SEPARATE OPINION OF JUDGE BULA-BULA

[Translation]

Establishment of the facts, mediate and immediate — Decolonization — Right of peoples to self-determination — Sovereign equality of States — Interference in domestic affairs — Armed aggression — International humanitarian law — Immunities of a Minister for Foreign Affairs — Immunity and impunity — Subject-matter and persistence of the dispute — Admissibility of an application — Claim to universal jurisdiction — Non ultra petita *rule — International customary law — Exception —* Opinio juris *and international practice — Internationally wrongful act — African conception — A people's dignity — International responsibility — Moral injury — Reparation — Good faith — Development of international law — The international community — Lessons of international law.*

1. Given that the landmark Judgment of 14 February 2002 declares the law and settles the dispute between the Democratic Republic of the Congo (hereinafter "the Congo") and the Kingdom of Belgium (hereinafter "Belgium"); that this judicial decision is without precedent in the field and codifies and develops contemporary international law; and that the Court has thus imposed the force of law upon the law of force within the "international community" which it has been at pains to establish over the years: I fully and unreservedly support the entire operative part of the Judgment.

2. I would nonetheless like to emphasize here other grounds of fact and law which seem to me to supplement and strengthen this collective decision. My opinion is also justified by the particular duty incumbent upon me in my capacity as judge *ad hoc*. An "opinion" does not necessarily obey rigid rules. Doubtless it must not address questions which bear no relation to any part of the Judgment. Subject to this, the traditional practice would seem to be characterized by its freedom. Not only does the length of opinions sometimes exceed that of the Judgment itself[1], but also

[1] Compare the Judgment of 5 February 1970 in the case concerning the *Barcelona Traction, Light and Power Company, Limited* (49 pages) with the opinions of Judges Ammoun (48 pages), Tanaka (47 pages), Fitzmaurice (50 pages) and Jessup (61 pages); the Advisory Opinion of 21 June 1971 in the *South West Africa* case (43 pages) with the opinion of Judge Fitzmaurice (103 pages); the Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (137 pages), with the opinion of Judge Schwebel (269 pages); the Judgment of 16 June 1992 in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* (30 pages) with the opinion of Judge Shahabuddeen (31 pages); the Judgment of 3 June 1993 in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)* (41 pages) with the opinion of Judge Shahabuddeen (81 pages); the Judgment of 24 February 1982 in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (77 pages) with the opinion of Judge Oda (21 pages); the Judgment of 12 December 1996 in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (19 pages) with the opinion of Judge Shahabuddeen (20 pages).

they can be written with a variety of aims in view[2]. Thus it is open to me, without carrying matters to excess, to develop my argument to a reasonable extent. On the one hand, it seems to me that the summary version of the facts presented by the opposing Parties reveals only the visible face of the iceberg. It permits a superficial reading of a case forming part of a far wider dispute. On the other, it was in part the immediate circumstances as thus presented to it which led the Court not to examine in depth the fundamental issue of the independence of the Congo, Belgium's former and sole colony, vis-à-vis the latter. The reference to sovereign equality, successively belaboured both at the provisional measures phase and then at the merits stage by two of Congo's counsel, both members of the Government, is a call to examine the matter in depth. It is repeated in the final submissions. And it surely underlies the choice of judges *ad hoc*, first by the Respondent, then by the Applicant!

3. In doctrine, judges *ad hoc* have the particular duty of contributing to an objective and impartial establishment of the facts and of presenting the conception of the law held by each party to the dispute[3]. In Judge Lauterpacht's view, an *ad hoc* judge has an obligation to

> "endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected — though not necessarily accepted — in any separate or dissenting opinion that he may write"[4].

4. Fulfilment of such an obligation does not in any sense assimilate a judge *ad hoc* to a representative of a State[5]. Further, his is in no sense a national representation but a "national presence"[6], which is, moreover, a permanent one for the permanent members of the Security Council. J. G. Merrills takes the view that the institution of judge *ad hoc* "provides an important link between the parties and the Court". In these circumstances, "the institution of the *ad hoc* judge reflecting, as it does, 'the incidence of metajuridical considerations in the functioning of international adjudication' is perhaps still too useful to be dispensed with"[7].

5. Naturally I am in agreement, in my capacity as judge *ad hoc*, with

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[2] See on this point, Charles Rousseau, *Droit international public*, Vol. V, "Les rapports conflictuels", 1983, p. 463.

[3] Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit international public*, 1999, p. 855, para. 541; E. McWhinney, *Les Nations Unies et la formation du droit*, 1986, p. 150.

[4] Judge Lauterpacht, separate opinion appended to the Order of 17 December 1997 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, *I.C.J. Reports 1997*, p. 278.

[5] See the communication of E. Lauterpacht, "The Role of *ad hoc* Judges", in *Increasing the Effectiveness of the International Court of Justice*, 1997, p. 374.

[6] See the commentary of Krzystof Skubiszewski, *ibid.*, p. 378.

[7] J. G. Merrills, *International Dispute Settlement*, 3rd ed., 1998, p. 139.

"at least the basic stance of the appointing State (jurisdiction, admissibility, fundamentals of the merits)"[8]. Otherwise, how could I have accepted the proposed appointment? My consent of course means that "there is a certain understanding . . . for the case that has been put in front of him"[9]. Moreover, it seemed to me helpful, as judge *ad hoc*, to give an opinion in both of the phases undergone by this case[10], thus, in my view, making the reasoning more readily understandable.

6. Covering a great deal of ground, and out of regard for the Court and its working methods, I will confine myself to recalling very concisely, from Belgian, Congolese, transnational and international sources, certain factual data, of both indirect and direct relevance, which make up the background to the case concerning the *Arrest Warrant of 11 April 2000*. Through these brief references, I seek both to exorcize the past and to foster between the Applicant and the Respondent, States intimately linked by history, effective implementation of the principle of *sovereign equality between States*.

7. Addressing the Congolese people at Kinshasa on 30 June 1991, forty-first anniversary of the country's independence, the Belgian Prime Minister declared:

> "You are an important part of our past. Special, particularly strong links unite our two countries. Links based on a relationship marked by pain, by promise, by prudence . . What unites us — you know it, we know it — is reflected in the external mirror constituted by our good or our bad conscience, the boundary between good and evil, between good intentions and blunders . . . I wish to say to the Congolese people, wheresoever they may be on this vast territory, that we are aware of their pain and of the suffering they have endured."

Rarely have such views been publicly expressed by the head of the government of a former colonial power four decades after decolonization. Wrongly or rightly, it is perhaps in the circumstances of a very particular act of decolonization, whose consequences are still with us today, including in the present case, that the justification for these views is to be sought.

8. Rereading the account of the decolonization of the Congo[11]

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[8] See the commentary of Krzystof Skubiszewski, *Increasing the Effectiveness of the International Court of Justice*, *loc. cit.*, p. 378.

[9] See the contribution of Hugh W. A. Thirlway, *ibid.*, p. 393.

[10] According to A. Pellet, *ibid.*, "judges *ad hoc* are very appreciated if they express their opinions during the various phases of the case", p. 395.

[11] The tragic events which marked the decolonization of the Congo led the United Nations to involve the Court. See S. Rosenne, "La Cour internationale de Justice en 1961", *Revue générale de droit international public*, 3rd series, Vol. XXXIII, October-December 1962, No. 4, p. 703.

prepared by one of the 40 or so political reconciliation conferences[12], we learn the following:

> "Following his victory in the legislative elections, Patrice Emery Lumumba, after consulting the main parties and political personalities at that time, formed a Government.
>
> On 23 June 1960, he obtained the confidence of Parliament, even before the latter's election of Kasavubu as Head of State, thanks to the Lumumba Party's majority.
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> Less than a week on from 30 June 1960, on 4 July, the army and police mutinied. Following the provocative statement by General Janssens to the military — 'after independence equals before independence' — the disturbances worsened. Katanga proclaimed its secession on 11 July 1960 and South Kasai its autonomy on 8 August 1960. Territorial and military administration collapsed and financial resourced dried up. The people's sovereignty was under threat.
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> Despite the co-operation agreements signed between the Kingdom of Belgium and the young Republic on 29 June 1960, the crisis was aggravated by the untimely intervention of Belgian troops. Faced with this situation, on 15 July the Head of State Kasavubu, guarantor of territorial integrity, and the Prime Minister and Minister of Defence, Lumumba, jointly signed a telegram appealing for troops from the United Nations in New York . . . as a result of Belgian diplomatic manœuvres, the United Nations hesitated to intervene . . ."[13]

9. Rightly or wrongly, the report also cites Belgium for its responsibility in the removal from office of Prime Minister Lumumba:

> "After our country had achieved independence . . . President Kasavubu and Prime Minister Lumumba worked harmoniously together. They had even toured Elisabethville together. I believe that the Belgians were against this harmony. So they provoked this divisive tension . . . I telephoned Lumumba to tell him about it. He then contacted President Kasavubu. I thought they had taken precautions against those manœuvres. I was surprised to hear on the radio around 5 September 1960 of the dismissal of Lumumba and on the same day of that of Kasavubu by Lumumba."[14]

10. According to the report: "The Belgian ambassador in Leopoldville

[12] Known as the "Sovereign National Conference", the forum was held from November 1991 to December 1992. It was organized by the then Government, under pressure from its principal partners, including Belgium, and financed by them.

[13] Sovereign National Conference, Report of the Commission on Murders and Violations of Human Rights, pp. 18-19.

[14] *Ibid.*, statement of Mr. Cléophas Kamitatu, then Provincial President of Leopoldville (Kinshasa).

was behind the creation of the autonomous State of South Kasai. By 8 August 1960, it was a fait accompli."[15] In regard to the murder of Prime Minister Lumumba and his companions, the report *inter alia* states: "On 16 January 1961 there was a meeting at Ndjili airport. Those present included Messrs. Nendaka, Damien Kandolo, Ferdinand Kazadi, Lahaye and the Sabena representatives." A witness, Mr. Gabriel Kitenge, stated the following:

> "When the aircraft arrived, he recognized only one of the three packages, Mr. Lumumba, who was covered in bruises and trying to cling to a wall. All three were unloaded alive at Elisabethville. Soon afterwards they were taken to the villa Brouwez a few kilometres from the airport, where they had a talk with Messrs. Godefroid Munongo and Jean-Baptiste Kibwe, who were together with some white soldiers . . .
>
> They were executed in the bush a kilometre from the villa. Under the command of a white officer, the black soldiers shot Okito first and finished off with Lumumba.
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> Those present were: Messrs. Munongo, Kitenge, Sapwe, Muke, four Belgians . . . On the orders of a senior Belgian police officer, the three prisoners were shot one after the other and thrown into a common grave which had already been dug."[16]

11. The conference report concluded with a proposal for "the opening of proceedings". It stated:

> "The murders of Lumumba, Mpolo and Okito, although not falling within the categories currently defined by the United Nations, should be assimilated to *crimes against humanity*, for these were acts of persecution and murder for political reasons."

