on which the Application is based

I. The international arrest warrant issued by a Belgian judge against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo

A. On 11 April 2000, an investigating judge of the Brussels *Tribunal de première instance*, enjoying *ipso facto* the

status of public official of the Kingdom of Belgium, Mr. Damien Vandermeersch, issued against *"Yerodia Ndombasi Abdulaye"*, born on 5 January 1933, a male of Congolese nationality, an arrest warrant seeking his provisional detention pending a request for his extradition to Belgium for alleged crimes constituting "serious violations of international humanitarian law", which warrant was circulated by the judge to all States, including the Democratic Republic of the Congo itself, which received it on 12 July 2000.

The person against whom the arrest warrant is directed is none other than His Excellency Mr. Abdulaye Yerodia Ndombasi, Minister of State and Minister for Foreign Affairs and International Co-operation of the Democratic Republic of the Congo. The issuing judge made no mention of that status as Minister for Foreign Affairs, although he could not conceivably have been unaware of it.

The arrest warrant characterized the facts alleged therein as

> "crimes under international law constituting grave breaches causing harm by action or omission to persons or property protected under the Conventions signed at Geneva on 12 August 1949 and Protocols I and II additional to said Conventions, [and] crimes against humanity"

and cited as the statutes alleged to be applicable "Article 1, paragraph 3" and "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".

It described the "place of commission of the offence" as "the Democratic Republic of the Congo" and gave as the date of that alleged offence "August 1998".

I shall now set out the terms of the arrest warrant, and of the legislation on which it claims to found itself.

B. The investigating judge described the circumstances in which the acts imputed to H.E. Mr. Yerodia Ndombasi allegedly took place in terms which may be summarized as follows.

1. After His Excellency President Laurent Désiré Kabila had, at the head of a coalition backed by Rwandan, Ugandan and Burundian troops, overthrown the régime of former President Mobutu in 1997 and set up a new government, it is alleged that, on account of the discontent caused among part of the Congolese population by substantial participation in that government of persons belonging to the Tutsi ethnic group - and here I cite the actual words of the Belgian judge - he ordered, on 27 July 1998, the withdrawal of Rwandan, Ugandan and Burundian military forces. That order is said to have gone virtually unheeded.

A rebellion by elements of the Congolese army reportedly broke out on 2 August 1998 and the rebels allied themselves with those foreign forces. A fresh conflict, which a United Nations special report was to describe as an internal armed conflict within the meaning of Article 3 common to the three Geneva Conventions of 12 August 1949, is said then to have opposed that coalition and the troops remaining loyal to H.E. President Kabila. An uprising of some military elements, Banyamulenge and Rwandan, reportedly took place in Kinshasa, and the new coalition partners are alleged to have transported troops to the west of the country to reinforce that rebellion.

According to Judge Vandermeersch, who relies on the United Nations report, serious violations of international humanitarian law were committed on both sides during the conflict.

In particular, Tutsis or "supposed Tutsis" (sic) were allegedly summarily executed or imprisoned, "particularly on ethnic grounds and notably following incitement to hatred against the Tutsis of which the Congolese leaders were allegedly guilty".

2. Having reached this point in its allegations, the arrest warrant comes to the offences with which it specifically charges H.E. Mr. Yerodia Ndombasi. It first states:

> "At the time, Kabila (sic) had practically no Congolese army. To prevent the rebels from seizing strategic points, Kabila [it is the Belgian judge who expresses himself in these terms] and Yerodia Ndombasi (sic) allegedly made speeches to the population calling on it to be vigilant and to hunt down the infiltrated rebels, described as Tutsis, indiscriminately . . ."

It then asserts that the Congolese population "already exacerbated (sic) by water and power cuts" responded to the call, conducting "dragnet operations" and hunting down not only the rebels or combatants of the invasion forces but

also Tutsi civilians, of whom it arbitrarily arrested a large number and massacred several hundreds. It claims that many persons were the victims of manhunts which ended in their being put to death, notably "by necklacing".

With regard in particular to H.E. Mr. Yerodia Ndombasi, who was then Principal Private Secretary to the President of the Republic, the Belgian judge accuses him of having provoked the continuation of those massacres by two "broadcast" public statements, made after they had begun.

