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The PRESIDENT: Please be seated. The sitting is open and I give the floor to the Agent of the Democratic Republic of the Congo. Ambassador, you have the floor.

Mr. MASANGU-a-MWANZA: Thank you, Mr. President. Mr. President, Members of the Court, Registrar, allow me to take the floor once again to present the persons who will speak on behalf of the Democratic Republic of the Congo on this second day of pleadings. They are:

1. Mr. Pierre d'Argent, who will continue his statement on immunities;
2. Mrs. Chemillier-Gendreau, who will speak on universal jurisdiction;
3. Professor François Rigaux, who will deal with the changes in the claim of the Democratic Republic of the Congo and the precise object of the claim.

I shall then return to conclude our statements. Thank you, Mr. President.

The PRESIDENT: Thank you, Ambassador.. I now give the floor to Mr. Pierre d'Argent to continue the statement he began yesterday.

IV. THE ARGUMENTS OF BELGIUM

Mr. D'ARGENT: Thank you, Mr. President. Mr. President, Members of the Court, it is my great honour to take up the statement I began yesterday morning. Allow me to remind you of where I left off. Yesterday morning I dealt briefly with the facts relating to this dispute and with the issue of immunity from suit, and I also described to you the points on which the Parties agree in order to bring out more clearly those on which they disagree.

The PRESIDENT: May I ask you to turn up the microphone a little . . . Yes. Thank you.

Mr. D'ARGENT: As I was saying, I described to you the points on which the Parties agree in order to bring out more clearly those on which they disagree, and I also explained the legal position of the Democratic Republic of the Congo on this issue of immunity from suit. Now I

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come — this being the fourth part of my statement — to a criticism of the arguments put forward by Belgium in its Counter-Memorial.

These arguments are of different kinds. In order to simplify my presentation, I shall group them under two main headings: on the one hand, there are arguments directly connected with the

case before us, and with the arrest warrant which was issued; on the other there are the arguments concerning the issue of principle as to whether an exception exists to the immunity of incumbent foreign government members where they are accused of international crimes in a domestic criminal court.

A. Arguments connected with the case

Belgium maintains that the disputed arrest warrant does not infringe the rights of the Democratic Republic of the Congo and puts forward three alternative arguments in an attempt to prove this assertion: first, we are told, the arrest warrant did not have the effect of preventing the Congo from freely conducting its diplomatic relations, nor did it cause it any injury; second, we are also told, the arrest warrant is without effect in the Congolese legal order and, should it be executed by a third State, Belgium tells us, the violation of immunity would be committed solely by that State and not by Belgium; third, the effect of the warrant in the Belgian legal order would, we are told, be suspended by the investigating judge in the event of an official invitation being addressed to Minister Yerodia by the Belgian Government.

Professor Rigaux and Professor Chemiller-Gendreau have already replied to these arguments at length and demonstrated their flimsiness. The Memorial of the Democratic Republic of the Congo, also, I think, refutes them convincingly. Although this makes it unnecessary to dwell on them, we do need, in order to dispel any doubts in this respect, to remember that the disputed arrest warrant is an infringement of criminal immunity *per se*, since it is a coercive act of criminal investigation opening the way to proceedings. It is also worth remembering that the French Court of Cassation, in the *Khadafi* Judgment to which I referred yesterday, took the view that the mere opening of the investigation, which precedes the issue of an arrest warrant and does not in itself constitute an act of coercion, is contrary to the rule of immunity from suit. Moreover, the issue and international circulation of the arrest warrant effectively and materially violated the immunity of the Minister for Foreign Affairs of the Congo from criminal process and thus infringed the sovereign rights of that State. Over and above the question of the legal effect of the warrant domestically — which in fact is perfectly clear — the mere fear of it being executed was such as to restrict the foreign travel of the Minister indicted, thus prejudicing the proper conduct of the

international relations of his State. The injury thus done to the Democratic Republic of the Congo is all the more serious and manifest in that the Belgian authorities were aware of the international war situation in Congo-Kinshasa. Because of that situation, it was doubtless more necessary than in normal times for the Minister for Foreign Affairs of the Democratic Republic of the Congo to enjoy the absolute freedom of movement which in principle is his due, and for his foreign partners not to be discouraged or inhibited from considering him as a legitimate interlocutor owing to the existence and circulation of the international arrest warrant.

Moreover, let me repeat, it cannot suffice for Belgium to maintain that the arrest warrant was devoid of effect, or that Belgium would not be responsible for its execution by a third State or again that it would cease to have effect if an official invitation was addressed to the Minister. These last two arguments clearly do not deserve further lengthy reconsideration, and the Congo requests the Court to be good enough to refer in this respect to the relevant passages in the Memorial which it filed; those contentions, it seems to me, should suffice in this respect. At all events, none of these arguments put forward by Belgium, all of which are unfounded, can conceal the fact that the public indictment of the Minister for Foreign Affairs of the Congo by the disputed arrest warrant is an act gravely prejudicial to the dignity of the Democratic Republic of the Congo and suffices in itself to infringe the immunity from criminal process which protects its incumbent representative. The violation of immunity materializes from the moment when a magistrate, even an investigating magistrate, seeks to bring the conduct of the incumbent minister within his criminal jurisdiction.