This proposal may thus stimulate reflection on the part of writers who note uncertainties in the notion of crime against humanity[17]. The conference established responsibility on the part of a number of persons both natural and legal, domestic and foreign. Of whom, for purposes of this case it suffices to note the following:

> "*The Government of the Kingdom of Belgium* as protecting power for having failed to ensure bilateral security for an independence deliberately rushed through by it in a perfunctory manner. The ambiguous nature of the Basic Law is self-evident. Despite the agreement of 29 June 1960, Belgium did not provide the lawful authorities

[15] *Op cit.* footnote 13 *supra*, p. 26.

[16] *Ibid.*, p. 40.

[17] See G. Abi Saab, "International Criminal Tribunals and the Development of International Humanitarian and Human Rights Law", *Liber Amicorum Judge Mohammed Bedjaoui*, 1999, p. 651. See also E. Roucounas, "Time Limitations for Claims and Actions under International Law", *ibid.*, pp. 223-240.

established by it in the Congo with the military and technical assistance which would have enabled the worst to be avoided.

. . . . . .

The support of the Belgian Government for the secession of Katanga through its official recognition as an independent State, with the opening of a Consulate-General, represents an offence against the rights of the Congolese people. Following the intervention of the Belgian Minister for African Affairs, Mr. Harold Aspremont, President Tshombe, on 16 January 1961, accepted transfer of the packages."[18]

Reacting, as it were, in advance to the respondent State, the conference decided to:

"Alert international opinion so that the very persons who teach us respect for human rights and the rights of the citizen contained in the United Nations Declaration may not in future repeat the same mistakes, which do not sit well with world opinion."[19]

12. Six years earlier, the transnational group known as "The Permanent Court of the Peoples [tribunal permanent des peuples]", called upon to deliver a ruling on the case of Zaire (Congo) stated:

"When the right of a people freely to pursue its economic, social and cultural development is treated with contempt by a State represented by collaborationist oligarchies, hostages or agents of foreign powers, installed or maintained in place by its will, that State cannot constitute a cover for the extinction of a people's right to self-determination."[20]

Thus that "court" held:

"In such a case, we are faced with a phenomenon essentially similar to the colonial situation opposing an enslaved people to a foreign power, with the government authorities playing the role of overseer, seemingly differing little in their functions from the former colonial agents (viceroys, governors, *préfets*, etc.) or local satraps in the service of the metropole."[21]

The jury further stated:

"The violation of the right of the Zairian people perpetrated by an alienated State raises the problem of the responsibility of other

[18] Sovereign National Conference, Report of the Commission on Murders and Violations of Human Rights, pp. 55-56.

[19] *Ibid.*

[20] See *Judgment of Permanent Court of the Peoples*, Rotterdam, 20 September 1982, p. 29.

[21] *Ibid.*

governments, and in particular of those who defend the interests for whose benefit the Zairian people are deprived of their sovereignty."[22]

The jury thus established, *inter alia*, "the responsibility . . . of Belgium"[23]. The operative part of the judgment finds that a number of the charges "constitute crimes against the Zairian people"[24]. Examining *inter alia* the legal force of the decisions of this "court of public opinion", some writers have concluded that "such a condemnation is a first step towards reparation"[25].

13. More recently, the United Nations Commission responsible for investigating the illegal exploitation of the natural resources of the Congo cited, among others, Belgian companies in occupied territories. Could it not be that the purported "neutrality" of the local Belgian authorities in the face of the armed aggression[26] suffered by the Congo since 2 August 1998 is being undermined by the participation of private groups or Belgian parastatal entities in the looting of the natural resources of the Congo, as established by a United Nations investigation[27]? All the more so in that the investigation has established a link between that illegal exploitation and the continuation of the war[28].

14. The immediate circumstances which gave rise to the issue of the warrant were amply debated by the Parties. It would be pointless to go over them again. Nonetheless, there are pertinent questions raised by this case. Why is it that virtually all of those charged before the Belgian courts, including Mr. Abdulaye Yerodia Ndombasi, belong essentially to a political tendency that was ousted in 1960 and, thanks to a variety of circumstances, regained power in 1997? Why does the respondent State not exercise its territorial jurisdiction by prosecuting Belgian companies established on its territory suspected of illegal activities in areas of foreign occupation within the Congo?

15. These are some of the facts emerging from a rapid survey covering more than four decades whereby the respective conducts of the Parties to the dispute before us may be judged. They should be compared with Bel-

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[22] *Op. cit.* footnote 20 *supra*, p. 30.

[23] *Ibid.*, p. 32.

[24] *Ibid.*, p. 34

[25] B. H. Weston, R. A. Falk and A. d'Amato, *International Law and World Order*, 2nd ed., p. 1286.

[26] Within the meaning of Article 51 of the United Nations Charter, as further defined by Article 3 of resolution 3314 of 14 December 1974 and confirmed as a rule of customary law by the Judgment of the Court of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, para. 195.

[27] See *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*. Those cited include the following Belgian companies: Cogem, Muka-Enterprise and Transintra for cassiterite; Chimie Pharmacie, Cogea, Tradement, Finiming Ltd., Cicle International, Specialty Metal, for coltan; Soger, Sogem, Cogecom, Tradement, MDW, for cassiterite and coltan. Source: http://www.un.org/News/dh/latest/drcongo.htm.

[28] See *ibid.*, paras. 109 *et seq.* "Links between the exploitation of natural resources and the continuation of the conflict."

gium's closing speech. Even as the respondent State brings its peroration to a glowing close with an invocation of the democracy and human rights which purportedly guided its conduct[29], at the same time it reopens one of the most shameful pages in the history of decolonization. In the 1960s, it appeared to grant the Congo its independence while, with the right hand, it was at the same time virtually ensuring the destabilization of that sovereignty and of the new-born Congolese democracy. The author Joseph Ki-Zerbo was able to write that, in the Congo, "independence was thrown like a bone to the natives in order the better to exploit their divisions, . . . the model for poisoned grants of independence"[30].

16. One of the points hotly debated by the Parties is Mr. Ndombasi's current loss of any governmental post. The Respondent relied on this fact in order to secure dismissal of the case by the Court, while the Applicant contended that it has no effect on the proceedings.

17. In my view, the argument deriving from the loss (and not the absence) of any current governmental function on Mr. Ndombasi's part is morally indecent. But the Court does not decide disputes on the basis of international morality, so dear to Nicolas Politis[31]. Legally, however, this argument should rebound against the Respondent, who has raised a mere corner of the veil over the cause of this situation, while exploiting its effects — and only those effects — to the full. It is juridically improper to seek to ground one's principal argument on a serious violation of international law (exercise of a right of censorship over the composition of the Congolese Government amounts to interference in the internal affairs of another State), which aggravates the original infringement of the criminal immunities and inviolability of the person of the Minister for Foreign Affairs. The Applicant's written pleadings and oral arguments (during both the "provisional" and the merits phase) denounced this fact and were not effectively rebutted by the Respondent. The Court was witness to this dismissal of a representative of the Congolese State, which occurred not only after the matter had been referred to the Court (17 October 2000), but, what is more, the demotion took place the day the hearings opened in the provisional phase (20 November 2000), and Mr. Ndombasi left the Government altogether not long afterwards (14 April 2001). Since that time his reappointment, although constantly announced in the press, has been resisted, apparently because of unlawful pressure exerted by the Respondent.

18. It is the duty of the Court, as guarantor of the integrity of international law[32], to sanction this doubly unlawful conduct on the part of the Respondent, denounced by the Applicant in its final submissions.

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[29] See Belgium's oral argument, CR 2001/11, pp. 17-18, paras. 8, 9 and 11.

[30] Joseph Ki-Zerbo, Preface to Ahamadou A. Dicko's *Journal d'une défaite. Autour du référendum du 28 Septembre 1958 en Afrique noire*, 1992, p. XIV.

[31] Nicolas Politis, *La morale internationale*, 1943, p. 179.

[32] *Corfu Channel, I.C.J. Reports 1949*, p. 35.

19. There are two possible ways in which the notion of "organ responsible for the integrity of international law" is generally understood. For some, it involves a "duty to preserve the integrity of law as a discipline — distinct from considerations of politics, morality, expediency and so on"[33]. In my view, it ought also to mean that the Court is under an obligation to ensure respect for international law in its totality. As regards the specific nature of the task of a judicial organ by comparison with that of a political organ, such as the Security Council, there is already plentiful case law on this point.

20. I also share Manfred Lachs's view that "the Court is the guardian of legality for the international community as a whole"[34].

21. It is difficult to see how the Court can focus its gaze so particularly on Mr. Ndombasi's current loss of government office while closing its eyes to the obvious reasons for that situation in the light of events which have been sufficiently argued before it right from the start of the provisional measures phase up to the closing of the merits phase. This is particularly so in that the violation of the immunities in question is simply evidence of a general disregard for the principle of sovereign equality of a State decolonized by Belgium. On this point the Court made no mistake. More than once in its reasoning, in the politest of terms, it criticized the Respondent's unlawful conduct.

22. Quite aside from the attention devoted by the Court to the argument concerning the loss of official duties, made so much of by the author of fundamentally unlawful conduct, there is the matter of the non-existent legal effect which the Respondent seeks to infer from Mr. Ndombasi's new situation. From the moment the immunities of the Minister for Foreign Affairs were breached, the violation of international law was complete. And the Congo began to insist — and continued to do so until the close of argument — that the Court should find that its rights have been violated, and that it be granted reparation accordingly. The Congo has never believed, and has never asserted, that one of its citizens has been the victim of a Belgian wrongful act. The Applicant has always been convinced, and has always declared, that Belgium was acting against it as a sovereign entity wishing to organize itself freely, including in the conduct of its foreign relations by a Minister of its choosing. But it has suffered, and continues to suffer, *de facto* interference resulting from the issue, maintenance and circulation of the warrant, and from Belgium's attempts to give greater effect to that warrant.

