CR 2001/8

Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2001

Audience publique

tenue le mercredi 17 octobre 2001, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, 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 Wednesday 17 October 2001, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

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

VERBATIM RECORD

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. Couvreur, greffier

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
	Registrar	Couvreur

Le Gouvernement de la République démocratique du Congo est représenté par :

S. Exc. M. Jacques Masangu-a-Mwanza, ambassadeur extraordinaire et plénipotentiaire de la République démocratique du Congo auprès du Royaume des Pays-Bas,

comme agent;

S. Exc. M^e^ Ngele Masudi, ministre de la justice et garde des sceaux,

M^e^ Kosisaka Kombe, conseiller juridique à la présidence de la République,

M. François Rigaux, professeur émérite à l'Université catholique de Louvain,

Mme Monique Chemillier-Gendreau, professeur à l'Université de Paris VII (Denis Diderot),

M. Pierre d'Argent, chargé de cours à l'Université catholique de Louvain,

M. Moka N'Golo, bâtonnier,

M. Djeina Wembou, professeur à l'Université d'Abidjan,

comme conseils et avocats;

M. Mandjambo, conseiller juridique au ministère de la justice,

comme conseiller.

Le Gouvernement du Royaume de Belgique est représenté par :

M. Jan Devadder, directeur général des affaires juridiques du ministère des affaires étrangères,

comme agent;

M. Eric David, professeur de droit international public à l'Université libre de Bruxelles,

M. Daniël Bethlehem, *Barrister*, membre du barreau d'Angleterre et du pays de Galles, *Fellow of Clare Hall* et directeur adjoint du *Lauterpacht Research Centre for International Law* de l'Université de Cambridge,

comme conseils et avocats;

S. Exc. le baron Olivier Gillès de Pélichy, représentant permanent du Royaume de Belgique auprès de l'Organisation pour l'interdiction des armes chimiques, en charge des relations avec la Cour internationale de Justice,

M. Claude Debrulle, directeur général de la législation pénale et des droits de l'homme du ministère de la justice,

M. Pierre Morlet, avocat général auprès de la cour d'appel de Bruxelles,

M. Wouter Detavernier, conseiller adjoint à la direction générale des affaires juridiques du ministère des affaires étrangères,

M. Rodney Neufeld, *Research Associate* au *Lauterpacht Research Centre for International Law* de l'Université de Cambridge,

M. Tom Vanderhaeghe, assistant à l'Université libre de Bruxelles.

The Government of the Democratic Republic of the Congo is represented by:

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Maître Ngele Masudi, Minister of Justice and Keeper of the Seals,

Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,

Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,

Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),

Mr. Pierre d'Argent, *Chargé de cours*, Catholic University of Louvain,

Mr. Moka N'Golo, *Bâtonnier*,

Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mandjambo, Legal Adviser to the Ministry of Justice,

as Counsellor.

The Government of the Kingdom of Belgium is represented by:

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, *Université libre de Bruxelles*,

Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy-Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gillès de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,

Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,

Mr. Pierre Morlet, Advocate-General, Brussels *cour d'Appel*,

Mr. Wouter Detavernier, Deputy-Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,

Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge.

Mr. Tom Vanderhaeghe, Assistant at the *Université libre de Bruxelles.*

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Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte dans l'affaire relative au *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)* en vue d'entendre la première série de plaidoiries orales du Royaume de Belgique et je vais immédiatement donner la parole à M. Jan Devadder, agent du Royaume de Belgique.

M. DEVADDER :

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un honneur pour moi de me présenter devant vous en qualité d'agent du Royaume de Belgique dans cette affaire. Comme je l'ai noté lors de la phase relative aux mesures conservatoires de cette instance, la Belgique peut s'enorgueillir d'une belle tradition dans le développement des institutions de droit international et des instruments clés qui forment actuellement la base de ce système. L'engagement de la Belgique en faveur de la primauté du droit au sein de la communauté internationale est illustré, notamment, par sa déclaration — qui remonte à 1958 — par laquelle elle a accepté la compétence obligatoire de la Cour aux termes de l'article 36, paragraphe 2, du Statut de la Cour. Conformément à son interprétation du droit et à ses intérêts dans les affaires de fond, tout au long de cette instance, l'objectif de la Belgique a été d'œuvrer à un examen à bref délai de cette affaire par la Cour — une affaire entre deux Etats historiquement très liés et ayant des relations très suivies. Malgré la présente affaire en instance, les relations entre la Belgique et la République démocratique du Congo se sont renforcées au cours des douze derniers mois. Bien que nous contestions cette semaine les allégations avancées par la République démocratique du Congo dans cette affaire, la Cour peut être rassurée d'apprendre que l'affaire n'aigrit pas les relations entre les deux Parties. J'étais heureux d'entendre les représentants de la République démocratique du Congo exprimer des sentiments similaires.

2. Monsieur le président, conformément aux considérations présentées par la Cour dans son Règlement en matière de mesures conservatoires[1], cette instance a pris un développement rapide. Il y a exactement douze mois aujourd'hui que la République démocratique du Congo a déposé sa requête introductive d'instance au Greffe de la Cour. Depuis lors, la Cour a entendu argumenter et

[1] Par. 76.

a examiné la demande en indication de mesures conservatoires de la République démocratique du Congo. Sur la base d'un accord conclu entre les deux Parties, il y a eu un échange de plaidoiries écrites touchant tant la compétence et la recevabilité que le fond. Les audiences de cette semaine concernent ces deux éléments. La rapidité avec laquelle cette affaire est traitée n'a guère d'équivalent dans l'histoire de la Cour. Comme je l'ai noté, en fixant les présentes modalités — initialement dans l'ordonnance de la Cour du 13 décembre 2000 — la Cour s'est fait l'écho de l'accord entre les Parties.

3. Evidemment, ce genre de procédure rapide présente des désavantages. Je les signale simplement de manière à pouvoir éviter des embûches. Jusqu'à l'ouverture de la phase orale qui a commencé cette semaine, les Parties n'ont pas eu l'occasion de répondre aux arguments allégués par l'autre Partie, tant sur le plan de la compétence et de la recevabilité que sur celui du fond. Pour cette raison, ni les Parties ni la Cour n'ont eu l'occasion d'examiner de manière détaillée les arguments évoqués par chacune des Parties comme ce serait habituellement le cas à la suite d'un échange plus complet de plaidoiries. D'autre part, l'examen tant de la compétence et de la recevabilité que du fond dans un même échange de plaidoiries écrites et dans une même phase orale, pose aussi des défis étant donné que l'essence même des objections sur la compétence et la recevabilité est d'être *préliminaires* à tout examen quant au fond. En effet, si elles sont fondées, ces objections excluent l'examen du fond par la Cour. Ainsi, cette procédure comporte des écueils et des dangers. J'ose affirmer, toutefois, que les deux Parties se sont efforcées de surmonter ces écueils dans un esprit de coopération. Je les mentionne maintenant parce que, devant une telle procédure rapide, notre tâche comme celle de la Cour est d'autant plus difficile et d'autant plus lourde.

4. La présente affaire est également inhabituelle à d'autres égards, comme la Belgique l'a fait remarquer dans sa lettre à la Cour en date du 14 juin 2001, et de manière plus détaillée, dans son contre-mémoire. L'élément central de la requête introductive d'instance de la République démocratique du Congo était que l'émission, par un juge belge, d'un mandat d'arrêt contre le ministre des affaires étrangères de la République démocratique du Congo, constituait, de la part de la Belgique, une violation du droit international. Toutefois, la personne qui faisait l'objet du mandat d'arrêt n'est plus ministre des affaires étrangères de la République démocratique du Congo,

et n'occupe plus de poste ministériel au sein du Gouvernement de la République démocratique du Congo. Aujourd'hui, il est un simple ressortissant de la République démocratique du Congo, une personne privée. La thèse de la République démocratique du Congo continue à reposer sur l'argument selon lequel le mandat d'arrêt émis par le juge belge *est* — en d'autres termes, reste — illicite en vertu du fait que, lorsqu'il a été émis, l'objet du mandat était le ministre des affaires étrangères de la République démocratique du Congo. Ainsi qu'il sera exposé de manière détaillée au cours des plaidoiries de la Belgique de ce jour, la Belgique soutient que, par suite du changement intervenu dans les circonstances qui sont au coeur de l'affaire, la Cour n'est plus compétente en l'espèce et la requête de la République démocratique du Congo est devenue irrecevable.

5. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, la Belgique est dans cette procédure un défendeur convaincu mais réticent. La Belgique est réticente, non parce qu'elle a des doutes sur la légalité de sa position ou la solidité de ses arguments mais plutôt parce qu'elle aurait préféré que les accusations contre M. Yerodia Ndombasi aient été traitées par les autorités compétentes en République démocratique du Congo. Ainsi que le contre-mémoire belge[2] le précise, la Belgique a dès l'origine soulevé, dans ses contacts avec la République démocratique du Congo, la possibilité que les autorités de cette dernière reprennent l'instruction des plaintes contre M. Yerodia. Les plaintes sont graves. Les plaignants sont tant des ressortissants de la République démocratique du Congo que des ressortissants belges. Le droit international oblige les Etats à prendre toute mesure législative nécessaire pour fixer les sanctions pénales adéquates à appliquer aux personnes ayant commis les infractions présumées[3]. Par conséquent, il ne s'agit pas de matières qui peuvent simplement rester sans réponse. Soucieuse de respecter les sensibilités inhérentes à la matière et de ne pas compliquer les relations diplomatiques avec la République démocratique du Congo, la Belgique a toutefois, dès l'origine, exprimé clairement sa volonté — et telle est toujours sa volonté aujourd'hui — de transférer le dossier des plaintes aux autorités

[2] Par. 1.7.

[3] Cf. par exemple l'arrticle 146 de la quatrième convention de Genève, de même que le contre-mémoire de la Belgique, par. 1.5-1.6.

compétentes de la République démocratique du Congo pour qu'elles poursuivent l'examen de l'affaire et qu'ainsi la procédure belge puisse être clôturée.

6. Jusqu'à présent cependant, la République démocratique du Congo n'a pas accepté cette proposition. Elle continue à prétendre que la Belgique a violé le droit international du fait qu'elle a passé outre à l'immunité dont bénéficient les ministres des affaires étrangères en fonction d'Etats étrangers. En agissant de la sorte, toutefois, la République démocratique du Congo omet de faire usage d'une option qui respecterait des considérations de dignité tout en étant conforme aux dispositions du droit international qui prescrivent que les Etats doivent prendre des mesures leur permettant de poursuivre les auteurs présumés d'infractions graves aux conventions de Genève et de crimes contre l'humanité. La Belgique le regrette. Comme je l'ai déjà dit, la Belgique est dans cette procédure un défendeur réticent. Elle préférerait que ces matières soient examinées par la République démocratique du Congo. Le juge naturel pour traiter d'affaires criminelles est généralement celui du lieu où les infractions présumées auraient été commises. Les conseils de la République démocratique du Congo l'ont affirmé à plusieurs reprises au cours des plaidoiries. Aujourd'hui encore, en pleine procédure, la Belgique renouvelle son offre de transmettre le dossier aux autorités compétentes de la République démocratique du Congo aux fins d'instruction et de poursuites éventuelles; il suffit que la République démocratique du Congo l'informe de ce qu'elle est disposée à procéder de cette manière.

7. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, dans sa lettre à la Cour en date du 14 juin 2001, la Belgique indiquait qu'elle allait procéder à une révision de sa législation mise en cause dans cette affaire. Commenter plus avant ce point peut être utile à la Cour quant à la recevabilité de la requête de la République démocratique du Congo, mais la question de la revision de la loi belge ne fait évidemment pas l'objet du présent différend.

8. Comme la Cour l'aura sans doute appris via certains comptes rendus parus dans la presse au cours des douze derniers mois, sur la base de la législation mise en cause dans cette affaire, des plaintes ont été déposées auprès des juges d'instruction en Belgique pour un certain nombre de violations présumées du droit international, revêtant une certaine gravité et déclarées comme ayant été commises en dehors de la Belgique mais pour lesquelles la Belgique est réputée avoir compétence. Les conseils de la République démocratique du Congo ont fait allusion à certaines de

ces plaintes. Le Gouvernement belge s'est inquiété de cette évolution, car il n'entrait pas dans les intentions du législateur belge de faire de la Belgique le prétoire du monde entier, poursuivant devant ses propres tribunaux l'une ou l'autre violation grave présumée des conventions de Genève ou d'autres violations graves présumées du droit international humanitaire. D'autre part, ainsi qu'il sera exposé ultérieurement dans notre plaidoirie de demain, la Belgique considère que le droit international autorise tous les Etats à connaître de pareilles affaires dès lors qu'il s'agit de crimes relevant de la compétence universelle. La Belgique estime également que la tendance visant à demander de rendre davantage compte et à faire appel à la responsabilité individuelle des auteurs présumés de pareilles violations est une tendance positive, à laquelle elle souhaite apporter son soutien. La pratique des Etats sert le développement du droit international. La pratique belge en la matière - comme sa législation en témoigne - vise à exiger des auteurs de violations graves du droit international humanitaire qu'ils rendent des comptes à ce sujet et encourent, s'il y a lieu, une responsabilité pénale individuelle.

