DECLARATION OF JUDGE ODA

1. I am in agreement with the Court's decision to dismiss the request for the indication of a provisional measure presented on 17 October 2000 by the Congo together with its Application, although I believe that paragraph 78 (2) of the operative part of the Court's Order should be more clearly phrased in order to reflect the dismissal of the request in this particular case.

2. I believe that the Application presented by the Congo has, from the outset, been moot, no matter whether Mr. Yerodia Ndombasi was Minister for Foreign Affairs (as he was up to 20 November 2000) or Minister of Education (as he is now). In my view, in any event, no "irreparable prejudice" did result for Congo, or "might be caused in the immediate future to the Congo's right", by the disputed arrest warrant (cf. Order, para. 72). It is noted that Mr. Yerodia Ndombasi was present at the United Nations General Assembly in New York in September of this year.

The Court seems to be led to the opposite conclusion that "the Congo's Application has not at the present time become moot" (Order, para. 57), and that "the request by the Congo for the indication of provisional measures has not become moot by reason of Mr. Yerodia Ndombasi's appointment as Minister of Education on 20 November 2000" (Order, para. 60), although the Court does not in the present Order seem to give sufficient explanation to justify these conclusions.

3. In this Order, the Court refrains from pronouncing on the argument advanced by Belgium that "the [provisional] measure relating to the discharge of the arrest warrant, sought by the Congo on a provisional basis, is identical to that sought by it on the merits" (Order, para. 73), while I believe that that reason in itself would be sufficient ground for the Court to reject the request for the indication of a provisional measure.

4. The Court states that "the Parties appear to be willing to consider seeking a friendly settlement of their *dispute*" (Order, para. 76, emphasis added), but what Belgium in fact suggested was that it would not object to the Court indicating

> "provisional measures which called upon the Parties jointly, in good faith, to address the difficulties caused by the issuance of the arrest warrant with a view to achieving a resolution to the dispute in a manner that is consistent with their obligations under international law, including Security Council resolutions 1234 (1999) and 1291 (2000)" (CR 2000/33, p. 60; CR 2000/35, p. 18; cf. CR 2000/35, p. 23).

In fact Belgium rather asks "the Court to remove from its List [this] case . . . brought by [the Congo] against Belgium by Application dated 17 October 2000" (final submissions of Belgium dated 23 November 2000).

5. I am unable to share the Court's view that

> "it is desirable that the issues before the Court should be determined as soon as possible; whereas it is therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition" (Order, para. 76).

I have doubts as to why the Court should be in so much haste to reach a conclusion on the interpretation of certain general principles of international law; possibly this is a compromise to make up for the dismissal of the Congo's request for provisional measures. It appears to me that the Court has misunderstood the intention of Belgium — for whom, in fact, there exists no dispute to be argued before this Court.

Belgium simply wished that the difficulties in the Congo region would not be aggravated, and that a resolution of the "dispute" in general should be sought in accordance with, *inter alia*, Security Council resolutions 1234 (1999) and 1291 (2000), which were aimed at halting hostilities and bringing about a cease-fire.

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6. This line of thinking reflects my position on paragraph 78 (1) of the Court's Order. With much reluctance I cast my vote in favour of paragraph 78 (1) of the operative part of the Court's Order, but *only* from a sense of judicial solidarity. However, I still believe that this case should have been removed from the Court's General List since, in my view, there is no legal dispute susceptible to the Court's jurisdiction in this instance.

7. The Congo did not indicate in its Application of 17 October 2000 any basis of jurisdiction for this case. The basis of jurisdiction was only referred to by the Congo on 22 November 2000 in the second round of the oral pleadings (CR 2000/34, p. 17). As understood from its belated argument, the Congo appears to rely on the optional clause — in other words Article 36, paragraph 2, of the Court's Statute — when it cites violation of "the principle that a State may not exercise its authority on the territory of another State" and "the principle of 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". The Congo also appears to rely on the 1961 Optional Protocol concerning the Compulsory Settlement of Disputes as far as it invokes the alleged violation by Belgium of the diplomatic immunity provided for in the 1961 Vienna Convention on Diplomatic Relations.

