DISSENTING OPINION OF JUDGE BULA-BULA

[Translation]

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INTRODUCTION

1. It was with regret that I voted against the main clause of the operative part of the Order of 8 December 2000 concerning the indication of provisional measures. I understand that the Court was sharply divided over the question. It thus appeared wise to seek a compromise among the Members of the Court.

2. Such a reason may be acceptable, particularly since the present case is at a purely procedural stage which does not prejudge the rights of either Party.

3. It is precisely the interlocutory nature of the Order which prompts me to believe that the compromise ultimately adopted by the Court lacks balance. Thus, I am of the opinion that the Court should have clearly indicated a minimal provisional measure which I find justified under the circumstances. Without necessarily following the terms of the request, the Court could have prescribed this measure *proprio motu*, as permitted by its Statute (Art. 41) and Rules (Art. 75).

4. I believe that the Court should give a certain, clear and precise response, whether affirmative or negative, to the Congo's request. In other words, it should either deny it or grant it. The statement "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures" (paragraph 2 of the operative part of the Order) does not appear, on first view, to be without ambiguity. We have become accustomed to the circumlocutions of a principal political organ of the United Nations when called upon to take difficult decisions. We must now get used to similar pronouncements from the principal judicial organ of the United Nations. Do the teachings, in the broad sense, of the jurisprudence benefit from this?

5. That is one of the main reasons for my dissent (I), but I do agree with the majority of the Court on certain points (II). Finally, I shall describe the solution which I find appropriate (III).

I. POINTS OF CONCURRENCE

6. I will briefly raise three points which the Court has considered and with which I am in agreement. Like the majority of the Members of the Court, I believe that the Court has prima facie jurisdiction (see paragraph 68 of the Order) pursuant to the Parties' respective declarations accepting its compulsory jurisdiction (see paragraphs 61 and 64 of the Order). But the Applicant failed to specify with mathematical precision the basis of the Court's jurisdiction. I also share the conclusion set out in the Order finding that "the request by the Congo for the indication of provisional measures has not been deprived of its object by reason of Mr. Yerodia Ndombasi's appointment as Minister of Education on 20 November 2000" (paragraph 60 of the Order). Finally, I voted with the majority

of the Court in favour of the first paragraph of the operative part of the Order. The Court rightly "*Reject[ed]* the request of the Kingdom of Belgium that the case be removed from the List". This request, possibly justified in the eyes of the Respondent, is in keeping with its extravagant claim to universal jurisdiction, as the Respondent conceives it. The Court intends to consider it on the merits "with all expedition" (paragraph 76 of the Order). This is a crucial point of the judicial compromise embodied in the decision and one which limits the inequitable consequences of the polite denial of the Congo's request.

7. Thus, I shall not address the very important issue, in this phase of the proceedings, of the legal relationship between universal jurisdiction and State immunities.

II. Points of Dissent

8. I shall now justify the minimal provisional measure which, in my view, the Court should have prescribed. For this purpose, I have to show that the conditions for the indication of such a measure, as laid down in a generally consistent manner in the jurisprudence, i.e., urgency, irreparable prejudice and the preservation of the rights of the parties, have been and remain satisfied (for the doctrine, see in particular P. M. Martin, "Renouveau des mesures conservatoires: les ordonnances récentes de la Cour internationale de Justice", *JDI*, Vol. 102, 1975, pp. 45-59; J. Peter A. Bernhard, "The Provisional Measures Procedure of the International Court of Justice through US Staff in Teheran: Fiat Justitia, Pereat Curia", *Virginia Journal of International Law*, Vol. 20, No. 3, 1980, pp. 592-602).

A. Urgency

9. I believe that urgency must be assessed in the light of the sphere of human endeavour in question. It may be regarded as a circumstance calling for the expeditious handling of the case. Within that position there may be degrees of urgency, so that it is possible to establish a hierarchy among urgent situations: extreme urgency, great urgency, urgency (see the Order of 3 March 1999 in the *LaGrand* case, "the greatest urgency" (*I.C.J. Reports 1999*, p. 12, para. 9)). In all of these various cases, there is always urgency.

