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006 The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, pursuant to Articles 43 *et seq.* of its Statute, to hear the oral arguments of the Parties 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, I should like to state that, following the resignation of Judge Mohammed Bedjaoui with effect from 30 September 2001, the General Assembly and the Security Council on 12 October 2001 elected Mr. Nabil Elaraby to serve for the remainder of Judge Bedjaoui's term of office, which will expire on 5 February 2006. As this election took place only three days ago, Mr. Elaraby will not be able to come to The Hague until a later date.

I should also like to take the opportunity offered to us by this sitting to mention very briefly the distinguished contribution made by Judge Bedjaoui to the work of the Court. For almost 20 years, Judge Bedjaoui made his mark on the Court, at a time of far-reaching developments in international law and international relations. My colleagues and I myself can bear witness to the breadth of his intellect and clarity of his thinking and to his personal commitment in the service of our institution. The departure of this former Judge and President of the Court is without doubt a great loss to the Court.

I would now recall that 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 of the Court to choose a Judge *ad hoc*. Mr. Sayeman Bula-Bula, chosen by the Democratic Republic of the Congo, and Mrs. Christine van den Wyngaert, chosen by Belgium, were duly installed as judges *ad hoc* in the case last year, when the Court considered the request for the indication of provisional measures submitted by the Democratic Republic of the Congo; in accordance with Article 8, paragraph 3, *in fine*, of the Rules of Court, they are not required to make a new declaration for the present phase of the case.

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007 On 17 October 2000, the Democratic Republic of the Congo filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium in the matter of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi". In that Application, the Congo contended that Belgium had violated the "principle that a State may not exercise [its authority] on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations". In section II of its Application, the Congo requested the Court to declare that Belgium should "annul the international arrest warrant issued on 11 April 2000".

In order to found the Court's jurisdiction, the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

The same day on which it filed its Application instituting proceedings, the Congo also submitted to the Court a request for the indication of a provisional measure pursuant to Article 41 of the Statute of the Court. In this request, it stated that the "disputed arrest warrant effectively bar[red] the Minister for Foreign Affairs . . . of the Congo from leaving that State in order to go to any other State which his duties require[d] him to visit and, hence, from carrying out those duties". The Congo stated in its request that it was seeking "an order for the immediate discharge of the disputed arrest warrant". In the meantime, Mr. Yerodia Ndombasi had left his position as Minister for Foreign Affairs and had been given the education portfolio. By Order of 8 December 2000, the Court, on the one hand, rejected a request by Belgium that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional

008 measures. In the same Order, the Court also held that "it [was] desirable that the issues before the

Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".

By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

By Order of 27 June 2001, the Court, on the one hand, rejected a request by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended. The case was then ready for hearing.

I would add that, having ascertained the views of the Parties, the Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, to make copies of the pleadings and documents annexed thereto accessible to the public from today. Further, in accordance with Court practice, the pleadings and annexes thereto will today be placed on the Court's Web site and will be published at a later date in the *Pleadings, Oral Arguments, Documents* series of the Court.

I note the presence at the hearing of the Agents, Counsel and Advocates of both Parties. I also note the presence of His Excellency Maître Ngele Masudi, Minister of Justice and Keeper of the Seals of the Democratic Republic of the Congo, whom I am pleased to welcome.

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In accordance with the schedule of hearings adopted by the Court, after consultation with the Parties, the Congo will make its oral statement first. I therefore now give the floor to H. E. Mr. Jaques Masangu-a-Mwanza, Agent of the Democratic Republic of the Congo.

Mr. MASANGU-A-MWANZA: Thank you, Mr. President. My speech will certainly be a very brief one, for it simply consists in introducing to you the distinguished individuals who are going to make the oral presentations and replies on behalf of the Democratic Republic of the Congo at the hearings in accordance with the agreement between the Parties in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*.

They are:

1. H.E. Maître Ngele Masudi, Minister of Justice and Keeper of the Seals (whom the President has just been kind enough to welcome);
2. Maître Kosisaka Kombe, Adviser to the Presidency of the Republic;
3. Professor Mandjambo, Legal Adviser to the Ministry of Justice;
4. Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain;
5. Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot);
6. Mr. Pierre d'Argent, *Chargé de cours*, Catholic University of Louvain;
7. Mr. Djeina Wembou, Professor at the University of Abidjan (who is not yet here);
8. Maître Moka N'Golo, *Bâtonnier* of the Kinshasa Bar (who is not yet here either).

In his letter of 14 June 2001 to the Registry of the Court, the Agent of Belgium asked that the proceedings be divided into three phases. He put forward two arguments in support of his request.

He wanted the proceedings split into a preliminary phase, where issues of *jurisdiction* and *admissibility* would be dealt with, and a phase dealing with the *merits*. He further argued that there was to be a review of the disputed Law in the Belgian legislative chambers.

These proposals were opposed by the Democratic Republic of the Congo, which desired no derogation from the procedure as fixed by the Court in its Orders of 8 and 13 December 2000.

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Whatever may be the content of the amendment to its legislation sought by the Belgian Government, we believe that at the present time no draft of any such amendment has been tabled with the Belgian Parliament. On the contrary, complaints against a number of prominent individuals, including Mr. Sharon, Prime Minister of Israel, Mr. Fidel Castro, President of Cuba, Mr. Laurent Gbabo, President of the Republic of Cote d'Ivoire, and, most recently, Mr. Denis

Sassou Nguesso, President of the Republic of the Congo, continue to be filed with the Belgian courts.

In any event, the Democratic Republic of the Congo has suffered moral injury from this affair and accordingly seeks reparation. For, in the Congo's view, this is a past wrongful act that no legislative reform can remedy.

It might perhaps have been possible to reach a compromise if, pursuant to Article 88, paragraph 2, of the Rules of Court, our opponents had been able to persuade Judge Damien van der Meersch to withdraw his arrest warrant, and if Belgium had agreed to make a formal apology to the DRC on account of the injury caused to it.

This being the present position, Mr. President, Members of the Court, the Congolese delegation respectfully asks you to decide this matter in accordance with the law.

Thank you.

The PRESIDENT: Thank you. May I ask to whom I am now to give the floor on behalf of the Democratic Republic of the Congo?

Mr. MASANGU-a-MWANZA: To the Minister of Justice.

The PRESIDENT: Thank you, Ambassador. I give the floor to His Excellency Maître Ngele Masudi, Minister of Justice and Keeper of the Seals. Minister, you have the floor.

Maître NGELE MASUDI: Thank you. Mr. President, Members of the Court, Registrar. It is a great honour for me to appear before you today to introduce the first round of oral argument of the Democratic Republic of the Congo in this case between itself and the Kingdom of Belgium. The presence of the Democratic Republic of the Congo before this Court as the applicant Party

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bears witness to its profound attachment to the principle of the pacific settlement of disputes. How could it be otherwise, given that since its accession to international sovereignty my country has chosen to participate in international life as a civilized modern State respectful of international law? Thus it is a party to all of the principal multilateral legal instruments, in particular those concerning human rights and humanitarian law, and its legal system enshrines the primacy of international law over domestic law. It was this choice of an approach based on respect for international law which

led the Democratic Republic of the Congo to accept the compulsory jurisdiction of your Court in regard to all disputes of a legal nature between itself and any other State having accepted the same obligation. It having proved impossible to reach a negotiated settlement of the dispute between the Democratic Republic of the Congo and the Kingdom of Belgium over the international arrest warrant of 11 April 2000, the Democratic Republic of the Congo has been obliged to submit that dispute to your Court for judicial settlement.

The Democratic Republic of the Congo considers that the issue and circulation of a warrant against an incumbent Minister for Foreign Affairs represents an internationally wrongful act on the part of Belgium which violates the Congo's sovereign rights and is enormously damaging to it, in both moral and material terms. This, the Congo's counsel and advocates will shortly demonstrate to you.

However, before that, I would ask you, Mr. President, to permit us a very short speech in which we will recall the specific context in which the statements having given rise to the disputed warrant were made, namely the aggression and invasion of the Democratic Republic of the Congo by its three neighbours, who chose deliberately to act outside international law.

Thank you.

The PRESIDENT: Thank you, Minister. If I have understood you correctly, I am now to give the floor to Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic. Maître, you have the floor.

Maître KOSISAKA KOMBE: Thank you, Mr. President. Mr. President, Members of the Court. Thank you for giving me this opportunity to remind you, in the form of some preliminary remarks, of the context in which the acts having given rise to the issue of the arrest warrant occurred. It all stems from the aggression by certain neighbouring countries of which our country has been victim since 2 August 1998, an aggression today acknowledged by the international community, notably through the relevant resolutions of the Security Council of the United Nations. The aggressors have distinguished themselves by systematic acts of massive violation of human rights — the United Nations estimate the number of deaths as a result of this aggression at more than two million — and of the plundering of the wealth of the Democratic Republic of the Congo.

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The inhuman conduct of the aggressors, who respect no rule of international humanitarian law, became manifest right from the month of August 1998, when they seized the electrical power supply facilities and cut off the supply of electricity to Kinshasa, with catastrophic results for the six million inhabitants of that city, particularly in the hospitals. It was in these circumstances that the population of Kinshasa rose up *en masse* to resist the aggression when the attacking forces reached the outskirts of the city. The Government, by rekindling the flame of freedom, strengthened the population's determination to resist foreign domination. There was never any question, as far as the Government of the Democratic Republic of the Congo was concerned, of inciting the population to attack a specific group with a view to exterminating them. Nor did the Government call on the population to subject individuals to inhuman or degrading treatment. On the contrary, whenever excesses were observed, the Government, with the support of certain friendly countries and of the international community, took steps to protect those at risk, successfully evacuating them or moving them to protected areas. It was thus with some indignation that the Congolese people and Government were informed of the issue by the Kingdom of Belgium of an arrest warrant against the Minister for Foreign Affairs, thereby handicapping the Congolese State in its efforts to mobilize the international community against the aggression. The people and Government of the Congo accordingly seek to secure from the Court a judgment which will make good the immense legal, material and moral injury which they have manifestly suffered. The Democratic Republic of the Congo, like all other weak nations, has a profound trust in the exercise by the Court of its judicial function within an international community with ever-growing aspirations to becoming a community governed by a rule of law akin to that prevailing at national

013 level. The present proceedings also represent a concrete example of the acceptance by the Congo of judicial settlement of international disputes as a method of pacific settlement of disputes in accordance with the United Nations Charter. Mr. President, Members of the Court, more than any other forum, the Court is best placed today to give practical effect to that fundamental principle of the international community represented by the sovereign equality of States, by condemning the illegal conduct of a member of the international community, irrespective of its developed-nation status. I thank you for your attention.