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[33] See H. Mendelson, "Formation of International Law and the Observational Standpoint", in connection with "The Formation of Rules of Customary (General) International Law", *International Law Association, Report of the Sixty-Third Conference, Warsaw, August 21st to August 27th 1988*, p. 944.

[34] See M. Lachs, separate opinion appended to the Order of 14 April 1992 in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, *I.C.J. Reports 1992*, p. 26.

23. The relevance of Mr. Ndombasi's loss of governmental responsibilities lies in the glaring light it throws on Belgium's flagrant meddling in the Congo's internal affairs. Further evidence of this can be found in the identity of certain Congolese complainants, members of a Congolese opposition political party[35], whose names the Respondent obstinately refused to reveal to the Court for so-called "security" reasons. Whichever way you look at it, this case clearly demonstrates the Respondent's interference in the Applicant's internal affairs. And, ultimately, the serious disregard for the sovereign equality of States underlying the violation of the immunities of the Minister for Foreign Affairs. The loss of government office is of no relevance in relation to Mr. Ndombasi's personal odyssey; he, strangely, unlike other accused Congolese high officials, and other foreign authorities, had this unprecedented warrant issued against him as Minister for Foreign Affairs, charged with maintaining permanent contact with the Congo's principal foreign partner.

24. So long as there shall exist the authentic, independent State of the Congo, born of decolonization — not to be confused with the fictional State entity calling itself "The Congo Free State", borne to the baptismal font by the powers at Berlin[36] — that debt will continue to exist. This is not a debt due to one specific incumbent Government — a Government bound, moreover, to pass on one day like every Government. What is at stake here is a debt owed to the Congolese people, freely organized in a sovereign State calling for its dignity to be respected.

25. But dignity has no price. It is one of those intangible assets, on which it is impossible to put a price in money terms. When a person, whether legal or natural, gives up his dignity, he loses the essence of his natural or legal personality. The dignity of the Congolese people, victim of the neocolonial chaos imposed upon it on the morrow of decolonization, of which the current tragic events largely represent the continued expression, is a dignity of this kind.

26. The loss of office by one of its authorities could not put an end to the unlawfulness of the Belgian warrant, any more than it could transform it into a lawful act. To appreciate that the unlawfulness cannot be extinguished as a result of Mr. A. Yerodia Ndombasi's loss of government office, I give two examples. When a representative of a foreign State

[35] According to the Applicant, these are representatives of an opposition party operating in Brussels! (See verbatim record of the public hearing of 22 November 2000, CR 2000/34, p. 20.) The Respondent, on the other hand, cites "security reasons" to the Court (despite the fact that the Court can sit in closed session) in order not to disclose the identity of the complainants of Congolese nationality (see verbatim record of the public hearing of 21 November 2000, CR 2000/33, p. 23).

[36] The 14 colonial powers meeting at Berlin (14 November 1884-26 February 1885) accorded their endorsement to the colonial project of King Leopold II called "Congo Free State".

is killed by the police in a particular country[37], that diplomat ceases by the very fact of his death to hold office. Can it be claimed that the unlawfulness of the act was extinguished by the death of the representative of the foreign State? It seems to me that the unlawfulness persists. Let us take another case. Suppose the diplomat was merely seriously wounded. After being evacuated to his sending country, he is declared unfit for diplomatic service. Can it be said that the unlawful act has disappeared, since the victim of the assault no longer represents his country abroad? I think not.

27. The question of the lack of object of the Congolese claim could have arisen if Belgium had adopted a diametrically opposite attitude, by showing respect for the Congo's independence. It should have admitted its violation of international law and then cancelled the warrant and hastened to request the foreign countries to which it had circulated the instrument to discharge it. It would then have informed the Congo of these various measures, which would have been tantamount to an expression of regret and an apology. Nothing of the sort occurred. The Congo's claim thus retained its object in full.

28. The Congo admits that "these requests differ to some extent from those formulated in its Application instituting proceedings", given Mr. Ndombasi's new situation. But it adds that, "since they are based on the same facts as those referred to in the Application, this cannot pose any problem"[38]. The Court has correctly confirmed its established practice of according the Parties the freedom to refine their claim between the date of filing of the Application instituting proceedings and the presentation of the final submissions at the close of oral argument. Thus there is no basis for criticism here, since these subsequent changes are based on the same facts as those already cited in the initial claim.

29. Moreover, in accordance with the Court's settled jurisprudence, the admissibility of the Congo's Application is to be assessed on "the only relevant date", which is the date of its filing in the Registry of the Court[39]. It is irrelevant whether the Respondent might subsequently have acted so as to empty the Application of its substance. The claim was already filed as such on 17 October 2000. Furthermore, as its substance is based on the violation of the Congo's sovereignty by the issue of the warrant, which requires reparation, that substance remains intact.

30. The Respondent's attempt to transform the international judicial

[37] This happened in Lomé (Togo) in October/November 1995, where a German diplomat was killed by policemen at a roadblock in the early evening. The incident caused a serious deterioration in relations between Germany and Togo.

[38] Memorial of the Democratic Republic of the Congo, p. 6, para. 8.

[39] See the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998*, p. 130, para. 43.

proceedings instituted and pursued by the Congo in its own right, following the violation of the criminal immunities and inviolability of one of its highest representatives, into the mere exercise of diplomatic protection of one of its nationals deserves a polite dismissal calling for no further comment on my part.

31. Did the Congo's final submissions preclude the Court from ruling on the question of so-called universal jurisdiction?

32. It is true that the Congo's "final submissions" make no mention whatever of this question. They seek to have the Court enforce the "rule of international customary law concerning the absolute inviolability and immunity from criminal process of *incumbent foreign ministers*; in so doing [the Respondent] violated the principle of sovereign equality among States"[40].

33. The issue here is one of judicial procedure. Did the Applicant's spectacular change of position on this point require the Court not to rule on so-called universal jurisdiction in the operative part of its Judgment? Most definitely. It would have been criticized for ruling *ultra petita*. That is not the same as taking no collective position on the point. In any event, in so far as the Judgment's reasoning failed to address this question, the opinions would do so.

34. Moreover, of the 64 pages of the Congo's Memorial, 15 are devoted to this question[41]. At the oral proceedings, the Congo stated, through its counsel, Professor Rigaux, that "that [was] an area of no interest to [it]", even though it had raised it in its original Application[42]. But, battle-weary, or for reasons of litigation strategy, it allowed that the Court might examine the

> "*issues of international law raised by universal jurisdiction*, but it will not do so at the request of the Applicant: it will, in a sense, *have the issue forced upon it* as a result of the defence strategy adopted by the Respondent, since the Respondent appears to contend not only that it is lawful to exercise such jurisdiction but that it is moreover obligatory to do so, and therefore that the *exercise of such jurisdiction can represent a valid counterweight to the observance of immunities*".

And counsel concludes:

> "I accordingly believe that the Court will in any event be obliged to *adjudicate on certain aspects* of universal jurisdiction, but I would stress that this is not at the request of the Applicant, which is not *directly* interested in the issue."[43]

[40] See CR 2001/10, p. 26; emphasis added.
[41] Memorial of the Democratic Republic of the Congo, pp. 47-61.
[42] See CR 2001/10, p. 11.
[43] *Ibid.*; emphasis added.

And Counsel then refers to its forthcoming submissions. For her part, Professor Chemillier-Gendreau, another of the Congo's counsel, stated that:

> "the extension of such jurisdiction to a case *where the person concerned is not within the territory has at present no confirmed legal basis, which is very different from saying, as Professor David would have us say, that we no longer challenge universal jurisdiction* in absentia".

Congo's counsel continued:

> "In the light of this case, Belgium would like the Court, by finding in favour of *a universal jurisdiction which possesses those broader bounds*, to intervene in the lawmaking process and thereby endorse the validity of its policy."

She concluded:

> "For our part, we contend that the point to which the Court should *confine its ruling in regard to universal jurisdiction is*, as Professor Rigaux has just said, *its use where it infringes an immunity from jurisdiction of an incumbent Minister for Foreign Affairs. And we then request the Court to declare that its use in these circumstances, as embodied in Belgium's action, is contrary to international law*."[44]

35. For its part, Belgium basically founded its defence strategy on so-called universal jurisdiction, upon which its controversial statute and disputed warrant are purportedly based. But, since the Congo ignored the issue of such purported jurisdiction in its final submissions, Belgium accordingly argued that the Court's jurisdiction was thus limited, pursuant to the *non ultra petita* rule, solely to those points in dispute appearing in the final submissions. The Respondent cited the Court's jurisprudence[45]: "It is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also *to abstain from deciding points not included in those submissions*."[46]

36. In its oral argument, the Respondent also stated that it was

> "reluctant, not because it has doubts as to the legality of its position or the soundness of its arguments, but rather it would have preferred the accusations against Mr. Yerodia Ndombasi to be dealt with by

[44] See CR 2001/10, p. 17; emphasis added.

[45] Case concerning *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 249; case concerning *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402.

[46] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402; Counter-Memorial of Belgium, paras. 0.25, 2.74, 2.79, 2.81, 10.2.

> the competent authorities in the Democratic Republic of the Congo"[47].

It also asserted 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 . . ."[48].

37. In my view, this is a major point of dispute between the Parties which the Court could decide were it not for the *non ultra petita* rule. On pain of acting *ultra vires*, the Court could not rule *ultra petita*. It has been correctly said that "while the Court is judge of its jurisdiction, it is not its master"[49]. The examination of points not included in the Congo's submissions would have exposed the Court to criticism on this score. In its final submissions, which were silent on the point, the Congo did not, however, show itself hostile to the Court's taking a stance on the point in its reasoning.

38. For its part, Belgium did not wish the Court to rule on the substance of its claims as above, which it did, however, consider established in law:

> "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."[50]

39. It goes without saying that it is not for a litigant to tell the Court how to do its job. The Respondent's concern regarding the rigidifying effects of an international judicial decision are unfounded. Particularly in international customary law, it is established that international jurisprudence does not have the effect of freezing the law for all time. To a certain extent, the same is true of treaty law, which is itself developed by States. Finally, to say that States have the prime responsibility for developing the law is to recognize implicitly the responsibility of other organs

[47] CR 2001/8, p. 8.
[48] CR 2001/8, p. 31, para. 54.
[49] Charles Rousseau, "Les rapports conflictuels", *Droit international public*, Vol. V, 1983, p. 326.
[50] CR 2001/8, p. 31, para. 54; emphasis added.

or entities, including the Court, for performing other tasks. Legal scholars are virtually unanimous in acknowledging this.