B. Arguments of principle

Mr. President, Members of the Court, I must now take up Belgium's assertion that, in the case of international crimes, an exception exists to the immunity from criminal process of incumbent members of foreign governments. The principle of the alleged first exception to
0 0 9 immunity from suit is not disputed by Belgium as such, but, I would remind you, its extent — that alone — is at issue here. And it is chapters four and five of Belgium's Counter-Memorial which we should look at in this respect. In reality, however, the entire conceptual structure of Belgium's argument is embodied in paragraph 3.4.4 of the Counter-Memorial, at the foot of p. 119. Whatever

comes after this paragraph is really no more than embroidery, an endless repetition of the same basic idea. What does this paragraph 3.4.4 state? It reads as follows:

> "*(a)* Ministers for Foreign Affairs in office are in general immune from suit before the Courts of a foreign State;
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> *(b) by way of exception* to the general rule, Ministers for Foreign Affairs in office bear personal *responsibility* for acts they are alleged to have committed which are so serious as to constitute international crimes" (emphasis added).

(A further "exception" is put forward, in regard to private acts committed during the performance of official functions. I already dealt with this point yesterday morning and showed that approach to be mistaken. I shall not therefore return to it.)

Let us concentrate, if you will, on the proposition I have just read to you, which may seem innocuous, "logical" even. It is in fact a profoundly mistaken proposition, for the simple reason that it takes a principle of personal criminal *responsibility* to be an *exception* to a rule of *immunity* from suit. There is a fundamental confusion of thought here: how can a rule of personal criminal responsibility constitute an exception to a rule of immunity from suit when the immunity rule relates to the jurisdiction of domestic criminal courts and the principle of personal criminal responsibility relates to the culpability of the offender? As Professor Rigaux has already pointed out, this confused thinking permeates Belgium's entire Counter-Memorial, which relies systematically on various assertions of the principle of personal criminal responsibility as a ground for establishing a so-called proof of the existence of an alleged exception to the régime of immunity from suit in the case of international crimes. As I said yesterday, the rule of personal criminal responsibility is not challenged by the Democratic Republic of the Congo. Nothing, however, can be inferred from this rule of personal responsibility in regard to the jurisdiction or lack of jurisdiction of the judges empowered to make a finding of such responsibility, except, precisely, that the issue of the judges' jurisdiction must not be confused with that of the offender's culpability.

010 Yet another piece of confused thinking is to be found in the Belgian Counter-Memorial. Not only, as I have just said, is a principle of responsibility wrongly taken to be an exception to a rule barring jurisdiction, but also this question of jurisdiction is treated in exactly the same way regardless of whether a domestic or an international criminal court is concerned. The fact that the

various statutes of international criminal tribunals provide that the accused's capacity or official position cannot exempt him from either a prosecution or conviction is taken as a basis for asserting that immunity from suit cannot exist before domestic jurisdictions in the case of a charge relating to international crimes. This reasoning is, it seems to me, clearly faulty.

In point of fact, the statutes of these international tribunals generally draw a distinction between official capacity as a ground for exemption from criminal responsibility and official capacity, or immunity, as an obstacle to the jurisdiction of the international tribunal. This is indeed the case with Article 27 of the Statute of the future International Criminal Court. Paragraph 1 of the Article deals with the principle of personal criminal responsibility, about which I have already spoken at length. Paragraph 2 of the Article relates to the "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law", and these immunities or special procedural rules, the Article states, "shall not bar the Court from exercising its jurisdiction over such a person". This paragraph 2 of Article 27 of the Statute of the International Criminal Court calls for a few brief comments. First, it is obvious that this provision clearly relates to the jurisdiction of that Court and to it alone. The sole object of the provision is to give the Court jurisdiction — jurisdiction in respect of all persons prosecutable by it, whose legal status may differ widely; they may be Heads of State, military commanders, members of parliament, ministers, secretaries-general of international organizations, diplomats, whoever. Since the provision is directed solely at ensuring the jurisdiction of the International Criminal Court alone, it would be rash to draw any inference whatever from it in regard to the jurisdiction of domestic courts. Second, it matters little whether "the immunities or special procedural rules" referred to in Article 27, paragraph 2, which cannot bar that Court's jurisdiction, are those of

national or international law. The precise scope of this broadly worded clause is perhaps not absolutely clear. Doubtless we should see it as a reminder that immunity from suit founded on international law is meaningless before international courts since, on the one hand, the sole purpose of this immunity is to exempt certain disputes from the jurisdiction of domestic courts, and, on the other, the consent given to the jurisdiction of the international court suffices in any event to lift the immunity. Perhaps we should also take it to mean that any international procedural requirements prior to the indictment of an offender are also waived. And as far as the immunities and special

procedures of domestic law are concerned, the provision represents a bar, precluding the representative of the State from invoking before the International Criminal Court any immunity or special procedural rule which his domestic law may allow him in his own courts. In other words, the provision nullifies any ground of exemption which derived from domestic law.