The PRESIDENT: Thank you Maître. I now give the floor to Professor Mandjambo, Legal Adviser to the Ministry of Justice.

Mr. MANDJAMBO: I am sorry, Mr. President, it is in fact Professor François Rigaux who will now speak.

The PRESIDENT: Thank you. I accordingly give the floor to Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain. Professor, you have the floor.

Mr. RIGAUX:

A. INTRODUCTORY REMARK

Thank you, Mr. President. May I first make it clear how honoured I feel to be appearing for the first time before the International Court of Justice. May I then just say, Mr. President, Members of the Court, by way of preliminary remark, that relations between the Democratic Republic of the Congo and the Kingdom of Belgium are currently excellent. There is absolutely no hostility whatever between the two States, and the problem which brings them before this Court is, as has already been pointed out, very much a one-off, specific one, namely this arrest warrant issued in the year 2000 against the Minister for Foreign Affairs of the Democratic Republic of the Congo. What the two Parties are submitting to you, Mr. President, Members of the Court, is a question of principle. Each of the two States is to an extent fighting rather for a principle than to defend its own interest. True, the Congo seeks reparation for the offence — *iniuria* — committed against it, but at the same time the Congo is defending an objective principle of international law, namely respect for the immunities guaranteed by international law. In so doing, the Congo is arguing on behalf of the entire international community, for it is certain that the violation of those immunities would truly lead to chaos in interstate relations. However, I would add that Belgium too is fighting to defend a principle — one which may be looked upon here with a degree of sympathy —, namely the principle that crimes must not go unpunished. I fear, however, that this concern on Belgium's part has in this case been wrongly inspired and ill-advised, and that it risks, moreover, doing more harm than good to the principle known as universal jurisdiction. The remainder of my speech, Mr. President, Members of the Court, will be in two parts. In the first

part, I will recall the subject-matter of the proceedings by the applicant State and the principles of law applicable, and in the second part I will briefly set out the grounds of the Kingdom of Belgium's international responsibility for the violation of the immunity of the Minister for Foreign Affairs of the Democratic Republic of the Congo.

B. THE SUBJECT-MATTER OF THE PROCEEDINGS BY THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE LEGAL PRINCIPLES APPLICABLE THERETO

Belgium's first point, Ariadne's thread, which runs from the first to the last page of the Counter-Memorial, is based on a flagrant misinterpretation of the subject-matter of the Congo's suit and of the legal principles applicable to it.

I. The subject-matter of the Application, as has already been said, concerns the carrying out of an act of judicial power which impugns an essential prerogative of a sovereign State, namely the right to conduct its international affairs in total independence, represented by the Minister for Foreign Affairs of its choice, who is accordingly immune from criminal process on the part of another State. Such immunity is guaranteed by an objective rule the victim of whose breach is and *remains* the Democratic Republic of the Congo, the breach being attributable to Belgium.

When the Counter-Memorial claims that the initial Application is now without object, it ignores an essential dimension of the application of the law to relations between States or between individuals. That essential dimension is time. Clearly, the key question to be answered in order to determine whether the international arrest warrant of 2000 complied with international law is what was Mr. Yerodia's status at that time. And those factual circumstances emphasized *ad nauseam* in the Counter-Memorial, namely the fact that the individual concerned is no longer Minister for Foreign Affairs, are clearly irrelevant, for it is not as of today that the internationally lawful or unlawful character of the arrest warrant has to be determined, but as of the time when the warrant was issued. And as we have already stated, the only approach which could have accorded satisfaction to the Democratic Republic of the Congo would have been for Belgium to have expressed its regrets and presented its apologies for this flagrant violation of international law, and to have undertaken to procure — and effectively to procure — withdrawal of the warrant.

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Thus this is not a theoretical question, as you have been asked to believe, but very much a practical one, particularly so in view of the fact that in its Counter-Memorial the Belgian

Government acknowledges that, at the time of the warrant's transmission to the Democratic Republic of the Congo, it was also sent to Interpol, though without being the subject of an Interpol Red Notice (Counter-Memorial, p. 69, para. 3.1.5). The fact that such a Red Notice might still be issued subsequently (*ibid*, p. 72) thus demonstrates that the Belgian Government still wishes today to see the arrest warrant of 11 April 2000 accorded its legal consequence, namely execution. Thus the current subject-matter of the proceedings by the Democratic Republic of the Congo is very much a real one, namely a request to the Court to rule on a violation of international law which was committed by Belgium in the year 2000, but which continues to this day.

The notion that it is a hypothetical question without any real substance which is today before the Court is developed principally in five passages of the Counter-Memorial which one is bound to regard at the very least as curious.

I shall cite them in the order in which they occur: it is stated that the "arrest warrant has no legal effect at all either in or as regards the DRC" (*ibid.*, p. 71, para. 3.1.12). I have trouble grasping the implications of this. Presumably it means that the authorities of the Democratic Republic of the Congo are not required to execute the warrant in any way. This notion is taken up again on the next page (*ibid.*, p. 72, para. 3.1.13) in regard to the Red Notice: even if one were to be issued, it would neither infringe the sovereignty of, nor create any obligation for, the DRC. This

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double caveat loses sight of the violation of the Congo's sovereignty resulting simply from performance of the act of coercion represented by an arrest warrant, irrespective of whether it is enforced or not. The third passage (*ibid.*, p. 83, para. 3.2.32) restates the passage from the reasoning in the arrest warrant in which the investigating judge argues that the warrant could not be executed if the Minister came to Belgium in his official capacity. Without wishing to labour this curious conception of the operation of the separation of powers within the domestic order in regard to a judicial decision which seeks to tell the Government how it should or should not respect an immunity under international law, it is clear from the statements which I have just cited that the arrest warrant is claimed to have no force or practical effect either in the Congo or in Belgium. Thus what we are seeing here is an attempt to reduce this famous arrest warrant to a document barely worth the paper it is written on.

And finally, the last passage — also, I must say, a somewhat astonishing one — where it is said (*ibid.*, pp. 130-131, para. 3.5.8) that, if the arrest warrant were to be executed in a third State, it would be that State, and not Belgium, which would be responsible for the violation of an international obligation to the detriment of the Congo. A point which evidently loses sight of the fact that there is a direct causal relation between the arrest warrant issued in Belgium and any act of execution carried out elsewhere.

The Counter-Memorial appears to criticize the Applicant for claiming no form of reparation other than one characterized as "moral". The reparation for this moral injury — and we shall come back to this tomorrow — consists in respectfully requesting the Court to find that the arrest warrant was issued illegally, but also to condemn the Respondent by requiring it to take the necessary steps to have the arrest warrant declared null and void *ab initio,* and accordingly withdrawn from its current continued circulation.

It is somewhat surprising that a Respondent should complain of the moderation of what is sought of the Court, and, in all likelihood, if Mr. Yerodia had still been Minister for Foreign Affairs, the content of the Applicant's requests might have been infinitely more substantial. But what remains, of course, is to defend the principle of State sovereignty, which has been manifestly ignored by the issue of the arrest warrant.

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I will terminate this point by accordingly noting that this is in no sense a hypothetical question, but both a question of principle and a very real one, namely the existence — the continuing existence — within the Belgian domestic legal order of an arrest warrant the issue of which is contrary to international law.

II. In addition to disregarding the need for the proper application *ratione temporis* of the rule of international law — this is the temporal problem to which I referred and to which I shall return — the Counter-Memorial is marked throughout by a certain conceptual confusion. In order to explain this point to the Court, I would like to discuss three basic concepts which need to be distinguished: (1) jurisdiction, (2) immunity, and (3) culpability.

(a) In respect of jurisdiction, the Counter-Memorial recalls the *dictum* from the *Lotus* Judgment to the effect that a State determines its criminal jurisdiction as it sees fit, subject to any prohibitive rule of international law. And jurisdiction characterized, rightly or wrongly, as

"universal" is particularly entitled to such an assessment, with wide latitude being left to States to determine the geographical reach of their criminal jurisdiction. Such universal jurisdiction appears even more attractive in that it receives support from a wide body of public opinion, which rightly demands on behalf of victims of crimes under international law that those crimes be punished and, if possible, that reparation be made for them. Even though this aspect of universal jurisdiction was referred to in the Application instituting proceedings, it is not, however, essentially at this point that the Court is now being asked to decide whether or not such jurisdiction is a violation of international law. I believe that the solution to the dispute does not call for a response to this question.

A State asserting a grievance based on the exercise of "universal" jurisdiction on behalf of one of its nationals who is not protected by immunity under international law could clearly bring a diplomatic action or an international judicial action. And although a clumsy attempt is made in the Counter-Memorial to distort the nature of the request before you by describing it in that way, the question here is obviously not one of diplomatic protection. It is not Mr. Yerodia's person which is at issue; what is at issue is the office, and it is the injury to that office which thus constitutes the prejudice suffered by the Congo.

018 *(b)* In respect of the second point, immunities, when these are immunities under international law, they are beyond the jurisdiction of any State legislature. And, what we find here is, if you will, the other aspect of the *Lotus* judgment, i.e., that simultaneously with the freedom conferred by a State's sovereignty in criminal matters, prohibitive norms of international law limiting such State autonomy in criminal matters must be maintained. And I believe that immunities under international law are precisely one example of a limitation placed on the exercise of "universal" jurisdiction.