10. I therefore reaffirm that the urgency characterizing the present case has its own particular features. It is neither urgency in the medical sense of the term nor urgency as understood directly from the humanitarian standpoint. It is urgency in the general legal sense of the term. It cannot be assessed either in the absolute or in the light of individual precedents. In the case under consideration, the criterion of time must be measured in the light of the tragic events afflicting the Congo and the quickening rate at which international conferences concerning the country are being held. The Court has already taken cognizance of the

facts, concerning which it has indicated provisional measures (case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 1 July 2000, I.C.J. Reports 2000*, p. 111).

11. If it were true that, as the Congo alleges and Belgium does not dispute, "more than half the members of the Congolese Government might be prosecuted and might be named on international arrest warrants and requests for extradition, including the President of the Republic himself" (see the oral argument by Mr. Ntumba Luaba Lumu, verbatim record of the public hearing on 22 November 2000, CR 2000/34, p. 20), and that, as the Congo contends, the "complainants" include "a political party in opposition to the Congolese Government and operating on Belgian territory", or that "security reasons" prevent counsel for Belgium from revealing the identity of the complainants of Congolese nationality who were behind the warrant of 11 April 2000 (see the oral argument by Mr. Eric David, verbatim record of the public hearing on 21 November 2000, CR 2000/33, p. 23), would there not be an urgent need for some form of provisional ruling? Does not the need to safeguard the efficacy of the international judicial function require that such a situation be prevented from arising in the case pending before the Court?

12. I am further led to reflect on this situation when I consider a comment by Mr. Ntumba Luaba Lumu, one of the Congo's counsel and a member of that country's Government. Belgium did not challenge that comment. The speaker asked in the following terms whether the reshuffling of the Congolese Government on 20 November 2000 was not in response to Belgium's desire:

> "The question may be raised whether this warrant was not intended as a means to force the lawful authorities of the Democratic Republic of the Congo to make certain political changes which Belgium desired and which, moreover, have been welcomed." (See the verbatim record of the public hearing of 22 November 2000, CR 2000/34, p. 10.)

13. While I cannot establish a definite causal relationship between certain facts, I can also reasonably question the closeness in time of the visit to Kinshasa by a member of the Belgian Government on 18 November 2000, the reshuffling of the Congolese Government on 20 November 2000 and the opening of the hearings by the Court on 20 November 2000. Was it mere chance that these events coincided?

14. I am therefore of the opinion that there is an urgent need, albeit an attenuated one, to order provisional measures. And I believe so even more strongly because I have one fear: that, regardless of the Court's good intentions, a judicial decision on the merits may be a long time in coming, and that during that time there is a risk that the case could be removed from the List. Barring unforeseen developments.

B. Irreparable Prejudice

15. I would be inclined to believe that the Congo has suffered irreparable prejudice, directly from the standpoint of moral damage and indirectly from the standpoints of material and physical damage and human injury, from Belgium's unilateral act against the Congolese Minister for Foreign Affairs. Such a criterion has been repeatedly upheld in the Court's abundant jurisprudence, notably in the cases concerning *Nuclear Tests (Australia* v. *France)* (*I.C.J. Reports 1973*, p. 103); *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* (*I.C.J. Reports 1979*, p. 19); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))* (*I.C.J. Reports 1993*, p. 19); and *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)* (*I.C.J. Reports 1998*, p. 36); *LaGrand (Germany* v. *United States of America)* (*I.C.J. Reports 1999*, p. 15); and the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (*I.C.J. Reports 2000*, p. 127, para. 39). But, as far as the Applicant is concerned, it remains the case that *actori incumbit probatio*. Nor do I deny that the magnitude of the prejudice suffered by the Congo has changed since Mr. Yerodia Ndombasi moved from the Ministry of Foreign Affairs to the Ministry of Education. In other words, that State continues to suffer harm but in lesser proportions than that previously suffered from the standpoint of international relations.

16. Specifically, I believe that the arrest warrant of 11 April 2000 caused prejudice to Congolese diplomacy, since the head of the diplomatic corps, who did nevertheless take numerous trips abroad — in the southern hemisphere —, was unable for several months to take part in all the international meetings held throughout the world where the question of foreign armed activities on the territory of the Congo was addressed. Thus, when it found itself being represented by lower-level officials at meetings of Foreign Ministers, the Congolese State suffered the loss of the benefit of diplomatic precedence. The result was that the substance of talks, especially discussions aimed at ending the armed conflict, was adversely affected. The Congo's international sovereign prerogatives therefore suffered. This, I believe, is a type of irreparable prejudice (see Ewa Stanislawa Alicja Salkiewicz, *Les mesures conservatoires dans la procédure des deux Cours de La Haye*, 1984, p. 69, concerning "damage not capable of any reparation"). Although unfortunately no irrebutable evidence was offered, this situation could have had *indirect consequences* on the life of the civilian population victim of the armed conflict in progress (according to the International Rescue Committee (United States), *Mortality Study Eastern Democratic Republic of Congo, "of the 1.7 million excess deaths, 200,000 were attributable to acts of violence"* (sources: www.theirc.org/mortality.htm).