Mr. President, Members of the Court, I think I could close my argument at this point. Once it is understood that Belgium's position is based entirely on a conceptual confusion between jurisdiction and responsibility, between the jurisdiction of domestic courts and the jurisdiction of international courts, the points that I have just made should suffice in law. However, Belgium has filed a voluminous and repetitive Counter-Memorial, in which it has repeatedly criticized the DRC for not having cited or commented upon certain sources on which Belgium founds its argument. I regret therefore that I must keep the floor a little longer, but it seems to me necessary, under the circumstances, to return to some of the statements contained in the Counter-Memorial. On reflection, this exercise is certainly not an entirely nugatory one, for it will enable me to illustrate aspects of the argument I have just made.

In order to justify the interpretation it places on Article 5, paragraph 3, of the Law of 1999, which provides that "immunity attaching to the official capacity of a person shall not prevent the application of the present Law", Belgium cites a large number of sources and references. All of them cannot be commented upon here. Nevertheless, it is worth saying a few words in general terms about these different sources, employing, for ease of reference, the broad classifications followed in Belgium's Counter-Memorial. There are four of these. Belgium refers to conventional sources, national sources, sources said to be from case law and sources from legal writings. We shall start, with your approval, with the conventional sources.

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1. Under the heading of "conventional sources" Belgium cites the 1919 Treaty of Versailles, the Statutes of international criminal jurisdictions, Law No. 10 of the Allied Control Council in Germany, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and certain resolutions of United Nations bodies.

(i) As regards the Treaty of Versailles, Belgium's position is extremely weak. It admits, moreover, that the 1919 Peace Treaty only "implicitly" excluded the immunity of the German Kaiser. In any event, and as already pointed out by Professor Rigaux yesterday morning,

no lesson, even of an implicit nature, can be drawn from the Treaty of Versailles, since it did not indict Emperor William II during the Great War, but after he had abdicated.

(ii) Next, as regards the Statutes of international criminal jurisdictions, I have just pointed out the confusion running through Belgium's Counter-Memorial between the rule of individual criminal responsibility and the argument based on the unenforceability before an international jurisdiction of rules governing immunity or preferential procedural status derived from domestic law, or from international law. The Nuremberg and Tokyo Tribunals did not even have to concern themselves with a claim to immunity deriving from international law, since the individuals whom they tried had ceased to exercise their duties at the time they were prosecuted. Only the Statutes of the *ad hoc* criminal tribunals set up by the Security Council, and the Statute of the International Criminal Court, have dealt with the question of immunity from suit of members of a government in office, and excluded it.

That, as I have said, is only logical since, I repeat, immunity from suit, which is intended to protect an act of State, is meaningless before an international court. In any event, the consent to the jurisdiction of such international court, whether by treaty or through a mandatory Security Council
013 resolution, suffices to lift that immunity. That said, one is bound to note that the conceptual confusion doubtless stems from a misunderstanding of the words used by Justice Jackson, reproduced in the Counter-Memorial (para. 3.5.22), where he refers to "the obsolete doctrine that a head of State is *immune from legal liability*": that phrase — and the rest of the extract cited demonstrates as much — refers to the principle of individual criminal responsibility and not to some rule of immunity applicable to the jurisdiction of domestic courts — notwithstanding the use of the words "immune from", which are the source of the confusion.

To counter the DRC's arguments that these "precedents" are not relevant in the present case, Belgium advances several contentions:

First, Belgium contends that these rules identified by international criminal courts are customary rules, and that domestic courts may — indeed must — also apply them (para. 3.5.26). However, we have to look at what these purported customary rules actually involve. It is clear that what is at issue is the principle — which is not contested — of individual criminal responsibility, and not a rule depriving government members in office of immunity from suit before domestic

courts. First, because the practice with regard to government members in office is extremely limited; secondly — and I say it again — because immunity from suit is meaningless before an international jurisdiction, even a criminal one. Thus, in my opinion, there can be no practice giving rise to a custom in this respect.

Second, Belgium then contends that

> "if it were to be established that no immunity could be invoked before an international criminal court, it would not be necessary to say so. The fact that it was nevertheless stated therefore has a meaning which goes beyond the narrow context of the international criminal court to cover that of all criminal jurisdictions, both international and national. This is a way to affirm that for certain abominations no immunity can come into play." (Counter-Memorial of Belgium, para. 3.5.27.)

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This is indeed a curious argument. Are we to understand that, when States agree to confer jurisdiction on the international bodies which they create, they at the same time agree to extend or limit, according to the situation, the jurisdiction of their own national organs? In reality, the true position is precisely the opposite of what the Counter-Memorial tells us: it is because immunity from suit or preferential procedural status is available in domestic law that it is necessary to make it clear that, in international law, such cannot be the case. Further, Belgium loses sight of the fact that a restatement of the rule, in the statutes of international criminal tribunals, was intended also, and above all, to give the lie to the old notion that organs of the State never had to account for acts carried out in the name of the latter.

Third, Belgium further contends that the fact that the individuals cited had ceased to exercise official functions is of no significance (Counter-Memorial of Belgium, para. 3.5.28). In this respect, it maintained that

> "the argument of immunity was not rejected on the basis of the international nature of these courts, but simply due to the horror of the crimes in question. If the horror of the crime justifies the exclusion of immunity, it matters little whether the question arises before an international court or a national court. Before both, the same cause should produce the same effects."