9. Dans cette perspective, la Belgique a entrepris un examen approfondi de sa législation. Au point où en sont les choses, elle estime que ladite législation est justifiée par le droit international et est conforme audit droit. Il me faut toutefois signaler ce qui suit. Le procureur général a saisi la *Chambre des mises en accusation* à Bruxelles pour qu'elle se prononce sur la question de savoir si l'article 12 du Code belge de procédure pénale s'appliquait à la législation en matière de poursuite de violations graves du droit humanitaire international. La Belgique a agi ainsi étant donné que la question avait été directement posée dans une autre affaire liée dans le cadre de l'application de cette législation. L'article 12 prévoit que, sous réserve de quelques rares exceptions, les poursuites pénales ne peuvent avoir lieu en Belgique que si l'inculpé est trouvé en Belgique. Un des effets de l'article 12 serait d'empêcher la délivrance de mandats d'arrêt dans des affaires semblables à celle pendante actuellement devant la Cour.

10. Alors que l'application de l'article 12 du Code d'instruction criminelle n'avait pas été mentionnée par M. Yerodia Ndombasi ou par la République démocratique du Congo - bien qu'ils eussent la faculté d'agir ainsi - le procureur général a, dans l'intérêt de la justice et de la cohérence, également saisi la *Chambre des mises en accusation* de l'affaire de M. Yerodia Ndombasi pour qu'elle se prononce sur ce point. Cette procédure fut ouverte le 2 octobre 2001. Après une période

au cours de laquelle les personnes intéressées auront la possibilité d'être entendues, on s'attend à ce que le tribunal rende sa décision au plus tard au début de l'année prochaine.

11. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, les problèmes abordés dans cette procédure au niveau belge ne font pas l'objet du débat actuel. Cette procédure a toutefois une incidence sur la présente affaire. Comme il sera exposé dans quelques instants, étant donné que M. Yerodia est à présent une personne privée, la Belgique soutient que - condition suspensive de l'action de la République démocratique du Congo devant la Cour - M. Yerodia Ndombasi aurait dû épuiser les voies de recours qui s'offraient à lui en Belgique. Comme le démontre le renvoi devant la *Chambre des mises en accusation* à Bruxelles, notamment sur la portée de l'article 12, des voies de recours internes s'offraient en effet à M. Yerodia mais n'ont pas été utilisées.

12. Les voies de recours internes illustrent également un élément important de la situation constitutionnelle de la Belgique. De même que dans de nombreux autres Etats, le système constitutionnel belge est caractérisé par la séparation des pouvoirs. Le pouvoir exécutif est distinct du pouvoir judiciaire. Le système belge connaît l'institution du juge d'instruction. Ce magistrat indépendant accomplit ou fait accomplir sous son autorité ou sous sa direction les actes qui ont pour objet de rechercher les auteurs d'infractions, de rassembler les preuves et de prendre les mesures destinées à permettre aux juridictions de statuer en connaissance de cause.

Etant un juge astreint à un strict devoir d'impartialité, il mène son instruction à charge et à décharge; il veille à la légalité et à la loyauté des preuves. La régularité de son instruction ne peut être contrôlée et, s'il y a lieu, censurée que par une autre juridiction, elle aussi indépendante, à savoir une chambre de la cour d'appel appelée la *Chambre des mises en accusation*.

Tel est le statut du juge d'instruction Vandermeersch dans l'affaire en cause de M. Yerodia.

Dans ces conditions, s'il peut se concevoir que le pouvoir politique ait sa vision propre de l'application du droit belge ou du droit international à propos d'une affaire particulière, en ce compris pour ce qui a trait à la compétence du juge d'instruction, la décision finale revient aux tribunaux belges.

13. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, dans le cadre de ces remarques préliminaires, les conclusions présentées par la Belgique cet après-midi et demain

matin seront développées par les conseils de l'Etat belge, M[e] Bethlehem et le professeur David. M[e] Bethlehem, que je vous inviterai à appeler sous peu, abordera la nature et le champ d'application de l'action de la République démocratique du Congo. Il développera ensuite les objections préliminaires de la Belgique concernant la compétence de la Cour et la recevabilité de la demande. Ainsi que l'aura fait apparaître le contre-mémoire de la Belgique, cette dernière affirme avec beaucoup de fermeté, au vu des changements tout à fait essentiels qui sont intervenus dans la situation qui est au cœur de l'action de laRépublique démocratique du Congo, que la Cour n'est pas compétente en la matière et que la demande de la République démocratique du Congo n'est pas recevable. Telle est la principale conclusion préliminaire de la Belgique en la matière.

14. Après les observations de la Belgique concernant la juridiction et la recevabilité, ce qui devrait prendre environ deux heures et demie, nous aborderons les questions de fond. M[e] Bethlehem commencera cet après-midi par quelques brèves observations sur la nature du mandat d'arrêt.

15. Nos observations principales concernant le fond de l'affaire seront développées par le professeur David demain matin. Il abordera les questions de fond concernant la compétence du juge belge et le droit se rapportant à l'immunité des ministres des affaires étrangères en fonction. Comme je l'ai déjà fait remarquer, la Belgique estime que la législation en vertu de laquelle le juge Vandermeersch s'est déclaré compétent, ainsi que le mandat d'arrêt émis par le juge, sont conformes au droit international. Les conclusions du professeur David devraient prendre environ aussi deux heures et demie. M[e] Bethlehem reviendra ensuite pour formuler quelques brèves observations concernant les réparations demandées par la République démocratique du Congo. La Belgique soumettra ses observations finales au moment de sa réplique vendredi après-midi.

16. Monsieur le président, comme le révèle ce canevas de plaidoiries de la Belgique, les conseils de la Belgique suivront globalement la structure du contre-mémoire de la Belgique. Ce faisant, ils s'efforceront cependant d'aborder les principaux arguments avancés par la République démocratique du Congo lors de ses plaidoiries de lundi et de mardi.

17. Monsieur le président, puis-je vous inviter à demander à Me Bethlehem de présenter les arguments de la Belgique sur la compétence et la recevabilité ? Je vous remercie.

Le PRESIDENT : Je vous remercie Maître et je donne maintenant la parole à M. David Bethlehem, counsel for the Kingdom of Belgium.

Mr. BETHLEHEM:

OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

I. BACKGROUND AND PRELIMINARY ISSUES

A. Introductory remarks

1. Monsieur le président, Mesdames et Messieurs de la Cour, it is a great honour for me to appear before you again representing the Kingdom of Belgium in these proceedings. It is a particular pleasure as the issues raised by this case are both interesting and important and, as has already been observed, relations between the Parties are good and the debate is taking place without any acrimony.

2. Mr. President, this is of course precisely what these proceedings are all about — a debate between the Parties on high principles of law. The dimension of a real, concrete dispute between the Parties in need of resolution by the Court lest it fester like some running sore is no longer apparent. A Belgian judge issued an arrest warrant naming a citizen of the Democratic Republic of the Congo on charges of grave breaches of the Geneva Conventions and crimes against humanity. When the warrant was issued — although not when the alleged acts are said to have occurred — the person concerned was the Foreign Minister of the Democratic Republic of the Congo. The warrant reflected this, and the immunity that subsisted in the DRC in the person of its agent, and expressly provided, and I quote "the absence of immunity under humanitarian law seems to us to require to be tempered as regards immunity from enforcement"[4]. The DRC took issue with the arrest warrant and initiated proceedings requesting that the Court declare, and I quote again from

[4]Arrest Warrant, at p. 62 (p. 23 in the French text). (Ann. 3).

the Application, "that the Kingdom of Belgium shall annul the international arrest warrant issued . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo"[5].

3. Mr. President, Members of the Court, between that point and this, the subject of the arrest warrant has ceased to be Foreign Minister. Nor does he occupy any other position in the Government of the Democratic Republic of the Congo. The case, however, continues. The issue remains the allegations that Belgium violated the immunity of the Foreign Minister of the DRC. But the point is now in reality one of abstract principle. Counsels for the DRC suggested on Monday that the case involved a conflict between legal theses underpinned by a conflict or interest[6]. A difference over legal theses certainly. But the conflict of *interest* now in reality coalesces around the issue of whether it is any part of the adjudicatory function of the Court to clarify the law in the absence of a subsisting dispute of concrete dimension. Belgium contends that it is not.

4. It was also said on Monday by counsel for the DRC that the DRC is pleading on behalf of the entire international community[7]. This is precisely Belgium's point. With the change in the circumstances of Mr. Yerodia Ndombasi, the case has become a public interest case. The object of the proceedings is a statement by the Court on the scope of the law of the immunity of Ministers for Foreign Affairs in office. This is, of course, an interesting and important issue. But it is now an abstract issue not appropriate for determination by the Court in the course of its adjudicatory function.

5. Mr. President, Members of the Court, a number of points were addressed by counsel for the DRC over the past two days which require brief preliminary comment. It was argued that the arrest warrant was improperly issued as there was an insufficiency of evidence. It was suggested that the acts alleged were of insufficient gravity. It was questioned whether the complainants were "real victims" properly entitled to initiate proceedings. These elements are not, however, in issue in these proceedings. This Court is not a court of criminal review charged with assessing whether

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[5]Application, at Sect. II. Nature of the Claim.

[6]CR 2001/15, at p. 35.

[7]CR 2001/15, at p. 14.

the investigating judge undertook his task with sufficient vigour. If there are subsisting questions of substance here at all, they go to the jurisdiction of a national judge as a matter of international law in respect of allegations of grave breaches of the Geneva Conventions and crimes against humanity, not whether the evidence was or was not sufficient to justify the issuing of an arrest warrant.

6. Much was made by the DRC of questions of timing. The present status of Mr. Yerodia Ndombasi is not important, or so it was contended. Nor, it was said, was his status when the alleged acts are said to have occurred. The only relevant point, it was argued, is that the arrest warrant was issued at a time when Mr. Yerodia Ndombasi was Minister for Foreign Affairs of the DRC. It follows, says the DRC, that Belgium is in breach of the immunity that attaches to Foreign Ministers in office.

7. Mr. President, the arrest warrant was not, however, predicated on Mr. Yerodia Ndombasi's official status. Nor is there any suggestion anywhere in the warrant that the alleged acts were committed in the name of the Democratic Republic of the Congo. Further, as I have already observed and as I will return to more fully in just a moment, the warrant on its face distinguishes between immunity from jurisdiction and immunity from enforcement and explicitly endorses immunity from enforcement in circumstances in which Mr. Yerodia Ndombasi, *qua* DRC Foreign Minister, might have visited Belgium on the basis of an official invitation. If there is a subsisting point of substance here at all, it is whether there is anything precluding the enforcement of the arrest warrant now, at this point. The DRC's emphasis on timing is simply an attempt to breathe new life into its claim now that the circumstances of Mr. Yerodia Ndombasi have changed.

8. Then there are the arguments by the DRC that go to the issues of jurisdiction and admissibility and the merits. Significantly, Mr. President, issues of jurisdiction and admissibility were not addressed in any detail by the Democratic Republic of the Congo. No attempt was made to respond systematically to the preliminary objections set out in Belgium's Counter-Memorial. Where jurisdiction and admissibility were addressed, they were treated as entirely intertwined with arguments going to the merits of the case. Both elements will, of course, be addressed by Belgium fully in the course of these proceedings. Notwithstanding the unusual procedural form of this case, sight must not, however, be lost of the fact that objections to jurisdiction and admissibility are and

remain *preliminary* questions to be addressed by the Court before any consideration of the merits. Indeed, if upheld, such objections would preclude the Court from turning to the merits.

9. Given their preliminary character, and for reasons of clarity, Belgium proposes to address issues of jurisdiction and admissibility quite distinctly from any treatment of the merits. I will turn to this aspect shortly. Following some initial observations that I will make towards the end of today's session on the character of the arrest warrant, Belgium's submission on the merits will be developed by Mr. Eric David tomorrow.