In the first place, he is alleged to have made a televised statement on 4 August 1998, in which "speaking in Kilongo, the language of the Bas Congo (sic)", he called on "his brothers" to "rise up as one to throw the common enemy out of the country" using all possible weapons available, "including shotguns, machetes, pickaxes, arrows, sticks and stones". The author of the document finds the terms thus employed "clear enough to call on the inhabitants of that region to attack the Tutsis", a word not actually uttered in the speech which he quotes.

It is further alleged that on 27 August 1998 H.E. Mr. Yerodia Ndombasi said of the enemy: "They are scum, germs that must be methodically eradicated. We are determined to utilize the most effective remedy".

The judge adds that [Mr. Ndombasi] could not have been unaware of the massacres said to have preceded the latter speech and concludes that, rather than discouraging the dragnet operations, he deliberately sought to encourage them.

And, asserting that fresh massacres subsequently took place, he finds that the speeches in question "(incited) racial hatred" and that they "thus resulted in the death of several hundred persons and the internment of Tutsis, summary executions, arbitrary arrests and unfair trials". Thank you so much for this tribute to Mr. Vandermeersch's colleagues - Congolese judges generally trained in Belgium.

II. The Belgian Law of 16 June 1993 as amended by the Law of 10 February 1999

That then is the warrant. I would now like to discuss, but not dwell too long on, the Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999, because, as we have seen, the arrest warrant which has just been analysed cites the Belgian Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law in respect of the offences which are asserted in the warrant to be applicable to the alleged facts. Furthermore, the very existence of this warrant can only be understood in the light of other provisions of that Law, relating to diplomatic immunity and to the international jurisdiction of Belgian courts.

It is important to describe these three kinds of provisions to the Court in turn.

A. As to the offences alleged, the first one cited by the investigating judge, on the basis of Article 1, paragraph 3, corresponds to the notion of a war crime. That paragraph contains *inter alia* the following definitions:

> "The grave breaches set out below, causing harm, by action or omission, to persons or property protected under the Conventions signed at Geneva on 12 August 1949 and approved by the Law of 3 September 1952 and by Protocols I and II additional to said Conventions, adopted at Geneva on 8 June 1977 and approved by the Law of 16 April 1986, shall constitute crimes under international law and shall be punished in accordance with the provisions of the present Law, . . .:
>
> (1) wilful killing;
>
> . . . . . .
>
> (3) wilfully causing great suffering or serious injury to body, health . . ."

The second offence covered by the arrest warrant is that of crimes against humanity, war crimes and now crimes against humanity, which are defined in paragraph 2 of the same Article 1, whose terms derive from the Law of 10 February 1999, the Belgian Law. That paragraph includes the following:

> "A crime against humanity, as defined below, whether committed in time of peace or in time of war, shall constitute a crime under international law and shall be punished in accordance with the provisions of the present Law. In accordance with the Statute of the International Criminal Court, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(1) murder;

(2) extermination;

. . . . . .

(4) deportation or forcible transfer of population;

(5) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

. . . . . .

(8) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this article."

B. As to diplomatic immunity, Article 5, paragraph 3, of the Law, also resulting from the Law of 10 February 1999, provides: "Immunity attaching to the official capacity of a person shall not prevent the application of the present Law"; this covers *inter alia* diplomatic immunity.

C. These provisions of substantive law are accompanied by a provision concerning Belgian international jurisdiction. Article 7 of the Law states:

"The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed.

For offences committed abroad by a Belgian against a foreigner, neither a complaint by the foreigner or his family nor an official notice from the authority in the country in which the offence has been committed shall be required."

It is clear that, in Judge Vandermeersch's mind, this provision establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of serious violations of international humanitarian law, without even - even! - making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory. One can hardly be surprised by this, for the same investigating judge, in an Order of 6 November 1998, adopted this interpretation, which gave rise to controversy.

Article 12 of the Preliminary Title of the Belgian Code of Criminal Procedure, entitled "Prosecution for crimes or offences *(délits)* committed outside the territory of the Kingdom", provides that

"except in the cases provided for in Articles 6, Nos. 1 and 2, 10, Nos. 1 and 2, and in Article 10*bis* (cases lying outside the universal jurisdiction of the Belgian courts), prosecution of the violations dealt with in this chapter shall take place only if the accused is found in Belgium".