What I wish to underscore is that, unlike international law or civil law, where — and I hope not to be showing a lack of respect for the Court in saying this — it is not necessary to call upon a judge at every step along the way — treaties are concluded, contracts are entered into by the parties, they are performed, they are construed, they are terminated without the need for intervention by a court, subject of course to respect for *ordre public* under domestic law and *jus cogens* under international law — criminal proceedings are characterized by the need for a

court. There can be no punishment in a State governed by the rule of law unless a court orders it. Accordingly, the rules of jurisdiction and procedure are utterly crucial in criminal matters. An act taken by a judge without jurisdiction, or by a judge who oversteps the bounds of his jurisdiction, as those bounds are established by an immunity, is a flagrantly unlawful act. It is not in fact a judicial act at all, and I believe that what the Court is being asked to do is to hold that this flagrantly unlawful act, one that in my opinion is unlawful even in the domestic order, must be condemned by the Court.

(c) I shall now turn to the third problem — culpability — and lay stress on a fundamental principle: immunity does not equal impunity. The fact that an immunity might bar prosecution before a specific court, or at a given point in time, does not mean that prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account.

I now return to the role played by time, and to the Counter-Memorial, and thus also to the Belgian Law, which, like the Counter-Memorial, confuses two points in time. The time when the alleged crime was committed and the time when the act of prosecution is carried out. The time when the crime was committed can have certain consequences — and did in the past have far greater consequences — with respect to prosecution. As you know, it was long considered that a

019 Head of State was safe from being charged personally or individually for any crime. It has only been quite recently that the view has been taken that acts carried out in the exercise of an office such as that of Head of State could be prosecuted. But there, what is decisive is the effect of the temporal rule concerning the existence, or alleged existence, at the time the acts were carried out, of a legal bar to prosecution. And there is also a second, entirely distinct, question: at the time of prosecution is there or is there not an immunity, independent of the individual's status at the time when the offence was committed, barring prosecution? Now, as you will recall, the acts of which Mr. Yerodia stands accused were, or are said to have been, committed before he took office as Minister for Foreign Affairs; he cannot claim the benefit of any rule concerning official status at the time of the acts. But the prosecution was instituted at a time when he did have that status.

If you look at the Counter-Memorial and all the examples so laboriously and extensively discussed, they all refer to a set of totally different situations, those of individuals who held an

official status at the time when the acts were committed and who had lost that status by the time of prosecution.

And if you consider the classic examples, from Kaiser Wilhelm II to the Japanese and German defendants before the Tokyo and Nuremberg tribunals, all these cases involved situations in which an official status could be claimed at the time of the acts. But there was no longer any official status, and therefore no longer any role to be played by immunity, at the time of prosecution. For example, no one thought during the First World War of indicting the German Kaiser before a tribunal of one of the belligerent States while he was in power. The issue was only raised after he ceased to hold office. Accordingly, this jurisprudence provides no basis for arguing that it is possible to prosecute an individual holding a status which would normally protect him from prosecution at the time prosecution is brought. In my view, the two aspects in which the Counter-Memorial is open to criticism are that, first, it fails to take account of the difference between an international court and a domestic one — the Nuremberg and Tokyo tribunals were international courts, which — and this is the second difference — ruled on crimes charged against individuals who had ceased to hold their official capacities at the time the prosecutions were brought.

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And this confusion, which is central to our problem, is to be found in the Belgian Law, which in a single article bypasses the two paragraphs of Article 27 of the Statute of the International Criminal Court. Article 27 of the Statute of the International Criminal Court makes a clear distinction between the first issue, grounds of exemption which the accused may claim by virtue of the office which he held at the time when he held it, and the second paragraph, which deals with immunity. And the Statute of the International Criminal Court explicitly refers to immunities both under national law and under international law.

The Belgian Law does indeed speak of immunity; it does not go so far as to speak of immunity under international law, for it would clearly be excessive for the lawmaker to legislate on immunity under international law. The Law thus refers to immunity, without further qualification. And, in any case, this is how the Law has been interpreted by a number of investigating judges, as we already pointed out a short while ago. Thus, in the case of the major war criminals, there was no question of immunity; they no longer enjoyed any immunity; they no longer held any official

capacity. It was a completely different problem, that of determining whether the offices they had held protected them against international criminal prosecution. As you will perhaps recall, Mr. President, Members of the Court, a number of dissenting voices, notably from the United States, were heard at the time former Kaiser Wilhelm II was indicted; adopting a doctrinal view that was accepted at that time but is now outdated, they believed that a Head of State could not be personally prosecuted for acts committed by him in the name of his government.

And now to the second part, which will be, rest assured, much shorter. Why and in what manner is Belgium assuming today an international responsibility which results in its appearance before your Court? Why is the injury to the Democratic Republic of the Congo imputable to the Kingdom of Belgium? And is the Court not under an obligation to establish which in particular of the various organs of the Belgian State, in the internal order, is responsible for the violation? However, I should like to stress the extent of this responsibility by stating that all the organs of the Belgian State have contributed to the wrong, to the violation of international law. First, of course, there is the organ of the judiciary which issued the disputed arrest warrant, then there is the legislator — or perhaps before the legislator (as the Congo stated in its Memorial, and I will not return to this, there were doubts as to the exact interpretation of the Belgian Law in question and, had the judge applied the old doctrine of the *Charming Betsy*, that is to say that where there is any doubt as to the interpretation of a domestic rule of law it must be construed and interpreted in compliance with international law — you will find this argument in the Memorial if you are interested, I shall not press that point for the moment). I simply state that the legislator also had a hand in, if one may use that phrase, issuing this arrest warrant and that, thirdly, the Government itself provided co-operation by circulating the arrest warrant or arranging for its circulation by its officials, and, further, by continuing to claim before the Court today that this arrest warrant is not contrary to international law.

In order to gain a clearer picture of this combination of wrongs committed within the Belgian internal order, I should like to recall a procedural rule of criminal law which is not peculiar to Belgium, but which nonetheless is not common to all States, and that is the possibility open to a plaintiff, an individual who claims to be the victim of a criminal offence, to lodge a civil complaint with an investigating judge. It is a practice which, in my view, is most welcome because it

prevents the *ministère public*, the public prosecutor and the crown prosecutor from monopolizing criminal proceedings. The complainant, the victim, can set in motion the public proceedings, and that is precisely what happened in this case and in the other similar cases. But let there not be any misunderstanding. The fact that the complainant may set the criminal proceedings in motion does not mean that the courts and the prosecuting authorities are deprived of their jurisdiction. Should the investigating judge receive a complaint or a civil suit which is contrary to the law, he must either himself make an order, or apply to the Chamber of the local criminal court *[Tribunal correctionnel]* for a finding that no prosecution will be brought. It was also pointed out in the Memorial that there are a large number of immunities under domestic law, primarily that of the inviolability of the person of the King and also those of ministers or parliamentarians, who may be prosecuted only after immunity has been waived, particularly as far as parliamentarians are concerned, by the competent assembly. Then there are special privileges or immunities from suit — a Belgian judge can be prosecuted only before the Appeal Court — and thus, if the plaintiff seeks to institute proceedings on a civil complainant before the investigating judge of a lower court

022 [*Tribunal de première instance*], that court must declare itself incompetent. Military courts represent another ground of incompetence. No proceedings on a civil complaint may be instituted against military personnel, because such come within the remit of the military courts, where no such provision exists.

Thus we must not shift the responsibility to the civil complainants. It was, of course, the civil complainants who initiated the criminal proceedings, but a civil complaint in no way deprives the organs of the judiciary of their power to verify the jurisdiction of the court and the possible existence of immunity.

In this context — and we referred to this just now — there are two aspects which appear to me of more interest. The annual address of the Public Prosecutor to the Brussels Appeal Court on 3 September 2001, followed by a statement by the Advocate-General, Alain Winants, entitled "The *ministère public* and international criminal law". First, as regards the system of universal jurisdiction, the *ministère public* considers that it must be maintained, but there are grounds *de lege ferenda*, on the one hand, "to establish jurisdictional hierarchy and, on the other, when Belgian courts are seised on the basis of universal jurisdiction, to provide for a criterion of connection with

Belgium, for example Belgian nationality of the perpetrator, Belgian nationality of the victim, residence of the victim in Belgium, the fact that the perpetrator is present in Belgium". An explanatory footnote stated that the jurisdictional hierarchy might be as follows: "1. International courts; 2. Courts *loci delicti*; 3. Courts of the State of the perpetrator's nationality or of the State where he resides, or of the State where he may be present; and finally, only in 4., the court seised under universal jurisdiction, in conjunction with criteria of connection".

Thus, we see that the principal prosecuting organ for the jurisdictional area of the Brussels Appeal Court, where all the cases are currently pending, has retreated very markedly from the approach which the legislator would have taken to this problem.

What follows is even more significant. The self-same prosecutor, still in the address of 3 September 2001, suggests *de lege ferenda* that "additional guarantees for individuals enjoying international immunity" should be provided. He continues:

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> "One could imagine a mechanism modelled on that applicable in domestic law either to ministers or to parliamentarians.
>
> Personally, it seems to me that we should favour the route of judicial intervention rather than action at parliamentary or government level, thus respecting the principle of the separation of powers." *[Translation by the Registry]*

What is really troubling about this text is the idea of removing or diminishing an immunity recognized under international law by subjecting it to review under domestic law. The true nature of such immunity is evidently misunderstood. What is interesting is that the certainty that Belgium is in the right, proudly proclaimed in the Counter-Memorial, is far from shared by all the organs of the domestic legal order. And indeed, in the letter addressed to the Registrar of the Court on 14 June 2001 — to which reference has already been made — by the Agent of the Belgian Government, one of the arguments invoked to secure a delay in the Court's consideration of the case was as follows:

> "As regards the Belgian legislation at issue in this case, Belgium would observe that it is currently undertaking a review of the Law in terms of its implementation.
>
> In light of these new facts, and in order to prevent the issues on the merits of the dispute between the Parties being considered and adjudicated upon to no purpose before the ongoing review of legislation has been completed . . ."