17. I would also argue that Belgium's conduct has cast discredit, and

continues to cast discredit, on the Government of the Congo, already weakened by the armed conflict in progress. That conduct is likely, as the result of a summary decision, to burden one of the Parties to the conflict from the outset with accusations that degrade it in the eyes of the international community and to characterize the aggressed as the aggressor (see Security Council resolution 1234 of 9 April 1999 and resolution 1304 of 16 June 2000). Has not the fact that Belgium, through Interpol, circulated its warrant to Interpol member States complicated the search for a peaceful resolution to the international armed conflict? I believe that the Congo's rights to international respect have been prejudiced thereby. These are moral rights to honour and dignity of the Congolese people, as represented by their State.

18. In sum, Belgium's actions have in the first place caused injury to the sovereign rights of the Congolese people, as organized in an independent State: "deprival of the State's sovereignty . . . is a sure test of the irreparability of the prejudice" (El-Kosheri, dissenting opinion in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), I.C.J. Reports 1992*, p. 215). In the words of Judge Oda, the object of provisional measures is "to preserve *rights of States* exposed to an imminent breach which is irreparable" (declaration in *LaGrand, I.C.J. Reports 1999*, p. 19, para. 5). Secondly, Belgium's actions have violated that people's rights to dignity and honour within the international community, including indirect injury in the form of other prejudice, albeit collateral.

19. I do not disagree, however, that it is very difficult to place a precise value on the injury caused to the Congo. But that is a problem which may arise in the practical application of the principle. I would point out once again that the absence over several months of the head of the Congolese diplomatic corps from international meetings held in the capitals of countries at the centre of world events, as opposed to those playing more peripheral roles, may in all likelihood have resulted in indirect damage to Congolese citizens and assets currently situated on territories where hostilities are taking place. The presence of the Congolese Minister for Foreign Affairs in person at those meetings might have saved lives. The Minister might have succeeded in convincing other parties to the armed conflict to respect international humanitarian law and human rights (see Judge Oda's declarations in the *Breard* and *LaGrand* cases: "the rights of victims of violent crimes (a point which has often been overlooked) should be taken into consideration" (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 260, para. 2, and *LaGrand (Germany* v. *United States of America), Order of 3 March 1999, I.C.J. Reports 1999*, p. 18, para. 2).

20. I believe it even more difficult to make a precise estimate of the moral prejudice. But that does not make that prejudice any less real.

When considering the merits of the case, the Court will be in a position to observe this. Under current international law, the act of issuing an arrest warrant against an organ of a foreign State is itself highly questionable. Let us imagine the converse situation, in which Congolese courts were to issue similar warrants against Belgian organs concerning acts committed in the Congo post-Nuremberg, during which period this new law came into being, according to counsel for Belgium. For, as Antonio Cassese states, European colonization caused "the destruction of entire ethnic groups" (Antonio Cassese, "La communauté internationale et le génocide", *Le droit international au service de la paix, de la justice et du développement, Mélanges Virally*, 1991, p. 183).

21. Nevertheless, I am of the view that the irreparable prejudice suffered by the *Congo* has diminished in magnitude since Mr. Yerodia Ndombasi was entrusted with the education portfolio on 20 November 2000, because he has *at present* been assigned the duties of Minister of Education and most of those activities are carried out on the national territory. The fact remains that, in a world in which an increasing number of matters take on an international dimension, a minor part of those duties, in the classic, division of labour sense, involves international relations. Is it acceptable that, because that part is small, it should be subject to such restrictions?