10. Mr. President, Members of the Court, against the background of these brief introductory remarks, I would like to turn now to look more closely at the context of this case and, thereafter, at the Democratic Republic of the Congo's characterization of its claim. I do so both, I hope, for reasons of clarity and by way of foundation for the submission on jurisdiction and admissibility that will follow.

B. The context of the case

11. Counsel for the Democratic Republic of the Congo have already made some observations on the context of the case. Touching only lightly upon issues that have already been addressed, it will nevertheless be helpful to set out some of the salient elements of the factual and legal background to these proceedings. Mr. President, Members of the Court, I would like also, if I may, to take you directly to one or two of the key documents relevant to this element. I understand that the Registrar has asked that Volume 1 of Belgium's Annexes be made available.

12. In November 1998, various complaints were lodged with a Belgian investigating judge, Judge Damien Vandermeersch, concerning events that had taken place some months earlier in the Democratic Republic of the Congo. Of the 12 complainants, as we have already heard, five were of Belgian nationality. All were resident in Belgium. The complaints variously alleged the commission of crimes amounting to grave breaches of the Geneva Conventions, and of the Additional Protocols thereto of 1977, and crimes against humanity.

13. Grave breaches of the Geneva Conventions and crimes against humanity were criminalized as a matter of Belgian law by an Act of 16 June 1993, as amended by an Act of 10 February 1999, on the punishment of grave breaches of international humanitarian law. The

legislation is set out in Annex 4 to the Belgian Counter-Memorial — I do not propose to refer to that directly, simply to observe that crimes against humanity are addressed in Article 1, paragraph 2, of the Act drawing, in part, on the Statute of the International Criminal Court. The ICC Statute apart, crimes against humanity are, however, largely customary in origin. "Grave breaches" are addressed in Article 1, paragraph 3, of the Belgian legislation by reference to the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977. As will be well known, "grave breaches" constitute a particularly serious form of violation of the principles enshrined in the Geneva Conventions. The relevant provisions are broadly the same across all four of the Geneva Conventions — not exact, but broadly the same. If I may, Mr. President, Members of the Court, I would like to refer you to Articles 146 and 147 of the Fourth Geneva Convention for the Protection of Civilian Persons in Time of War in respect of which you have already heard observations by counsel for the Democratic Republic of the Congo yesterday. You will find this document at Annex 5 to the Belgian Counter-Memorial. If I may refer you to that document, it is about a third of the way through the collection. The French text of the document is followed right at the end of that Annex by an English translation of Articles 146 and 147. I appreciate that without tabs it is perhaps a little difficult to find the document so easily. It is towards the middle of the collection. The tab starts with the French text of the Convention, the very last page of that tab contains an English translation of Articles 146 and 147.

14. Mr. President, Members of the Court, if you look at Article 147, this defines "grave breaches" *inter alia* as "any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health", etc. That is the definition of "grave breaches" in Article 147.

15. Article 146, which was the subject of a good deal of comment yesterday, addresses penal sanctions in respect of such grave breaches in the following terms. I refer now to the first and second paragraphs of Article 146:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

16. Mr. President, Members of the Court, I would add parenthetically here that both Belgium and the Democratic Republic of the Congo are parties to the Geneva Conventions.

17. The authoritative Pictet commentary to Article 146 prepared under the auspices of the International Committee of the Red Cross ("ICRC") states as follows:

> "This Article is the cornerstone of the system used for the repression of breaches of the Convention. That system is based on three essential obligations laid upon each Contracting Party: to enact special legislation; to search for persons alleged to have committed breaches of the Convention; to bring such persons before its own courts or, if it prefers, to hand them over for trial to another High Contracting Party concerned."[8]

18. It was partly in response to the obligation to legislate in respect of the punishment of grave breaches that the Belgian law here in issue was enacted.

19. Following detailed investigation over an 18-month period, the investigating judge concluded that the evidence was such as to warrant a charge against Mr. Yerodia Ndombasi on the basis of the complaints. Accordingly, on 11 April 2000 he issued an arrest warrant charging Mr. Yerodia Ndombasi, as perpetrator and co-perpetrator, with two counts: first, crimes constituting grave breaches of the Geneva Conventions and the Additional Protocols thereto, and secondly, crimes against humanity. Mr. President, Members of the Court, at the risk of asking you to turn up another document which it is going to be difficult to find but this is rather important as it is the arrest warrant, I would like, if I may, to refer you to the arrest warrant, which you will find at Annex 3 of the collection. It is a rather substantial Annex. Curiously, we have reprinted two copies of the French text before you get to the English text. The English text is printed in double-space towards the middle of that Annex. The Court has been referred a good deal to the arrest warrant over the course of the last two days. It would be helpful to look at the actual document.

20. You will see in the preambular parts of the warrant — that is on page 1 in the original French text and on page 2 in the English translation — that Mr. Yerodia Ndombasi is named and his profession identified, in other words, former director of the Office of President Kabila and

[8] Fourth Geneva Convention, Article 146, Commentary, ICRC 1958.

currently Minister for Foreign Affairs of the Democratic Republic of the Congo. Much was made of this description by counsel for the DRC on Monday, contending that the warrant charged Mr. Yerodia Ndombasi in his capacity as Foreign Minister of the DRC. This is entirely inaccurate. There is no suggestion anywhere in the warrant that the charges were directed at Mr. Yerodia Ndombasi in his capacity as Foreign Minister. Quite to the contrary, the charges were laid against him personally for conduct he allegedly carried out as a private citizen. He did not occupy any position in the government when the alleged acts were said to have occurred. His position as Minister for Foreign Affairs when the arrest warrant was issued was entirely incidental. It is a standard requirement in an arrest warrant — reflected in Interpol documentation — to give the profession or occupation of the named person.

21. The arrest warrant goes on to set out the charges — these are on the bottom of page 1 and the top of page 2 of the original French text and on pages 2 and 3 of the English translation — namely, as perpetrator or co-perpetrator charged with:

> "— crimes against international law constituting serious violations occasioning harm by act or omission to persons and property protected by the Geneva Conventions of 12 August 1949 and the additional protocols I and II to these Conventions (Section 1, paragraph 3, of the Act of 16 June 1993, amended by the Act of 10 February 1999 on the prosecution of serious violations of international humanitarian law)",

and the second charge

> "— crimes against humanity (Section 1, paragraph 2, of the Act of 16 June 1993, as amended by the Act of 10 February 1999 on the prosecution of serious violations of international humanitarian law)".

22. The warrant goes on then to address in detail the procedure leading to its issue, the facts and evidence relevant to the charges, and the relevant principles of law. There is no need for me to go over these here. These elements are not in issue in these proceedings. They have in any event already been the subject of comment by counsel to the Democratic Republic of the Congo. It may be useful to note, however, that the warrant explicitly reflects that, at the time that the alleged acts were said to have been committed, Mr. Yerodia Ndombasi was the director of the Office of President Kabila not Minister for Foreign Affairs. You will find this on page 6 of the French text and page 15 of the English translation. There is no disagreement between the Parties on this point, I do not propose to take you to that passage.

23. Mr. President, Members of the Court, what does merit further comment is the warrant's treatment of the question of the immunity of Mr. Yerodia Ndombasi given his status as Minister for Foreign Affairs of the DRC at the point at which the warrant was issued. I would like, if I may, to take you to those passages — you will find these addressed in some detail on pages 21 to 23 of the French text and pages 58 to 63 of the English text. Given the importance of these proceedings, it will be useful to have a look at these closely.

24. Section 3.5 of the warrant titled "Official Immunity" opens by noting that "[i]n terms of section 5 (3) of the Act of 16 June 1993, as amended by the Act of 10 February 1999, the immunity attaching to the official capacity of a person does not prevent prosecutions on the grounds of a crime against humanitarian law". Mr. President, the warrant goes on to trace this principle through Article 27, paragraph 2, of the Statute of the International Criminal Court as well as through various other international cases and commentaries. It also refers to the opinions expressed at the time of the passage of the legislation through the Belgian Parliament. By reference to these various sources, the warrant goes on to observe (this is at page 22 of the French text and page 61 of the English text) that "the office of Minister for Foreign Affairs that is currently occupied by the accused does not entail any immunity from jurisdiction and enforcement and this court is consequently competent to take the present decision".

25. Mr. President, Members of the Court, the warrant continues, in terms that merit full recitation, as follows (this is on page 23 of the French text and towards the bottom of page 62 and the top of page 63 of the English text) — you will forgive me if I quote the paragraph in full. This follows the conclusion of the office for Minister for Foreign Affairs that is currently occupied by the accused does not entail any immunity from jurisdiction and enforcement. The warrant goes on:

> "However, the rule of the absence of immunity under humanitarian law seems to us to require to be tempered as regards immunity from enforcement. Beyond the question of the extent of the protection that a private individual who holds an official capacity enjoys, sight must not be lost of the fact that the immunity conferred on the representatives of a State is not intended so much to protect the private individual but first and foremost the State of which he is a representative. This immunity, customary in origin, is founded on the principle that a State has no jurisdiction to judge another State *('par in parem non habet juridictionem')*. By virtue of the general principle of fairness in legal action, in our view, an immunity from enforcement must be accorded to all representatives of a State that are welcomed onto the territory of Belgium as such (on 'official visits'). Welcoming such a foreign personality as an official representative of a sovereign State puts at stake not only relations between individuals

> but also relations between States. On this line of thinking, it includes an undertaking by the host State and its various components not to take any coercive measures against its guest, and the invitation may not become a pretext [for] having the party in question fall into what would then be labelled an ambush. In the contrary case, failure to adhere to this undertaking would entail the host State being liable at an international level."

26. This element of the warrant was subject to much critical comment by counsel for the DRC — yet without any explicit reference to what is actually said. As becomes clear when one examines the text, there is no suggestion, even implied, that the immunity of Foreign Ministers is somehow subject to the whimsical or capricious dictates of the investigating judge. On the contrary, the judge makes a clear distinction between immunity from jurisdiction — in other words, immunity from investigation and charge — and immunity from enforcement — in other words, immunity from arrest. He further notes explicitly that, and I recall, "the immunity conferred on the representatives of a State is not intended so much to protect the private individual but first and foremost the State of which he is a representative". Finally, the warrant notes that "an immunity from enforcement must be accorded to all representatives of a State that are welcomed onto the territory of Belgium as such (on 'official visits')".

27. Mr. President, Members of the Court. Mr. David will address the law relevant to the immunity of Foreign Ministers tomorrow. I would venture to say at this point, however, that, contrary to the arguments advanced by counsel to the DRC, there is nothing absurd or problematic about the way in which the arrest warrant is framed. The Belgian legislation criminalizes acts that are crimes under international law. In the case of grave breaches, it does so in implementation of explicit commitments under the Geneva Conventions. Following complaint and investigation, the judge concluded that there were grounds for laying charges against Mr. Yerodia Ndombasi. He was thus charged with two counts, one of acts constituting grave breaches, the other of crimes against humanity.

28. In view of his position as Minister for Foreign Affairs at the point at which the warrant was issued, the judge explicitly addressed the question of immunity. While noting that international humanitarian law does not recognize immunity as a bar to proceedings, the judge nevertheless concluded that the position of Mr. Yerodia Ndombasi as Minister for Foreign Affairs

of the DRC required that he be accorded immunity from enforcement when visiting Belgium in his capacity as Foreign Minister. There is nothing capricious or exorbitant about the jurisdiction relied upon by the judge or the manner in which he exercised his function.

29. The arrest warrant was transmitted to the DRC on 7 June 2000. As the Agent for Belgium noted in his opening remarks, taking the view that the matter would be more appropriately addressed by the relevant authorities of the Democratic Republic of the Congo, Belgium from the outset raised with the DRC the possibility of transferring the dossier of complaint to the DRC authorities for further investigation. The complaints are serious and could not therefore simply be left unaddressed. Mindful, however, of the sensitivities of the matter, Belgium made it clear from the outset that it was ready to transfer the dossier to the appropriate authorities in the DRC to pursue the matter and thereby to bring the Belgian proceedings to a close.