Once again, the argument is a curious one. We are told that the horror of an act — which is beyond dispute on moral grounds — confers a title of domestic jurisdiction — which strikes me as a remarkable judicial short-circuit. Is it necessary at this juncture to point out once more that the French Court of Cassation recently refused to find in the gravity alone of the crime committed grounds to justify lifting a foreign Head of State's immunity from suit?

Fourth, this argument concerning the gravity of crimes is again employed to justify the fact that the Statute of the International Criminal Court rejects, in its mutual relations with parties to the Statute, any argument derived from immunity. In reality, inasmuch as immunity or special procedural status under domestic law is excluded from consideration, this is because, for the international jurisdiction, these are simply questions of fact; and, inasmuch as immunity from suit deriving from international law is also excluded, it is because, I repeat, it is meaningless before the international tribunal, since, on the one hand, immunity is intended to remove a matter from the jurisdiction of a domestic court and, on the other, the jurisdiction of the international tribunal is founded on the consent of the States party to its statute, which includes an agreement to lift immunity.

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Fifthly, Belgium advances yet a fifth argument. It contends that the complementary nature of the International Criminal Court entitles national courts to do whatever the International Criminal Court itself can do, so that the rules of its Statute with regard to immunities may be transposed as they stand to national criminal courts. Thus, Belgium claims that, if the International Criminal Court alone had the power to prosecute government members in office, its role would become principal rather than complementary, given that the most serious crimes under international law which the Court is charged with prosecuting are always committed by the higher organs of State. Does this argument really merit any attention? I doubt it, and I say that without any animosity towards Belgium's counsel. I will content myself with refuting Belgium's curious notion of the International Criminal Court's complementarity — one which it appears to regard as "quantifiable", or even of merely statistical significance. In reality, complementarity quite simply means that the International Criminal Court is there in order to *supplement* prosecution by national authorities, in other words to perform that which national courts are unable to do, because of the jurisdictional limits imposed by immunity from suit. The proceedings of the Venice Committee, cited by Belgium in this context (Counter-Memorial of Belgium, p. 140) also have no bearing on the question which concerns us here, because they relate to the problem of the compatibility of the Statute of the International Criminal Court with certain constitutional rules. All that observations of the Venice Committee are concerned with is the power of a State having ratified the statute of

the ICC to try before its own courts *its* leader[1], who has committed crimes falling within the Court's jurisdiction. The proceedings of the Venice Committee in fact refer to "a leader", and not to *"des dirigeants"* as Belgium mistakenly claims. This power to try its leader before its own courts, even though it has ratified the Statute of the International Criminal Court, clearly cannot be regarded as incompatible with the principle of the Statute's complementarity.

016 (iii) Belgium also relies on Allied Control Council Law No. 10. In passing, it may be noted that it is somewhat surprising to see this law classified among the sources of conventional international law, since it was a piece of German domestic legislation promulgated by the four major powers in pursuance of their supreme authority, in accordance with the "Government in commission" formula analysed in such precision and detail by Sir Robert Jennings (*BYBIL*, 1946, p. 112). Be that as it may, Belgium once again omits to indicate that Law No. 10 concerned individuals who had ceased to hold office and was concerned with their trial by German domestic courts, or by Allied military courts acting as domestic courts.

(iv) The fourth conventional source cited by Belgium is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Belgium contends that Article IV of this Convention contains a rule precluding the immunity of government members in office before foreign criminal courts. This Article reads as follows: "persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Here again, the rule affirms more a principle of individual criminal responsibility rather than an exception to immunity from suit before domestic courts. Moreover, it must be read in conjunction with Article V of the Convention, which concerns the obligation to take measures for prosecution under domestic law, and particularly in conjunction with Article VI, which imposes an obligation to prosecute the perpetrators of genocide only upon the State *loci delicti*, while referring to the possible jurisdiction of an international penal tribunal. Even if Article IV were considered relevant to the issue of immunity from suit, which it is not, such immunity could in reality be lifted only for the benefit of the courts of the State designated in the Convention as being obliged to prosecute the perpetrators of genocide — and for that State

[1]The English text of footnote 13, which must be read in light of the principal text cited in Annex 34, actually refers to "a leader", wrongly translated as *"des dirigeants"*.

alone —, namely the State *loci delicti*. In any event, this discussion can be halted here as no such inference can be made in the instant case, since no accusation of genocide is contained in the disputed warrant.

(v) The fifth conventional source referred to by Belgium consists of the few resolutions adopted by United Nations organs which are cited in the Counter-Memorial. I think it necessary to point out, once again, the confusion between the affirmation of a principle of personal criminal responsibility and immunity from suit, which concerns the jurisdiction of domestic criminal courts. It is still the same confusion. Moreover, can reliance seriously be placed on resolutions by United Nations organs when their legal scope is not otherwise made clear?