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40. In short, how should so-called universal jurisdiction have been treated, given the discretion shown in the Congo's final submissions on this subject and the lack of urgency demonstrated by Belgium for a ruling by the Court on the matter? The Congo's extreme caution was not justified, since it was seeking to have the dispute completely resolved. The resistance on Belgium's part was unfounded too. The Respondent, which was claiming to act under international law, had the opportunity to secure a positive sanction for a practice which it considered lawful. In my view, the Court's *primary responsibility was to decide* whether or not, as the Applicant claimed, the customary rules concerning the personal immunities and inviolability from criminal process of the Minister for Foreign Affairs of the Congo, Mr. Yerodia Ndombasi, had been violated by the Respondent. And since it was in the name of a so-called universal jurisdiction, in my opinion ill-conceived and misapplied, that this infringement took place, the operative part of the Judgment nonetheless implicitly condemns Belgium's claim. But ought not the Court, as guarantor of the integrity of international law, to have *ruled* in its reasoning equally clearly on the validity *ratione loci* and *ratione personae* of such manifestly unlawful claims on Belgium's part? Should the reasoning of the Judgment not have contained a relevant passage on one of the currently most controversial questions in international law? Would the Court have been criticized for stating the law on this point? The fact remains, however, that the Court, in accord with the Parties, made its choice of "essential reasons"[51] in order to settle the dispute. It has taken the opportunity to codify and develop the law of immunities. The vexed question of so-called universal jurisdiction, as presented in this case, has also been settled.

41. There is not the slightest doubt that in customary international law Ministers for Foreign Affairs enjoy immunities and inviolability of their person in respect of criminal process before national courts. These are restrictions imposed by international law on the operation of domestic law. To be more specific, all national law ceases to prevail in the presence of a higher organ of a foreign State. No sovereign entity can legally exercise authority over any other equally sovereign government as so represented. That is the current state of positive international law, which a worldwide survey would certainly confirm.

42. The Respondent has done its utmost to create confusion in the mind of the layman. It has been unable to do so in the minds of jurists.

[51] See Tanaka, separate opinion appended to the Judgment of 24 July 1964 in the case concerning *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 65.

Belgium went to great lengths in seeking to equate immunity with *impunity*. No lawyer would be so misled as to believe that any proof was required of proposition that the personal criminal responsibility of the perpetrator of an alleged offence remains intact, notwithstanding the immunities protecting him. Nor should we lose sight of the basics of criminal law, to the point of forgetting the principle of the presumption of the accused's innocence! It might even have been thought that the issue of a Minister's immunities was a legal commonplace, had "certain recent developments"[52] not been cited. Wrongly. Those who defend before this Court States' rights to make law are seeking to transform the proponents of a certain school of doctrine into legislators, having refused that status to the Court.

43. There is no doubt that the immunities and their corollary, the inviolability of the person of the Minister in question, have a functional character. They are based on the importance of a high representative of another State being able freely to discharge his duties, without let or hindrance and under conditions of equality. It is for this reason that the prerogatives of the host State in regard, *inter alia*, to the maintenance of law and order, defence and justice must be exercised in such a way as to make it easier for the Minister for Foreign Affairs of another State to do his job. As certain writers have stated: "the immunity representatives of foreign States enjoy is a function of the nature of their office"[53].

44. American doctrine recalls that:

> "According to the Restatement, immunity extended to :
>
> *(a)* the State itself;
> *(b)* its head of State;
> *(c)* its government or any governmental agency;
> *(d)* its head of government;
> *(e)* its foreign minister;
> *(f)* any other public minister, official, or agent of the State with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the State."[54]

45. Although the Congo was not able to demonstrate sufficiently, either in its written pleadings or in oral argument, the extent of the hindrance caused by Belgium to the free exercise of his duties by the Congo's Minister for Foreign Affairs, I can now give some examples. Following the issue of the warrant, the Congolese Minister for Foreign Affairs was unable to attend ministerial meetings of the ACP States with the European Union in Brussels, since his criminal immunities and inviolability

[52] Counter-Memorial of Belgium, p. 109, para. 3.4.1.
[53] Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law*, 1993, p. 1188.
[54] *Ibid.*, p. 1191.

were not guaranteed. Nor was he able to participate in a meeting held in Paris to evaluate the Francophone Summit. In October 2000, Mr. Ndombasi was unable to undertake an official visit to Tokyo (Japan), as the Japanese authorities stated that they were unable to give an assurance that his criminal immunities and inviolability would be guaranteed.

46. In addition to the official visits that he was unable to make, the Minister was obliged, depending on the itinerary, to travel separately from his Head of State arriving late at their common destination. This resulted in increased travel costs, lost baggage, and late arrivals at international meetings, such as the Maputo Summit following a visit to China. It is self-evident that, as a result of the official visits that he missed or carried out under such difficult circumstances, the Minister for Foreign Affairs was unable to perform his duties normally, whether alongside the Head of State or otherwise. Finally, a combination of various factors, particularly his undesirable character in the eyes of certain Belgian authorities, led to his dismissal on 20 November 2000, the date of the opening of the hearings in the provisional measures phase of this case.

47. The Respondent contends that there is an exception to the rule of the immunity and criminal inviolability of the person of the Minister for Foreign Affairs in the case of "crimes under international law". It has not proved that contention. This is no more than an element of its defence strategy. At times, it sought to circumvent the official status enjoyed at the relevant time by Mr. Ndombasi by arguing that it was concerned with him solely in his capacity as a private individual; at others, it apparently attempted to invent an exception which simply does not exist in customary international law.

48. The existence of a firmly established rule, obligatorily followed by the majority of some 190 States from Africa, Asia, America, Europe and Oceania, whereby an incumbent Minister for Foreign Affairs enjoys absolute immunity and inviolability from criminal process is not open to question. The doctrine confirms this[55].

49. Nonetheless, some dissenting voices, apparently moved by certain moral concerns, claim that these appointed State representatives should be stripped of such absolute legal protection where they have committed certain international offences. In many regions of the world, such provisions can only be welcome in countries traditionally victims of crimes against humanity. From its inception, the Permanent Court of International Justice, our predecessor, recognized that,

[55] See *inter alia* Jean Salmon, *Manuel de droit diplomatique*, 1994, p. 539: the Minister for Foreign Affairs enjoys "privileges and immunities analogous to those of the Head of Government"; Joe Verhoeven, *Droit international public*, 2000, p. 123: "there is a tendency, at least in the doctrine, to grant the Head of Government, and indeed the Minister for Foreign Affairs, the protection accorded to the Head of State".

"in the fulfilment of its task of *itself ascertaining what the international law is*, [the Court] has not confined itself to a consideration of the arguments put forward, but has included in its researches all *precedents* . . . and *facts* to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement"[56].

50. It is in the area of *customary law* that the Belgian claims and their counterparts, the Congolese denials, lie. The Belgian Government possibly anticipated that, as with the Truman Proclamation of 1945 on the continental shelf, its new claim, formulated at a time when humanitarian ideas are undergoing a revival of interest, would be followed (massively) by other States. It gives the impression of having overestimated its importance on the world chessboard. No matter. The main charge which can be levied against the Respondent is of abusing the humanitarian argument for the purposes of political domination. As in the nineteenth century[57]! To the point of devising an exception to the rules of international law governing immunities which simply does not exist in international law.

51. In short, the Belgian claim was bound, from its inception, to represent violation of existing law. Despite the publicity enjoyed by the warrant of 11 April 2000, no other State has followed Belgium's example. No member of the international community has offered Belgium assistance in executing the warrant. In fact, on the contrary, several States, particularly African States, have ignored it. The unfortunate Belgian precedent has thus remained an isolated one. While Belgium is entitled to contribute to the formation of general international law, it cannot, on its own, create that law. Thus it does not have international practice behind it. By contrast, the State which is the victim of this action, the Congo, has resolutely opposed the application of the Belgian measure. On the ground that it is unlawful.

52. Moreover, the Belgian Government has shown, by its conduct, that it is unsure of the lawfulness of its disputed act. Its correspondence with the Applicant while the proceedings were in progress demonstrates this[58]. The Respondent claims that it is contemplating an amendment to its controversial statute so as to respect the immunities of high representatives of foreign States. From all the many inconsistencies and equivocations fundamentally characterizing a practice both unilateral and solitary — if we exclude the Yugoslav initiative of 21 September 2000, which has strangely gone unremarked by Belgium — no customary norm has

[56] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31.

[57] The Preamble to the General Act of Berlin of 26 February 1885 provides reassurance as to the object and purpose of the Treaty: "the moral and material well-being of the indigenous populations".

[58] See the Belgian communication of 14 February 2001, to which the Congo replied on 22 June 2001.

emerged. Just as the Respondent's own *opinio juris* is apparently far from established.

53. In reality, the Respondent has sought to rely on a small number of opinions of publicists in order to claim that a new derogative customary norm has come into being. It has provided no evidence of its existence. We know that doctrine represents a means for determining the rules of law. It must be founded on a general practice corresponding to the *opinio juris sive necessitas*. Nothing of the kind exists today. In my view, the Court could readily find that the Respondent's claims were unfounded. Is it possible that the implementation of international humanitarian law might be subject to a co-efficient of *relative normativity* — to paraphrase P. Weil? If not, how can there be any legal justification for suspending proceedings against an organ of a Middle Eastern State whilst obstinately persisting with proceedings against the former Congolese Minister for Foreign Affairs?

54. Referring to the relationship between crimes and immunities, or the extent to which the nature of the former impedes the exercise of the latter, Pierre-Marie Dupuy writes, in light of the House of Lords ruling in the *Pinochet* case:

> "We should exercise caution in confirming the emergence of a new customary rule as embodied in the House of Lords ruling, which is based on considerations that are not entirely consistent and cannot, *of itself*, result in the consolidation of such custom."[59]

Dupuy then recalled that

> "custom emerges from the legal opinion of States as demonstrated by their practice, which is, however, far from unified, and in any event shows that States are still reluctant to accept any reductions in the immunities of their high officials"[60].

There is no conduct "generally" adopted "by the practice of States". As this Court has held,

> "[the] presence [of customary norms] in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, *and not by deduction from preconceived ideas*"[61].