In its Counter-Memorial — which I have, however, read with care — the Belgian Government makes no further reference to any thoughts of legislative review. I would add that this is the wiser approach when appearing before the Court, since a future amendment of current legislation — the Laws of 1993 and 1999 — cannot make good the infringement of international law committed by implementation of the law as it currently stands. The legislator and the Belgian judiciary should be invited to reread the well-chosen words of Portalis, in which the Government Orator provided justification in response to certain observations that the draft Civil Code did not contain any provisions on immunities under international law. Portalis' reply was:

> "Matters regarding ambassadors pertain to the law of nations. It was not incumbent upon us to concern ourselves with this in a law which concerns only the country's internal régime." (Memorial of the Democratic Republic of the Congo, p. 12)

I will conclude by saying that whatever may be the future direction taken by Belgian law in the matter, it is of no relevance to the present proceedings and that is why I would highlight the reference in the Agent's letter of June to the matter being "adjudicated upon to no purpose". There

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is no question of adjudicating to no purpose upon an act which has been committed and which cannot be remedied by a simple legislative amendment designed for the future. It is certainly desirable that Belgium should cease making an exhibition of itself by openly disregarding the international régime of immunities, but the cracks appearing in a crumbling edifice are merely an additional argument in support of the position we are honoured to defend before the Court on behalf of the Democratic Republic of the Congo. A violation of international law has been committed, and the Court is respectfully requested to order Belgium to make redress. I thank the Court for its attention.

The PRESIDENT: Thank you Professor. To whom should I now give the floor?

Mr. RIGAUX: To Ms Chemillier-Gendreau.

The PRESIDENT: Thank you. Professor Chemillier-Gendreau, you have the floor.

Ms CHEMILLIER-GENDREAU: Mr. President, Members of the Court, I am honoured at appearing before you to present certain arguments in support of the Application which the

Democratic Republic of the Congo has submitted to the Court. Professor Rigaux has just given a comprehensive review of the reasons underlying the point of view of the applicant State. I shall now attempt to demonstrate that, contrary to what is stated in the Counter-Memorial, there is no impediment to the Court's jurisdiction in terms of the admissibility of the claim of the Democratic Republic of the Congo.

Belgium has put forward two arguments in this respect: first, on the alleged basis of the facts, it says that the claim of the Democratic Republic of the Congo is now without object. Second, it asserts that the substance of that claim underwent considerable alteration between its initial formulation in the Application filed on 17 October 2000 and the submissions made in the Memorial presented to the Court on 15 May 2001.

This metamorphosis, according to Belgium, is on such a scale that the dispute between the two States now relates purely to a theoretical issue, and thus cloaks a request for an advisory

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opinion in the guise of a contentious Application that has become entirely meaningless. The applicant State intends to show the Court that the dispute at the origin of its Application of 17 October 2000 is still fully extant, that any change which may have taken place in the facts has not modified the terms of the dispute and that there is no argument which could justify terminating the proceedings by a finding of lack of jurisdiction and/or inadmissibility, which would leave the dispute unresolved.

Today, it is my turn to give a rapid sketch of the facts in order to demonstrate how their extremely unrealistic presentation has enabled the Belgian Government to convince itself that the dispute no longer exists. In the view of the respondent State, the point which founds the lack of jurisdiction of the Court or the inadmissibility of the Congolese claim concerns the changes which took place in Mr. Yerodia Ndombasi's career. Thus it is stated that, having held the post of Director of the Office of President Laurent Désirée Kabila, as he did at the time of the acts of which he is accused, he then became Minister for Foreign Affairs of the Congolese Government, the post which he held at the time of issue of the Belgian arrest warrant which is the subject of the present dispute. Subsequently, Mr. Yerodia was Minister of National Education, and this change of office coincided with the opening of the proceedings on provisional measures. Finally, since

April 2001, he has ceased to be shown as holding any government office. In the context of the present case we should pause for a while at this point.

There is no disagreement between the Parties on this statement of the facts. The arguments which Belgium adduces to justify the criminal proceedings instituted against the Minister for Foreign Affairs of the Congo nevertheless deserve attention.

In November 1998, when the person named in the Belgian arrest warrant was Director of the Office of the President of the Democratic Republic of the Congo, a number of complaints were lodged in Belgium in regard to international crimes committed in the Congo. They were made by 12 complainants, five of whom are said to be Belgian nationality, against President Laurent Désiré Kabila himself, but also against the Minister for Information, the Minister of the Interior, the Communications Adviser to Mr. Kabila and, finally, Mr. Yerodia Ndombasi.

The last-named, however, is the only person who is today the subject of an arrest warrant. This is an initial cause for justifiable surprise.

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Belgium has enacted some bold legislation, making itself a pioneer in the contribution of States to the suppression of international crimes. The Democratic Republic of the Congo does not seek to criticize *per se* the principle of national laws which enhance the ability of States to participate in the struggle against international crimes. We shall have occasion to revert to this tomorrow. We fully understand why Belgian justice, being rightly alarmed at the murderous events taking place on the territory of the Democratic Republic of the Congo, and having been seised of complaints relating to these events, wished to utilize the recent legislation as a possible means of putting a halt to the tragic events which were taking place. This is the professed aim. The difficulty, however, arises from the selectivity which governed the measures that were taken. And the argument that the prosecution was justified cannot dispose of this difficulty. What we object to here, namely, that in international law, the immunities enjoyed by high-ranking political leaders bar proceedings being taken against them, proved no obstacle to the long arm of Belgian justice. That arm struck, however, in a manner that was highly partial.

Such a course of action does not match the defined objective, if that objective is in fact to put a halt to crimes whose massive scale clearly precludes them in every possible way from being attributable to one individual alone. The recitals in the warrant specifically cite the accused's

personality as a ground for the absolute necessity to issue a warrant against him in the interests of public security. What, then, is this public security to which he represents a threat, and not others against whom complaints were also filed? According to the testimonies, however, they uttered remarks of the same kind as those which formed the basis of the arrest warrant of 11 April 2000.

The question, why prosecute that particular individual? is all the more troubling in light of the acts alleged against him even were these to be confirmed. The indictment and its terms, and the characterization of the offences charged, are, it is true, questions falling outside the scope of the proceedings now before the Court. The reason, however, why it is necessary to mention them briefly is that they form elements to the background of the case and serve to show how it is marked at every stage by vacillation and imprecision.

Mr. Yerodia is said to have uttered words in 1998 constituting incitement to hate and violence. That is what he is accused of.

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The representative of the Democratic Republic of the Congo, now present here before you, naturally shares the censure which such statements would arouse were it confirmed that they had been made. He nevertheless notes that the accusation relates to words and not to acts.

This clearly raises questions about the entire course of reasoning which is needed if there is to be an absolutely rigorous progression from the facts to their characterization, and thence to the prosecution of the persons actually responsible. Is the reference to intentional homicide relevant? Is the act of killing intentionally, a crime dealt with in the Geneva Conventions as an international war crime, assimilable to intention to kill? Can an extension of this kind be effected by a national law or by the application of the national law by a domestic judge? On the basis of the information on record in the file, is the charge of incitement to racial hatred justified? According to the actual terms of the warrant, the speeches concerned — since the complaints relate to speeches — "resulted in the death of several hundred people and the internment of Tutsis, summary executions, arbitrary arrests and unfair trials". Is the process of imputation — such a delicate matter where personal criminal responsibility is concerned — applied here correctly? International criminal justice, inarticulate and fragile as it is, gains nothing from proceedings being instituted without the full rigour which the nature of their subject demands. Extending the indictment even further, to crimes against humanity, the judge relies on Article 4 of the Belgian Law of 16 June 1993, citing

provocation to commit such crimes and failure to act by persons in a position to prevent their commission (see page 20 of the arrest warrant [p. 54 of the English translation]). Yet, as we have pointed out, no action was taken on complaints brought against persons who were far more powerful in the machinery of Congolese Government at the time of the alleged offences. In his investigation, 7,000 km from the scene of the violence, the Belgian judge charges the accused with speeches whose content emerges solely from the testimony available to him in Belgium. Then, heedless of any scruples, he lays an indictment for crimes of the gravest kind.

In this hazy context, there is one point which is not without relevance to the case presented to the Court, because it is central to the dispute which the Court has to resolve. That is the failure to act, which in the eyes of the investigating judge justifies both the charge of war crimes and that of crimes against humanity. The inevitable corollary of this argument is that the warrant concerns Mr. Yerodia in his public capacity. Moreover, it is brought against Mr. Yerodia Ndombasi as

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former Director of the Office of President Kabila and currently Minister for Foreign Affairs of the Democratic Republic of the Congo. Thus there is no doubt: it is definitely the individual with governmental responsibilities who is being prosecuted. The reason why part of the indictment rests on his failure to act is that, in the view of the judge, the political posts successively occupied by Mr. Yerodia were such as might have enabled him to curb the violence. Thus the acts prosecuted are, according to their express interpretation by the Belgian investigating judge, acts of office. This point is an embarrassment to the representatives of Belgium, who strive to reconcile it with the argument that the accused acted privately and not in the course of his official duties. They cannot get around the fact that the core of this case is the question of the immunities from jurisdiction enjoyed by certain incumbent representatives of the State. Belgium is nevertheless bent in its Counter-Memorial on maintaining that the immunities do not protect the persons to whom they apply when these are acting privately or not in the course of their official duties. Thus, for the needs of its thesis, Belgium takes the view here that the accused was in a position to protect the population and prosecutes him for not having done so, but it also contends that the dispute before the Court is without object, since immunity from jurisdiction is not at issue in this case, which is solely a matter of private acts. In reality it is pointless here to go into the distinction between acts of office and private acts, or into a discussion of acts which remain criminal once the person is no

longer in office. What the accused is charged with relates to a period during which he occupied an important post, but one which did not entitle him to immunity. The warrant was issued while he was in office as Minister for Foreign Affairs and was thus protected by an immunity which barred his prosecution, regardless of the date or nature of the acts charged against him. Herein lies the violation of international law.