2. Belgium also refers to "national sources excluding the immunity of alleged perpetrators of serious crimes of international humanitarian law". Chinese and Luxembourg laws are quoted (Counter-Memorial, paras. 3.5.56-3.5.57), but these are very general criminal provisions, from which no useful guidance can be drawn in the present case. They merely reaffirm the rule that culpability subsists regardless of the official capacity under cover of which the crime was committed. Also, the interpretation by the Swiss Federal Department for Foreign Affairs of the compatibility of Article 6 of the European Convention on Human Rights and the rules of diplomatic law, as interesting or specific as it may be, is in no way a "national source" relevant to the present case (Counter-Memorial, para. 3.5.58). It is an act by an executive body whose role is not to state the law; it is nothing but an opinion, that of a ministry of a State party to a convention — the European Convention on Human Rights — and is not opposable to the Democratic Republic of the Congo. The same is true of the rather vague statements by the Norwegian and Polish Governments (Counter-Memorial, paras. 3.5.59-3.5.60).

3. Belgium takes absolutely no account in the "jurisprudence" cited in support of its position of the domestic or international character of the court in question, and it fails to distinguish, once again, between the question of personal criminal responsibility and that of immunity from suit, refusing to note that all the actions cited were brought against leaders no longer in office. Belgium sets great store by the Nuremberg Judgment. It specifically criticizes the Democratic Republic of the Congo for having failed to address the assertion found therein to the effect that "[t]he perpetrators of such acts cannot refer to their official capacity to escape the normal procedure or to

protect themselves from punishment". Once again, Belgium distorts the sense of the text, which it regards as a statement of general application, covering both the international proceedings before the international tribunal hearing that case and future domestic proceedings. It is, however, clear that under a reasonable, practical interpretation of this passage, its scope must be limited to the facts before that international criminal tribunal, and that when the tribunal referred to "the normal procedure", it meant to rule only as far as it itself was concerned. The passage from the Judgment of the International Military Tribunal in Tokyo in the *Oshima* case, quoted by Belgium (Counter-Memorial, para. 3.5.66), clearly confirms this:

> "Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by courts of the State to which the Ambassador is accredited. In any event, this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence."

Please allow me, at the risk of trying the Court's patience, to provide a brief summary of what this means:

— a diplomat's immunity from jurisdiction is without prejudice to his personal criminal liability;

— the diplomat enjoys immunity from suit before the courts of the receiving State;

— that immunity is lifted before courts having jurisdiction in the case, i.e., before those — international courts like the International Military Tribunal — not required to respect that immunity, or, as far as the diplomat is concerned, any other domestic courts of a State in which he does not exercise his representative functions.

Belgium cites other national case law, concerning the act of State doctrine and the application of the Alien Tort Statute, which from the conceptual point of view frankly appears far removed from the subject under discussion and I shall not address this any further.

In respect of the *Pinochet* case, which I spoke about yesterday morning but which I said I would come back to, Belgium confines itself to extensive quotations from certain passages in the Lords' opinions, all of which relate to the immunity of former Heads of State and to the question whether torture can be considered an official act covered by the immunity from jurisdiction which subsists for those acts alone after the termination of office. These passages are all noteworthy in that they establish that crimes under international law cannot be considered to be official acts and they cannot therefore be covered by immunity from suit, which continues after the termination of

office only for official acts. Once again, that however is not the point at issue in this case, as I stressed yesterday morning. Belgium asserts, however, in succinct terms that "[e]ven if the [quoted] judge's reasoning is confined to the case of former Heads of State, it is also applicable, as such, to the case of high foreign representatives in power" (para. 3.5.82). Frankly, this is a peremptory assertion and it is surprising, especially since, as I have already pointed out, it is denied by the House of Lords itself! Belgium further asserts that the passage from the opinion by Lord Nicholls, the clear concise passage I quoted yesterday morning in support of the Democratic Republic of the Congo's position, is not relevant because the judge was, in Belgium's words, "simply refer[ring] to the general rule" (Counter-Memorial, p. 157) and that Lord Nicholls also stated:

> "From this time on [as Belgium notes in its Counter-Memorial, the judge was referring to the Nuremberg judgment], no head of State could have been in any doubt about his potential personal liability if he participated in acts regarded by international law as crimes against humanity . . . Acts of torture and hostage-taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability".

This passage, which Belgium quotes, in no way contradicts what Lord Nicholls soberly affirmed in respect of the immunity of a Head of State in power. This passage concerns "*potential* personal liability", the personal criminal responsibility which might impliedly be invoked after the termination of the office. Lord Nicholls also affirms that the representative's personal criminal responsibility subsists even where the international responsibility of his State can be engaged for his criminal acts, for which he remains in all events liable. This in no way gainsays the legal position of the Democratic Republic of the Congo, which, as I have already pointed out, does not deny this principle of personal responsibility.

I shall now return to the *Qaddafi* Judgment by the French *Cour de cassation* on 13 March 2001, which I referred to yesterday morning and which I said that I might come back to as well. In respect of that judgment, Belgium would, in fact, seem to attach more importance to the judgment of the Indictments Chamber, which has been quoted extensively even though it was quashed, than to the judgment of the *Cour de cassation* itself; this is surprising, to say the least. Belgium considers the *Cour de cassation* judgment to be compatible in all respects with its position, because that judgment is said to recognize exceptions to the principle of immunity from

suit of Heads of State in office and, according to Belgium, these exceptions are established by customary international law concerning war crimes, the crime of genocide and crimes against humanity. We are going round in circles . . . In reality, the Democratic Republic of the Congo maintains that Belgium, which bears the burden of proof, has failed to establish that there is such a customary exception because it infers consequences concerning the jurisdiction of domestic courts from texts dealing with culpability. Furthermore, if an exception to immunity from the jurisdiction of national criminal courts were truly a customary principle of *jus cogens*, as Belgium repeatedly insists, it should apply equally to all crimes under international law, including terrorism — and this is precisely what the French *Cour de cassation* rejected. The exception recognized by the *Cour de cassation* no doubt concerns the Statutes of the International Criminal Court and the international criminal tribunals.

