DISSENTING OPINION OF JUDGE ODA

Lack of jurisdiction of the Court — Absence of a legal dispute within the purview of Article 36, paragraph 2, of the Statute — Mere belief of the Congo that the Belgian Law violated international law not evidence or proof that a dispute existed between it and Belgium — Failure of the Application instituting proceedings to specify the legal grounds upon which the jurisdiction of the Court is said to be based or to indicate the subject of the dispute — Failure of the Congo to cite any damage or injury which the Congo or Mr. Yerodia has suffered or will suffer except for some moral injury — Changing of the subject-matter of the proceedings by the Congo — Principle that a State cannot exercise its jurisdiction outside its territory — National case law, treaty-made law and legal writing in respect of the issue of universal jurisdiction — Inability of a State to arrest an individual outside its territory — Arrest warrant not directly binding without more on foreign authorities — Issuance and international circulation of arrest warrant having no legal impact unless arrest request validated by the receiving State — Question of the immunity of a Minister for Foreign Affairs and of whether it can be claimed in connection with serious breaches of international humanitarian law — Concluding remarks.

INTRODUCTION

1. I voted against all provisions of the operative part of the Judgment. My objections are not directed individually at the various provisions since I am unable to support any aspect of the position the Court has taken in dealing with the presentation of this case by the Congo.

It is my firm belief that the Court should have declared *ex officio* that it lacked jurisdiction to entertain the Congo's Application of 17 October 2000 for the reason that there was, at that date, no *legal dispute* between the Congo and Belgium falling within the purview of Article 36, paragraph 2, of the Statute, a belief already expressed in my declaration appended to the Court's Order of 8 December 2000 concerning the request for the indication of provisional measures. I reiterate my view that the Court should have dismissed the Application submitted by the Congo on 17 October 2000 for lack of jurisdiction.

My opinion was that the case should have been removed from the General List at the provisional measures stage. In the Order of 8 December 2000, however, I voted in favour of the holding that the case should *not* be removed from the General List but did so reluctantly "*only* from a sense of judicial solidarity" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 205, para. 6, declaration of Judge Oda). I now regret that vote.

2. It strikes me as unfortunate that the Court, after finding that "it has jurisdiction to entertain the Application" and that "the Application . . . is admissible" (Judgment, para. 78 (1) (B) and (D)), quickly comes to certain conclusions concerning "the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of [the Congo] enjoyed under international law" in connection with "the issue against [Mr. Yerodia] of the arrest warrant of 11 April 2000" and "its international circulation" (Judgment, para. 78 (2)).

I. No Legal Dispute in Terms of Article 36, Paragraph 2, of the Statute

3. To begin with, the Congo's Application provides no basis on which to infer that the Congo ever thought that a *dispute* existed between it and Belgium regarding the arrest warrant issued by a Belgian investigating judge on 11 April 2000 against Mr. Yerodia, the Minister for Foreign Affairs of the Congo. The word "dispute" appears in the Application only at its very end, under the heading "V. Admissibility of the Present Application", in which the Congo stated that:

> "As to the existence of a *dispute* on that question [namely, the question that the Court is called upon to decide], this is established *ab initio* by the very fact that it is the non-conformity with international law of the Law of the Belgian State on which the investigating judge founds his warrant which is the subject of the legal grounds which [the Congo] has submitted to the Court." (Emphasis added.)

Without giving any further explanation as to the alleged *dispute*, the Congo simply asserted that Belgium's 1993 Law, as amended in 1999, concerning the Punishment of Serious Violations of International Humanitarian Law contravened international law.

4. The Congo's mere belief that the Belgian law violated international law is not evidence, let alone proof, that a *dispute* existed between it and Belgium. It shows at most that the Congo held a different legal view, one opposed to the action taken by Belgium. It is clear that the Congo did not think that it was referring a *dispute* to the Court. The Congo, furthermore, never thought of this as a *legal dispute*, the existence of which is a requirement for unilateral applications to the Court under Article 36, paragraph 2, of the Court's Statute. The Congo's mere opposition to the Belgian Law and certain acts taken by Belgium pursuant to it cannot be regarded as a *dispute* or a *legal dispute* between the Congo and Belgium. In fact, there existed no such *legal dispute* in this case.