It should be noted that that chapter includes an Article 12*bis*, which establishes a few cases in which the Belgian courts have universal jurisdiction pursuant to international conventions (on physical protection of nuclear materials and on aircraft hijacking) and that that Article reiterates that this jurisdiction is subject to the condition that the alleged perpetrator of the offence be found on Belgian territory. It would appear that, having regard to this provision of Article 12, some Belgian jurists have opined that the jurisdiction established by Article 7 of the Law of 16 June 1998 is subject to the condition that the person in question has been found in Belgium: that Article should, under this interpretation, be understood as a reference to the general rule of law expressed in Article 12 of the Preliminary Title of the Code of Criminal Procedure.

Moreover, it will be observed in the same vein that, when the drafters of the Law of 16 June 1993 wished to derogate from the general rule of law concerning the extraterritorial jurisdiction of the Belgian courts, as in the case of serious violations of international humanitarian law committed by a Belgian abroad, they inserted an express provision in the Law (Article 7, paragraph 2, quoted above) and also that, concerning domestic jurisdiction *ratione loci*, the Belgian Court of Cassation has held that, failing an express exception in the Law of 16 June 1993, the general rules of law applied (*French Section, 2nd Civil Chamber, 31 May 1995*, judgment submitted herewith).

However, in his Order of 6 November 1998, rendered in criminal proceedings against General Pinochet, Judge Vandermeersch considered that Article 7 of the Law of 16 June 1993 derogates from Article 12 of the Preliminary Title of the Code of Criminal Procedure and does not therefore make the jurisdiction of Belgian courts conditional on the person in question being found on the territory of the Kingdom. He bases that interpretation on a passage from the statement of reasons in the draft which resulted in the Law of 16 June 1993.

It is clearly this unlimited jurisdiction which the Belgian State would confer upon itself if this judge's interpretation of the Law were correct which explains the issue of the arrest warrant against H.E. Mr. Yerodia Ndombasi, against whom it is patently evident that no basis of territorial or *in personam* jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked.

Since the issue of the warrant, the Belgian Government has not disavowed this interpretation. Quite to the contrary, in querying the Government of the Democratic Republic of the Congo in connection with this case on its legislation concerning extradition, the Belgian Government has implicitly claimed jurisdiction of the Belgian courts (see the exchange of notes submitted herewith).

This attitude thus clearly confirms the existence of the dispute which has led the Democratic Republic of the Congo to submit to the Court an Application on the merits and the request for the indication of a provisional measure which is being argued today.

Discussion

Preliminary remark

At this point, Mr. President, I should like to make a preliminary remark. Neither the present request for the indication of a provisional measure, nor the Application whereby the Democratic Republic of the Congo seised the Court of the merits of the dispute between itself and the Kingdom of Belgium, seeks to make any claim whatever on the basis of the diplomatic protection of one of its nationals.

In his personal capacity, H.E. Mr. Yeorida Ndombasi has submitted to the Belgian courts an application for the annulment of the arrest warrant issued against him by Judge Vandermeersch. Those proceedings are entirely separate from the present discussion and, whatever legal incongruities they may have presented, they must remain so.

The purpose of these proceedings by the Democratic Republic of the Congo is altogether different. It is to make good the breaches of international law affecting the Congolese State in the exercise of its sovereign prerogatives in diplomatic matters. The Congo is attacking the arrest warrant issued by the Belgian judge because it is directed not at Mr. Yerodia Ndombasi as such, but at the office of Minister for Foreign Affairs of the sovereign State of the Congo.

My argument setting out the grounds of the Application will, I hope, serve to illustrate this preliminary remark.

Grounds of the request

The Democratic Republic of the Congo, pursuant to Article 73 of the Rules of Court, requests the indication of a provisional measure ordering the immediate discharge of the arrest warrant issued against the Minister for Foreign Affairs.

The object of provisional measures is, according to the Court's case-law, "to preserve the respective rights of the Parties pending the decision of the Court" (*Order of 5 July 1951, Anglo-Iranian Oil Co.* case).