These are few decisions — or at least any significant number — of courts

[59] Pierre-Marie Dupuy, "Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes", *Revue générale de droit international public*, Vol. 103, No. 2, 1999, p. 293; emphasis added.

[60] *Ibid.*

[61] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 299; emphasis added.

and tribunals worldwide which have taken the Belgian view. Quite the contrary. Just recently, the Court delivered an Opinion in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, stating: "the Malaysian courts had the obligation to deal with the question of immunity from legal process as a *preliminary issue* to be expeditiously decided"[62].

55. Previously, it had noted that

> "The High Court of Kuala Lumpur did not pass upon . . . immunity *in limine litis*, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity."[63]

A similar obligation applies also, and above all, to States in their mutual relations. Thus, by way of analogy, and *a fortiori* — since we are dealing here with primary subjects of international law and with their highest ranking representatives, namely Ministers for Foreign Affairs — this rule as restated by the Court must be applied in the present case.

56. The successive changes in Mr. Ndombasi's status have no serious implications for the case, except to underline further the violation of the Congo's sovereignty by Belgium on account of its continued interference (see above).

57. Moreover, as the focus of this case is the violation of the immunities of the Minister for Foreign Affairs at the time of the issue and notification of the warrant, the previous and subsequent status of Mr. Ndombasi in no way affect the Congolese complaint. Given that the unlawful proceedings were instituted at a time when he had the status of a specialized organ responsible for the foreign relations of a State and, in consequence, was protected by absolute immunity and personal inviolability from criminal process, the violation of international law to the detriment of the Congo continues to exist; in transgressing the rule of customary international law governing inter-State relations, Belgium has incurred a debt not to an individual but a State, the Congo, whose organ responsible for international relations has been subjected to a rash, vexatious and unlawful measure, which calls for reparation. Yet, in response to these well-founded claims of the Applicant, the Respondent claims not to have violated the sovereign rights of its victim. On the contrary, Belgium claims to be exercising a right conferred on it by international law or fulfilling an obligation imposed on it by international law. That is why it

[62] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 90, para. 67 (2) *(b)*; emphasis added.

[63] *Ibid.*, p. 72, para. 17.

refuses to cancel the warrant and thus make reparation for the injury suffered. Mr. Ndombasi's personal odyssey in no sense marks the end of the inter-State dispute.

58. It is significant that the Respondent implicitly acknowledges the weakness of its defence in the following terms:

> "Even were the Court to uphold, contrary to Belgium's submissions, the immunity of Mr. Yerodia Ndombasi *qua* Minister for Foreign Affairs of the DRC in the circumstances in issue, it would not follow that he would have been immune, even when in office, as regards conduct of a private nature . . ."[64]

59. Unless one were to contend that Belgium's offence became time-barred after two years. There is in principle no such rule in international law, even less so in the *African conception* of the law. In Africa, a dispute does not disappear. It is transmitted, like a debt, from generation to generation. The same applies to the subject-matter of the dispute, which cannot be effaced as long as there is no acknowledgment of the offence committed or reparation for the injury suffered by the victim. The Respondent's unfounded denials prompt me to present a hypothetical case.

60. Let us take the example of an individual carrying out the duties of an Adviser on African Affairs to the President or Prime Minister of a certain State. In that capacity, the individual orders the suppression of a popular uprising or a student demonstration in a "friendly country"[65], resulting in deaths. Subsequently, that Adviser is appointed Minister for Foreign Affairs or Secretary of State of the country in question.

61. A third State then issues a warrant against the Minister or Secretary of State on the grounds that he had given orders as Adviser which, when implemented, led to wide-scale and systematic violations of human rights. The question is whether such a warrant does or does not affect the criminal immunities and personal inviolability of the Minister or Secretary of State. In my opinion, the reply has to be in the affirmative. It is the organ of the State, responsible for representing that State internationally, which is the victim of that measure at that point in time.

62. Following a change in administration or government, the Minister for Foreign Affairs or Secretary of State loses his post (which is different

[64] Counter-Memorial, p. 116, para. 3.4.15.

[65] Jean-Pierre Cot, *A l'épreuve du pouvoir. Le tiers-mondisme. Pour quoi faire?*, 1984, p. 85. The author notes that, when he was Minister for Co-operation, he issued orders that French military advisers should not be involved in the suppression of the student demonstration of June 1981 in Kinshasa.

from the case of Mr. Ndombasi, where external pressures were exerted). The State which issued the warrant continues proceedings. Does this measure continue to affect the Adviser on African Affairs, the Minister for Foreign Affairs or the Secretary of State, or does it affect the individual now freed of all governmental responsibility? I consider that it is the date of the issue of the warrant which establishes the precise moment of the internationally wrongful act and the status at that time of the person against whom the warrant is issued, naming him and violating his moral integrity. It is the Minister for Foreign Affairs or the Secretary of State on the day and at the time of the issue of the warrant who was impugned. This is not an investigative measure directed against a private individual, which the former Secretary of State or Minister for Foreign Affairs has become, nor is it a measure directed at the time against the Adviser on African Affairs. Nothing can change the facts, which, like the sphinx, remain unaffected.

63. The principle of jurisdiction which some call "universal" cannot be seriously contested in terms of the relevant provisions of the Geneva Conventions. However, I do have certain reservations about the somewhat unfortunate terminology used in international law. For, in my opinion, the correct *summa divisio* should consist of (1) territorial jurisdiction, (2) personal jurisdiction and (3) jurisdiction in the public interest.

64. I would not describe the authority exercised by a State as "universal jurisdiction", whether exercised with respect to its nationals abroad, which comes under the head of its personal jurisdiction, or with respect to foreign nationals on the high seas having committed acts of maritime piracy, which falls under the head of jurisdiction in the public interest, or with respect to any person in its territory having offended against its *ordre public*, which thus falls within the scope of its territorial jurisdiction. The same applies to the jurisdiction which States accord to themselves regarding the punishment of certain violations of treaty provisions. It is readily conceivable that a worldwide entity, not yet in existence, or the United Nations itself and its principal judicial organ, being of a quasi-universal nature, might lay claim to universal legal jurisdiction. As we know, under the specific treaties to which they are parties, the members of the quasi-universal community have the power to punish certain offences committed outside their territory in well-defined circumstances. Yet, in material terms, such legal power is not universal. Perhaps under the unfortunate influence of the views of criminal law specialists[66], certain internationalists refer to it as the exercise of universal jurisdiction. This expression does not seem appropriate in the present international

[66] References to "universal jurisdiction" are relatively rare in the works of criminal jurists themselves. See, for example, André Huet and René Koering-Joulin, *Droit pénal international*, 1994.

order[67]. At a time when a large number of States are seeking to promote an international criminal forum with worldwide jurisdiction, would the promotion of "universal" jurisdiction not be a backward step in legal terms?

65. As thus understood, the principle of "universal jurisdiction" is laid down, in particular, in Article 49 of the First Geneva Convention of 12 August 1949[68]. But its conception, and especially its application by the Respondent in the present case, do not accord with the law as it currently stands.

66. According to the authorized interpretation of the above Article, the system is based on three essential obligations incumbent on each high contracting party, namely: "to promulgate *special legislation*; *to search for* any individual accused of violating the Convention; *to try* such individual or, if the contracting party prefers, *to hand over* the individual for trial to another interested State"[69].

67. The Respondent is to be thanked for having, in principle, satisfied the first obligation, subject to reservations as to the scope of its special legislation. Its apparent concern to search for any individual accused of having violated the relevant conventional provisions is also praiseworthy.

68. The *congratulations* due to the Respondent as regards the principles nevertheless leave room for *legitimate complaints* on grounds of the scope of its legislation and its implementing measures. The warrant would appear to come under the latter category.

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[67] It is from international criminal law, an embryonic discipline with sparse, fragmentary rules, that what is inappropriately termed universal jurisdiction derives. But it cannot escape the marks of its original mould. Hence the somewhat nebulous character of an ancient legal power, limited to a handful of historical curiosities such as the repression of the slave trade, timidly extended in the mid-twentieth century to include the punishment of violations of international humanitarian law. It is from the latter that the specialized doctrine and jurisprudence (International Criminal Tribunal for the former Yugoslavia) are seeking to make it autonomous. For the "universal jurisdiction" claimed by Belgium concerns coercive implementation of the humanitarian rules of Geneva. It is beyond dispute that positive international law authorizes States to penalize offences committed outside their territory when certain conditions relating to the appurtenance to their territorial sovereignty have been met. Nor is there any doubt that this penal jurisdiction should be strictly interpreted, in conformity with the requirements of criminal law.

[68] Article 49 states:

> "Each high contracting party shall be obliged to search for persons presumed to have committed or ordered to have committed one or other of these offences, and must bring them before their own courts, irrespective of their nationality."

[69] Jean Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, p. 407; emphasis added.

1. Special Legislation

69. Neither of the two States (Switzerland and Yugoslavia) cited in the above-mentioned Commentary have adopted legislation with such universal geographical reach as the Belgian warrant. The passages in the Commentary merely reflect a concern to punish offences. The Commentary even warns that "no reference is made to the responsibility which could be incurred by individuals who have not *intervened to prevent an offence or to halt it*". Given "the Convention's silence, it must be accepted that it is for national legislation to settle the matter"[70].

2. Searching for and Prosecuting the Perpetrators

70. Not only does the Commentary emphasize the punishment of the accused irrespective of their nationality, it also endorses the territorial link, which, under classical international law as thus codified at Geneva, is in fact the norm:

> "As soon as one of the contracting parties is aware of the fact that an individual *present on its territory* has committed such an offence, its duty is to ensure that the individual is arrested and prosecuted quickly."[71]

Thus, it is not only at the request of a State that the necessary police investigations can be undertaken, but they may also be carried out unprompted. Beyond the confines of national territory, where in principle the exercise of State authority, whether legislative, executive or judicial, must end, the Commentary — quite naturally in my view — refers to the *mechanism of judicial co-operation*, that is to say extradition, where "adequate charges are brought against the accused"[72]. Not only is there no extradition treaty between the Parties concerned regarding this matter, but the Congo also subscribes to the legal principle that it cannot extradite its own nationals. It adds — an argument decisive of the matter — that it is unable to prosecute Mr. Ndombasi for lack of any charges against him, there being nothing it accuses him of.

71. The exercise of "universal" jurisdiction thus presupposes the existence of "adequate charges", under the terms of the humanitarian conventions[73]. Are there any in this case? The Applicant has rejected

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[70] Jean Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, p. 409; emphasis added.