4. After "conventional sources", after "national sources" and after the "jurisprudence", Belgium also cites "the writings of publicists" in support of its position. I do not think it necessary, after what I said on the subject yesterday morning, to dwell on this point. A brief word, however, concerning the International Law Commission deliberations cited by Belgium. Those deliberations concern, yet again, the question of personal criminal responsibility, as the articles in question expressly state, and not the question of immunity from suit, contrary to Belgium's assertion. In particular, Article 7 of the Draft Code of Crimes Against Peace and Security of Mankind, adopted in 1996, makes absolutely no advance determination of the judicial authority — domestic or international — empowered to establish liability, which cannot be escaped simply because of the importance of the office held.

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Mr. President, Members of the Court. I have already said much and do not believe it helpful to add further criticisms of Belgium's Counter-Memorial. Before I conclude and summarize the Democratic Republic of the Congo's legal position, please allow me to look somewhat beyond the framework of this dispute and briefly to place it in a wider context.

021 As Professor Rigaux has already noted, the question of principle before the Court, as it extends beyond the issue of relations between Belgium and the Congo, is of general interest to the entire international community. Immunity from criminal process of government members in office is a well-established rule of public international law. It is of vital necessity to intercourse among States, and among the international organizations which they create, it being crucial for nations to be represented by individuals in a position to carry out fully and freely the offices which have been entrusted to them in the exercise of complete sovereignty. In this sense, immunity from suit meets a genuine need of the international community. There can be no doubt that this need is felt even more acutely in this era of "globalization". It is even less acceptable for a State's international representation to be adversely affected by criminal proceedings brought abroad against its representative when the basis of the prosecution can only be mere allegations, as is the case here. In this respect, the immunity from suit of foreign government members in office is not only a necessary rule but also a wise one, which should not be lightly waived. Moreover, immunity from suit is in no way incompatible with the coherence of the international legal order, or with the very legitimate concern to fight against outrageous impunity. Immunity does not mean impunity, as has already been pointed out. This is particularly so when the immunity is a functional one and for the most part treaties have by now removed any statute of limitations on the crimes under international law which that immunity temporarily prevents the domestic courts from trying.

V. CONCLUSION

Mr. President, Members of the Court, the Democratic Republic of the Congo's position may thus be summarized very simply as follows:

— the international arrest warrant issued on 11 April 2000 is an internationally wrongful act committed by Belgium against the Democratic Republic of the Congo, in that it violated the immunity from suit held by the sitting Minister for Foreign Affairs;

— no exception to the rule of immunity from suit can be recognized in this case;

— finally, the injury caused to the Congo's sovereign rights by this wrongful act must accordingly be repaired.

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That brings my oral statement to an end. I thank the Court for its kind attention and ask you, Mr. President, to call Professor Chemillier-Gendreau to the Bar. She will speak to us on the issue of universal jurisdiction.

The PRESIDENT: Thank you very much. I now give the floor to Professor Chemillier-Gendreau.

Ms CHEMILLIER-GENDREAU: Mr. President, Members of the Court, the question of universal jurisdiction pervades this case. As a result of legislation which Belgium adopted conferring upon itself maximum universal jurisdiction, it now finds itself the focus of all hopes on the part of the countless victims of international crimes.

The main difficulty confronting Belgium is to respond to hopes which emanate from the world over and which can only grow in number. That is the price of a bold, but unilateral and unusual, step. This general difficulty, which is a matter of that State's judicial policy, is in addition to another series of difficulties, which are legal in the strict sense of the term. Those are difficulties which might arise, first, from any contradictions between the Belgian legislation and the way it is applied and, second, from the rules of international law which Belgium's exercise of universal jurisdiction might breach.

This, moreover, is the situation underlying the case concerning the arrest warrant of 11 April 2000, but the Democratic Republic of the Congo's point of view on this sensitive question of the role to be played by national courts in prosecuting international crimes is not the one implied by Belgium's representatives in their written pleadings.

I would first like to place the question of universal jurisdiction in its general context before addressing the specific question. The Applicant in these proceedings closely shares the concern to put an end to impunity in order to put a stop to the crimes themselves. This is because the crimes are, for the Applicant, neither distant nor abstract. They have ravaged that country, in a war both international and civil in nature. But it must be noted that this conflict, despite its uniqueness, is nevertheless comparable to many others. This is not the occasion on which to draw up a list of the regions of the world having experienced wounds of this magnitude. The Court has occasion to deal

023 with some of these cases. The full list is long and growing longer rather than shorter. The acts of violence are not the same in every place, but they are horrific everywhere.

To try and to punish. That is one of the remedies, as fragile as it might be, capable of checking the spiral of violence. But trial and punishment by whom, and in accordance with which rules?