The need for such preservation is subject to two essential conditions, namely urgency and the existence of irreparable harm.

It is these two conditions, which are clearly satisfied here, that I now wish to examine.

I. Urgency

The arrest warrant issued by the Belgian judge has undoubtedly engendered a situation which makes it impossible for the Minister for Foreign Affairs of the Democratic Republic of the Congo properly to perform his State duties.

Thus, while certain States consider that this warrant cannot be enforced, if only because it is in flagrant breach of the diplomatic immunity which international law accords to every Minister for Foreign Affairs, and the Minister for Foreign Affairs has in fact been able to travel to certain of those States, and to the headquarters of the United Nations, this does not apply to other States. Certain of these latter were not able to give Mr. Ndombasi an assurance that he would not be arrested on leaving his aircraft by policemen following the letter of the arrest warrant and unfamiliar with international law, or that there would be competent, independent courts who would rapidly quash such arrest, irrespective of the correctness of the legal arguments raised.

Hence the Minister, who had been planning to visit France for political meetings on his return from New York, where he had attended a meeting of the United Nations General Assembly, had to cancel his plans.

Thus he cannot visit any State to which his duties may call him and, as a result, he is unable to carry out those duties in a proper manner. It is unnecessary to emphasize, in this regard, that certain sensitive matters can be settled only by direct meetings between the political representatives of States.

A State whose Minister for Foreign Affairs is obliged to remain on the territory of that State is, as it were, decapitated.

II. Irreparable harm

As far as the particular situation of the Democratic Republic of the Congo is concerned, meetings are to take place in the next few days in neighbouring countries with a view to ending the armed conflict between the Democratic Republic of the Congo and a number of other States, including Rwanda and Uganda.

The representatives of these States have already met at Lusaka and elsewhere. It is urgently necessary that the Democratic Republic of the Congo should take part in these discussions, in these meetings, which are intended to put an end to the present state of war. How though, if this warrant continues in force, could the Minister for Foreign Affairs of the Democratic Republic of the Congo attend these meetings? They are extremely urgent. Unless one by one some of these States say to themselves: this decision of the Belgian judge is in breach of international law and we shall not apply it. But is such a situation tolerable in the international sphere? Assuredly not.

As regards the harm, as I was saying, it is irreparable. The consequences of excluding the qualified representative of the Democratic Republic of the Congo from the international arena for an undetermined period of time are, by their very nature, consequences which are irreparable.

From one day to the next the need for a trip abroad may arise, for urgent negotiations, linked to the search for a peaceful solution to the events which at present afflict that country.

Doubtless it is conceivable - this has been mooted unofficially - to maintain that the Republic could automatically overcome the political handicap inflicted on it by the Belgian judge by appointing a new Minister for Foreign Affairs. Obviously, however, no sovereign State can agree that the composition of its government should be dictated to it by a foreign Power. Any such pretension on the part of the foreign Power is already a violation of sovereignty in itself. There have also been unconfirmed reports in Belgian newspapers that the Belgian judge was prepared to relinquish jurisdiction and transmit the case file to the Congo, if the Congo undertook to continue the proceedings begun by the Belgian judge. It seems to us that if a State transmits a case file to another State, the other State has sovereign discretion to decide what it should do, and there again we see a suggestion which violates the sovereignty of the Congo.

What is more, as regards both the urgency and the irreparable nature of the harm, the request of the Democratic Republic of the Congo relies on the precedent constituted, as you know, by the *Order of 15 December 1979 (Diplomatic and Consular Staff (United States of America* v. *Iran), I.C.J. Reports 1979)* - the seizure of hostages from the United States Embassy in Tehran, in which the Court held that the violation of diplomatic immunity created a situation requiring the indication of a provisional measure.

Nor can it be said that the position of the United States Embassy in Iran was more serious, as regards diplomatic immunity, than the inability of a Minister for Foreign Affairs to move about: in the first case, although it is true that both diplomats and diplomatic premises were subjected to physical violence, that twofold violation of immunity did not impede the operation of American diplomacy, or if it did, only in one single State; in the second case, the case which concerns us today, there is no physical violation of the person of the Minister for Foreign Affairs - at least as long as the arrest warrant is not executed - but the State's foreign policy is handicapped throughout the entire world.