[71] *Ibid.*, p. 411; emphasis added.

[72] *Ibid.*

[73] See, for example, Article 129 (2) of the Third Geneva Convention of 12 August 1949.

them[74]. Presidents of the Congolese Bar asserted before local media, the day after notification of the warrant on 12 July 2000, that "the case-file was empty". In its warrant, the Respondent failed to specify adequate charges, apart from an unproven assertion that the accused "actively and directly" participated in committing serious offences under international humanitarian law.

72. What, moreover is the objective criterion which would authorize a State to exercise universal jurisdiction by default in various situations where no jurisdiction has normally been exercised? Is it that these are *core crimes*? There are said to be a number of them. Hence the legitimacy of the territorial criterion, which allocates jurisdiction as between the States concerned. Otherwise the political criterion of expediency would hold sway. It is accordingly understandable that the consequences of the tragic events in the Congo in August 1998 provided a pretext for the warrant of 11 April 2000, whereas the *extermination* of over two and a half million Congolese since that date by Rwandan, Ugandan and Burundian aggressors has so far gone unpunished.

73. The Respondent has done everything it can, in accordance with its egregious approach, to criminalize the Applicant's conduct. To the bitter end it has done its utmost to try and prick the conscience of the judges. Not only has it chosen the wrong forum — this Court not being one dealing with matters of substance relating to possible individual criminal responsibility — it has failed, moreover, to provide proof of such responsibility. It should be remembered that *actori incumbit probatio*, but also that *allegans probat*.

74. Should the former model colony of the Belgian Congo, without any *proof*, prosecute one of the Congolese leaders, who, like his fellow countrymen, rose up against the foreign invaders and their Congolese henchmen? The idea that a State could have the legal power to try offences committed abroad, by foreigners against foreigners, while the suspect himself is on foreign territory, runs counter to the very notion of international law.

75. Article 129, paragraph 2, of the Third Geneva Convention, setting out the principle *aut dedere aut judicare* with respect to criminal penalties, lays down the requirement of "adequate charges". In no wise has it contemplated a so-called jurisdiction by default *(in absentia)*. Thus the

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[74] Memorial of the Democratic Republic of the Congo, p. 38, para. 57,

> "the Belgian authorities failed to place his [Mr. Yerodia's] statements, notably those made on 28 August 1998, in any historical or cultural context. They improperly interpreted them . . . but the causal connection between those words and certain unspeakable acts of violence . . . is far from having been clearly established."

For its part the Counter-Memorial of the Kingdom of Belgium reiterates (p. 11, para. 1.10) the facts as stated in the warrant of 11 April 2000, after announcing: "it is not necessary to go into these facts at this point, although relevant aspects will be addressed briefly in Part III below".

Commentary on this provision expressly contemplates a situation where the accused "is present on the territory" (of the State party).

76. In vain would one look, in recent practice, for a legislative text or domestic jurisprudence as far-going as this. In its War Crimes Act 1945, as amended in 1988, *Australia* states that "only an Australian citizen or *resident* can be charged under the 1988 Act" (Section 11 of the above Act). In *Polyukhovich* v. *Commonwealth of Australia*, the Australian High Court had recognized that the Australian courts had the power to exercise "a jurisdiction recognized by international law *as universal jurisdiction*" vis-à-vis war crimes[75].

77. A territorial connection is also required by the Austrian Criminal Code in relation to the prosecution of international crimes such as genocide (see its application in the *Dusko Cvjetkovic* case of 13 July 1994). A personal or territorial connection is also required by Article 7 of the Canadian Criminal Code, as revised in 1985. It was applied in *R* v. *Finta*. France, too, requires this connection: "where [the individual] *is present in France*"[76]. It would be tiresome to list all the many examples.

78. If I may resort to *reasoning by analogy*, it is noteworthy that, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, the Court held, specifically with respect to human rights, that:

> "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves"[77].

At the time of their adoption, the Geneva Conventions clearly circumscribed the rights and obligations of States on this point. The authors of those instruments certainly in no way contemplated the excessively wide interpretation adopted by Belgium. Moreover, there has been scant evidence in the subsequent practice of any customary development of treaty law in this direction. It could have been codified in the Rome Convention of 17 July 1998, but was not. Thus, one year after the adoption of that Convention, Belgium has introduced a radical innovation of its own. Such concern for humanity!

79. In providing, in Article 7 of the Law of 16 June 1993, as amended on 10 February 1999, that "Belgian courts have jurisdiction to try the offences provided for in the present Law, irrespective of *where such offences have been committed*", Belgium adopted legislation that was totally unprecedented. It set itself up, if not as the prosecutor for the

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[75] *Polyukhovich* v. *Commonwealth of Australia* (1991) 172 CLR 501, p. 562; emphasis added.

[76] Article 689-1 of the Code of Criminal Procedure.

[77] *I.C.J. Reports 1986*, p. 134, para. 267.

human race in the trans-temporal and trans-spatial sense attributed to this term by R.-J. Dupuy, then at least as arbiter of transnational justice, in accordance with the doctrine of "law without frontiers". This approach could even be said to transcend international law itself, since the latter deals essentially with relations between structures with defined borders, namely States. Yet even a cursory assessment shows that the Respondent is violating international law. It is not entitled, as the law currently stands, disdainfully to transcend it. Thus, Heads of States in office Laurent Gbagbo (Côte d'Ivoire) on 26 June 2001, Saddam Hussein on 29 June 2001, Fidel Castro (Cuba) on 4 October 2001, Denis Sassou Nguesso (Congo-Brazzaville) on 4 October 2001, Yasser Arafat on 27 November 2001, a Prime Minister, Ariel Sharon (Israel) on 1 July 2001, an incumbent Minister for Foreign Affairs, Abdulaye Yerodia Ndombasi on 11 April 2000, are the subject of complaints or prosecutions before the Belgian courts for various "international crimes". The list is still far from exhaustive, the name of President Paul Biya (Cameroon) having been added in December 2001. Joe Verhoeven[78] rightly feared that the result would be chaos, by definition the opposite of an order already precarious in the international arena. The Court must necessarily be called upon to intervene.

80. It should be strongly emphasized that Mr. A. Yerodia Ndombasi would appear to be the only person to have been served with an "international arrest warrant". Most singular. It should also be emphasized that the proceedings against Mr. Ariel Sharon, closely watched all over the world, have apparently been quietly put on hold while Belgium seeks an honourable way out for him through a form of a legal technicality; that since then the highest political authorities in the land have been queuing up at the universities (ULB) to give lectures abruptly denouncing the absurdities of this law, and that, since the close of the oral argument in November 2001, one of Belgium's counsel has altered his teaching in favour of a *sine qua non* territorial connection. Such is the showing of the Belgian Law when put to the test of international Realpolitik. The chances are that the proceedings instituted following a complaint by "unrepentant subjects of law" against Mr. A. Sharon will be a dead letter.

81. Belgium has neither any obligation — as discussed above — nor any entitlement under international law to pose as prosecutor for all

[78] Joe Verhoeven, "M. Pinochet, la coutume internationale et la compétence universelle", *Journal des tribunaux*, 1999, p. 315, and, by the same author, "Vers un ordre répressif universel? Quelques observations", *Annuaire français de droit international*, 1999, p. 55. Also, "what would happen if a plaintiff prosecuted Mr. Chirac in the French courts for having served in the Algerian War, when massacres were carried out by the French army?" a senior Israeli official is said to have asked following the complaint filed by Mr. Sharon, the Israeli Prime Minister. (*The Washington Post*, 30 April 2001, Washington Post Foreign Service, Karl Vick, p. 101 : "Death Toll in Congo War May Approach 3 Million".)

mankind, in other words, to claim the right to redeem human suffering across national borders and over generations. The State practice referred to above also applies to my comments here. In no sense, however, is this to argue the case for impunity, whether geographical or temporal, including in wars of colonial conquest and neo-colonial reconquest in Africa, America, Asia, Europe and Oceania.

82. As victims of the violence[79] of the aggressors and the series of grave breaches of international humanitarian law, such as the occupation of the Inga Dam and the severing of power and water supplies, particularly in Kinshasa, a city of over 5 million people, resulting in numerous deaths, the Congolese people have consistently called for the withdrawal of the regular occupying forces from Uganda, Rwanda and Burundi. They have also called for the setting up of an international criminal tribunal on the Congo. This tribunal would try all persons, whether perpetrators, co-perpetrators or accomplices, whether African or non-African, having committed war crimes and crimes against humanity, such as the extermination of over two-and-a-half million Congolese[80] in the regions under foreign occupation since 2 August 1998. It would seem that those victims are (as yet) of no concern to Belgium, sadly notorious — rightly or wrongly — for its colonial[81] and neo-colonial[82] past in the field of human rights in the Congo, where a situation of grave, systematic and massive human rights violations persists which requires a response from international opinion. To echo the very fitting words of the French Ambassador to Kinshasa: "on such an issue, there must be no beating about the bush. Endless semantics are not an option when an entire people is dying." For "it is war . . . the occupying armies are on Congolese soil despite the injunctions of the international community"[83].

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[79] See S. Oda, declaration appended to the Order of 9 April 1998 in the case concerning the *Vienna Convention on Consular Relations, Provisional Measures, I.C.J. Reports 1998*, p. 260, para. 2, and the Order of 3 March 1999 in *LaGrand (Germany* v. *United States of America), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 18, para. 2, on the need to take account of the rights of the victims of violent attacks (an aspect often neglected).

[80] Source: International Rescue Committee (USA), <http://intranet.theirc.org/docs/mortll_report_small.pdf.>

[81] Adam Horschild, *Le fantôme du Roi Léopold. Un holocauste oublié*, 1998, pp. 264-274; Daniel Vangroenweghe, *Du sang sur les lianes. Léopold II et son Congo*, 1986, pp. 18-123; Barbara Emerson, *Léopold II. Le Royaume et l'Empire*, 1980, pp. 248-251.

[82] See CR 2000/34, p. 16, on the scathing argument of the Congo and Noam Chomsky, *Autopsie des terrorismes*, 2001, pp. 12-13.

> "The European Powers conquered a large part of the world with extreme brutality. With very few exceptions, these Powers were not attacked by their victims in return . . ., nor was Belgium attacked by the Congo . . ."

[83] See the speech by Mr. Gildas Le Lidec, French Ambassador in Kinshasa, on 14 July 2001, on the occasion of the French national holiday, *Le Palmarès*, No. 2181, of 16 July 2001, p. 8.