But the imprecision of the Belgian position does not stop there. I should like now to identify certain additional instances of it. They explain why — and this is what justifies mentioning them — Belgium's argument revolves around the disappearance of the object of the dispute. This purported extinction of the dispute would, were it a true — *quod non* — open the way for a finding by the Court of lack of jurisdiction and/or inadmissibility. That would, without further ado, permit the disappearance of a dispute which has highlighted the difficulties, underestimated by Belgium, that are inherent in the joint conduct by States and international tribunals of the suppression of international crimes. It is in no one's interest to do away with the matter at so little cost, however, and the difficulties which embarrass the representatives of Belgium in these proceedings deserve to be examined. The Belgian Law calls for no territorial nexus for the exercise of its universal jurisdiction. This point will be discussed tomorrow from the standpoint of its consistency with the general logic of international law. The Belgian investigating judge made use in this case of the power thus conferred on him. However, what seems highly significant here is that, notwithstanding the terms of the Law, the arrest warrant itself, and above all the arguments contained in the Counter-Memorial, demonstrate a concern to prove a territorial link nevertheless. No doubt universal jurisdiction, a notion which reaches beyond the confines of individual States and is exercised on behalf of the entire community of mankind, is an exalting idea, but one which also tends to induce a certain sense of vertigo. Thus the authors of the Counter-Memorial are at pains to emphasize, in paragraph 3.3.69, that certain of the complainants, who also consider themselves to be victims, are of Belgian nationality; that they are resident in Belgium; that there is a large Congolese community in Belgium and that Mr. Yerodia's speech aroused real emotion in Belgium. This raises a whole flood of questions: is it possible to lodge a complaint on account of crimes against international law without having been a victim, since some of the complainants were not victims? Who can be called victims of such crimes? Alas, the majority of the direct victims

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are no longer with us. Is this a sort of "class action"? If so, why record all the evidence pertaining particularly to Belgium? Moreover, is it truly immaterial to the institution of proceedings whether the individual concerned is present in the territory of the prosecuting State? Not without real candour — a candour which the Court will appreciate as much as we, their opponents, do — the authors of the Counter-Memorial acknowledge the uncertainties created by the amendments to Belgian criminal law in 1993 and 1999. In order to widen the possibilities of prosecution open to Belgian courts dealing with complaints on account of crimes under international law, the presence in Belgian territory of the perpetrator is no longer required. But this runs up against the obstacle of a provision of the Belgian Code of Criminal Investigation which authorizes the prosecution of offences only if the accused is present in Belgium. We are told that the Belgian courts have not yet reached a decision on this. Depending on the outcome, their decision might render void all pending proceedings, including the arrest warrant against Mr. Yerodia. Yet the arrest warrant remains in force. Even were it to disappear, the damage has been done and reparation must be made. Furthermore, the Belgian Government is well aware of the fact that the Belgian Law, despite the advance in international criminal law which it represents, needs to shed the contradictions which have arisen between it and the prevailing legal structure. The Belgian Government makes no secret of its wish to amend its legislation, but, as Professor Rigaux has just pointed out, that has no bearing on this case. However, it does highlight the unsoundness of the position from the standpoint of international law. By the same token, it is significant that the representative of Belgium is at pains to minimize all the potential effects of the arrest warrant. The arrest warrant, issued in breach of international law, has caused injury to the Democratic Republic of the Congo, for which it seeks legitimate redress from the Court. Nevertheless, the arrest warrant is still in force. The conduct of the Belgian investigating judge, supported by the authors of the Counter-Memorial, consists in indicting a minister in office of the Democratic Republic of the Congo because, in the eyes of Belgian justice, he has committed crimes so serious as to invalidate his immunity.

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The arrest warrant claims that this will have no effect on international relations between Belgium and the Congo. An entire paragraph of its text is devoted to justifying an assurance to the

individual concerned that his presence, in his capacity as Minister, on Belgian territory would not lead to an arrest.

"In the contrary case," writes the judge, "failure to adhere to this undertaking could entail the host State being liable at international level." The judge is gravely mistaken here as to the origin of that international responsibility.

Responsibility has already arisen, not because of the hypothetical arrest of an invited Minister, but because of the arrest warrant issued against him. For, if the offences with which he was charged were so serious as to extinguish the immunity from suit of a minister in office, how could such immunity be resurrected precisely when the practical condition for the execution of the arrest warrant was met: namely his presence in the territory of the prosecuting State?

How could the courts blindfold themselves and suspend proceedings, only to relaunch them at the very time when nothing further could be achieved owing to the absence of the individual concerned?

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Such inconsistencies cannot be made good by drawing a distinction between immunity from jurisdiction and immunity from execution. We see the inconsistency in concentrated form on page 9 of the Counter-Memorial. There it is said:

> "[1.] Immunity does not in any event avail Ministers for Foreign Affairs in office alleged to have committed war crimes or crimes against humanity;
>
> [2.] The arrest warrant explicitly recognizes that had Mr. Yerodia Ndombasi, in his role as DRC Foreign Minister, visited Belgium on the basis of an invitation and in his official capacity, he could not have been arrested."

The "not in any event" of paragraph 1 is thus incorrect, since there is an instance in which he is protected by immunity, that set out in paragraph 2.

Unfortunately, failing lamentably to observe the principle of the sovereign equality of States, Belgium has arbitrarily reserved the right to be able to lift immunity, then to restore it, at the whim of its diplomatic convenience. It is impossible not to see in this a sort of judicial opportunism, which has in effect led to the invention of the category of "virtual arrest warrant".

In the same irresponsible spirit, the representatives of Belgium, having dwelt at length on the follow-up to an international arrest warrant in the shape of action by Interpol, state that to date the arrest warrant has not been the subject of a Red Notice.

The PRESIDENT: Madam Professor, allow me to ask if this would be a convenient time for the traditional break, or if you would prefer to speak for a few moments longer.

Ms CHEMILLIER-GENDREAU: Mr. President, yes, my statement will take another ten to fifteen minutes, and I am quite willing to take a break here.

The PRESIDENT: We shall now take a break, if you will be so kind. Thank you.

The Court adjourned from 11.30 to 11.50 a.m.

Le VICE-PRESIDENT, faisant fonction de Président : En raison d'un important engagement officiel, le Président m'a demandé d'assurer la présidence pour le reste de l'audience. J'invite

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maintenant Mme Chemillier-Gendreau à poursuivre son exposé. Je prie aussi Mme Chemillier-Gendreau de parler plus lentement afin de permettre aux interprètes de suivre plus facilement le cours de l'exposé.

Ms CHEMILLIER-GENDREAU: Thank you, Mr. President. I shall do my best to ensure that the interpreters can follow me, and I beg your pardon for having spoken too rapidly at the outset. I accordingly continue my statement, which, in a first part which I did not completely finish earlier, has covered a number of points which we shall analyse, such as the inconsistencies and difficulties of the Belgian position. Having pointed out that the arrest warrant against Mr. Yerodia also contained the assurance that he would not be arrested were he to be invited into Belgian territory, the point I had reached concerns what I would term the irresponsible spirit in which the representatives of Belgium dwelt at length on the follow-up to an international arrest warrant in the shape of action by Interpol. In the Counter-Memorial, they state that to date the arrest warrant has not been the subject of a Red Notice. Such a notice, issued and circulated by Interpol, is an international wanted notice. Almost casually, the Counter-Memorial adds, in paragraph 3.1.13: "Given the effect of Red Notices in the DRC, even were a Red Notice to be issued, it would neither infringe the sovereignty of, nor create any obligation for, the DRC." In a similar vein, one which it will be for the Court to appraise, Belgium's Counter-Memorial notes the statement by the Democratic Republic of the Congo that to date no State has acted on the arrest warrant. But

Belgium twists this to make it say what the Democratic Republic of the Congo did not say, namely that "no State is prepared to act on the arrest warrant". And this distortion of language permits an astonishing mental leap: these proceedings are pointless. It cannot be concluded that, just because no State has so far acted on the arrest warrant, no State is prepared to do so. For so long as the arrest warrant exists, there is still a risk that it will be enforced in any country, including Belgium, despite Belgium's unilateral undertakings. All this reveals a sad misreading of the obligations of States arising from the respect due to international law. Yet such respect, as the Democratic Republic of the Congo will later show, requires all States to give effect to the immunities enjoyed by certain of their representatives. It is not for one State alone to lift such immunities. It can happen that international law provides for derogations that apply to all, but a single State cannot claim to be applying a derogation if it is unable to indicate the rules of international law — not of domestic law — which permit such derogation.

Noting such contradictions in Belgium's reasoning has enabled me to identify the context which explains Belgium's wish to have the dispute swept under the table on the grounds of lack of jurisdiction or lack of admissibility. Belgium has thrown itself ardently into a new role as an international sheriff. It legitimizes this on the grounds of its humanitarian views, views which I myself share passionately. Belgium saw in the United Nation resolutions a call to advance the cause of international justice in the wake of the crimes committed in the Democratic Republic of the Congo. However, it erroneously saw in them a mandate to act swiftly and severely without concerning itself with the consistency demanded by the law as a whole.

Belgium now finds itself in an awkward corner and it attempts to minimize the significance of its actions. It is not possible to flout the sovereignty of another State in this manner. The withdrawal of the disputed arrest warrant was the only way out. In refusing, Belgium has chosen to sideline the dispute by declaring that it has become moot. We regret, quite as much as the representatives of Belgium, this new episode in relations between the two States. Yet the dispute is still extant, as I shall now show.