III. Credibility of the substantive legal grounds of the Application

At this point in my statement, I should like - albeit briefly as the merits are not being discussed today - to refer to the credibility of the substantive legal grounds of our Application. The substantive legal grounds of the Application are the following:

(1) violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the Organization of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations;

(2) violation 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.

In order to establish the credibility of these grounds, it is sufficient to reproduce, with some clarifications, the presentation made in the Application.

A. Regarding violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the Organization of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations

1. The *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law of 16 June 1993, and as interpreted by Judge Vandermeersch in his Pinochet order, contravenes the international jurisprudence established by the Judgment of your Permanent Court of International Justice (PCIJ) in the *Lotus* case *(7 September 1927, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10).*

The Court recognized at that time that territoriality is a principle of international law (while ruling that this principle is not absolute, in that it cannot prevent a State from prosecuting acts done outside its territory if they had consequences on that territory, such as, in that case, on board a ship flying the Turkish flag). According to the Judgment, this principle means that *a State may not exercise its authority on the territory of another State*.

This rule of jurisprudence is now corroborated by Article 2, paragraph 1, of the Charter of the United Nations, which states: "The Organization is based on the principle of *the sovereign equality* of all its Members".

The only instances in which general international law allows, exceptionally, that a State may prosecute acts committed on the territory of another State by a foreigner are, first, cases involving violation of the security or dignity of the first State and, second, cases involving serious offences committed against its nationals.

It is important to point out in this connection that Belgian jurists, in commentaries on Article 7 of the Law of 16 June 1993, while themselves considering, on the basis of an interpretation which minimizes the scope of the Judgment delivered in the *Lotus* case, that this Article is not inherently unlawful from the standpoint of international law, nevertheless express serious reservations about its total conformity with that law: they state that its exercise might:

> "encounter some reluctance, based on the rule which prohibits any State from interfering in the affairs of others";
>
> "a State risks incurring international responsibility if, with the intention of punishing on its territory crimes committed elsewhere, it unduly affects the delicate balance of post-conflict internal settlements which are manifestly in the public interest";
>
> "the law . . . under cover of seeking to promote a better international order . . . in reality simply has the unfortunate effect of prolonging the naturally anarchic state of the international 'community'".

Its application would engender a "monstrous cacophony" (see document attached hereto). And at this stage, I should like - on the basis of pure hypothesis which nevertheless illustrates my point - to submit the following case for your consideration. Recently, in Paris, there was a debate between two retired generals. Both of them had served in Algeria. Both acknowledged that torture had been used there: one regretted that fact, the other justified it. Two States are concerned by this debate: Algeria, of which the victims were nationals, and the French State, the French Republic, of which the generals are nationals. Neither the Algerian Government nor the French Government, for

reasons of their own, took any action in this field. Is it nonetheless conceivable that Mr. Vandermeersch, by virtue of the universal jurisdiction which Belgium attributes to itself, would seek the extradition of these two generals from France? This clearly illustrates what state of anarchy we would arrive at if these measures were not revoked, if the Kingdom of Belgium's pretension to act as universal moral arbiter were not curbed.

2. It is true that a number of multilateral conventions for the suppression of specifically defined offences (torture and other cruel, inhuman or degrading treatment or punishment; terrorism; breaches of the rules on the physical protection of nuclear materials; unlawful acts against the safety of maritime navigation; unlawful seizure of aircraft; unlawful acts of violence at airports) provide for universal jurisdiction of the States parties to them.

But the term universal still has to be defined. Crucially, those conventions make jurisdiction conditional on the perpetrator's presence on the territory of the prosecuting State. As can be seen, this is already an exception to the principle of territoriality, and universal jurisdiction is to be understood as the right - and hence no doubt the duty - of a State to prosecute a person suspected of one of the crimes specifically enumerated, if that suspect is present on its territory. This is what the concept of universal jurisdiction is understood to mean in all countries and in all United Nations texts. Thus, the Belgian judge and the Belgian law claim today to be free of these constraints. For example, apart from the above-mentioned Article 12*bis* of the Preamble to the Belgian Code of Criminal Procedure, Article 689-1 of the French Code of Criminal Procedure provides that:

> "pursuant to the international conventions referred to in the following articles (i.e., Articles 689-2 to 689-7, each of which refers to one of the conventions just mentioned), any person guilty of any of the offences listed in those articles . . . may be prosecuted and tried by French courts if that person is present in France". ["[I]f that person is present in France."]