83. The views of a few legal writers will suffice to indicate the scale of the dispute on this issue. According to P.-M. Dupuy, "still seldom recognized in customary law, universal jurisdiction can thus only be *optional*"[84]. The author cites in his support the fact that the French Court of Cassation "has confirmed the refusal by the Appeal Court to see the 1949 Geneva Conventions as providing any legal basis for invoking such jurisdiction"[85]. He concludes that "the Rome Convention does not . . . institute true universal jurisdiction, based as it is on the jurisdiction of the State of nationality of the perpetrator and/or that of the State where the offence was committed"[86]. As for François Rigaux, he prefers not to commit himself "on a controversial, topical theme"[87]. Mario Bettati, on the other hand, considers that "universal jurisdiction . . . provides grounds for any State to prosecute crimes which are all the more serious because they sometimes involve both crimes against the laws of war and crimes against humanity"[88]. No proof is provided for this assertion. By contrast, Nguyen Quoc Dinh, Patrick Dailler and Alain Pellet refer to it as "a disputed principle"[89]. Olivier T. Covey only accepts it if the author of the offence "is later found on national territory"[90]. The advocates of universal jurisdiction recognize it provided the accused "is present on its territory"[91]. Jean Combacau and Serge Sur, however, point out that "States remain faithful to territorial and personal criteria and refrain from any recourse to universal or *in rem* jurisdiction"[92]. And Philippe Weckel, while observing the reference to universal jurisdiction in the Preamble to the Treaty of Rome of 28 July 1998, nevertheless notes the ubiquitous presence of the "judicial sovereignty of States"; for, as Belgian practice has already shown, "universal jurisdiction . . . would ultimately seem to be exercised unilaterally"[93].

84. The warrant of 11 April 2000 produced legal effects both internally in Belgium and internationally.

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[84] Pierre-Marie Dupuy, *loc. cit.*, p. 293; emphasis added.

[85] *Ibid.*, p. 294.

[86] *Ibid.*

[87] François Rigaux, "Le concept de territorialité: un fantasme en quête de réalité", in *Liber Amicorum Judge Mohammed Bedjaoui*, 1999, p. 211.

[88] Mario Bettati, *Le droit d'ingérence. Mutation de l'ordre international*, 1996, p. 269.

[89] Nguyen Quoc Dinh, Patrick Dailler and Alain Pellet, *Droit international public*, 1999, p. 689.

[90] Olivier T. Covey, "La compétence des Etats", *Droit international. Bilan et perspectives*, 1991, p. 336.

[91] Brigitte Stern, "A propos de la compétence universelle", in *Liber Amicorum Judge Mohammed Bedjaoui*, p. 748.

[92] Jean Combacau and Serge Sur, *Droit international public*, 1993, p. 351.

[93] P. Weckel, "La Cour pénale internationale", *Revue générale de droit international public*, Vol. 102, No. 4, 1998, pp. 986, 989. According to one criminal expert from the Congo, Nyabirungu Mwene Songa, *Droit pénal general*, Kinshasa, 1995, pp. 77 and 79, the "so-called system of universal jurisdiction gives the court of the *place of arrest* the power of trial" (emphasis added).

85. To begin with the internal aspect. Juridically, it seems clear that serving a warrant on a Minister for Foreign Affairs constitutes an unlawful act, as it breaches both his inviolability and his immunity from criminal jurisdiction. Formally, it is by nature an act of coercion. Materially, its terms make no secret of the fate which awaits the Foreign Minister. The agents of the Belgian authorities are required physically to apprehend a Minister for Foreign Affairs of another sovereign State! In terms of its purpose, the warrant seeks to extinguish the freedom to come and go as well as to destroy the inherent dignity of an organ of an independent country. Organically, the investigating judge who acted against the Minister concerned is not to be confused with an agent of State protocol. Regarding the warrant, the Court rightly states:

> "its mere issue violated . . . immunity . . . The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister . . . under international law." (Judgment, para. 70.)

86. These are the objective elements showing that this unprecedented warrant produced legal effects. The fact that it was not physically implemented is another matter. It could have been implemented. That the Respondent may flout the rules of elementary courtesy between supposedly civilized States with respect to another State is one thing in law. The warrant quite simply discredited the Congolese organs of State, treating them in an altogether discourteous and unlawful manner. And that is not all.

87. At international level, our main focus of attention here, since we are dealing with a flagrant breach of customary international law on immunities, I need only refer to my analysis at the provisional measures stage. Moreover, the reasoning of the Judgment does indeed appear to underline the legal harm thus suffered[94].

88. As I indicated at the preliminary measures stage, the disputed warrant caused prejudice to Congolese diplomacy. While the head of the diplomatic corps was nevertheless able to travel unimpeded in the southern hemisphere in order to attend diplomatic meetings aimed at bringing an end to the armed conflict in the Congo, he was, on the other hand, unable so to travel in other regions much more important for settlement of the conflict. Even if the Congolese State was represented there, it was at a lower level. The result was that the substance of the peace talks at foreign ministerial level was adversely affected by virtue of the rule of diplomatic precedence. Ultimately, the Congo's international sovereignty prerogatives suffered prejudice[95].

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[94] Judgment, paras. 70 and 71.

[95] See also S. Bula-Bula, dissenting opinion appended to the Order of 8 December 2000, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, p. 222, para. 16.

89. In particular, the regular and continuous operation of the country's foreign service was disrupted by this politico-legal interference, the head of the diplomatic corps having been subjected to "arbitrary quarantine". The serving of the warrant also violated the political independence of the Congo. As indicated above, it obliged a weak State, further weakened by armed aggression, to change the composition of its Government — against its wishes according to counsel for the Congo, a member of that country's Government[96] — to please the Respondent. Belgium has not disputed this statement.

90. There is no doubt at all that Belgium's conduct has discredited the Congo. Its effect, as a result of a decision taken in an apparently summary manner, has been to put further pressure on a State already under attack at a time when the Central African States, meeting in Libreville (Gabon) on 24 September 1998, "condemned the aggression against the DR of the Congo and the interference described above in the internal affairs of that country"[97]. The criminal proceedings thus instituted against an organ of a victim of aggression constitute accusations that degrade it in the eyes of the "international community". They had a deleterious effect on the moral rights to honour and dignity of the Congolese people, as represented by their State[98].

91. The fact that, by issuing, circulating and maintaining the arrest warrant of 11 April 2000, the Respondent committed an internationally wrongful act has been demonstrated above. Belgium breached its international obligations under general international law.

92. At this point, the following view expressed by Paul Guggenheim seems particularly instructive:

> "Contrary to widely held opinion, it is not only when it is actually implemented that domestic law may *violate international law*. The very fact of the enactment — or non-enactment — of a general norm capable of being applied directly and thereby causing injury, is an *international wrong*. The enactment of a norm contrary to international law is thus a sanctionable matter . . ."[99]

This is an argument applicable *a fortiori* to the warrant, a mere act — indeed, in the view of Congo's counsel, a wrongful act — of application.

93. On closer examination, the Belgian warrant does not, in interna-

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[96] See oral argument of 22 November 2000, CR 2000/34, p. 10.

[97] See *Le Phare*, No. 818 of 28 September 1988, p. 3.

[98] See also S. Bula-Bula, dissenting opinion appended to the Order of 8 December 2000, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, pp. 222-223, para. 17.

[99] P. Guggenheim, *Traité de droit international public*, Vol. I, pp. 7-8, quoted by Krystyna Marek, "Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour permanente de Justice internationale", *Revue générale de droit international public*, Vol. XXXIII, 1962, p. 276; emphasis added.

tional law, constitute a legal act. As noted by Congo's counsel, it is an internationally wrongful act. The proposition that: "[i]n the eyes of international law and of the Court which is its organ, domestic laws are merely facts, manifestations of the will and the activity of States, just as judicial decisions or administrative measures are" [100], is extremely apposite here.

94. The argument seeking to distinguish the *instrumentum* on the one hand and the *negotium* on the other is thus invalid. Wrongfulness does not cease to exist because the organ of State has changed. For, through that organ, it is, of course, the State which is the target. This is even clearer in the case at issue, in which various members of the Government were on the list drawn up by the Belgian judge, the Head of State included! Moreover, an unlawful warrant is not, *ipso facto*, void in law. This is precisely the case here. Generally speaking, in international law, there are national measures (human rights, law of the sea, etc.) enacted perfectly legally, which are nevertheless unlawful. They engage the responsibility of their authors. But the fact that it is adjudged unlawful by an international organ does not of itself annul the national measure. It is for the State transgressing international law to extinguish its unlawful act.

95. The Respondent violated international law on immunities on 11 April 2000 by issuing the warrant. It subsequently confirmed its unlawful conduct by circulating the warrant internationally. The unlawful act was communicated to the Applicant on 12 July 2000. After the violation, which was complete on 11 April 2000, the Respondent claims to have sought, on 15 September 2000, to transmit the case file to the Applicant by diplomatic channels. Not only did it provide no proof of this tardy act of repentance, which, moreover, is contested by Congo's counsel; the attempt to whitewash the wrongful act, rightly repudiated by the Applicant, is devoid of all effect.

96. Worse, there is a major factor which demonstrates Belgium's resolutely wrongful conduct in the course of the proceedings. What other word could be used to describe the Respondent's request for a Red Notice on 12 September 2001? Notwithstanding the international judicial proceedings brought against it, Belgium persists in seeking to implement its unilateral wrongful act by means of a Red Notice. In so doing, not only has the Respondent provided eloquent proof of lack of *good faith* in relation to the conduct of the international legal proceedings; but is it not also guilty of "an encroachment on the functions of the Court" [101]?

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[100] Case concerning *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

[101] I am here drawing on the views of Judge Tarazi, dissenting opinion appended to the Judgment of 24 May 1980, case concerning *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 64.

97. While powerful States — a relative notion in terms of time and geography — sometimes tend to invoke international law to justify their conduct *a posteriori*, weak States — an equally relative concept in the same terms — often tend to ensure that their conduct complies with international law, since this is the only power they have.

98. Without regard for the criminal immunities and inviolability of the Minister for Foreign Affairs of the Congo, the Kingdom of Belgium issued an arrest warrant against this distinguished organ of a sovereign State on the basis of allegations that "international crimes" had been committed during the armed attack on the Congo of 2 August 1998.