30. As the Belgian Agent noted, the Democratic Republic of the Congo has not, to this point, accepted this proposal.

31. There was some passing comment on Monday by counsel to the DRC about Interpol Red Notices and the effect of the arrest warrant. I will address this matter further towards the end of today's session at the start of our submissions on the merits of the case. For the moment, let me simply observe as part of this factual context of the case, that we simply observe that the arrest warrant was transmitted to Interpol at the point at which it was transmitted to the DRC. It was not, however, at that point, and I stress this: it was not, however, at that point, the subject of a request by the relevant Belgian authorities for the issue of an Interpol Red Notice and no such notice was issued. Nor at any point did Belgium make a formal request for the extradition of Mr. Yerodia Ndombasi, whether to the DRC or to any other State. A request for the issue of a Red Notice was first made by the Belgian National Central Bureau of Interpol on 12 September 2001, that is some five months after Mr. Yerodia Ndombasi ceased to be a member of the DRC Government. This request is reproduced at Annex 9 to the Belgian Counter-Memorial, which is about halfway through. It is a relatively brief document but it may be useful simply to have a look at it given its significance. Annex 9 is reproduced only in its original French.

32. Mr. President, Members of the Court, you will see in the top left-hand corner the reference to *Formulaire Rouge*, or the Red Notice. In the first box on the top left-hand side, you

will see the reference to the requesting agency the "BCN" in Brussels. In other words, this is the Interpol National Central Bureau in Brussels, the national Interpol agency in Brussels. Moving across the top right-hand column, you will find the date "12 September 2001".

33. In the middle of that page, corresponding to box 1.1, Mr. Yerodia Ndombasi is named. If you turn over the page, you will see, at box 1.14, reference to Mr. Yerodia Ndombasi's former professional position, the former Minister for Foreign Affairs of the Democratic Republic of the Congo and *Chef de Cabinet* of President Kabila. This corresponds to the statement regarding his position in the arrest warrant. It does not, as is self-evident from this form, indicate that the person named is alleged to have committed the acts in question in his capacity as a representative of the State. The application form — and that is what it is, it is simply an application form — goes on to indicate other information which is not immediately material for present purposes. Before leaving this document, I would simply note that, notwithstanding this application, Interpol has not yet issued a Red Notice in this case. Mr. President, Members of the Court, you may be relieved to hear that this is the last of the documents in this bundle that I will be referring you to.

34. On 13 September 2000, lawyers acting for Mr. Yerodia Ndombasi applied to have access to the dossier of complaints submitted to Judge Vandermeersch. The application was ultimately rejected by the Brussels *chambre des mises en accusation* on 23 October 2000 on grounds that there was a substantial risk that reprisals might be taken against the complainants and others associated with the complainants and that in any event Mr. Yerodia Ndombasi was fully aware of the substance of the complaints against him, the arrest warrant having been transmitted to the DRC.

35. One final point relevant to the context of the case requires mention. As the Belgian Agent noted, in view of initiatives pursued by those acting in other cases under the same legislation, the Prosecutor-General, on 2 October 2001, referred to the *chambre des mises en accusation* in Brussels — a chamber of appellate jurisdiction competent in respect of matters relating to the conduct of an investigating judge — the question of whether Article 12 of the Belgian Code on Criminal Procedure applied to the Belgian law here in issue. This provision, Article 12 of the Belgian Code on Criminal Procedure, restricts criminal prosecutions in Belgium to persons who are found in Belgium. In the event that the *chambre* were to conclude that

Article 12 does apply, this would effectively preclude the issuing of arrest warrants in cases such as that concerning Mr. Yerodia Ndombasi and would require the withdrawal of all such warrants already issued.

36. As I will address further a little later, it was from the outset open to Mr. Yerodia Ndombasi to pursue this procedure, even *in absentia*. He did not do so. The matter has now been referred to the *chambre* by the Prosecutor-General in order to ensure that the case of Mr. Yerodia Ndombasi is treated in the same manner as other cases that have arisen under the law. Lawyers acting for Mr. Yerodia Ndombasi have been informed of the proceedings. There will be an oral hearing on the matter on 6 November this year, at which they will have an opportunity to put submissions on behalf of Mr. Yerodia Ndombasi. It is anticipated that the *chambre* will give its decision in the matter in either December or early in the new year. As I will turn to shortly, Belgium contends that the fact that Mr. Yerodia Ndombasi did not avail himself of this procedure has material consequences for this in the light of the change of circumstances of Mr. Yerodia Ndombasi, in particular his status as a private citizen.

C. The DRC's characterization of its claim

37. Let me turn now relatively briefly to address the DRC's characterization of its claim. As the Court will appreciate, this is material to the question of the jurisdiction of the Court and the admissibility of the Application. We have, of course, already heard something of this from counsel to the DRC in their submissions over the past two days. Their oral submissions nevertheless bear closer scrutiny by reference notably to the DRC's Application instituting proceedings and the case as formulated in the DRC Memorial.

38. In oral argument, counsel for the DRC yesterday referred the Court to the operative part of the Application instituting proceedings. Under the heading "Nature of the Claim", the DRC stated as follows:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Adbulaye Yerodia Ndombasi, seeking his provisional detention pending a request

> for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

39. I note parenthetically here that, contrary to what is stated in this passage, the arrest warrant in fact did not amount to a request for the provisional detention of Mr. Yerodia Ndombasi. This is a quite separate matter linked to the question of Interpol Red Notices, to which I will return in due course. I simply observe at this stage that, in this respect, the DRC Application was in error.

40. Counsel for the DRC referred to this passage to show that the DRC's claim had not changed between the point that the case was started and today. He noted that, in its Memorial, the DRC is still seeking the annulment of the arrest warrant. This, of course, is true; although it is, in Belgium's contention, a more complex issue to which I will return shortly. I make reference to this passage here today simply for purposes of illustrating quite how central to the DRC's claim was the then status of Mr. Yerodia Ndombasi as the incumbent Minister for Foreign Affairs of the DRC. This element is reflected throughout the Application. The matter is addressed fully in Part I of Belgium's Counter-Memorial.

41. As is well known, the underlying circumstances of the case changed dramatically in the midst of the oral hearing on provisional measures when, on 19 November, Mr. Yerodia Ndombasi was relieved of his position as Foreign Minister of the DRC and became Minister for National Education. In response to a question from the Court as to the consequence of this for the proceedings, the DRC indicated that it was still intent on pursuing the matter as the question of immunity was relevant to the office of Ministers of Education[9]. The clear implication of this was that the case was concerned with the *effect* of the arrest warrant on a minister in office.

42. Now, of course, the position is different as, from 15 April 2001, Mr. Yerodia Ndombasi no longer occupies any position in the DRC Government. The case, however, continues. The issue now, however, is not one of any practical significance — that is, the effect of the arrest warrant on a minister in office — but rather one of abstract principle — that is, whether, as a matter of principle, the issuing of the arrest warrant amounted, at the time, to a violation of the immunity of

[9]See Belgian Counter-Memorial, at para. 1.29.

the Minister for Foreign Affairs. What was a case about legal effects and the practical reality of the immunity of Foreign Ministers has become a case about legal principle and the speculative consequences for immunity of the action of the Belgian judge.

43. Counsel for the DRC on Monday, in a rather rapid passing comment, said that the DRC's case as now formulated is not a new case; that the situation is not akin to that in the *Nauru* proceedings in which the Court ruled inadmissible a fresh claim introduced by Nauru. I will return to this element in due course. It may, however, be useful to point out at this stage that the third of Belgium's objections to jurisdiction and admissibility contends that the DRC case as it now stands is materially different to that set out in the DRC's Application instituting proceedings. Our objection is precisely that the DRC's case has *not* evolved to reflect the fundamental change in the underlying facts at the heart of the matter. It is in consequence of this that Belgium contends that the Court lacks jurisdiction in the matter and that the application is inadmissible. The reality of the case has changed quite fundamentally since it was first instituted. As I have suggested, a case that was about the legal effects and practical reality of the constraints of the arrest warrant has become a case about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge. This is not, in Belgium's contention, a case appropriate for the adjudicatory function of the Court.

44. The manner in which the DRC's claim is characterized in its Memorial is addressed in some detail in Part I of Belgium's Counter-Memorial. I do not need now to take you through the various elements there set out. There are, however, one or two observations concerning aspects of the DRC's case that it would be useful to highlight briefly.

45. We have heard a good deal these past few days from counsel for the DRC about moral and real damage suffered by the DRC in consequence of the issuing of the arrest warrant. Very little more specific was, however, said about this in the course of oral argument. The reason for this, I would venture to suggest, is that, in reality, there is in fact little more that can be said on the matter.

46. The issue is addressed in the DRC's Memorial at paragraphs 50 to 55 of that Memorial. In essence, what the DRC alleges is, first, that the issuing of the arrest warrant in and of itself has coercive effect, and, second, that this coercive effect manifested itself in restrictions on the freedom

of movement of Mr. Yerodia Ndombasi. In support of the contention that the sovereignty of the DRC was infringed, there was some — if I can put it in these terms — rhetorical flourish. It was said in the Memorial that "the issue of the arrest warrant is meaningful only with a view to the arrest of the person named"[10]. The difficult circumstances of the "international war prevailing in the DRC" were also referred to[11]. We heard further argument to this effect over the past two days. It was also suggested that Belgium is in fact rather disingenuous when it contends that the arrest warrant does not in fact have the coercive effect on the DRC's sovereignty that the DRC considers to be so self-evident.

47. I will return to this matter towards the end of the submissions today. I should note at this stage, however, that Belgium is by no means being disingenuous when it raises the question of the real and actual effect of the arrest warrant. The Democratic Republic of the Congo is asking the Court in these proceedings to condemn the actions of Belgium as unlawful; as a violation of the DRC's sovereignty; as a breach of the immunity of the DRC Minister for Foreign Affairs. It is appropriate in the circumstances to ask whether the national instrument of Belgian law that is alleged to have visited all of this on the DRC can properly be said to have this effect. Belgium contends that it did not and does not. Belgium further contends that the DRC case fundamentally misunderstands the character and legal effect of the arrest warrant. I will return to this element, as I mentioned, towards the end of these proceedings.

48. One last element of the DRC's case warrants brief comment. This is the form of the DRC's final submissions. We heard something of this yesterday from counsel to the DRC. I will address the significance of the formulations of the DRC's final submissions in due course. For the moment, I would like simply to draw your attention to the detail. Mr. President, Members of the Court, I understand that you have a copy of the text of paragraph 97 of the DRC's Memorial with which those final submissions are set out. If not, no matter, I would simply like to go through them and I read here from the Court's translation, paragraph 97 is the final paragraph:

> "97. In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

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[10]DRC Memorial, at para. 51.

[11]DRC Memorial, at para. 52.

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;

2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;

3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, further to the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

49. With this remark I will conclude this section. I would at this point simply make three brief observations about these final submissions. First, as is well-known, and as was implicitly acknowledged yesterday by counsel for the DRC when he referred to the *dispositif* of the DRC's case, the final submissions in the pleadings of a party are important for purposes of defining the focus of the Court's task and the scope of the Court's jurisdiction. Second, despite the fact that aspects of the DRC's Memorial are directed towards issues of universal jurisdiction, and we heard more of this yesterday, the question of universal jurisdiction does not feature at all in the DRC's final submissions. As I will return to in due course, the consequence of this, Belgium contends, by operation of the principle of *non ultra petita*, is to require the Court to abstain from addressing this element in any decision on the merits of the case — that is, of course, if the Court decides to address the merits of the case. Third, against the background of the fact that the arrest warrant was not predicated in any way on Mr. Yerodia Ndombasi's position as Minister for Foreign Affairs, and in the light of the fact that Mr. Yerodia Ndombasi is now a private citizen, I would simply note that the third and fourth requests in the DRC's final submissions in reality seek relief on behalf of a private person. There is no necessary connection between the first two requests of the DRC and the third and fourth requests. I will return to these matters shortly.

Mr. President, that brings me to the end of my preliminary submissions. I, of course, have to turn to the objections of jurisdiction and admissibility. I am in your hands if it would be an appropriate point to break.

Le PRESIDENT : Je vous remercie beaucoup. Ceci me paraît effectivement un moment approprié pour une suspension de dix minutes. La séance est suspendue.

L'audience est suspendue de 16 h 35 à16 h 45.

Le PRESIDENT : Veuillez vous asseoir. L'audience est reprise et je donne à nouveau la parole à M[e] Bethlehem.

Mr. BETHLEHEM: Thank you, Mr. President.

II. Objections to jurisdiction and admissibility

A. Introductory remarks

50. Mr. President, having set out the context of the case and the formulation by the DRC's claims, I turn now to Belgium's objections to the jurisdiction of the Court and the admissibility of the Application. These aspects are fully addressed in Part II of Belgium's Counter-Memorial. As I have already observed, under the scheme of the Court's Statute, objections to jurisdiction and admissibility are preliminary matters which require consideration prior to any consideration of the merits. If upheld, such objections preclude the Court from proceeding to address the merits. There is of course nothing in the unusual procedure of the present case that departs from that statutory scheme.