Belgium states that the dispute has become an abstract one, that it is no longer anything more than a theoretical issue, tantamount to a request for an advisory opinion, and its argument is founded on the changes of office that have marked Mr. Yerodia's career since 1998. The arrest

warrant, we are told, was addressed to Mr. Yerodia in his private capacity on account of personal acts. As a result, the waters of the case have become muddied by the confusion of two arguments. On the one hand, it is stated that, in the face of the most serious crimes — and it is these that the judge imputes to Mr. Yerodia — immunities must cede. Here already we have a point of law that is open to debate. Are immunities to be ceded before all national courts as well as international courts, and without States having expressly agreed thereto among themselves? The Democratic Republic of the Congo maintains the opposite. If, on the other hand, immunity could constitute a bar to the warrant whilst the accused held office it would no longer, we are told, be effective after the cessation of that office. The warrant would have remained in force without interruption as from its issue. Now it would address an individual without governmental duties and would retain no memory of those once performed, for it would be based on acts done in his private capacity. Unfortunately for Belgium, this scenario is not the true one, as is confirmed by the statements of the judge, who charged this individual as a government official and not as a private person. The Democratic Republic of the Congo is not acting here on behalf of one of its nationals by way of diplomatic protection, as is erroneously suggested in Belgium's pleadings. The Democratic Republic of the Congo is quite simply acting within the framework of State continuity and the defence of its interests, and on those grounds the dispute persists. I fully understand that it is not enough for one of the Parties to claim that it is in disagreement with the other to require a finding that a dispute exists — which might be nothing more than the product of a subjective belief. Since the case of the *Mavromattis Palestine Concessions* in 1924, international courts have consistently stressed that there must be a dispute on a point of law or of fact — a conflict, a clash of legal arguments or interests between the parties. It has been stated since, *inter alia* in the 1950 judgment on the interpretation of the peace treaties with Bulgaria, Hungary and Romania, that the existence of an international dispute is a matter for objective determination. In the *South West Africa Cases* in 1962 the Court stated that the claim of one of the parties must be positively opposed by the other. It is because it found that there was such opposition that the Court ruled that there was a dispute in 1988 in its advisory opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*. It was after stressing

that Portugal's complaints had been rejected by Australia that this Court again ruled that a dispute existed in 1995 in the case concerning *East Timor*. Here the terms of the dispute are obvious.

The Democratic Republic of the Congo states that the arrest warrant issued while Mr. Yerodia was Minister for Foreign Affairs violates international law and seeks reparation for this wrongful act. Belgium maintains that there has been no such violation of that law. The legal conflict arises from the fact that in the opinion of the Democratic Republic of the Congo the respect for immunity from suit enjoyed by a Minister for Foreign Affairs in office flows from a positive norm of customary international law, that at present there are no contrary rules of international law with greater force and that the domestic law of a State cannot validly and unilaterally amend the

035 terms of international law. The respondent State maintains on the contrary that it was justified in doing so.

Underlying these conflicting legal stances is a clash of interests. The Republic of the Congo is defending its interests as a sovereign State, which require that the immunities recognized under international law for holders of the highest public offices should be respected.

Belgium is defending the broad positions with regard to the prosecution of international crimes established by Belgian legislation and the use that has been made of them by a judge.

We still have to look more closely to see whether, as Belgium maintains, this dispute has evolved since the time when the Application was filed. More precisely, we must check whether it has diminished to such a point as to leave the case without object. We are told that the changed situation stems from the changes that have occurred in the positions held by Mr. Yerodia. However, as I have already pointed out, Belgium is pursuing two parallel lines of argument.

It is contended that immunities would not apply in any case to crimes of a certain gravity – and that this is such a case. However, as if this argument were not sufficient, it is said that the immunities of the Minister for Foreign Affairs were extinguished on his departure from that post and that the case became moot due to the changes that took place in the Congolese government. The respondent State believes itself entitled to rely on the Order made by the Court on 8 December 2000 on the request for provisional measures. Then, however, the urgency and the existence of irreparable injury stemmed in the view of the Congo from the fact that Mr. Yerodia held the post of Minister for Foreign Affairs. His change of post during the proceedings, and the

post of Minister for National Education that he then occupied, still justified provisional measures in the Congo's view. The Court considered that such measures were no longer necessary in the circumstances. There was, however, no question of ruling on the merits.

Assessment of the time factor cannot be the same on the merits and on the issue of urgency. On the merits, the fact that Mr. Yerodia is no longer the Minister for Foreign Affairs today cannot erase the fact that he was Minister when the warrant was issued. And it is that contemporaneity — which cannot be effaced by any external event of whatever nature — between the protected office and the warrant that disregards that protection, which lies at the heart of the dispute. It is precisely this claim by the Democratic Republic of the Congo, based on its right as an injured sovereign State, that comes into collision with the manifest opposition of the respondent State. The latter refuses to cancel the disputed arrest warrant and contests the legal basis of the claim.

This is not an abstract issue, under the guise of which we are asking the Court to declare the law. We expect the Court to settle an actual dispute. Because this is a legal dispute, the Court's decision will doubtless clarify the law, but that is only to be expected. To have an injured right upheld is what States normally come to the Court for. In order for the case to become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have had to be obtained. The cause here is the warrant issued by the Belgian judge.

In its Order of 8 December 2000 the Court stressed that to date the said warrant had not been withdrawn and still related to the same individual (see paragraph 56). Ten months later, my words still accord with the facts.

In continuing to claim that the Court no longer has any grounds for the exercise of its jurisdiction, Belgium seems to me to be falling into a serious error by devoting several pages of its Memorial *[sic]* to the *Northern Cameroons* and *Nuclear Tests* cases. But the attempt to draw a parallel between those and the present case is irrelevant in both instances. In the *Northern Cameroons* case, the Court rejected two of the United Kingdom's preliminary objections, stating clearly that there was indeed a legal dispute between the parties. And, while it is true that the Court ultimately took the view that it could not rule on the merits, this is because it was faced with the resolution of the United Nations General Assembly (Resolution 1608 of 21 April 1961) which

terminated the trusteeship agreement and was moreover not disputed by the Applicant. There is nothing comparable in the case now being argued here.

The *Nuclear Tests* case represents an even clearer argument against Belgium's position. For, while this Court decided then that no decision was necessary in that case, that was because the aims of the applicant States – to put an end to nuclear tests – had been achieved. Here, at the point in time when the Court has to decide the dispute, the aim of the applicant State – to have the disputed arrest warrant cancelled and to obtain redress for it – remains unachieved. This is what leaves room for the judgment of the Court. Thus we are not in a situation where there is a simple difference of opinion which would be a matter for academic discussion, and which it would be an abuse of process to bring before the Court; the wrong done to the Republic of the Congo in the person of the individual who was then its Minister for Foreign Affairs in office continues.

The argument used by Belgium in the proceedings on provisional measures, namely that negotiations were proceeding at the highest level regarding the arrest warrant, has faded away with time. Belgium, pleading at that time the terms of its declaration, contended that "the compulsory jurisdiction of the Court was excluded in the event of the parties resorting to another method of peaceable settlement". But nearly a year later it appears that this other method has failed. By maintaining the arrest warrant, Belgium has maintained the dispute and preserved its subject-matter. Has there, nonetheless, been that substantial amendment of the terms of the Congolese Application stressed in Belgium's Counter-Memorial? Tomorrow, to conclude this initial presentation, the Democratic Republic of the Congo will restate its requests to the Court. As you will see, Mr. President, Members of the Court, the Democratic Republic of the Congo has done nothing through the various stages in the proceedings but condense and refine its claims, as most States that appear before the Court are wont to do. We are not in a situation comparable to the case concerning *Certain Phosphate Lands in Nauru* in 1992. Here there is no new claim, whether of substance or of form, that would have altered the subject-matter of the dispute. Use is simply being made of the option given to the Parties to amend their submissions until the end of the oral proceedings, a usage already recognised by the Permanent Court of International Justice and confirmed by your Court. The truth is that the Congo's claim, by being defined more precisely, identifies as the central issue in this dispute the immunities from suit to which Ministers for

Foreign Affairs in office may be entitled. This is the point that will now be argued before you by Mr. Pierre d'Argent. I thank the Court.

Le VICE-PRESIDENT, faisant fonction de Président : Merci beaucoup, Madame Chemillier-Gendreau. Je donne maintenant la parole à M. Pierre d'Argent.

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Mr. D'ARGENT: Thank you Mr. President. Mr. President, Members of the Court. Let me say first of all how honoured I am to take the floor for the first time before the Court.

As Professor Chemillier-Gendreau has just informed you, it falls to me to present the position of the Democratic Republic of the Congo with regard to the violation of the immunity from suit of its Minister for Foreign Affairs, arising from the issue and international circulation of the disputed arrest warrant.

This matter is at the heart of the dispute before the Court, and even amounts to its *raison d'être*.

My statement will be divided into four parts:

First, I will give a brief, very brief restatement of the facts in relation to this issue of immunity from suit.

Secondly, I will set out the points of agreement between the Parties, to show more clearly the points of difference — on which, in our view, the Court should rule.

Thirdly, I will set out the legal position of the Democratic Republic of the Congo regarding the issue of principle of which your Court is seised. As Professor Rigaux has already emphasized, this issue of principle is by no means an abstract point, as Belgium erroneously claims in its Counter-Memorial.

Fourthly, and before briefly summing up, I will refute the arguments presented by Belgium in its Counter-Memorial regarding this issue of immunity. As time is getting on, I propose to deal with this fourth part tomorrow morning.

I. THE FACTS

Let us return briefly to the facts that form the basis of this dispute. These facts are well known to you and have already been set forth. Nevertheless, I venture to refer in particular to the

few factors that are essential to our discussion on the immunity of a Minister for Foreign Affairs in office.

0 3 9 It is important to refer back to the wording used by the "international arrest warrant by default" of 11 April 2000 concerning identification of the accused. It is written in terms which identify the accused "Mr. Abdulaye Yerodia Ndombasi, born 5 January 1933, former director of President Kabila's Cabinet and *currently* Minister for Foreign Affairs of the Democratic Republic of the Congo, *having as his professional residence* the Ministry of Foreign Affairs in Kinshasa." (Counter-Memorial, Ann. 3.)

This identification gives rise to four comments:

First, it is neither disputed nor disputable that, at the time when the warrant was issued, Mr. Yerodia was indeed the Minister for Foreign Affairs of the DRC and that he was actually performing his duties.

Secondly, Judge Vandermeersch was perfectly well aware of the fact that his arrest warrant was directed against the Minister for Foreign Affairs in office of a sovereign State. In other words, the issue of this arrest warrant is a deliberate act.