I find it strange that the Court does not take up this point in the Judgment; instead the Court simply states in the first paragraph of its decision that "the Congo . . . filed in the Registry of the Court an Application

instituting proceedings against . . . Belgium . . . in respect of a *dispute* concerning an 'international arrest warrant . . .'" (Judgment, para. 1, emphasis added) and speaks of "a *legal dispute* between [the Congo and Belgium] concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the arrest warrant was unlawful" (Judgment, para. 27, emphasis added). To repeat, the Congo did refer in its Application to a *dispute* but only in reference to the admissibility of the case, *not* "[i]n order to found the Court's jurisdiction", as the Court mistakenly asserts in paragraph 1 of the Judgment.

5. While Article 40 of the Court's Statute does not require from an applicant State a statement of "the legal grounds upon which the jurisdiction of the Court is said to be based", Article 38, paragraph 2, of the Rules of Court does and the Congo failed to specify those grounds in its Application. Furthermore, the Congo did not indicate "the subject of the dispute", which is required under Article 40 of the Statute.

In its Application the Congo refers only to "Legal Grounds" (Section I) and "Statement of the Grounds on which the Claim is Based" (Section IV). In those sections of the Application, the Congo, without referring to the basis of jurisdiction or the subject of dispute, simply mentions "[v]iolation of the principle that a State may not exercise [its authority] on the territory of another State and of the principle of sovereign equality" and "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State".

6. The Congo's claim is, first, that the 1993 Belgian Law, as amended in 1999, is in breach of those two aforementioned principles and, secondly, that Belgium's prosecution of Mr. Yerodia, Foreign Minister of the Congo, violates the diplomatic immunity granted under international law to Ministers for Foreign Affairs. The Congo did *not* cite any damage or injury which the Congo or Mr. Yerodia himself has suffered or will suffer except for some moral injury; that is, at most, Mr. Yerodia might have thought it wise to forgo travel to foreign countries for fear of being arrested by those States pursuant to the arrest warrant issued by the Belgian investigating judge (that fear being ungrounded). Thus, as already noted, the Congo did not ask the Court to settle a *legal dispute* with Belgium but rather to render a *legal opinion* on the lawfulness of the 1993 Belgian Law as amended in 1999 and actions taken under it.

7. I fear that the Court's conclusions finding that this case involves a *legal dispute* between the Congo and Belgium within the meaning of Article 36, paragraph 2, of the Statute (such questions being the only ones which can be submitted to the Court) and upholding its jurisdiction in the present case will eventually lead to an excessive number of cases of this nature being referred to the Court even when no real injury has occurred, simply because one State believes that another State has acted contrary to international law. I am also afraid that many States will then

withdraw their recognition of the Court's compulsory jurisdiction in order to avoid falling victim to this distortion of the rules governing the submission of cases. (See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 204, declaration of Judge Oda.)

This "loose" interpretation of the compulsory jurisdiction of the Court will frustrate the expectations of a number of law-abiding nations. I would emphasize that the Court's jurisdiction is, in principle, based on the consent of the sovereign States seeking judicial settlement by the Court.

II. The Congo's Changing of the Subject-Matter

8. In reaffirming my conviction that the Congo's Application unilaterally submitted to the Court was not a proper subject of contentious proceedings before the Court, I would like to take up a few other points which I find to be crucial to understanding the essence of this inappropriate, unjustified and, if I may say so, wrongly decided case. It is to be noted, firstly, that between filing its Application of 17 October 2000 and submitting its Memorial on 15 May 2001, the Congo restated the issues, changing the underlying subject-matter in the process.

The Congo contended in the Application: (i) that the 1993 Belgian Law, as amended in 1999, violated the "principle that a State may not exercise [its authority] on the territory of another State" and the "principle of sovereign equality" and (ii) that Belgium's exercise of criminal jurisdiction over Mr. Yerodia, then Minister for Foreign Affairs of the Congo, violated the "diplomatic immunity of the Minister for Foreign Affairs of a sovereign State". The alleged violations of those first two principles concern the question of "universal jurisdiction", which remains a matter of controversy within the international legal community, while the last claim relates only to a question of the "diplomatic immunity" enjoyed by the incumbent Minister for Foreign Affairs.