51. This is an interesting case, there is no doubt about it. The issues of legal principle raised by the case go to the heart of the evolving framework of international law. They are central to the question of the responsibility of private persons for acts contrary to international criminal law. Issues of jurisdiction not tested virtually since the *Lotus* case before the Permanent Court are before the Court now. The scope of the law of immunity is in focus, against the background of shifting trends in this area in recent years. There have been other hugely significant developments in this area in recent years. Tribunals have been established to address serious violations of international humanitarian law by the Security Council in the former Yugoslavia and in Rwanda. One is contemplated in Sierra Leone: a number of preliminary steps have been taken. The Statute of the International Criminal Court was adopted and, on all expectations, will enter into force in the not

too distant future. Dictators have been swept from power over the past decade with bewildering speed, with consequent prosecutions against former political leaders before national courts for breaches committed while in office. There is a new focus on human rights and humanitarian law. Issues of law relating to immunity and individual responsibility have been addressed in recent years by national courts: in France, in the *Kadhafi* case; in England, in the *Pinochet* case; in the Netherlands, in the *Bouterse* case; in Senegal, in the *Hisen Habre* case; and elsewhere. Finally, finally, these issues are raised in proceedings before the International Court of Justice. The international community can look forward to an authoritative judgment on the matter to unravel all of the problems and all of the complexity. The only difficulty is that the facts underlying this case have changed so fundamentally since the case was initiated that the jurisdiction of the Court and the admissibility of the Application would involve a significant departure from the established legal principle on these matters. It would do more. It would elevate to a pre-eminent place in the adjudicatory function of the Court the abstract clarification of the law, displacing in that position the resolution of existing, concrete disputes between litigating States.

52. This is a dramatic picture. As I have already observed, Belgium acknowledges that there are issues of high legal principle between the Parties in this case. The question, however, is whether, on the basis of established legal principle, the Court has jurisdiction to address these matters. The question, beyond this, is whether the Application is admissible. Beyond this again, it might also be asked, if some basis could be found on which the case could be heard, whether it would be *desirable* for the development of the law for the Court to proceed to a judgment on the merits of the case. This last element — a matter that goes to principles of judicial restraint and an appreciation of law as process rather than simply as rules — was addressed by Judge van Eysinga in the *Panevezys-Saldutiskis Railway* case in 1932. Referring to a statement by Borchard to the effect that an extensive jurisprudence had established and crystallized the nationality of claims rule, Judge van Eysinga observed as follows:

> "It may be that this jurisprudence has *crystallised* the rule which Borchard has in mind. But it may be observed that 'crystallise' implies the idea of rigidity. When the Court has to apply unwritten law, of course it encounters difficulty. But there are

> also advantages, in particular the advantage that such rules of law, not being written, are precisely not rigid."[12]

53. In her interesting submissions yesterday on the question of universal jurisdiction, Professor Chemillier-Gendreau observed that the world was moving into a period of great uncertainty and that, while the Belgian legislation in issue had laudable aims, by "jumping the stages of embryonic evolution", the radical approach at the heart of the Belgian legislation was apt to cause difficulty.

54. The point can of course be put the other way around as well. It is precisely through the practice of States that the law develops. Although Belgium contends that the principles of universal jurisdiction and the absence of immunity in the case of allegations of serious breaches of international humanitarian law are well-founded in the law — a matter that Eric David will address tomorrow — Belgium also acknowledges that the past decade has seen very considerable developments in this area. The Belgian legislation — and issues to which it is giving rise internally in Belgium — is one such development. Similar developments are taking place in other States, as the long list of potential prosecuting States in the *Pinochet* case attested. Further developments may be anticipated. In the realm of law as process, the question is, if it ultimately turns on the discretion of the Court, whether it would be desirable for the Court to proceed to a judgment on the merits of this case. Belgium, with the very greatest of respect for the role of the Court in developing international law, contends that it would not. In Belgium's contention, in the absence of a compelling reason to do so — and a compelling reason to do so would be a subsisting concrete dispute between two States which requires resolution — for the Court to proceed to a judgment on the merits of these issues would risk rigidity in the law just at the point at which States, principally responsible for the development of the law, are groping towards solutions of their own. In Belgium's contention, this is not the point at which rigidity in the law, whether expansive or restrictive, is desirable.

55. All of this is of course is by way of comment on a matter that falls firmly within the Court's discretion. It assumes a certain flexibility on the issues of jurisdiction and admissibility in this case that might lead the Court to decide either way on the matter. It contends that, in such

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[12] *Panevezys-Saldutiskis Railway* case (1932), *P.C.I.J., Series A/B, No. 76*, p. 34.

circumstances, that discretion should, for very sound reasons, be exercised to decline jurisdiction. Mr. President, Members of the Court, it is not, of course, Belgium's contention that there is any flexibility on the issues of jurisdiction and admissibility in this case. Belgium takes the view that the law on these matters is clear and that the Court does not have jurisdiction in this matter and that the Application is inadmissible. The preceding remarks simply sketch the wider contours of the ground on which we stand.

56. Before I turn to the substance of our preliminary objections to jurisdiction and admissibility, two concluding comments to these introductory observations are warranted. First, as both a bridge to our arguments to come, which are grounded in the decisions of the Court in the *Northern Cameroon* and the *Nuclear Tests* cases, and also suggesting caution by the Court in the face of these decisions, I would recall briefly the recent observations made by a former distinguished Member of this Court. Writing under the title *Precedent in the World Court*, Judge Mohamed Shahabuddeen observed as follows:

> "The desiderate of consistency, stability and predictability, which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection. This is of especial importance in the delicate field of applying the rule of law to inter-State relations. The law of these relations may occasionally require some rethinking of a previous rule as to the law, but more usually it will call for its maintenance. This consideration is reinforced by the reflection that the decisions of the Court are relatively small in number; there is greater freedom to overrule where a court is functioning in a system which delivers a multitude of decisions."[13]

57. I will turn shortly to the previous decisions of the Court that have a bearing on the jurisdiction of the Court in this case and the admissibility of the Application. I do so against the echo of Judge Shahabuddeen's "desiderate of consistency, stability and predictability".

58. Second, although this trespasses a little into merits, I would recall the observations of the Court in the Merits phase of the *Nicaragua* case on the question of the identification of rules of customary international law. I do so here for purposes of underlining the accepted appreciation of the dynamic nature of customary international law. The subtext to this reference, consistent with my preceding remarks, is that the Court should be cautious about intruding into a dynamic process

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[13]Mohamed Shahabuddeen, *Precedent in the World Court* (1996), at pp. 131-132.

of law creation or crystallization. Addressing the process of enquiry by which a rule of custom is identified, the Court said as follows:

> "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[14]

59. Rules of law emerge and crystallize through the practice of States. There will often be controversy during this process. The Court should, in Belgium's contention, be cautious about intruding itself into this process in circumstances in which there is no compelling requirement for it to do so. Such caution is inherent in the judicial function.

B. Belgium's preliminary objections to the jurisdiction of the Court and the admissibility of the Application

60. Mr. President, Members of the Court, I turn now to address Belgium's substantive objections to the jurisdiction of the Court and the admissibility of the Application. As will have been evident from its Counter-Memorial, Belgium advances four principal submissions under this heading and a fifth, ancillary submission. For convenience, these can be summarized as follows:

First submission

In the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, there is no longer a dispute between the Parties within the meaning of this term in the optional clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case.

Second submission

In the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the Government of the DRC, the case is now without object and the Court should accordingly decline to proceed to a judgment on the merits of the case.

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[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986*, at para. 186.

Third submission

The case as it now stands is materially different to that set out in the DRC's Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or the Application is inadmissible.

Fourth submission

In the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and the Court accordingly lacks jurisdiction and/or the Application is inadmissible.

61. Mr. President, Members of the Court, these submissions are advanced cumulatively and in the alternative.

62. By way of a fifth, ancillary submission, in the event that the Court decides — contrary to the first four submissions — that it does have jurisdiction in this case and that the Application is admissible, Belgium contends that the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions.

63. Mr. President, Belgium's objections to jurisdiction and admissibility are set out in detail in the Belgian Counter-Memorial. I do not propose, therefore, to go through all the nuances of argument there set out. Needless to say, Belgium relies fully on the submissions as set out in its written pleadings. It will nevertheless be useful for me to touch upon and, where appropriate, elaborate briefly upon, the key elements of each of these submissions.

C. First submission: there is no longer a dispute between the Parties

64. I turn then to Belgium's first preliminary objection to the jurisdiction of the Court, namely, that there is no longer a dispute between the Parties within the meaning of this term in the Parties' optional clause Declarations.

65. The DRC founds the jurisdiction of the Court in this case on the two optional clause Declarations of the Parties — Belgium's Declaration of June 1958; the DRC's Declaration of February 1989. These Declarations reflect the language of Article 36, paragraph 2, of the Court's Statute: both give the Court jurisdiction in the case of "legal disputes".

66. Over the past two days, counsel for the DRC have repeatedly stated that there is a dispute between the DRC and Belgium. It has also been asserted that, notwithstanding the change in status of Mr. Yerodia Ndombasi, the dispute is not of an abstract nature. In this regard, fleeting reference was made by counsel to the DRC to the *Mavrommatis* case, the *Peace Treaties* Advisory Opinion, the 1962 Judgment in the *South West Africa* case, the *Headquarters Agreement* Advisory Opinion and the *East Timor* case[15]. As I have previously observed, it was contended by counsel for the DRC that the conflict of legal thesis between the Parties was underpinned by a conflict of interest[16]. Beyond these assertions, however, no attempt was made by the DRC to grapple with the central contentions advanced in the Belgian Counter-Memorial, namely, that, in the light of the change in the factual circumstances of Mr. Yerodia Ndombasi, there is no longer a "dispute" between the Parties within the accepted meaning of this term in the optional clause Declarations of the Parties.

67. Let me sketch out the essence of this contention. Belgium accepts that the question of whether there is a dispute between the Parties is a matter for objective determination by the Court. Belgium also accepts the established jurisprudence of the Court on the definition of a dispute — being a disagreement on a point of law or fact, a conflict of legal views or of interests[17]. Belgium further accepts that a legal dispute existed between the Parties at the point at which the DRC filed its Application instituting proceedings.

68. The question, Mr. President, Members of the Court, however, by reference to the Court's long-established jurisprudence, is not whether a legal dispute *did* exist when the DRC initiated proceedings. It is whether a legal dispute *does* exist today at the point at which the Court is called upon to address the matter. The question is, to adopt the language of the Court in the *Northern Cameroons* case, whether there continues to be "a concrete case" involving an "actual controversy" at the point at which the Court is called upon to give a judgment on the merits[18].

69. The point was made unambiguously by the Court in the *Nuclear Tests* cases in the following terms:

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[15]CR 2001/15, at p. 34.

[16]CR 2001/15, at p. 35.

[17]*East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 90, at para. 22. See further the Belgian Counter-Memorial, at paras. 2.4-2.5.

[18]Case concerning *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, p. 15, at pp. 33-34.

> "The Court, as a court of law, is called upon to resolve *existing disputes* between States . . . The dispute brought before it must therefore *continue to exist* at the time when the Court makes its decision."[19]

70. In her oral submissions on Monday, Professor Chemillier-Gendreau attempted lightly and in passing to distinguish the *Northern Cameroons* case and the *Nuclear Tests* cases by saying that, in the former case, the Court had regard to a General Assembly resolution and, in the latter case, the Applicants' objective in the proceedings had been achieved in consequence of the statements of the French officials on the question of nuclear testing[20]. These points, of course, go to the distinct, though parallel, contention advanced by Belgium, to which I will come in a moment, to the effect that the case is now without object. These observations, however, fail at all to grapple with the central proposition that emerges from these cases, namely, that, for the Court to have jurisdiction, the essence of the claim must continue to exist. There must be some purpose to the exercise of the Court's adjudicatory function other than the mere clarification of law. This point is crucially important. The mere clarification of law, however important may be the issue of principle, is not in and of itself sufficient to imbue a difference of views between two States into a dispute over which the Court is entitled, as a matter of law, to exercise jurisdiction.