These, then, are exceptional heads of jurisdiction, which derive their compliance with international law solely from the treaties which provide for them. They are not part of general international law.

3. There is nothing in that law, as it currently stands, to admit of the notion that a further exception has to be generally recognized, in regard to war crimes or crimes against humanity.

Doubtless certain States, in adopting laws designed to bring their legislation into line with *United Nations Security Council resolutions 827 of 25 May 1993 and 955 of 8 November 1994*, establishing *international tribunals for the prosecution of*, respectively, *persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991* and *persons responsible for acts of genocide or other serious violations of international humanitarian law committed in 1994 in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States*, extended their jurisdiction in respect of the crimes thus defined to cases other than those where either the persons responsible or the victims were their own nationals.

However, such provisions are in no way materially comparable with Article 7 of the Belgian Law cited above.

Thus the above-mentioned Security Council resolutions constitute interference in the affairs of sovereign States whose sole justification is the mission of maintaining peace and international security vested in the United Nations - there is no question here of intervention by the United Nations in favour of Belgian law - to which, moreover, the preamble to those resolutions expressly refers, and which, of course, no State may usurp. However, while the Security Council attributes to national courts jurisdiction concurrent with that of the international tribunals - subject to the primacy of the latter - to try the crimes which it defines, it lays down no criterion for such jurisdiction. It establishes no derogation from the rules of criminal jurisdiction recognized by international law.

The example of the *French Laws Nos. 95-1 of 2 January 1995* and *96-432 of 22 May 1996*, which bring French law into line with resolutions 827 and 955, confirms this. The *first* of these provides, in the *opening paragraph of Article 2*, that "principals or accessories in respect of the offences referred to in Article 1 may be prosecuted and tried by French courts, if they are found in France . . ." and, in the *second paragraph*, bars those claiming to have been injured as a result of any such offence from bringing a civil action by filing suit in France unless the French courts are competent under the first paragraph. *Article 2* of the *second Law inter alia* declares applicable to persons referred to in its Article 1 (that is to say, persons responsible for acts of genocide or other serious violations of international humanitarian law committed in the territory of Rwanda) the provisions of Article 2 of the first Law.

A *circular* from the French Minister of Justice, dated *10 February 1995, which contains a commentary on the Law of 2 January 1995* and, moreover, points out that "recognition of such universal jurisdiction was not required by the

Security Council resolution", explains as follows the subjection of the jurisdiction of the French courts to the condition that the person in question be found in France: "in accordance with the rule traditionally governing universal jurisdiction, and out of a concern for efficacy, Parliament did not wish to extend the jurisdiction of the domestic courts to offences referred to in Article 1 the authors of which are not present in France".

The PRESIDENT: Excuse me, Maître, but the interpreters can no longer follow you at the rate at which you are going. Perhaps you would be kind enough to slow down a little.

Mr. VERGES: Yes of course. I apologize to the interpreters.

The *circular of 22 July 1996 commenting on the Law of 22 May 1996* refers back to that of 10 February 1995. The passage from this latter circular just cited makes implicit reference to the rejection, in the course of the parliamentary debate, of an amendment seeking to delete the condition of presence in France for the acceptance of universal jurisdiction of the French courts. The essential argument was the incompatibility with international law of unlimited universal jurisdiction, as proposed by the Belgian Law of 1993.

Thus the above-mentioned Security Council resolutions cannot be invoked to justify under international law, in regard to offences punishable under those resolutions but limitatively defined by reference to the time and place of their commission, a law whereby a State claims unconditional jurisdiction to try such offences throughout the world.

A fortiori, those resolutions cannot be invoked to justify such a claim in relation to other offences, notwithstanding that they may be of the same character as those to which the resolutions relate but were committed in other places and at other times.