22. Moreover, international law recognizes the constitutional autonomy of States and, pursuant to that autonomy, States may freely appoint, without impediment or outside interference, any member of the Government to fulfil missions abroad, without regard to that member's nominal office. This would appear to be a common practice of the Congo, among other States. This is all the more important because the armed conflict confronting the Congo requires participation, both individual and collective, by members of its Government in bilateral and multilateral negotiations aimed at ending the war. It is therefore possible that the Congo is deprived *de facto* of the full exercise of its sovereign prerogatives internationally if Mr. Yerodia Ndombasi is prevented, because of his recent experience in this area or for any other reason, from freely accomplishing a mission on behalf of his Government in certain foreign countries.

23. In the final analysis, it appears to me that, as long as the former Minister for Foreign Affairs of the Congo remains a member of the Congolese Government, his change in position does not drastically alter the *circumstances* which called for the submission of the request for the indication of provisional measures. I do not, however, deny that there is a substantial difference between the functions of a Minister for Foreign Affairs and those of a Minister of Education, and between the legal bases of the immunities attaching to one or the other of those government posts.

C. Preservation of the Parties' Respective Rights

24. Much argument was devoted to the Parties' respective rights to be preserved. It was thus alleged that the Congo was making the same

claims in the request for provisional measures as in the Application concerning the merits. Fortunately, the Court did not accept this argument. I continue to believe that the Applicant's *sovereign rights* and its *rights to honour and dignity* must be safeguarded in a balanced manner with the Respondent's rights pending the judgment on the merits. Under the present circumstances, these respective rights are not evenly balanced. There is a real risk that one of the States will continue to be subject to the will of the other.

25. The Respondent justifies its singular conduct as follows:

> "33. Quite the contrary: the issue of the arrest warrant is a means of helping the Congo to exercise a right which — it should be recalled — is also an obligation for the Congo, namely that of arresting and prosecuting Mr. Yerodia Ndombasi in the Congolese courts on account of the acts with which he is charged." (See the oral argument by Mr. Eric David, CR 2000/33, pp. 31-32.)

I interpret this conception as "[r]eliance by a State on a novel right or an unprecedented exception to the principle" [of non-intervention] which "if shared in principle by other States" would "tend towards a modification of customary international law" (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 109, para. 207). Does a subjective right not have the effect of excluding third-party claims and obliging third parties to respect the right of another?

"In other words," continued counsel for Belgium, "the arrest warrant issued by the Belgian judicial authority, far from violating the Congo's rights, on the contrary assists that country in exercising them" (CR 2000/33, p. 32). Are these the consequences of lingering memories of historical legal ties that enabled the colonizing Power to promulgate legal provisions with overseas effect?

Thus what we find being put forward here is the notion of "judicial intervention" (see Mario Bettati, *Le droit d'ingérence — Mutation de l'ordre international*, 1996, *contra* S. Bula-Bula, "L'idée d'ingérence à la lumière du Nouvel Ordre Mondial", *Revue africaine de droit international et comparé*, Vol. IV, No. 1, March 1994, "La doctrine d'ingérence humanitaire revisitée", *ibid.*, Vol. 9, No. 3, September 1997).

And Belgium goes so far as to assert that: "In these circumstances, to indicate the provisional measures requested by the Congo in this case would be tantamount to violating the rights which international law itself has conferred on Belgium." (Oral argument by Mr. Eric David, CR 2000/33, p. 35.)

26. I persist in believing that the analysis set out in points A and B above shows that there is *relative urgency* in indicating provisional measures. It also demonstrates the *irreparable prejudice* already suffered and continuing to be suffered by a decolonized State, caused by an erstwhile colonial Power convinced — some would say — of its "sacred civilizing

mission". The Applicant is not relying on a " 'ghost' right" (oral argument by Mr. Eric David, CR 2000/33, p. 35). It is apparent that the Congo's accusations against Belgium in this case, which, as shown above, Belgium has implicitly admitted, do indeed concern Belgium's violation of the sovereignty and political independence of the Congo. I believe that those rights fall within the scope of the present legal dispute.

Those rights demand safeguarding, at the risk otherwise that one of the Parties will impose its political and legal order on the other, thereby rendering moot any consideration of the case on the merits (see above the reference to the Belgian judge's "waiting list" of arrest warrants for several Congolese ministers and the reference by counsel for the Congo, a member of the Congolese Government, to Belgium's desire for a Cabinet reshuffle and to the simultaneous occurrence of certain events, etc.).