71. In Belgium's contention, with the change in the position of Mr. Yerodia Ndombasi, the difference of views that is evident between the Parties on the law on universal jurisdiction or relating to the immunity of Ministers for Foreign Affairs is essentially a difference of opinion of an abstract nature. For all practical purposes, notwithstanding the strenuously asserted views to the contrary by counsel for the DRC over the past few days, a judgment by the Court on the merits of the case would not serve any practical purpose. As I have already observed, the arrest warrant naming Mr. Yerodia Ndombasi was not predicated on his status as Foreign Minister. It is not alleged that he acted in any official capacity in respect of the acts in question. The DRC is nowhere contending in these proceedings that Belgium is precluded from asserting jurisdiction over grave breaches of the Geneva Conventions and crimes against humanity committed abroad by private persons of foreign nationality. What then is the sustainable continuing rationale of this case?

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[19] *Nuclear Tests* cases *(Australia* v. *France; New Zealand* v. *France), I.C.J. Reports 1974,* pp. 253 and 457 respectively ("*Nuclear Tests* cases"), at paras. 55 and 58 respectively.

[20] CR 2001/15, at p. 36.

72. There are, perhaps, issues of dignity. As the Belgian Agent was at pains to say at the start of these proceedings, Belgium would like nothing more than to transfer the dossier of this case to the appropriate authorities in the DRC for further investigation and action. It has made this clear from the point at which the arrest warrant was issued. The only consideration that motivates Belgium in respect of this matter is that the allegations are of sufficient gravity as to require that they not simply be abandoned.

73. There is also the declared continuing rationale of the DRC of wanting from the Court some clarification of the law. There is also the declared rationale of wanting from the Court a judgment that will vindicate the rights of the DRC. The fundamental difficulty with all of these elements is that the Court — in the *Nuclear Tests* case and the *Northern Cameroons* case — explicitly rejected each of them as a sufficient basis for the continuing existence of a dispute when the very essence of the claim has disappeared. It is precisely in such cases that the Court has characterized the issues before it as abstract. It is precisely in such cases that the Court has observed that to render a judgment on the matter would fall outside of its adjudicatory functions[21].

74. Mr. President, Members of the Court, absent some real contortion in the appreciation of the essence of the DRC's case or a departure from the principles laid down in the Court's jurisprudence, there is no getting away from this issue. The change in the circumstances of Mr. Yerodia Ndombasi has deprived the case of the object that stood at the heart of the DRC's Application instituting proceedings, no matter how firmly counsel for the DRC protest to the contrary. A difference of views does not become a concrete dispute amenable to the jurisdiction of the Court simply because one side feels aggrieved, or because it would like vindication on a point of law, or because it is pursuing a point that may be of interest to the wider international community, or, for that matter, because it is challenging conduct that it contends amounted to a violation of the law. This last element was the essence of the Cameroonian Application in the *Northern Cameroons* case. It was rejected by the Court as constituting a sufficient index of concreteness warranting a judgment by the Court on the merits. The same is true for each of the other indicia of continuing existence of a dispute just mentioned.

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[21]See the Belgian Counter-Memorial, at paras. 2.9-2.12; also, at paras. 2.23 and 2.27-2.31.

75. I would only make one more point on this first Belgian preliminary objection. Counsel for the DRC on Monday, with a hint of humour, commented that Belgium, in its observations noting that the DRC had characterized the damage that the DRC is said to have suffered as "moral" damages[22], that Belgium was complaining about the moderation of the DRC's request[23]. Well we, of course, appreciate the light-hearted comment. But there is a serious point here. As Belgium noted in its Counter-Memorial, the absence of a claim for compensatory damages was one of the elements that led the Court to conclude, in the Australian *Nuclear Tests* case, that the case had become moot[24]. In the *Northern Cameroons* case, the Court noted expressly that the Cameroonian claim was "solely for a finding of a breach of the law [and that] [n]o further action is asked of the Court or can be added"[25]. Now the DRC does of course ask for something more in this case in the form of the annulment of the arrest warrant and restraint upon its execution. However, as I have already commented and will address in more detail shortly, these requests in reality seek relief on behalf of a private citizen of the DRC. They can have no proper place in these proceedings, even if the Court concludes that it does have jurisdiction in this case and that the Application is admissible.

D. Second submission: the case is now without object

76. I turn now to address the second of Belgium's preliminary objections, namely, that the case is now without object or that it has become moot. This is, of course, closely related in many ways to the submission I have just advanced. It is, however, a distinct point as it goes not to law but to the discretion of the Court. Lest this reference to discretion imply a wide latitude I would add quickly that the exercise of the Court's discretion in such circumstances does not take place in a vacuum. The jurisprudence of the Court contains a number of principles relevant to the matter.

77. The relevant cases here are once again the *Northern Cameroons* and *Nuclear Tests* cases. Each of these is examined closely in Part II of Belgium's Counter-Memorial and it is not necessary for me to go over the detail again at this stage. I would simply note a number of key points. First, circumstances that render adjudication by the Court in a given case "devoid of purpose" or

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[22]Belgian Counter-Memorial, at para. 2.14.

[23]CR 2001/15, at p. 16.

[24]Belgian Counter-Memorial, at para. 2.14.

[25]*Northern Cameroons*, *supra*, at p. 34.

"without object" raise questions that go to the administration of justice and the proper exercise of the judicial function. Second, by reference to these considerations, the Court will decline to exercise jurisdiction in such cases. The rationale behind the principle, as expressed by the Court in the *Northern Cameroons* case, is that "it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved"[26].

78. In the *Nuclear Tests* cases, the Court, referring to the "inherent limitations on the exercise of the judicial function" and the requirement that the dispute must continue to exist at the time when the Court comes to make its decision, declined to proceed to judgment in the matter on the ground that to do so would be devoid of purpose[27].

79. Mr. President, Members of the Court, in Belgium's contention, this is the situation with which the Court is faced in the present case. Circumstances subsequent to the filing of the Application have fundamentally altered the practical dimension of the proceedings. As the Court observed in both the *Northern Cameroons* and the *Nuclear Tests* cases, clarification of the law in the absence of some tangible effect on the parties does not in and of itself constitute sufficient reason for the Court to give judgment. Nor does the fact that there remains a subsisting difference of views between the parties[28].

80. As I have already noted, counsel for the DRC sought very lightly to cast doubt upon the weight and relevance of these cases for present purposes. The *Northern Cameroons* case, it was said, hinged on the special circumstances of a General Assembly resolution. The *Nuclear Tests* cases turned, it was said, on the fact that the object of the Application had been achieved. Both of these elements are, of course, correct but they overlook the generality of the principles expressed by the Court in each case. In the *Northern Cameroons* case, the Court did not say that it was not the function of the Court to clarify the law in circumstances in which the proceedings had been rendered devoid of purpose because of a resolution of the General Assembly. Rather the Court simply said that that it would not be a proper discharge of its duties to proceed further in a case in

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[26] *Northern Cameroons* case, *supra*, at p. 37.

[27] See the Belgian Counter-Memorial, at para. 2.26.

[28] See further the Belgian Counter-Memorial, at paras. 2.23 and 2.27-2.31.

which any adjudication was devoid of purpose. Indeed, Cameroon expressly requested the Court to give a declaratory judgment on the matter, notwithstanding the supervening change of circumstances. The Court, however, declined to do so.

81. In the *Nuclear Tests* cases, while the fact that the object of the Applicants' claim had been achieved was the operative cause of the disappearance of the dispute, the reasoning of the Court was clearly not restricted to such situations. Indeed, in reaching its decision in that case, the Court drew on earlier jurisprudence in which the operative consideration was *not* the realization of the aims of the Applicant. As is discussed in Belgium's Counter-Memorial, the *Nuclear Tests* cases support a number of other propositions of law of general application as follows:

(a) that the fact that a judgment of the Court might serve some purpose in clarifying the law for the future is not a sufficient ground to proceed to a judgment on the matter if the claim advanced by the applicant has no other continuing object[29];

(b) that the proper limits of the judicial function require that the Court does not adjudicate on abstract issues notwithstanding that it may have jurisdiction to do so[30]; and

(c) that the test of whether issues in contention between the parties amounts to a concrete dispute or on the other hand are issues *in abstracto* hinges not on whether there is an on-going difference of views but on whether a determination by the Court would have any practical utility between the parties[31].

82. There is no need to labour this issue further. The question in this case is whether there remain concrete issues in contention between the Parties or whether they have become abstract questions on which a determination by the Court would serve no practical purpose. In Belgium's contention, the answer to this question is clear. For all practical purposes, the issues raised by this case are now either issues of an abstract nature or, to the extent that they are not, they in fact fall outside the proper scope of these proceedings altogether. Thus, the DRC's request for a declaration of rights is an exercise focused simply on the clarification of the law. That is the first of its requests in its submissions. The request (No. 2 in its formal submissions) for a formal finding that

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[29]See the Belgian Counter-Memorial, at para. 2.28.

[30]See the Belgian Counter-Memorial, at para. 2.29.

[31]See the Belgian Counter-Memorial, at para. 2.31.

such a declaration constitutes sufficient reparation is likewise entirely abstract. In contrast, the requests (No. 3) that the Court order Belgium to annul the arrest warrant and to restrain any execution thereof (No. 4) both seek relief on behalf of a private citizen in the DRC. In Belgium's contention, they fall outside of the proper purview of these proceedings altogether. In any event, and additionally, they fall outside the accepted judicial function of the Court. These are matters to which I will return later.

83. Mr. President, Members of the Court, in Belgium's contention, with the change in the circumstances of Mr. Yerodia Ndombasi, the case has for all practical purposes become moot. The DRC is attempting valiantly to breathe life into it by contending that it still serves some real practical object. But, if I may borrow a term from Professor Rigaux's presentation on Monday that gave us all cause to smile, this argument is more ectoplasm than substance. The case is now without object. With Judge Shahabuddeen's "desiderate of consistency, stability and predictability" firmly in mind, by reference to the established principle in the jurisprudence of the Court, the Court should decline to proceed to a judgment on the merits of this case.

E. Third submission: the case as it now stands is materially different to that set out in the DRC's Application instituting proceedings

84. I turn now to Belgium's third preliminary objection, namely, that the case as it now stands is materially different to that set out in the DRC's Application instituting proceedings. As I have already had cause to remark, counsel for the DRC sought rather peremptorily to dismiss this objection by rejecting any parallel between the DRC's case and the *Nauru* case in which the Court rejected an attempt by *Nauru* to add a new element to its claim[32]. However, as I have observed, this is not at all what Belgium is contending. We are not saying that the DRC has introduced new claims which go beyond its Application instituting proceedings. What we are saying is that the case as now presented by the DRC is so far removed from the factual reality that now prevails that, by reference to principles of legal security and the good administration of justice, the Court lacks jurisdiction in the case as now presented or that the Application is inadmissible. The point is important. It can, however, be addressed relatively briefly.

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[32]CR 2001/15, at p. 37.

85. As Belgium observes in Part II of its Counter-Memorial, the principle that an applicant must specify its case with sufficient clarity when instituting proceedings is well-established, both in the Statute and Rules of Court and in the jurisprudence of both this Court and of the Permanent Court before it[33]. As the Court observed in the *Fisheries Jurisdiction* case between Spain and Canada, this requirement of clarity was "essential from the point of view of legal security and the good administration of justice"[34].

86. In Belgium's contention, and I must acknowledge that the point is novel in the case law of the Court, but nevertheless, in Belgium's contention, implicit in the requirement of clarity and precision in the initiation of legal proceedings is also its corollary; that it would be contrary to legal security and the good administration of justice for an applicant to continue with legal proceedings in circumstances in which the factual dimension on which the proceedings were first instituted had changed fundamentally. The soundness of this proposition can be no better illustrated than by reference to the circumstances of this case. I do not need to go over the various twists and turns in these proceedings since they were first initiated. They are well known to the Court and are, in any event, described in Belgium's Counter-Memorial[35]. There is also real prejudice to the Respondent in these circumstances. The case has assumed an artificial character. There has been considerable uncertainty about the substance of the case that Belgium would be called upon to address. The raison d'être of the case has become the abstract pursuit of legal principle. The question, in these circumstances, is whether, in the light of the principle of legal security and the good administration of justice, it is appropriate for the applicant to be able to proceed in this manner.

87. Belgium contends that it is not. It would not be appropriate. The Court has taken a number of steps recently to ensure that the adjudicatory process works more efficiently and to greater legal effect. Time limits, notably for preliminary objections, have been shortened by revisions to the Rules of Court. The Court has taken a corresponding approach to the management of its docket. Attempts are being made to inject a new rigour into oral proceedings before the

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[33]See the Belgian Counter-Memorial, at paras. 2.39 *et seq*.

[34]*Fisheries Jurisdiction (Spain* v. *Canada), I.C.J. Reports 1998*, p. 432, at para. 29.