Thirdly, the complaints that form the basis of the criminal action were filed with the investigating judge, as you have already been told, in the month of November 1998 (Counter-Memorial, p. 10). At that time Mr. Yerodia was still the director of President Kabila's Cabinet. He became Minister for Foreign Affairs on 15 March 1999 and the arrest warrant was issued on 11 April 2000. Almost a year and a half elapsed between the complaints and the arrest warrant. Doubtless this should be seen as evidence of a "detailed examination" (as stated by Belgium in its Counter-Memorial). However, it should be noted that the arrest warrant relies mainly on sources *prior to* Minister Yerodia taking office, so that this delay of a year and a half is difficult to explain. In chronological order, the following are listed in the arrest warrant:

— an excerpt from the newspaper *Le Monde* dated 26 August 1998;

— a news bulletin from the Belgian French-language Broadcasting Service (RTBF) dated 28 August 1998 and another bulletin broadcast two days later through the same medium;

— a report by Amnesty International dated 23 November 1998;

— a report by the United Nations Commission for Human Rights dated 8 February 1999;

— a February 1999 report by Human Rights Watch.

040 All these documents predate Minister Yerodia's assumption of office. It will also be noted that these sources, which are general, and purely documentary in nature, were nevertheless deemed sufficient to give credence to the unsubstantiated allegations made against the Minister.

Fourthly, it is clear that these facts, which form the basis of this dispute, raise a very specific point of law: as has already been stated, whether the incumbent Minister for Foreign Affairs of a sovereign State can, while he is in office, be the subject of criminal proceedings. Can a Minister in office be brought before a foreign criminal court, even when he is accused of crimes under international law?

In other words, the disputed arrest warrant itself sets the legal parameters of the issue of which the Court is seised. This issue is that of the extent of immunity from suit of a Minister for Foreign Affairs in office of a sovereign State before the criminal courts of a foreign State. Thus the issue does not concern the possible continuation of such immunity after those duties have ceased. Neither does it concern the relevance of any exceptions to immunity that might be relied on before international criminal courts. No: here the issue of immunity from suit arises before a domestic court; and it arises at the time when the accused is performing the duties of Minister for Foreign Affairs of another State.

Precisely defined in this way, the conflict of principle between the Parties is clearly apparent: whereas the Congo maintains that the issue of an arrest warrant violates the immunity of its Minister for Foreign Affairs, Belgium claims that there has been no such violation because, in its view, there can be no criminal immunity once the individual accused — even a Minister for Foreign Affairs in office — is charged with having committed crimes under international law. Belgium thus claims that there is an exception to the rule of immunity from suit and the Congo maintains that in this case there cannot be such an exception.

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II. THE POINTS OF CONVERGENCE BETWEEN THE PARTIES

Before dealing with this central issue, which, as I have said, is the crux of this dispute, I think it helpful, Mr. President and Members of the Court, to bring out the few points of law on

which the Congo and Belgium are not in disagreement. These points of convergence are as follows:

First, it is not disputed by Belgium that Ministers for Foreign Affairs in office in principle enjoy, by virtue of international custom, immunity from criminal prosecution before foreign courts. Belgium also agrees that their persons are in principle inviolable. Thus, on page 118 of the Belgian Counter-Memorial we read: "ordinarily and as a matter of general proposition, Ministers for Foreign Affairs are immune from suit before the courts of foreign states and . . . the persons [of Ministers for Foreign Affairs] are inviolable". To be sure, this statement is qualified, in that it is immediately accompanied by an alleged exception, which is said to exist when accusations directed against Ministers in office relate to crimes under international law. I will certainly return to this point later. For the present, however, it is important to establish that Belgium does not dispute the existence of a customary rule of immunity from suit on the part of Ministers for Foreign Affairs. Once more it is only the precise scope of this rule — its absolute or integral nature — that constitutes a point of difference between the Parties.

2. Belgium no longer seems to dispute the fact that, during their period of office, Ministers for Foreign Affairs enjoy the same immunity from suit in foreign courts as heads of State in office. This principle of assimilation of the status of Ministers for Foreign Affairs to that of heads of State in matters of immunity from suit was asserted by the Democratic Republic of the Congo in its Memorial on pages 29 to 31. And it is in no way disputed by Belgium in its Counter-Memorial, save, of course, in regard to its extent, as I have just pointed out.

3. The third point of convergence between the Democratic Republic of the Congo and Belgium relates to the issue of personal criminal responsibility in respect of criminal acts, and particularly crimes under international law. The applicant State considers it important to show the

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Court that in reality, and contrary to what Belgium seeks to imply, there is no difference of views between the Parties in this respect, in so far as it is fully understood what is meant by personal criminal responsibility on the one hand and immunity from suit on the other. In its Counter-Memorial Belgium attempts to discredit the legal position of the Democratic Republic of the Congo, implying that to assert the rule of immunity from suit amounts to a denial of the well-established principle of personal criminal responsibility. This is an absurd simplification of

the Democratic Republic of the Congo's position. It is however clear that the Democratic Republic of the Congo has never maintained that immunity from suit would constitute a substantive defence to a criminal charge, nor that persons enjoying immunity are not criminally liable. On the contrary: the Democratic Republic of the Congo maintains, like Belgium, that there can be no question as to the existence in international criminal law of a principle of personal criminal responsibility in the case of crimes under international law, just as there can be no doubt as to its existence in the general criminal law in relation to any kind of offence. On the other hand the applicant State does maintain, unlike Belgium, that this principle of responsibility is without prejudice to the issue of immunity from suit, that is to say, of the question of the forum in which, and the time when, such personal criminal responsibility may be established.

It is important that there should be no ambiguity in this respect. The difference between the Parties does not relate to the existence or absence of a principle of personal criminal responsibility. It relates solely to the question whether a domestic forum may seise itself of this issue of personal criminal responsibility when it is raised, while the individual is in office, against a member of a foreign government entitled in principle to immunity from criminal process.

III. THE LAW ON IMMUNITIES

Mr. President, Members of the Court, I come now to the legal position of the Democratic Republic of the Congo on the question of the immunity of the Minister for Foreign Affairs in office. After affirming the principle of immunity from jurisdiction, I shall review the basis of the principle and shall outline its scope.

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The position of the applicant State is quite simple: throughout his term of office, no criminal prosecution may be brought against the Minister for Foreign Affairs of a sovereign State in a foreign court. In other words, before foreign courts he is entitled to inviolability and to absolute, full immunity from criminal prosecution, as regards both jurisdiction and execution, that is to say immunity without exception. Even were he to be suspected of having committed offences against international law, a domestic court in a foreign country cannot make a finding of criminal responsibility and any investigation or enquiry undertaken with the intention of bringing him to court would contravene the principle of immunity from jurisdiction, as long as he remains in office.

It is quite obvious that there is no violation of immunity from suit when the State represented agrees to waive immunity. Immunity may be waived on the occasion of a specific criminal prosecution. It may also be excluded in advance, under the express terms of a treaty.

The basis of immunity from criminal prosecution is purely functional, that is to say that immunity is accorded under customary international law in order to allow the representative of a foreign State to perform his functions, freely and without let or hindrance. In protecting the representative of a sovereign State from prosecution, immunity in fact protects the State, since it is designed to ensure that the representative freely chosen by that State is able to carry out his distinguished duties effectively. It is quite obvious that the untrammelled performance of such functions is in the elementary interest of the State represented. However, let us make no mistake: the untrammelled performance of such representative functions is also, and perhaps chiefly, in the interest of the international community as a whole. Legal transactions between States would very soon grind to a halt were those responsible for such transactions to be exposed to the possibility of criminal prosecution before various national courts. Immunity from suit may thus be seen as a necessity for the international community as a whole, not only for each State within that community. If there were no immunity, the representative of the State would have to defend himself before foreign criminal courts and would be unable also to represent his State fully and effectively, which would be an embarrassment not only to his own State but also to all others. It is therefore the office, the duties to be performed, which substantiates and founds the principle of immunity from criminal prosecution for ministers of foreign governments in office.

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Pray allow me a brief digression in this exposition of legal theory. It is not inopportune to recall that, in the course of the oral arguments on the request for the indication of provisional measures, Professor David said that the disputed arrest warrant in no way infringed the rights of the Democratic Republic of the Congo since, and I quote, "there is nothing to prevent the Congo from continuing its foreign policy with an other representative of its choice" (Verbatim Record of the hearing of 21 November 2000, p. 27, para. 30, Professor David)! It seems to me that this view is indicative of the spirit in which Belgium approaches this matter. It is, however, clear that it is not for the respondent State, nor for any other State, to criticize the Congo's choice of Government ministers.

When a representative is in office, his immunity from jurisdiction is therefore functional, as I have just explained. The "functionality" of the immunity of a representative in office does not depend on any distinction between official acts and acts which are not part of his functions. In reality, if a representative of the State in office cannot be prosecuted for a past act, this is not because it was effectively an act performed in the course of his functions but because the complaint is made during his period of office, something which immunity cannot tolerate. In other words, the Congo maintains that such immunity from criminal jurisdiction when in office covers *all* the acts of a foreign representative. It is irrelevant whether such acts were done before he took office, or afterwards. It is irrelevant whether or not the acts done whilst in office were official acts.

In its Counter-Memorial (3.4.4., p. 119), Belgium, on the other hand, considers that there are two exceptions to the immunity from jurisdiction enjoyed by a Minister for Foreign Affairs in office: one relates to criminal responsibility in the case of offences against international law; the other to acts done in a private capacity or otherwise than in the performance of official functions. I shall come back to Belgium's first so-called exception to the principle of immunity, and to the

045 conceptual confusion it conceals. Today I propose succinctly to review the second so-called exception, even though it is not directly relevant to the case.

The second exception is undoubtedly presented in terms which are far too sweeping and cannot apply to acts, albeit acts in a private capacity, which normally fall within the jurisdiction of the criminal courts. In office there is immunity from criminal prosecution, even if the offence is committed in a private capacity or was committed before the person concerned took office, for the reasons I have just set forth. This is moreover confirmed by the principle that, *after* office, immunity from jurisdiction remains *only* in respect of official acts performed in the exercise of the representative's functions. That rule has not been challenged by Belgium (Counter-Memorial, p. 120). It was *inter alia* recalled in Article 13, paragraph 2 of the resolution adopted this summer by the *Institut de Droit International*, at its Vancouver session. If the Court will indulge me, I shall read this article out:

"Article 13

1. A head of State who is no longer in office is no longer entitled to inviolability in the territory of a foreign State;

> 2. He [a head of State no in longer in office] enjoys no immunity from jurisdiction, whether criminal, civil or administrative, unless he is sued or prosecuted for acts performed whilst in office and performed in the exercise of his functions." *[Translation by the Registry]*

It is however surprising that Belgium has not realised the contradiction between this principle, the correct one, and the incorrect one which has been put forward as the second exception to the immunity of ministers of foreign governments in office. Thus, if after office immunity from suit remains *only* in respect of official acts performed whilst in office, this is necessarily because during office, it was broader in scope and also covered acts performed before taking office, acts done in a private capacity and any other acts which could not be described as official acts. This is also the reasoning followed by Sir Arthur Watts, who is nevertheless quoted by Belgium on page 119 of its Counter-Memorial.