8. I would question whether, at the time of the Application of 17 October 2000, there was in fact between the Congo and Belgium "[a] legal dis-

pute[s] concerning: *(a)* the interpretation of a treaty; *(b)* any question of international law; [etc.]" (Statute of the Court, Art. 36, para. 2) or a dispute "arising out of the interpretation or application of the [Vienna Convention on Diplomatic Relations]" (Optional Protocol concerning the Compulsory Settlement of Disputes, Art. 1). Moreover, in order for such a *dispute* or *legal dispute* to exist, there have to be legal claims raised by one party reflecting the assertion of a breach by the other party of its rights and interests, and denial of those claims by the other party.

9. In its Application of 17 October 2000 the Congo did not present its submissions and thus did not specify the dispute, in the terms as I have referred to them above, alleged to exist between it and Belgium.

The Congo simply stated that it believed, in my view erroneously, that Mr. Yerodia Ndombasi, as Foreign Minister, would be arrested in consequence of the warrant issued by the Belgian judge. Such a belief or suspicion regarding possible or potential inconvenience cannot, in my view, amount to a claim in a legal sense and cannot constitute a legal basis for the Court's jurisdiction. Towards the end of the oral pleadings, counsel for the Congo stated that:

> "[Congo] requests the Court to order Belgium to comply with international law; to cease and desist from any conduct which might exacerbate the dispute with [the Congo]; specifically, to withdraw the international arrest warrant issued against Minister Yerodia" (CR 2000/34, p. 23);

and the Agent for Congo asked the Court "to determine what the law is . . . and . . . [to] persuad[e] the Belgian judge, Mr. Vandermeersch, to withdraw his international arrest warrant" (*ibid.*, p. 27). I repeat that the Congo neither identified a legal dispute with Belgium nor specified the rights and interests allegedly breached by Belgium. The Congo simply wanted confirmation of certain legal principles of international law concerning the exercise of State jurisdiction.

10. The matters concerning the scope and extent of State jurisdiction are certainly major issues of general international law, but they cannot be dealt with by this Court unless they are presented to it as the *subject of a dispute*.

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11. It might be argued that the issue of the existence of a dispute — a *legal dispute* as referred to in Article 36, paragraph 2, of the Court's Statute, or a *dispute* as referred to in the 1961 Optional Protocol — is a matter to be dealt with at the jurisdictional stage of a case before this Court. In my view, however, that issue is not the same as a preliminary

objection raised by a respondent State, in a case initiated by unilateral application, concerning the issue of whether a State may be compulsorily brought to the Court in consequence of its voluntary acceptance in advance of the Court's jurisdiction, in circumstances where, in principle, the consent of the parties is essential.

The existence of such a "legal dispute" or of a "dispute" is, theoretically, a matter to be dealt with prior to a decision on whether the Court has jurisdiction. It is true that this issue may generally be dealt with at the jurisdictional phase once the case is registered with the Court (see "Preliminary Objections" under Section D (Incidental Proceedings) of the Rules of Court).

12. However, if by chance the Court finds itself in a position (as has been seen in certain recent cases) to face this question much earlier, namely prior to the jurisdictional phase, it should not hesitate to do so. Interim Protection (Section D (Incidental Proceedings) of the Rules of Court) presents an ideal opportunity to deal with this question as a "pre-preliminary" question. The Court could make a decision to remove a case from its General List at that stage or to continue to be seised of it, after having examined whether there existed a "legal dispute" or a "dispute".

If the Court had to wait until the jurisdictional phase before dealing with the question of whether or not there actually existed a justiciable dispute, there would be an excessive number of similar cases brought to the Court simply for the reason that a State believed that another State had acted contrary to international law. I am afraid that many States would then withdraw their acceptance of the Court's compulsory jurisdiction in order to avoid such a distortion in the presentation of cases brought by other States.

(Signed) Shigeru ODA.