The points of law raised here lie within a profound historical movement. But this is not the peaceful movement of a river flowing through flatlands. We are caught in a storm raging in many parts of the world and strong appeals are made to the law to help in calming it.

At the very centre of this upheaval, the status of State sovereignty is subject to conflicting tensions. The legal norm of sovereign equality appearing in the United Nations Charter, which is valid on paper, is weakened by the enormous actual inequalities which it covers.

Political theorists are examining the situation. In France, Gérard Mairet in his book *Le principe de souveraineté* sees it as a concept that has become inert, no longer able to express the common feeling of a people. In Italy, Giorgio Agamben, in a short essay entitled "Homo Sacer. Le pouvoir souverain ou la vie nue", ventures a philosophical view of the crisis of sovereignty. He points out how the enigma of the transformation of violence into law lies at the origin of sovereignty. This enigma — never elucidated but long accepted — made it possible to achieve the pacification of situations within a given State context.

For reasons of great complexity, which it would not be opportune to delve into here, sovereignty, of new States as well as older States, is to varying degrees delegated voluntarily or impaired involuntarily.

The alchemy whereby a major part of social violence was contained by the law no longer works. The crisis of sovereignty, like a widening fissure, allows eruptions of violence which become impossible to stem. No continent has been spared. But in States described as "new" — because they were born of decolonization — the sovereignty so desired by peoples long subject to domination has in many regions found itself in crisis even before it became consolidated. There the risk of outbreaks of violence on a massive scale is clearly greater than elsewhere.

024 The very extensive literature in the areas of domestic and international public law, as well as political science, reflects this major turning point at which the global community currently finds

itself, but fails to show clearly how peace can be assured between different human groups. Earlier developments were thought to have produced an acceptable model. It is true that the model resulted above all from political, conceptual and technological developments among the peoples of the West. But those peoples, emerging at the end of the Middle Ages from imperial systems, in which power knew no bounds, at least as it was manifested, rejected the universalist tendencies which marked the Renaissance in Europe and organized themselves on the basis of strong territorialization of power and therefore of law. The doctrine of sovereignty was born and with it classic international law, strongly oriented towards the division of powers among sovereign States. It was natural that the logic of sovereignty would extend to criminal law and that that law would thus become territorial. Does this mean that the authority of a domestic court would be limited to ruling on acts committed on the territory of that court's State and against people on that territory? Not exactly, for extraterritorial jurisdiction to prosecute nationals no longer on that territory, but also possibly to protect them, or to prosecute foreign nationals abroad for acts committed on the territory, could be realized when combined with extradition proceedings.

This adjustment to the principle of territoriality dates back well before the explosive entry of international crimes onto the global scene. It is obviously inadequate to deal with that. The new situation, which was characteristic of the twentieth century and the series of conflicts occurring then and which does not appear to be becoming any less acute as the twenty-first century begins, shows that the legal categories under traditional law, which allow for unlimited impunity, are inadequate or inappropriate.

The procedural possibilities in this connection are effectively limited, and criminals take advantage of that and are able to live out their lives undisturbed. Confining jurisdiction to the *locus delicti* State in the case of crimes committed by the State usually means letting the guilty go free. Latin America is rife with examples. Even when régimes which promoted the most serious crimes are replaced with more clement political structures, the argument of national reconciliation

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combines with the extensive ties which the guilty maintain within the society to block domestic trials. Notwithstanding this situation, criminal law has long remained absent from international law.

Little by little, it was however introduced into that law through two mechanisms: first, that of international tribunals. In condemning one of the most painful and dishonourable periods in human history, Nuremberg and Tokyo gave rise to great hopes. But that justice, based on an agreement among the victors, long remained unique. Horrifying situations reoccurred in various regions of the world, while at the same time what are now called humanitarian considerations began to be raised.

The ground has been prepared for new advances in international criminal law, and the last decade of the twentieth century witnessed the creation of three unprecedented courts. The first two (I am referring to the International Criminal Tribunals for the former Yugoslavia and for Rwanda) were set up by resolutions of the Security Council. They thus derived their authority over States from the fact that they were created by the most powerful organ within the United Nations. The International Criminal Court was born in a more traditional way: pursuant to a treaty binding on States by virtue of their own consent. As we see, the genesis of these courts remains compatible with the principle of sovereignty. It is through the derived law of the United Nations in one case, and through treaty law in the other, that States have assumed obligations in the criminal area, obligations which may, albeit cautiously, weaken the principle of territoriality and even go so far as to prevail over the immunities which usually protect the highest representatives of each sovereign entity.

In the scheme of things ushered in by the creation of international tribunals, all sovereignties are equally limited and have directly or indirectly given their consent to their jurisdiction — albeit that this offers only very slender hope for the victims of mass violence perpetrated elsewhere than in the former Yugoslavia and Rwanda. It will still take some time to set up the International Criminal Court and crimes committed prior to the entry into force of the treaty constituting that Court will not fall within its jurisdiction.

It is because of this legitimate frustration that the victims and their counsel and all jurists desirous of progress in the law have turned towards the possibilities opened up by the universal jurisdiction of national courts.

026 Universal jurisdiction is not something completely new. While traditionally it has been applied to piracy, it has been extended by agreement to various scourges, which haunt societies and leave them helpless, such as counterfeiting, drug trafficking and terrorism.