The example of "Christmas shopping in Brussels" put forward by Belgium in the provisional measures phase and echoed in its Counter-Memorial is therefore not sound, at least as far as

immunity from criminal prosecution is concerned. Even in the course of a private visit, a Minister for Foreign Affairs does not stop doing his daily job and it is certain that modern means of communication, particularly mobile telephones, place him in a position where he is available to his State at all times and in all places — which is why there must be no obstacles to the functions he performs or will be called upon to perform.

Thus it is only once a representative of the State has lost office that the characterization of the act comes into play. That is the appropriate time to raise the issue. However, it must be noted that at that particular moment the question of immunity from jurisdiction takes on a different aspect. During office, immunity had a prospective function: to allow functions *which had still to be* performed to be performed freely. On loss of office, immunity becomes retrospective, applying to an act *which has been* done. In this respect, the true lesson of the *Pinochet* ruling in the House of Lords, as Professor Rigaux has said, is to have affirmed that crimes against international law may not be considered official acts, and that consequently a foreign dignitary who is no longer in office is not entitled to immunity from jurisdiction in respect of past acts. This is also what is said in paragraph 2 of Article 13 of the Institute's Vancouver resolution, the last passage of which I did not read to you. I shall come back to the House of Lords ruling. For now, it is enough to recall that the dispute before the Court does not concern the immunity from jurisdiction of the former minister

of a foreign government, but in fact the immunity from jurisdiction which protected him in office. As I said, the disputed arrest warrant was actually issued at a time when the accused was Minister for Foreign Affairs of the Democratic Republic of the Congo. It is therefore pointless to speculate on the private or public nature of the words complained of, or to establish whether or not they constituted an official act as a minister, something which would be absurd since the words were spoken before he took office as minister.

Mr. President, Members of the Court, the position of the Democratic Republic of the Congo in this case conforms fully to practice, to precedent and to the most authoritative legal opinion. There is no international practice to contradict the assertion that the Minister for Foreign Affairs of a sovereign State, or any other distinguished representative on a similar footing, is entitled to absolute or total immunity from criminal prosecution before the domestic courts of foreign countries whilst in office. Any search for a true precedent for the Belgian practice would be fruitless, since to date States have always naturally respected the immunity from jurisdiction enjoyed by foreign dignitaries in office and have not arraigned them before their courts whilst they were in office, even when there was a serious suspicion that they had committed offences against international law.

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When it comes to jurisprudence, as Professor Rigaux has already said, all the cases to which Belgium refers in its Counter-Memorial concern either cases before international courts or cases before national courts, and in both instances they concern foreign dignitaries who were no longer in office. Therefore they bear no relation to the facts underlying this dispute. The only case which comes close to the legal position adopted by Belgium is one before a Belgrade court as a result of the conflict in Kosovo, one in which the presidents, prime ministers, foreign ministers and chiefs of staff of the member countries of NATO, together with the Secretary General of the Organization, were sentenced in their absence for the crime of aggression and war crimes. It is understandable that Belgium was at pains not to mention this precedent, a surprising one to say the least! On the contrary, the most recent and most authoritative jurisprudence confirms the principle of immunity from criminal jurisdiction of senior representatives of foreign countries in office. Such immunity exists even when the charge relates to crimes against international law. The House of Lords followed this reasoning in the *Pinochet* case; the Court of Cassation in France also took this stance

in the *Khadafi* case. Both cases are cited and analysed in the Memorial of the Democratic Republic of the Congo and it would not be appropriate to dwell on them at length. Allow me, however, to recall the pithy words of Lord Nicholls in the *Pinochet* case: "I have no doubt that a current Head of State is immune from criminal process under customary international law". None of his peers contradicted the Lord Justice. On the contrary, Lord Browne Wilkinson restated the same rule in a paragraph cited on pages 40 and 41 of the Memorial of the Democratic Republic of the Congo. In its Counter-Memorial, Belgium barely touched on these decisive pertinent passages of the *Pinochet* judgment. And its interpretation of them is debatable, as I shall show tomorrow.

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I would furthermore recall that the French Court of Cassation solemnly affirmed in its Judgment of 13 March of this year that: "unless otherwise provided by international provisions binding on the parties concerned, international custom bars the prosecution of a Head of State in power before a foreign State's criminal courts". The Court of Cassation also emphatically dismissed the argument that the serious nature of the crime and the fact that it was a breach of international law would be sufficient grounds in themselves to set aside the principle of immunity from jurisdiction — an argument steadfastly put forward by Belgium in its Counter-Memorial. I shall come back to Belgium's interpretation of this finding, a finding which is nonetheless crystal clear. It is therefore evident that there can in principle be no exception to the immunity from jurisdiction before domestic criminal courts of foreign Heads of State in office and of persons of a similar standing. Nonetheless, this rule does not prejudice the fact that there is no immunity when the State that is represented agrees to waive it, either in a specific criminal prosecution or in advance by means of a treaty. Immunity also ceases to exist when waived as a result of a decision of a Security Council, since the Parties to the Charter have agreed in advance to obey its decisions and are obliged to collaborate with the international criminal tribunals set up by the Security Council. Since none of these three situations obtains in this case, Belgium must be found to have violated the principle of immunity from suit.

Finally, the leading doctrinal authorities provide us, I believe, with confirmation that the position maintained by the Democratic Republic of the Congo accords with general international law. It will doubtless suffice in this respect to point to Article 2 of the resolution adopted this summer by the Institute of International Law, to which I have already referred: "In criminal

matters, a Head of State enjoys immunity from suit before the courts of a foreign State in regard to any offence, however serious, that he is alleged to have committed." *[Translation by the Registry]*

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It seems unnecessary to refer here to Professor Verhoeven's report justifying this rule, or to the remarkable mental acrobatics indulged in by Belgium in its Counter-Memorial in order to demonstrate the alleged compatibility of the resolution with its own position and at the same time mainly to establish its irrelevance to the present proceedings (pp. 170-171, paras. 3.5.116 and 3.5.117). It is equally unnecessary to dwell further on the literature cited so extensively by Belgium in its Counter-Memorial in support of its position. It would weary the Court, I believe, to re-examine each writer, whose thinking is often more complex and more subtle than — and even different from — what the brief extracts quoted by Belgium suggest. One might also cite a large number of authors whose views contradict Belgium's arguments. To take just one example, and a recent one – since Belgium somewhat vainly reproaches the Congo for relying on literature which antedates the *Pinochet* and *Khadafi* jurisprudence — I shall quote Professor Michel Cosnard, who writes in his introductory report on the symposium of the *Société française pour le droit international* held in June this year:

> "if there is one principle which is proclaimed unanimously, it is that of the absolute immunity from criminal process of incumbent Heads of State, regardless of the date of the criminal acts alleged against them, even where these are prior to their taking office" (M. Cosnard, *'Les immunités du chef d'État'*, Introductory Report, SFDI, Clermont Symposium (June 2001), *Le chef d'État et le droit international*, p. 24). *[Translation by the Registry]*

Michel Cosnard also points out that the only decision conflicting with this undisputed rule is the decision handed down by a Serbian court on 21 September 2000, which I have already mentioned.

At all events, Mr. President, the Democratic Republic of the Congo does not seek to deny that there are writers, authoritative writers, who believe that members of foreign governments, even incumbents, should not enjoy immunity from criminal process in domestic courts where they are accused of an international crime. It is nevertheless clear, all things considered, that the state of positive law as I have just described it is judicious and perfectly consistent.

Mr. President, Members of the Court, I would suggest that I end my statement for this morning at this point and, with your permission, begin again tomorrow morning. I shall then deal

more specifically with the various arguments expounded by Belgium in its Counter-Memorial on this issue of immunity from jurisdiction. I thank the Court for its attention.

050 Le VICE-PRESIDENT, faisant fonction de président : Je vous remercie, Monsieur Pierre d'Argent. La séance de ce matin parvient ainsi à son terme. L'audience de la Cour reprendra demain matin à 10 heures.

L'audience est levée à 12 h 45.

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Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNÉE 2001

Audience publique

tenue le lundi 15 octobre 2001, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président, puis de M. Shi, vice-président,

en l'affaire relative au Mandat d'arrêt du 11 avril 2000
(République démocratique du Congo c. Belgique)

COMPTE RENDU

YEAR 2001

Public sitting

held on Monday 15 October 2001, at 10 a.m., at the Peace Palace,

President Guillaume and Vice-President Shi presiding, successively,

in the case concerning the Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. *Belgium)*

VERBATIM RECORD

[Pour des raisons techniques, les pages 2 et 3 du présent corrigendum remplacent les pages correspondantes du CR 2001/5 distribué ultérieurement.]

[For technical reasons, this and the following page replace pages 2 and 3 of CR 2000/5 as previously distributed.]

Présents :	M.	Guillaume, président
	M.	Shi, vice-président
	MM.	Oda
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
	Mme	Higgins
	MM.	Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal, juges
	M.	Bula-Bula
	Mme	Van den Wyngaert, juges *ad hoc*
	M.	Arnaldez, greffier-adjoint

Present: President	Guillaume
Vice-President	Shi
Judges	Oda
	Ranjeva
	Herczegh
	Fleischhauer
	Koroma
	Vereshchetin
	Higgins
	Parra-Aranguren
	Kooijmans
	Rezek
	Al-Khasawneh
	Buergenthal
Judges *ad hoc*	Bula-Bula
	Van den Wyngaert
Deputy-Registrar	Arnaldez