[35]See paras. 2.42-2.46.

Court. Exceptional procedures — as in this case — have been introduced. Provisional measures order have been declared to be binding. Although these measures do not all go in a single direction, and the Court will I hope appreciate that I make a wider systemic point here, not a point which goes to the particular procedures in this case, it bears pointing out that many of these important and widely welcomed developments operate effectively to the relative disadvantage of respondents in proceedings before the Court.

88. If these developments are to be matched by a level of comfort in all quarters of the international community such that, for example, more States will be prepared to file optional clause Declarations accepting the compulsory jurisdiction of the Court — a figure that still stands, regrettably, at under one third of the members of the international community — if there is to be such a level of comfort, States will have to be persuaded that the new rigour in the proceedings of the Court applies also to the manner in which applicants prosecute the cases that they initiate. In Belgium's contention, consistent with the wider developments in the practice and procedure of the Court, the Court should signal clearly that the sound administration of justice precludes the continuation of proceedings by an applicant in circumstances in which the underlying factual dimension of the case has changed fundamentally since the filing of the application instituting proceedings. In such circumstances, if an applicant wishes to pursue a matter, it should be required to initiate proceedings afresh, or, at the very least, to apply to the Court for permission to amend its initial application before proceeding further. This at least would allow observations on the matter to be submitted by the respondent.

89. In view of the fact that the case as presented by the DRC is so far removed from the factual reality that now prevails, Belgium contends that the Court lacks jurisdiction in this case and/or that the Application is inadmissible.

F. Fourth submission: the case has assumed the character of an action of diplomatic protection but local remedies have not been exhausted

90. I turn now to the last of Belgium's principal preliminary objections, namely, that the case has assumed the character of an action of diplomatic protection but that local remedies have not been exhausted. Counsel for the DRC, in a passing observation on Monday, described this

submission by Belgium as a cumbersome attempt to obscure the DRC's claims[36]. He did not, however, go on to address it. In Belgium's contention, there is an important element here which goes to the character of the DRC's case that should not be overlooked.

91. The law on the exhaustion of local remedies has been addressed fully in Belgium's Counter-Memorial by reference to the jurisprudence of the Court, wider international jurisprudence and authoritative commentary[37]. For present purposes at least, this is largely uncontroversial and there is accordingly no need for me to go over this element here. Simply for purposes of the coherence of my remarks to come, I would simply observe that, in the event that there is an issue of local remedies to be addressed here at all — and this is the critical point which I will come to in a moment —, three propositions follow:

— first, that it would be for Belgium to adduce evidence of the existence of a local remedy that Mr. Yerodia Ndombasi had failed to pursue;

— second, that the question of whether there is an available local remedy falls to be addressed by reference to the whole system of legal protection provided by municipal law. The relevant issue is whether any given procedure is capable of providing an effective and sufficient means of redressing the wrongs alleged; and

— third, once Belgium has adduced sufficient evidence to show the existence of a local remedy meeting these criteria, it will be for the DRC to show that the remedy was either exhausted or inadequate[38].

92. Against this background I turn to the more important question here of whether a question of non-exhaustion of local remedies falls to be addressed in these proceedings at all. In Belgium's submission it does, for the reasons that I will explain. The DRC understandably rejects this proposition, although it has only done so by implication in the form of an assertion that this is not an action of diplomatic protection.

93. Belgium accepts that, when this case was first instituted, the DRC had a direct legal interest in the matter. The DRC was asserting a claim in its own name in respect of the alleged

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[36]CR 2001/15, at p. 17.

[37]See the Belgian Counter-Memorial, at paras. 2.54 and 2.60-2.63.

[38]See the Belgian Counter-Memorial, at para. 2.63.

violation by Belgium of the immunity of its Foreign Minister. Erroneous on the law, Belgium would claim, but nonetheless perfectly proper.

94. The position since 15 April 2001 is, however, quite different. This, it will be recalled, was the date on which Mr. Yerodia Ndombasi ceased to be a member of the Government of the DRC. This was also a full month before the DRC filed its Memorial in this case. In Belgium's contention, given the change in the circumstances of Mr. Yerodia Ndombasi, and in the light of certain important elements in the DRC's claim as set out in its Memorial one month later, the case, in important respects, assumed the character of an action of diplomatic protection. Let me try to tease out the point a little bit more clearly. In Belgium's contention, it is important.

95. As I have already observed, the arrest warrant naming Mr. Yerodia Ndombasi was not predicated on his position as Minister for Foreign Affairs. Nor did it allege that he had committed the acts in question in any official capacity. The arrest warrant was thus directed at Mr. Yerodia Ndombasi in his capacity as a private citizen of the DRC.

96. In the normal course of affairs, assuming *arguendo* that Mr. Yerodia Ndombasi had not been Foreign Minister, if the DRC had wanted to challenge the arrest warrant issued against its national, Mr. Yerodia Ndombasi would first have had to exhaust any available local remedies that might have been capable of providing an effective and sufficient means of redress or the DRC would have had to show that no such remedies existed. This follows simply from the normal operation of the principles relevant to diplomatic protection.

97. Given Mr. Yerodia Ndombasi's position as Foreign Minister of the DRC when the case was initiated, these principles did not of course apply as the DRC was quite properly proceeding in respect of a matter in respect of which it had a direct interest, that is, the alleged infringement of the immunity of its Foreign Minister. What, however, is the situation now?

98. Well, as Belgium sees the matter, there is now a significant confusion in the DRC's case. On the one hand, it continues to assert that it is pursuing a claim in respect of a violation of its own rights in the name of its Foreign Minister. On the other hand, however, two of the remedies it requests of the Court — no matter what the language in which they are couched — effectively seek relief on behalf of a private citizen of the DRC. As matters stand today, no question of immunity would arise if an attempt was made to enforce the arrest warrant. Mr. Yerodia Ndombasi had no

immunity at the point at which the alleged acts were said to have occurred. There is no suggestion that he was acting in any official capacity engaging the wider responsibility of the DRC. As a private citizen, he cannot claim any immunity now. As counsel for the DRC have been at pains to inform the Court, immunity is not the same as impunity. Once immunity ceases to apply, a person who may have previously been shielded from criminal prosecution can be the subject of proceedings.

99. So, no question of immunity could arise today if an attempt was made to enforce the warrant. The warrant was issued against Mr. Yerodia Ndombasi personally. Yet, the DRC is requesting the Court to order the annulment of the warrant and restraint on any attempt to enforce it. However this is described, in proceeding in this fashion, the DRC is effectively asserting a claim on behalf of its national. The question arises, therefore, as to whether Mr. Yerodia Ndombasi has exhausted the local remedies available to him to redress the wrongs allegedly done by the issuing of the arrest warrant? A further question, are there any potentially effective local remedies available to him? Well, the answer to both of these questions is that there is at least one potentially effective local remedy available to Mr. Yerodia Ndombasi and that he has failed to exhaust it, or even pursue it at all.

100. The issues have already been touched upon in passing by the Belgian Agent in his opening remarks this afternoon, although in a different context. They are also set out in Belgium's Counter-Memorial[39]. The relevant points can therefore be addressed briefly.

101. As a matter of accepted practice under Belgian criminal law, persons who are the subject of criminal investigation by an investigating judge may submit a legal memorandum to the judge concerned contesting his or her jurisdiction and the validity of any arrest warrant said to have been issued in excess of jurisdiction. The judge is not compelled to take the arguments so raised into account. If, however, he or she considers that the arguments raise important issues going to jurisdiction, he or she must submit the matter to the Prosecutor-General who, in turn, will submit the matter to the court, in the form of the *chambre des mises en accusation*, for resolution.

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[39] At paras. 2.65-2.71.

102. We heard a good deal on Monday and Tuesday to the effect that the Belgian law in issue in these proceedings requires no territorial link between the accused and the acts alleged and Belgium. The matter is not, however, quite so clear, as even some of the learned articles attached to the DRC's Memorial point out. As is by now very well known, there is an unresolved anomaly to the Belgian law here in issue. This is whether Article 12, paragraph 1, of the Belgian Code of Criminal Procedure applies to the Law. This provision, which is set out in Annex 6 to the Belgian Counter-Memorial, provides, as a general rule relating to criminal prosecutions, that any prosecution of offences can only take place if the accused is found in Belgium.

103. The question of whether Article 12 of the Code of Criminal Procedure applies to the legislation pursuant to which the arrest warrant was issued is uncertain. The matter ultimately for determination by the Belgian courts. What is clear, however, is that if Article 12 does apply, it would preclude the issuing of an arrest warrant in circumstances akin to those applicable in the case of Mr. Yerodia Ndombasi and, further, it would require the withdrawal of any such arrest warrants already issued.

104. The particular significance of this procedure and of the argument is that it has been pursued in another case currently being addressed by an investigating judge under the same Law. The case concerns the allegations made against the current Prime Minister of Israel, Mr. Ariel Sharon. Legal counsel acting in that case raised the issue of the territorial scope of the Belgian Law with the investigating judge. The judge, considering that this raised important issues going to his jurisdiction, referred the matter to the Prosecutor-General. The Prosecutor-General, in turn, has referred the matter to the *chambre des mises en accusation* for determination.

105. In the interests of justice and consistency, the investigating judge in the case of Mr. Yerodia Ndombasi decided *proprio motu* also to refer this case to the Prosecutor-General for transmission to the *chambre des mises en accusation*. This is notwithstanding that the matter has not been raised by Mr. Yerodia Ndombasi. This procedure was opened on 2 October 2001. Counsel to Mr. Yerodia Ndombasi has been informed. They will have an opportunity to make submissions to the court at a hearing on 6 November. Thereafter, as has already been recalled, it is expected that the *chambre* will give its decision either in December or early in the new year.

106. Mr. President, Members of the Court, the point, for present purposes, is that this domestic procedure was from the outset open to Mr. Yerodia Ndombasi. While, when the case was first initiated by the DRC before this Court, it was properly a case in which the DRC was pursuing its own sovereign interests, this is no longer the position. In respect of two of its requests to the Court, the DRC is now effectively pursuing a remedy on behalf of one of its nationals. Before it can do so, however, it must be shown that Mr. Yerodia Ndombasi has exhausted all effective local remedies. This he has not done. In consequence, at least as regards this element of the DRC's claim, Belgium contends that the Court lacks jurisdiction and/or that the DRC's Application is inadmissible.

G. Fifth submission: the *non ultra petita* rule limits the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions

107. Mr. President, I turn finally, and briefly, to Belgium's ancillary submission going to jurisdiction and admissibility. In the event that the Court decides, contrary to what I have said so far, that it does have jurisdiction in this case and that the Application is admissible, Belgium contends that the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions.

108. The point is straightforward and has been adequately developed in Belgium's Counter-Memorial[40]. It has not been addressed at all in the DRC's observations to this point. I do not propose therefore to say much about it other than to affirm reliance on Belgium's written submissions and to observe that, pursuant to this principle, the Court has a duty to abstain from deciding on points not included in the final submissions of the Parties. This is relevant notably to the issue of universal jurisdiction. Although we have heard some argument on the matter, the DRC has made no specific request in respect of this element in the final submissions in its Memorial. Accordingly, Belgium contends that the Court must abstain from addressing such matters in the event that it proceeds to give judgment on the merits of the DRC claim.

[40] At paras. 2.74-2.79.

H. Concluding observations

109. By way of concluding comment to Belgium's preliminary objections, I would simply recall the observations of Judge Fitzmaurice in his separate opinion in the *Northern Cameroons* case as follows:

> "[C]ourts of law are not there to make legal pronouncements *in abstracto*, however great their scientific value as such. They are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford concrete reparation if a wrong has been committed, or to give rulings in relation to existing and continuing legal situations. Any legal pronouncements that emerge are necessarily in the course, and for the purpose, of doing one or more of these things. Otherwise they serve no purpose falling within or engaging the proper function of courts of law as a judicial institution."[41]

110. Mr. President, Members of the Court, this brings to an end Belgium's submissions on jurisdiction and admissibility. I am grateful to the Court for the patience with which it has listened to this rather lengthy presentation.

111. As the Agent for Belgium noted in his introductory remarks, it falls to me to make some preliminary observations on the merits of the case. I anticipate that I have about 15 or 20 minutes worth of arguments to make. Mr. President, thank you.