99. Not only has the Congo demonstrated vis-à-vis the "international community" its status as a subject of international law capable of appearing before the Court, but this victim of aggression has conducted itself as a State of law, in other words, an entity which respects international law.

100. The Congolese people, through the medium of their State, have thus been able to express their international personality. They have also affirmed that they are free. In this respect, has the Respondent mistaken which generation and era it is dealing with? When in 1989 the ruling Government in Kinshasa considered bringing the *Belgo-Congolese dispute* before the Court, its initiative went no further than acceptance of the Court's compulsory jurisdiction. There followed the Rabat Agreement of June 1989, which defused the quarrel between sovereigns States. That is no longer the case today.

101. Whilst R. Aron maintained in 1984 that "the example of Congo suggests that, in the masses, tribal awareness still prevails over national awareness . . ."[102], at the same time, Paul Reuter and Jean Combacau had no hesitation in drawing the following parallel between the nation-building process in "the most centralized European States of today" and in the Congo: "this is the situation of a large and populous African State such as Zaire, where a Zairian nation is daily being forged at the expense of the ethnic communities, whose fate might otherwise have been different"[103]. We, for our part, have taken the view that "for unacknowledged reasons, the collective Zairian will to live, forged by years of sometimes open, sometimes silent resistance to one of the most savage political regimes the twentieth century has seen, is underestimated"[104].

102. Like a two-headed Janus, the Judgment constitutes, on the one hand, an act of repudiation of the unhealthy relations, supposedly of friendship and co-operation, between a dominating and a dominated

[102] Raymond Aron, *Paix et guerre entre les nations*, 1984, p. 389.

[103] Paul Reuter and Jean Combacau, *Institutions et relations internationales*, 1988, p. 24.

[104] Sayeman Bula-Bula, "La doctrine d'ingérence humanitaire revisitée", *Revue africaine de droit international et comparé* (London), Vol. 9, No. 3, September 1997, p. 626, footnote 109.

State immediately following a botched process of decolonization; on the other hand, it is an act which may well serve as the basis of mutually beneficial healthy relations of friendship and lasting co-operation between sovereign partners linked by history. Sooner or later such relations will develop. The sooner the better. It is to be hoped that the Parties, and especially the Respondent, grasp the fundamental significance of this decision. The Court's contribution to the peaceful settlement of the dispute will have been most beneficial. Provided the Respondent adopts a new mindset and jettisons its outmoded conceptions maintained by the weight of history and unequal power relations. Thus, on the eve of the formation of a government inspired by Belgium, academic advisers from that country warned it that:

> "Unless it ensures that it can play a decisive role in revitalizing the national economy, unless it claims such a role for itself and succeeds in playing it, Belgium risks relinquishing its leadership in Zaire and losing its principal asset, as well as its most effective vehicle for the expression of foreign policy. *It is first and foremost Zaire that enables us to play a role on the international stage and frequently to sit at the table of the powerful.*" [105]

103. The African States particularly, which increasingly appear as "ordinary" parties before the Court, have their own reasons for entrusting their disputes to that body of eminent, independent and upright [106] jurists. Here I am particularly thinking of complaints like the one against Congo brought before a national judge, should the Respondent pursue its policy of double standards. Especially as the large number of African, Latin American and Asian leaders brought before Belgian justice might — wrongly — suggest that the presumed violations of international humanitarian law, in particular crimes against peace, crimes against humanity and war crimes, are a monopoly of Africa, Latin America and Asia.

104. This is where "universal" jurisdiction shows its true colours as a "variable geometry" jurisdiction, selectively exercised against some States to the exclusion of others. It requires no great knowledge to be aware that, at global level, it is not just the handful of prominent personalities charged before the Brussels judge who are the subject of public rumours of serious human rights violations.

105. It is clear that the Court's task is to settle disputes between States

[105] See Société nationale d'investissement et administration générale de la coopération au développement, *Zaïre, secteur des parastataux, réactivation de l'économie. Contribution d'entreprise du portefeuille de l'Etat*, report by M. Moll, J.-P. Couvreur and M. Norro, professors at the Université catholique de Louvain, 29 April 1994, p. 231.

[106] See Article 2 of the Statute of the International Court of Justice.

submitted to it by parties. It is not its task to teach the law. Yet the settlement of disputes can provide valuable lessons. Indeed, at the end of the oral argument, one of Belgium's counsel revised his script. One of the merits of the Judgment is that it has contributed to the teaching of international law. The fears we expressed when preliminary measures were requested[107] have not become groundless. The Court has drafted a new chapter on the international law of immunities as it pertains to Ministers for Foreign Affairs[108]. As such, there is no doubt that it is a useful addition to the handbooks on public international law. Intervening at a time when the doctrinal debate is at its height, as witness the proceedings of the Institut de droit international at its Vancouver session in August 2001, the Judgment casts a great deal of light on this issue.

106. The question of the "legal relationship between universal jurisdiction and . . . immunities"[109], which I was concerned to raise, has also implicitly been settled in favour of immunities[110]. And without prejudice to the established nature of the legal principle concerned, with the exception of the power to punish certain violations of conventional provisions recognized as between States parties.

107. The Court has established the existence in customary international law of the rules relating to the criminal immunity and inviolability of Ministers for Foreign Affairs. It has applied them to this case because Mr. A. Yerodia Ndombasi was Minister for Foreign Affairs at the time of the events concerned. Given that the international dispute concerned conflicting claims between the immunities in question and so-called universal jurisdiction, it follows that the Court, by virtue of its decision, has *implicitly* rejected the claim to such jurisdiction in the present case[111]. It has thus ruled that so-called universal jurisdiction, even if it were established in international law, would in any event be inoperative as regards the criminal immunities and inviolability of the Minister for Foreign Affairs, whatever the alleged crimes. The Applicant has not requested a declaratory judgment. The Court has been asked to settle a concrete dispute by stating the law and effectively applying it to the dispute. But a general, abstract, impersonal discussion of this disputed

[107] See Sayeman Bula-Bula, dissenting opinion appended to the Order of 8 December 2000 delivered in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, p. 219, para. 4.

[108] According to Dominique Carreau, *Droit international*, Vol. I, 2001, p. 653, the Court performs a "major role" in "the development of contemporary international law".

[109] Sayeman Bula-Bula, dissenting opinion appended to the Order of 8 December 2000 delivered in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, p. 220, para. 7.

[110] Judgment, paras. 70 and 71.

[111] See the cases concerning the *North Sea Continental Shelf, I.C.J. Reports 1969*, pp. 6 *et seq.*

jurisdiction, having not been requested by the Applicant, was not required[112], even though, in my view, it would have been desirable for the Congo to have maintained this claim also in its final written and oral submissions. Since the Applicant asked the Court to state the law and settle the dispute, should it not have sought to dispose of every possible ground, whether "universal", humanitarian or other? One thing is certain, the argument seeking to qualify immunities was rejected in the Judgment's operative part. Any other argument founded on other grounds of "trans-frontierism" is also virtually excluded in the reasoning. Faced with the "sound judicial economy"[113] observed by our institution, it was for the opinions to "illuminate the reasoning of the Judgment in counterpoint", so that "the decision's full substance could be extracted and the whole import of its contribution to the jurisprudence could be apprehended"[114].

108. In conclusion, it is clear that the Congo also seems to have acted in accordance with the "functional duality" referred to by Georges Scelle. It brought international legal proceedings not only on its own behalf and for itself, but also for the benefit of the "international community". It has given the Court the opportunity to reaffirm and strengthen the legal mechanism of immunities, which facilitates legal relations between States worldwide, irrespective of the arguments raised against it.

109. There is every likelihood that the Judgment, small in size, yet large in legal substance, will be favourably received by the "international community", if, of course, this is taken to mean all States, international organizations and other international public entities. Irrespective of the divergence of interests, the disparity in the level of development and the diversity of cultures, what has been reaffirmed here is a denominator common to all.

110. The decision should also serve as a rebuke to the opinion manipulators, who should be denied the *de facto* power to exploit "the misfortunes of others" for unstated ends[115].

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[112] There are some who trace "universal jurisdiction" back to the Middle Ages. In this respect, one should perhaps be wary of taking as universal what is probably merely regional. Hence, according to E. Ogueri II "the rules of conduct which, for example, governed relations between Ghana and Nigeria in West Africa, or between nations in other parts of Africa and Asia, were regarded as 'universally recognized customary laws'" prior to colonization. See E. Ogueri II, Intervention, *International Law Association Report*, Warsaw Session, 1988, p. 969.

[113] See Manfred Lachs, separate opinion appended to the Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 47.

[114] Mohammed Bedjaoui, "La 'fabrication' des arrêts de la Cour international de Justice", *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally*, 1991, p. 105.

[115] See Bernard Kouchner, *Le malheur des autres*, 1991 (241 pages).

111. Lastly, it should call for greater modesty from the new fundamentalist crusaders on behalf of humanitarianism, "skilled at presenting problems in a false light in order to justify damaging solutions"[116], including a certain trend of legal militancy[117].

(Signed) Sayeman BULA-BULA.

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[116] See Aimé Césaire, *Discours sur le colonialisme*, 1995, p. 8.

[117] On legal militancy, see J. Combacau and Serge Sur, *Droit international public*, 1993, p. 46; Nguyen Quoc Dinh, Patrick Dallier and Alain Pellet, *Droit international public*, 1992, p. 79. The authors discern a western current of militancy, supposedly represented by Georg Schwarzenberger and Rosalyn Higgins of the United Kingdom and Myres S. McDougal, Richard Falk and M. Reisman of the United States; an Eastern current, without indicating any authors, and an Ancient World current with Mohammed Bedjaoui, Georges Abi-Saab and Taslim Olawale Elias in the vanguard. In reality, there is always an ideological start, and hence militancy, in the work of any author. To quote just a few, J. Combacau and S. Sur, in *op. cit.*, Avertissement, while stressing their "legal positivism", nonetheless display their liberal tendency. Thus, at a time when the number of ratifications required by the Convention on the Law of the Sea had been reached, they still speculate: "always supposing it ever enters into force" (pp. 452-453); see also the assertion that this Convention has inverted "on purely formal bases the real balance between interests and power" (p. 446) or the assertion that this text is not "like the Geneva Conventions of 1958, a convention of codification but one of progressive development . . ." (p. 452). See also Nguyen Quoc Dinh *et al., op. cit.*, p. 1093, who refer to "the possible entry into force of the Convention".