27. The rights to be preserved also include the sovereign prerogative (see paragraph 40 of the Order of 1 July 2000 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*: it is upon "[the] rights to sovereignty . . . that the Court must focus its attention in its consideration of this request for the indication of provisional measures") which each State is recognized to enjoy in exercising its full powers in the legislative, executive and judicial spheres without outside interference. No State can impose on another State, by means of *coercive* measures, whether administrative, judicial or others, the manner in which domestic affairs are to be conducted on its territory (see Judge Bedjaoui, case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1992*, p. 148, and S. A. El-Kosheri, *ibid.*, p. 215). The allegation of any fact which might engage the responsibility of a State must be communicated through appropriate diplomatic channels to that State, because "international law requires political integrity also to be respected" (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 202).

28. It is to be hoped that the dispute between the two States is neither *aggravated* nor *extended*, given that the Congo's ambassador to Brussels returned to his post in late November 2000, after having been recalled in response to the issue of the disputed warrant in April 2000. Nevertheless, relations between Belgium and the Congo, historically characterized by highs and lows ever since decolonization, could have benefited had the Court been less pusillanimous.

III. Conclusion

29. In short, I consider that it would have been appropriate and legitimate for the Court to indicate a provisional measure ordering the *suspen-*

sion of the warrant of 11 April 2000 pending the Court's decision on the merits, to be rendered with all expedition in light of the importance of the case.

30. I therefore find the Respondent's request that the Court deny all provisional measures to be altogether excessive. Also, I do not agree with the Court's analysis of the current circumstances, which, in its view, do not require it to exercise its power as defined in Article 41 of the Statute.

31. Failing the minimal provisional measure set out above, the Court could have included my amendment, worded as follows, in the operative part of the draft Order:

> "2. (*a*) *Finds* that the Kingdom of Belgium, which has knowledge of the nature of the claim by the Democratic Republic of the Congo, should consider the impact that a judgment upholding that claim could have on the execution of the warrant of 11 April 2000 and should decide whether and to what extent it ought therefore to reconsider its warrant;
>
> (*b*) *Finds* that the Democratic Republic of the Congo, which has knowledge of the nature of the claim by the Kingdom of Belgium, should consider the impact that a judgment upholding that claim could have on the execution of the arrest warrant of 11 April 2000 and should decide whether and to what extent it ought therefore to reconsider its position."

As Judge Oda has recalled:

> "through the Court's jurisprudence it is established that, if the Court appears prima facie to possess jurisdiction, it may (if it thinks fit) indicate provisional measures, and this rule has always been interpreted most generously in favour of the applicant, lest a denial be needlessly prejudicial to the continuation of the case. Thus the possibility of indicating provisional measures may be denied *in limine* only in a case where the lack of jurisdiction is so obvious as to require no further examination of the existence of jurisdiction in a later phase." (Declaration of Acting President Oda, appended to the Order of 14 April 1992 concerning provisional measures in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1992*, p. 130.)

33. The doctrine is in general agreement in acknowledging that the Court's power to indicate provisional measures aims to "prevent its decisions from being stultified" (G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, p. 542, 1986, quoted by Judge Ajibola in his dissenting opinion in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising*

from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United States of America), I.C.J. Reports 1992*, p. 194).

34. Can I consider that the Court in the present case has interpreted the request generously? Can it be asserted that there is no reason to fear that the case could be removed from the Court's List? Is there any doubt as to the very high importance of this case on the merits? Yet a very wide majority of the Members of the Court agree that the Court has prima facie jurisdiction in this case.

35. It is to be hoped that the Court's attitude, apparently dictated by the institution's own considerations of judicial policy, is not seen by certain litigants, first and foremost the Applicant in the present proceedings, as a denial of justice. What is at stake is promotion of the rule of law. For, as Lacordaire said, as between the weak and the strong, freedom oppresses and the law protects. Is not the "freedom" found in dealings between a former colonial Power, now an industrialized country, and its weakened, former colony an example of this?

36. Admittedly, the Applicant appears not to have made an entirely coherent case before the Court. It is undeniably true that a litigant bringing judicial proceedings is under an obligation, pursuant to the rules of procedure, to act in a manner calculated to maximize its chances of prevailing, even within the relatively short time-limits for incidental proceedings.

37. No one, moreover, can be ignorant of the role played, especially lately, by public opinion. It is however sometimes important to cast an objective eye on the "hasty judgments of public opinion or the mass media" (dissenting opinion of Judge Bedjaoui in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1992*, p. 148).

(Signed) Sayeman BULA-BULA.