9. The Congo changed its claim in its Memorial, submitted seven months later, stating that

> "by issuing and internationally circulating the arrest warrant of 11 April 2000 against [Mr. Yerodia], 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" (Memorial of the Democratic Republic of the Congo of 15 May 2001, p. 64). *[Translation by the Registry.]*

Charging and arresting a suspect are clearly acts falling within the exercise of a State's criminal jurisdiction. The questions originally raised —

namely, whether a State has *extraterritorial jurisdiction* over crimes constituting serious violations of humanitarian law wherever committed and by whomever (in other words, the question of universal jurisdiction) and whether a Foreign Minister is exempt from such jurisdiction (in other words, the question of diplomatic immunity) — were transmuted into questions of the "issue and international circulation" of an arrest warrant against a Foreign Minister and the immunities of incumbent Foreign Ministers.

This is clearly a change in subject-matter, one not encompassed in "the right to argue further the grounds of its Application", which the Congo reserved in its Application of 17 October 2000.

10. It remains a mystery to me why Belgium did not raise preliminary objections concerning the Court's jurisdiction at the outset of this case. Instead, it admitted in its Counter-Memorial that there had been a dispute between the two States, one susceptible to judicial settlement by the Court, at the time the proceedings were instituted and that the Court was then seised of the case, as the Court itself finds (Judgment, paras. 27-28). Did Belgium view this as a case involving a unilateral application and the Respondent's subsequent recognition of the Court's jurisdiction, instances of which are to be found in the Court's past?

Belgium seems to have taken the position that once Mr. Yerodia had ceased to be Foreign Minister, a dispute existed concerning him in his capacity as a *former* Foreign Minister and contended that the Court lacked jurisdiction under those circumstances. Thus, Belgium also appears to have replaced the issues as they existed on the date of the Congo's Application with those arising at a later date. It would appear that Belgium did not challenge the Court's jurisdiction in the original case but rather was concerned only with the admissibility of the Application or the mootness of the case once Mr. Yerodia had been relieved of his duties as Foreign Minister (see Belgium's four preliminary objections raised in its Counter-Memorial, referred to in the Judgment, paras. 23, 29, 33 and 37).

In this respect, I share the view of the Court (reserving, of course, my position that a *dispute* did not exist) that the alleged *dispute* was the one existing in October 2000 (Judgment, para. 38) and, although I voted against paragraph 78 (1) (A) of the Judgment for the reasons set out in paragraph 1 of my opinion, I concur with the Court in rejecting Belgium's objections relating to "jurisdiction, mootness and admissibility" in regard to the alleged *dispute* which Belgium believed existed after Mr. Yerodia left office.

Certainly, the question whether a *former* Foreign Minister is entitled to the same privileges and immunities as an *incumbent* Foreign Minister may well be a legal issue but it is not a proper subject of the present case brought by the Congo in October 2000.

III. Does the Present Case Involve Any Legal Issues on Which the Congo and Belgium Held Conflicting Views?

11. Putting aside for now my view that that there was no *legal dispute* between the Congo and Belgium susceptible to judicial settlement by the Court under its Statute and that the Congo seems simply to have asked the Court to render an opinion, I shall note my incomprehension of the Congo's intention and purpose in bringing this request to the Court in October 2000 when Mr. Yerodia held the office of Foreign Minister.

In its Application of October 2000, the Congo raised the question whether the 1993 Belgian Law, as amended in 1999, providing for the punishment of serious violations of humanitarian law was itself contrary to the principle of sovereign equality under international law (see Application of the Democratic Republic of the Congo of 17 October 2000, Part III: Statement of the Facts, A). Yet it appears that the Congo abandoned this point in its Memorial of May 2001, as the Court admits (Judgment, para. 45), and never took it up during the oral proceedings.

12. It is one of the fundamental principles of international law that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law. From the base established by the Permanent Court's decision in 1927 in the *"Lotus"* case, the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc. Universal jurisdiction is increasingly recognized in cases of terrorism and genocide. Belgium is known for taking the lead in this field and its 1993 Law (which would make Mr. Yerodia liable to punishment for any crimes against humanitarian law he committed outside of Belgium) may well be at the forefront of a trend. There is some national case law and some treaty-made law evidencing such a trend.

Legal scholars the world over have written prolifically on this issue. Some of the opinions appended to this Judgment also give guidance in this respect. I believe, however, that the Court has shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the Court is not requested in the present case to take a decision on this point.