MERITS

112. Mr. President, Members of the Court, with a hint of schizophrenia, I now turn to make a start on Belgium's submissions on the merits of the case. As the Belgian Agent noted, I will address the character of the arrest warrant. My remarks will be relatively brief. Tomorrow, Mr. Eric David will turn to the main substantive part of our arguments on the merits concerning universal jurisdiction and the immunity of Ministers for Foreign Affairs. I will return to make some very brief final remarks at the end of tomorrow's session concerning the remedies requested by the DRC. It goes without saying, of course, that these submissions on the merits are advanced in the alternative to those on jurisdiction and admissibility which I have just completed. They are relevant only to the extent that the Court decides, contrary to our earlier submissions, that it does indeed have jurisdiction in this case and that the Application is admissible.

113. Before I turn to address the character of the arrest warrant here in issue, it may be useful to describe briefly the graduated nature of Belgium's submissions on the merits as the various

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[41] *Northern Cameroons* case, *supra*, at pp. 98-99.

arguments we will be advancing are sequential in nature, addressing issues that the Court will properly need to consider in stages.

114. The DRC alleges that the issuing and transmission of the arrest warrant infringes its sovereignty and constitutes a violation of the immunity of its Minister for Foreign Affairs. Belgium rejects this contention. Its submissions on the matter in effect come in two distinct parts. There is the issue to which I will turn shortly, namely, that, simply by reference to the character of the arrest warrant, the DRC's contention does not stand up to scrutiny. The arrest warrant does not, in our contention, have the effect that the DRC ascribes to it. The issuing and transmittal of the warrant did not, in Belgium's contention, in any way infringe the sovereignty of the DRC, whether by violating the immunity of the Foreign Minister or in some other manner.

115. If, however, we are wrong on this point, if you conclude that the character of the arrest warrant is such that it did, or does infringe upon the sovereignty of the DRC and on the immunity of its Foreign Minister, Belgium contends that no violation of law follows from this. And this goes to Mr. David's submissions tomorrow. In Belgium's contention, the permissive rules concerning the exercise of universal jurisdiction and the law relating to the immunity of Ministers for Foreign Affairs in circumstances in which serious violations of international humanitarian law are alleged, permit Belgium to take the course that it has followed. The issuing and transmittal of the arrest warrant, therefore, are, in consequence, lawful acts.

116. There is a third tier to Belgium's submissions on the merits. It is a brief argument advanced in the alternative in the event that, contrary to our submissions on the character of the warrant and on universal jurisdiction and immunity, the Court were to conclude that the issuing and transmittal of the warrant did indeed violate the sovereignty of the DRC and the immunity of its Foreign Minister. This is an argument which goes to the remedies requested of the Court by the DRC. I will return to this element very briefly at the end of tomorrow's session. In essence, Belgium contends, as you will perhaps have already gathered from my submissions so far today, that the third and fourth requests addressed to the Court by the DRC fall outside the accepted judicial function of the Court and should accordingly not be entertained by the Court.

117. Mr. President, Members of the Court, without more ado, let me turn to address the character of the arrest warrant, and I will do so relatively briefly. I should add that the matter is addressed in Part 3, Chapter 1 of our Counter-Memorial.

118. We have heard very little of substance over the past few days going to the character and real effect of the arrest warrant. Counsel for the DRC were at pains to affirm that the issuing and transmission of the arrest warrant caused real damage to the DRC. As I observed in my submissions a short while ago on the DRC's characterization of its claim, very little substance was in fact given to this claim. It is said, in the DRC's Memorial, that the issuing and transmittal of the arrest warrant in and of itself had a coercive effect. It is further said that this coercive effect manifested itself in restrictions on the freedom of movement of Mr. Yerodia Ndombasi with a consequential impact on his ability to carry out his functions. Beyond this, however, little more of real substance is alleged.

119. The preliminary issue before the Court on the merits of the DRC's claim is, however, whether the effects ascribed to the arrest warrant by the DRC are in fact apparent. In what way did the arrest warrant actually infringe the sovereignty of the DRC? It does not have legal effect on the territory of the DRC. Belgium has not sought to execute it in the DRC. It does not create any legal obligation for the DRC. No request for extradition based on the warrant has been made by Belgium, whether addressed to the DRC or to any other State. The arrest warrant in and of itself does not create any legal obligation for the DRC or for any other State to provisionally detain Mr. Yerodia Ndombasi. A necessary step to achieving this end — at least in respect of some States — would be the issuing of a Red Notice by Interpol. Until now, however, no such Red Notice has been issued. Indeed, a request addressed to Interpol to issue a Red Notice was not even made until a short while ago — until 12 September 2001, some five months after Mr. Yerodia Ndombasi ceased to be a member of the DRC Government. Where, then, is the infringement of the DRC's sovereignty? This cannot be simply assumed. It must be proved. The DRC is asking the Court to condemn Belgium for the acts of its investigating judge. An essential element in this exercise must be a credible case that the arrest warrant has indeed had the effects

that the DRC alleges. There is, however, nothing in either the DRC's Memorial or in its oral submissions over these past two days that even remotely approaches a credible standard of proof on these matters.

120. Mr. President, Members of the Court, let me address this issue a little more closely. As has been indicated in the Belgian Counter-Memorial, the arrest warrant is a measure of national law. It, of course, has legal effects internally in Belgium — we are not into ectoplasm territory here, it has legal effects in Belgium. Subject to its terms — notably concerning immunity in the case of official visits — it must be enforced by the relevant Belgian authorities. But, beyond this, it is not automatically enforceable in third States. If an arrest warrant is to act as a basis for the provisional arrest of the person named therein by a third State it must either be complemented by a request for the provisional arrest of the person concerned or, as regards those States which consider an Interpol Red Notice to amount to a request for provisional arrest, it must have been the subject of an Interpol Red Notice. This is not, however, the case here.

121. Further, as the Belgian Counter-Memorial points out, in the absence of a formal request for extradition, or an indication that such a request is pending, and a binding international commitment to act upon such an extradition request, a third State is under no obligation to take any action to enforce the arrest warrant. In the case of Mr. Yerodia Ndombasi, Belgium has not addressed any formal request for the extradition of Mr. Yerodia Ndombasi to the DRC or to any other State. No State, therefore, has been under any compulsion of law to give effect to the arrest warrant.

122. As was noted in Belgium's Counter-Memorial, at the point, in early June 2000, at which the arrest warrant was transmitted by Belgium to the DRC, it was also transmitted to Interpol. Through Interpol, the warrant was circulated internationally for information. It was *not*, however, the subject of a Red Notice at this point. Although a request has recently been made, as I have noted, for a Red Notice to be issued, no such Notice has yet been issued by Interpol.

123. Mr. President, a good deal has been said about Red Notices over the past few days. The matter is of course addressed rather fully in our Counter-Memorial and in a number of the Annexes, notably Annexes 7 and 8. But, it may be helpful if I say a brief word or two of explanation about these documents.

124. A Red Notice, or Interpol Wanted Notice, is a formal document issued by Interpol at the request of the Interpol National Central Bureau ("NCB") of the State concerned identifying a person whose arrest is requested with a view to extradition. It contains detailed information about the person whose arrest is sought and about the alleged facts said to have taken place. Paper copies of Red Notices are sent by mail to all National Central Bureaux. Thereafter, it is up to each State, in conformity with its own legislation and regulations, to inform its police and immigration authorities that the arrest of the individual concerned is sought by another State. The legal status of a Red Notice beyond this varies from State to State being determined in each case by national legislation, such legislation informed, where appropriate, by international conventions to which the State concerned is a party which may address such matters.

125. In a number of States, although not — so far as Belgium has been able to establish, including on enquiring with Interpol — in the DRC, a Red Notice is considered to be a sufficient basis for the provisional arrest of a person named therein. Where a Red Notice is considered to be a sufficient basis for the provisional arrest of a person named therein, this effectively constitutes a request for provisional arrest. I should stress, however, in this regard, that a request for provisional arrest is not the same as a request for extradition. Rather, it is a document requesting that a wanted person be arrested pending the transmittal of a formal request for extradition. A request for extradition, in contrast, is a formal document sent by one State to another, usually through diplomatic channels, requesting the surrender to the requesting State of a named person found on the territory of the requested State for purposes of either standing trial for an offence or to serve a sentence already pronounced.

126. Mr. President, Members of the Court, as I have already noted, the arrest warrant in this case was not the subject of an Interpol Red Notice. Nor has Belgium made a formal request for the extradition of Mr. Yerodia Ndombasi. At the visible level, therefore, the issuing and transmittal of the arrest warrant did not give rise to any legal obligation for the DRC or for any other State.

127. The DRC's contention of damage, however, operates at another level — and one which has some intuitive appeal. It must, however, be tested. It is said that the mere issuing and transmission of an arrest warrant, the mere fact that other States were aware of the warrant and might have acted in the execution thereof, gave rise to a credible fear that measures of enforcement

may be taken. The restrictions on the movement of Mr. Yerodia Ndombasi, and the consequential impediments to the performance of his duties that followed reasonably from this perception, were sufficient, it is argued, to amount to a violation of the DRC's sovereignty and a violation of the immunity of Ministers for Foreign Affairs.

128. But, Mr. President, Members of the Court, surely something more is required than mere concern that measures of enforcement may be taken. Was that perception accurate? Did it in fact operate to constrain the Foreign Minister in the exercise of his functions? As was addressed at the provisional measures stage of these proceedings, Mr. Yerodia Ndombasi, as Foreign Minister of the DRC, in fact travelled abroad extensively in the period following the issuing of the arrest warrant. It is not evident that the performance of his functions was materially affected.

129. It is, furthermore, possible to conceive of many acts that a State may take, or that may be attributed to a State, within its own jurisdiction that may have uncomfortable consequences for third States elsewhere but that would not be actionable in law. Assume, for example, that a State refuses to receive the Head of State, the Prime Minister or a Minister for Foreign Affairs of another States and says explicitly when doing so that it considers that the Head of State, Prime Minister or Minister for Foreign Affairs is a war criminal and wants nothing whatever to do with the person concerned. These are not fanciful thoughts. The act concerned would be an internal, sovereign act of the putative receiving State. It would be an act falling within the complete sovereign discretion of that State. The wider consequences of that act may, however, be very considerable. It may be perceived as an affront to the dignity of the State whose representative is so harshly characterized. It may have wider consequences in that it may influence other States to take similar action. It may even prompt some States to indicate that, should the person concerned come within its jurisdiction, it could not guarantee that domestic legal proceedings would not be commenced to prosecute a claim for war crimes.

130. Consider, for example, the situation of a State which refused to admit entry to its territory of a former United Nations Secretary-General and President of a third State following revelations of his wartime past. The reasons for such refusal might have been stated publicly and explicitly. The wider consequences of these discretionary sovereign acts of the putative receiving States might have been considerable. The person concerned may very well have been at risk of

personal attack had he chosen to travel abroad. There may have been a real risk of national proceedings being commenced against him in third States. Does all this mean, however, that the State or States refusing him entry, and stating publicly the reasons for so acting, could have been the subject of legal proceedings alleging an infringement of sovereignty and a violation of Head of State immunity? This is, of course, a speculative and rhetorical example, but it would be extraordinary indeed if such a course could follow.

131. Mr. President, Members of the Court, the DRC in these proceedings is alleging that the mere issuing and transmission of the arrest warrant infringed its sovereignty and violated the immunity of its Minister for Foreign Affairs. The allegation must, however, be subjected to closer scrutiny. Belgium contends that the character of the arrest warrant is not such that it gave rise automatically to any legal effects, whether for the DRC or for third States. The warrant is a national arrest warrant. It was not the subject of an Interpol Red Notice. Belgium has made no formal request for the extradition of Mr. Yerodia Ndombasi.

132. The warrant, of course, has legal effect in Belgium. It could, in due course, form the basis for the issuing of an Interpol Red Notice. This may, at some point, be acted upon to secure the provisional arrest of Mr. Yerodia Ndombasi. The warrant could, at some stage, form the basis for a provisional request by Belgium to a third State for the extradition of Mr. Yerodia Ndombasi. But, Mr. President, Members of the Court, for the moment at least, these are all speculative consequences. The DRC, however, claims that its sovereignty was infringed; that the immunity of its Minister for Foreign Affairs was violated. In Belgium's contention, something more is required from the DRC to sustain its claim to injury than we have currently seen.

133. Mr. President, that concludes my submissions for today. May I once again thank the Court for its patience and indulgence in what has been a rather long afternoon.

Le PRESIDENT : Je vous remercie beaucoup. Ceci met un terme à la séance d'aujourd'hui. La Cour se réunira à nouveau demain à 10heures pour écouter la suite de la plaidoirie de la Belgique. La séance est levée.

L'audience est levée à 17 h 50.