By the same token, it is self-evident that the Rome Convention of 17 July 1998 relating to the Statute of the International Criminal Court - which covers only offences committed on the territory of States party thereto or by their nationals - cannot be invoked so as to confer legitimacy upon such laws in respect of offences allegedly committed in the Democratic Republic of the Congo by nationals of that State, which is not a signatory to the Convention. And here may I say in passing that the Belgian judge seeks the conviction of persons of Congolese nationality in respect of acts committed - allegedly committed - in the Congo against Rwandan or Congolese citizens. Have the countries affected by these acts taken any judicial action? Has Rwanda, whose nationals the alleged Tutsi victims are, instituted proceedings in this regard? Not at all. And the Democratic Republic of the Congo still less so. Here again we have the example I gave you - far-fetched, perhaps - of the two French generals. In the present case the Belgian judge claims to have jurisdiction and the duty to bring proceedings which relate to acts committed in a foreign country by a foreigner against other foreigners. And this when the States of which both the alleged offenders and the alleged victims are nationals - when these two States find no cause for judicial action. This is the state of affairs - laughable, it would be said, in other circumstances but dangerous in the present case - that we have reached.

Moreover, nothing in that Convention authorizes signatory States to attribute to themselves unconditional universal jurisdiction. *Article 17* of the Rome Convention of 17 July 1998 relating to the Statute of the International Criminal Court refers to "a State which has jurisdiction [over the case]" - not jurisdiction in general; when we speak of a State having jurisdiction over the case, this means that there are States which do not have jurisdiction over the case, thereby in itself implying that every State does not necessarily have jurisdiction as the Kingdom of Belgium claims.

It follows that the Article, as cited above, of the Belgian Law of 16 June 1993, and the arrest warrant issued by the judge pursuant to that Law, are in breach of international law.

B. As regards the violation 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

The *non-recognition*, on the basis of *Article 5, paragraph 2*, of the Belgian Law, of the *immunity of a Minister for Foreign Affairs* in office is contrary to international case-law, according to which customary law and international courtesy accord to a Minister for Foreign Affairs, the representative of the State on behalf of which he acts, diplomatic privileges and immunities. This situation has already been examined by the Court in the *Eastern Greenland* case.

That case-law finds support today in *Article 41, paragraph 2, of the Vienna Convention of 18 April 1961*, codifying diplomatic relations, which provides:

"All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other Ministry as may be agreed."

Under this rule of international law as it stands today, to deny diplomatic immunity to the Minister for Foreign Affairs would be the very negation of such immunity.

And that which is laid down by international law clearly cannot be displaced by the law of a State.

Exceptions to diplomatic immunity can derive only from other rules of international law, as for example the Security Council resolutions cited above. However, as has already been stated, the offences as alleged in the disputed arrest warrant were committed in circumstances outside the scope of those resolutions.

It follows that the aforementioned provision of Article 5, paragraph 2, of the Belgian Law of 16 June 1993 is manifestly in breach of international law in so far as it claims to derogate from diplomatic immunity, as is the arrest warrant issued pursuant thereto against the Minister for Foreign Affairs of a sovereign State.

And as if this were not enough, we would further point out that this Article, inserted into the Law of 16 June 1993 by the Law of 10 February 1999, is subsequent to the acts contemplated in the arrest warrant. But a law which removes an immunity, and thereby extends the scope of an offence *ratione personae*, is a substantive law which cannot have effect retroactively, by virtue of a principle which forms part of the international legal order.

The Court is not asked at present to determine the merits of these grounds of law, but to note that they are credible and justify steps to ensure that the *capitis diminutio* which a Belgian judge has sought to inflict on the Democratic Republic of the Congo, and for which the Kingdom of Belgium is answerable, should cease.

Mr. President, Members of the Court, I thank you for having listened to what I had to say. I have said my piece, Mr. President.

The PRESIDENT: Thank you, Maître. I understand that this concludes the oral presentation of the Democratic Republic of the Congo for this morning. I thank you kindly. The sitting is therefore closed, and the Court will resume its work at 10 a.m. tomorrow to hear the reply of the Kingdom of Belgium.

The Court rose at 11.15 a.m.

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