13. It is clear that a State cannot arrest an individual outside its territory and forcibly bring him before its courts for trial. In this connection, it is necessary to examine the effect of an arrest warrant issued by a State authority against an individual who is subject to that State's jurisdiction to prescribe law.

The arrest warrant is an official document issued by the State's judiciary empowering the police authorities to take forcible action to place

the individual under arrest. Without more, however, the warrant is not directly binding on foreign authorities, who are not part of the law enforcement mechanism of the issuing State. The individual may be arrested abroad (that is, outside the issuing State) only by the authorities of the State where he or she is present, since jurisdiction over that territory lies exclusively with that State. Those authorities will arrest the individual being sought by the issuing State only if the requested State is committed to do so pursuant to international arrangements with the issuing State. Interpol is merely an organization which transmits the arrest request from one State to another; it has no enforcement powers of its own.

It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is even some doubt whether the Court itself properly understood this, particularly as regards a warrant's legal effect. The crucial point in this regard is *not* the issuance or international circulation of an arrest warrant but the response of the State receiving it.

14. Diplomatic immunity is the immunity which an individual holding diplomatic status enjoys from the exercise of jurisdiction by States other than his own. The issue whether Mr. Yerodia, as Foreign Minister of the Congo, should have been immune in 2000 from Belgium's exercise of criminal jurisdiction *pursuant to the 1993 Law as amended in 1999* is twofold. The first question is whether in principle a Foreign Minister, the post which Mr. Yerodia held in 2000, is entitled to the same immunity as diplomatic agents. Neither the 1961 Vienna Convention on Diplomatic Relations nor any other convention spells out the privileges of Foreign Ministers and the answer may not be clear under customary international law. The Judgment addresses this question merely by giving a hornbook-like explanation in paragraphs 51 to 55. I have no further comment on this.

The more important aspect is the second one: can diplomatic immunity also be claimed in respect of serious breaches of humanitarian law — over which many advocate the existence of universal jurisdiction and which are the subject-matter of Belgium's 1993 Law as amended in 1999 — and, furthermore, is a Foreign Minister entitled to greater immunity in this respect than ordinary diplomatic agents? These issues are too new to admit of any definite answer.

The Court, after quoting several recent incidents in European countries, seems to conclude that Ministers for Foreign Affairs enjoy absolute immunity (Judgment, paras. 56-61). It may reasonably be asked whether

it was necessary, or advisable, for the Court to commit itself on this issue, which remains a highly hypothetical question as Belgium has not exercised its criminal jurisdiction over Mr. Yerodia pursuant to the 1993 Belgian Law, as amended in 1999, and no third State has yet acted in pursuance of Belgium's assertion of universal jurisdiction.

IV. Concluding Remarks

15. I find little sense in the Court's finding in paragraph (3) of the operative part of the Judgment, which in the Court's logic appears to be the consequence of the finding set out in paragraph (2) (Judgment, para. 78). Given that the Court concludes that the violation of international law occurred in *2000* and the Court would appear to believe that there is nothing in *2002* to prevent Belgium from issuing a new arrest warrant against Mr. Yerodia, this time as a *former* Foreign Minister and not the *incumbent* Foreign Minister, there is no practical significance in ordering Belgium to cancel the arrest warrant of April 2000. If the Court believes that this is an issue of the sovereign dignity of the Congo and that that dignity was violated in 2000, thereby causing injury at that time to the Congo, the harm done cannot be remedied by the cancellation of the arrest warrant; the only remedy would be an apology by Belgium. But I do not believe that Belgium caused any injury to the Congo because no action was ever taken against Mr. Yerodia pursuant to the warrant. Furthermore, Belgium was under no obligation to provide the Congo with any assurances that the incumbent Foreign Minister's immunity from criminal jurisdiction would be respected under the 1993 Law, as amended in 1999, but that is not the issue here.

16. In conclusion, I find the present case to be not only unripe for adjudication at this time but also fundamentally inappropriate for the Court's consideration. There is not even agreement between the Congo and Belgium concerning the issues in dispute in the present case. The potentially significant questions (the validity of universal jurisdiction, the general scope of diplomatic immunity) were transmuted into a simple question of the issuance and international circulation of an arrest warrant as they relate to diplomatic immunity. It is indeed unfortunate that the Court chose to treat this matter as a contentious case suitable for judicial resolution.

(Signed) Shigeru Oda.