SEPARATE OPINION OF JUDGE REZEK

[Translation]

Logical priority of jurisdictional issues over issues of immunities — Effect of the exclusion of jurisdictional issues from the Congo's final submissions — Territoriality and the defence of certain legally protected interests as fundamental rules of jurisdiction — Active and passive nationality as supplementary bases of jurisdiction — Exercise of criminal jurisdiction in the absence of any factor of connection with the forum State not yet permitted under international law — International system of co-operation in the punishment of crime.

1. I am convinced that I am in the process of writing a *dissenting opinion*, even though it must be classified as a *separate opinion* because I voted in favour of the entire operative part of the Judgment. Like the majority of Members of the Court, I fully concur with the operative part, because I find the treatment of the question of immunity to be in conformity with the law as it now stands. I do, however, regret that no majority could be found to address the crucial aspect of the problem before the Court.

2. No immunity is absolute, in any legal order. An immunity must necessarily exist within a particular context, and no subject of law can enjoy immunity in the abstract. Thus, an immunity might be available before one national court but not before another. Similarly, an immunity might be effective in respect of domestic courts but not of an international one. Within a given legal order, an immunity might be relied upon in relation to criminal proceedings but not to civil proceedings, or vis-à-vis an ordinary court but not a special tribunal.

3. The question of jurisdiction thus inevitably precedes that of immunity. Moreover, the two issues were debated at length by the Parties both in their written pleadings and in oral argument. The fact that the Congo confined itself in its final submissions to asking the Court to render a decision based on its former Minister's immunity vis-à-vis the Belgian domestic court does not justify the Court's disregard of an inescapable premise underlying consideration of the issue of immunity. Here, the point is not to *follow the order* in which the issues were submitted to the Court for consideration but rather to respect the order which a strictly logical approach requires. Otherwise, we are impelled towards a situation where the Court is deciding whether or not there would be immunity in the event that *the Belgian courts were to have jurisdiction* . . .

4. By ruling first on the jurisdictional issue, the Court would have had the opportunity to point out that domestic criminal jurisdiction based

solely on the principle of universal justice is necessarily subsidiary in nature and that there are good reasons for that. First, it is accepted that no forum is as qualified as that of the *locus delicti* to see a criminal trial through to its conclusion in the proper manner, if for no other reasons than that the evidence lies closer to hand and that that forum has greater knowledge of the accused and the victims, as well as a clearer appreciation of the full circumstances surrounding the offence. It is for political rather than practical reasons that a number of domestic systems rank, immediately after the principle of *territoriality*, a basis of criminal jurisdiction of a different kind, one which applies irrespective of the *locus delicti*: the principle of the *defence of certain legal interests* to which the State attaches particular value: the life and physical integrity of the sovereign, the national heritage, good governance.

5. With the exception of these two basic principles, complementarity is becoming the rule: in most countries, criminal proceedings are possible on the basis of the principles of *active* or *passive nationality* where crimes have been committed abroad by or against nationals of the forum State, but on condition that those crimes have not been tried elsewhere, in a State where criminal jurisdiction would more naturally lie, and provided that the accused is present on the territory of the forum State, of which either he himself or his victims are nationals.

6. In no way does international law as it now stands allow for activist intervention, whereby a State seeks out on another State's territory, by means of an extradition request or an international arrest warrant, an individual accused of crimes under public international law but having *no factual connection with the forum State*. It required considerable presumption to suggest that Belgium was "obliged" to initiate criminal proceedings in the present case. Something which is not permitted cannot, *a fortiori*, be required. Even disregarding the question of the accused's immunity, the Respondent has been unable to point to a single other State which has in similar circumstances gone ahead with a public prosecution. No "nascent customary law" derives from the isolated action of one State; there is no embryonic customary rule in the making, notwithstanding that the Court, in addressing the issue of jurisdiction, acceded to the Respondent's request not to impose any restraint on the formative process of the law.

7. Article 146 of the Fourth Geneva Convention of 1949, on the protection of civilian persons in time of war, an article which also appears in the other three 1949 Conventions, is, of all the norms of current treaty law, the one which could best support the Respondent's position founding the exercise of criminal jurisdiction solely on the basis of the principle of universal jurisdiction. That provision obliges States to search for and either hand over or try individuals accused of the crimes defined by the relevant Convention. However, quite apart from the fact that the present case does not come within the scope, as strictly defined, of the 1949 Con-

ventions, we must also bear in mind, as Ms Chemillier-Gendreau recalled in order to clarify the provision's meaning, the point made by one of the most distinguished specialists in international criminal law (and in the criminal aspects of international law), Professor Claude Lombois:

> "Wherever that condition is not put into words, it must be taken to be implied: how could a State search for a criminal in a territory other than its own? How could it hand him over if he were not present in its territory? Both searching and handing over presuppose coercive acts, linked to the prerogatives of sovereign authority, the spatial limits of which are defined by the territory."[1]

8. It is essential that all States ask themselves, before attempting to steer public international law in a direction conflicting with certain principles which still govern contemporary international relations, what the consequences would be should other States, and possibly a large number of other States, adopt such a practice. Thus it was apt for the Parties to discuss before the Court what the reaction of some European countries would be if a judge in the Congo had accused their leaders of crimes purportedly committed in Africa by them or on their orders[2].

9. An even more pertinent scenario could serve as counterpoint to the present case. There are many judges in the southern hemisphere, no less qualified than Mr. Vandermeersch, and, like him, imbued with good faith and a deep attachment to human rights and peoples' rights, who would not hesitate for one instant to launch criminal proceedings against various leaders in the northern hemisphere in relation to recent military episodes, all of which have occurred north of the equator. Their knowledge of the facts is no less complete, or less impartial, than the knowledge which the court in Brussels thinks it possesses about events in Kinshasa. Why do these judges show restraint? Because they are aware that international law does not permit the assertion of criminal jurisdiction in such circumstances. Because they know that their national Governments, in light of this legal reality, would never support such action at international level. If the application of the principle of universal jurisdiction does not presuppose that the accused be present on the territory of the forum State, co-ordination becomes totally impossible, leading to the collapse of the international system of co-operation for the prosecution of crime[3]. It is important that the domestic treatment of issues of this kind, and hence the conduct of the authorities of each State, should accord with the notion of a decentralized international community, founded on the principle of the equality of its members and necessarily requiring the

[1] CR 2001/6, p. 31.
[2] CR 2001/6, p. 28 (Ms Chemillier-Gendreau); CR 2001/9, pp. 12-13 (Mr. Eric David).
[3] As regards the current status of the principle of universal jurisdiction, note that the States which negotiated the Rome Treaty avoided extending this principle to the jurisdiction of the future International Criminal Court.

co-ordination of their efforts. Any policy adopted in the name of human rights but not in keeping with that discipline threatens to harm rather than serve that cause.

10. In my view, if the Court had first considered the question of jurisdiction, it would have been relieved of any need to rule on the question of immunity. I do in any event adhere to the conclusions of the majority of my colleagues on this point. I find that under the facts and circumstances of the present case the Belgian domestic court lacks jurisdiction to conduct criminal proceedings, in the absence of any basis of jurisdiction other than the principle of universal jurisdiction and failing, in support of that principle, the presence on Belgian territory of the accused, whom it would be unlawful to force to appear. But I believe that, even on the assumption that the Belgian judicial authorities did have jurisdiction, the immunity enjoyed by the Congo's Minister for Foreign Affairs would have barred both the initiation of criminal proceedings and the circulation of the international arrest warrant by the judge, with support from the Belgian Government.

(*Signed*) Francisco REZEK.