In the field of international crimes, it has had its famous moments, such as the Eichman trial in Jerusalem in 1961. However, in light of the circumstances in which Eichman was kidnapped in Argentina, this case illustrates the practical limits to the application of universal competence. The fact that the coercive act necessary to capture the accused was carried out on foreign territory and created an incident between the two countries, the fact that the State of Israel then chose to apologize to Argentina and make reparation for the injury caused, would tend to demonstrate rather the crucial nature of the territorial link. And while the Supreme Court of Israel ruled in favour of the universal jurisdiction of all States in respect of crimes against humanity, it was able to do so on the basis of the apprehension of the accused by an unlawful act of force rather than by recourse to legal proceedings. However, it is in Hannah Arendt's book, based on her experience of the trial and, above all, in her correspondence with Jaspers at that time, that one finds discussed the issues at stake surrounding the territorial question. Whereas Jaspers expresses doubts as to the jurisdiction of a tribunal to try offences committed in another territory, Arendt deploys a philosophy of humanity and of the political community which is far less statist. For her, universal jurisdiction is merely a contingent instrument for the defence of rights, which is the ultimate goal.

Irrespective of the theoretical debate, universal competence, introduced as a principle in the 1949 Geneva Conventions concerning human rights in the event of armed conflicts, has long remained a dead letter.

The renaissance of universal jurisdiction some years ago is due to reasons that I have referred to above. Given that mass crimes have taken on an international dimension through the illicit trade in arms, secret funding and criminal co-operation between certain dictatorial regimes, it was necessary to devise other means to prevent such crimes. Still feeling its way, created by the process of globalization, universal jurisdiction seeks to go beyond the sovereignty of a State to reach the criminals harboured by the State or who are even sometimes located at the heart of the State's power. Thus the response to the abuse of the principle of sovereignty would be to transcend it.

027 But, can one construct the new world criminal law on such a paradox, while world society is not yet able to demonstrate that it constitutes a community of law.

We are entering into murky waters.

As for international courts, their legitimacy is derived either from the body which created them, or from agreement between States. However, whence comes the legitimacy of a national court to prosecute foreigners for acts committed other than on its national territory? From its own law no doubt, but is that sufficient to found extra-territorial legitimacy, which is absolutely indispensable? Surely not. It is essential that domestic legislation opening the way to universal jurisdiction should be compatible with the overall logic of international law from the moment it is introduced.

This is the delicate issue which lies at the very source of the problem in the case concerning the *Arrest Warrant of 11 April 2000*. The Democratic Republic of the Congo is not opposed to the principle of universal jurisdiction. Belgium wrongly fears (as it states in paragraph 2.74 of its Counter-Memorial) that the Congo wants the Court to rule against universal jurisdiction *per se*. The Congo is concerned here only with the sovereign equality of States and the manner in which this key principle could be undermined by the misplaced use of universal jurisdiction.

The Democratic Republic of the Congo has no disagreement whatsoever with Belgium about the fact that complementarity is necessary today between embryonic international criminal jurisdictions and the limited effectiveness and universal jurisdiction of domestic courts. Nevertheless, it still questions, as it did in its Memorial, the compatibility of Belgian law with the Statute of the International Criminal Court (Articles 1 and 17). Belgium's Counter-Memorial seems to confirm that where the Statute of the Court introduced complementarity between its jurisdiction and the jurisdiction of national courts, Belgium detects instead subsidiarity, a form of hierarchy whereby only those cases in which Belgium could not successfully bring proceedings would be left to the International Criminal Court. *Such* is the universal jurisdiction, which Belgium confers on itself, and such is the universal jurisdiction which it has deployed against a Minister for Foreign Affairs in office of the Democratic Republic of the Congo. That is what is contested, and not the principle *per se* of such jurisdiction.

028 Mass violence constituted by international crimes has its origin in crumbling or depraved sovereignty. Must the remedy aggravate the disease? Should some additional blow at sovereignty be struck? That is the core of the theoretical problem raised by this case. For our part, we consider that sovereignty can, and sometimes must, be limited by the reach of international law, which needs to be developed as a matter of urgency in that direction. This must not be done in a unilateral manner by one State at the expense of another.

The real test of the concept of universal jurisdiction is the genuine universalization of the prosecution of crime. Further, that is precisely the meaning intended by those who drafted Article 146 of the Geneva Conventions. The idea was not that a single State should take responsibility for prosecuting and trying all international crimes. It was that all States should fulfil their obligation to search for, each on its own territory, the guilty parties, so that there is no territory left where they can escape judgment for their crimes.

That States should advance in unison in this direction is therefore essential in order to ensure that the system is truly effective. Equality and reciprocity are its cornerstones. What would be the reaction of Belgium, of France, or of any other powerful country, if a court in the Democratic Republic of the Congo had accused and prosecuted the Head of State in office or the Minister for Foreign Affairs in office of Belgium or of France for crimes allegedly committed by them or under their orders or by their omission in Rwanda? There can be no proper discussion of this case without posing this question, which is the question of the sovereign equality of States.

Before examining briefly, and in more technical terms, the problematic aspects of universal competence, such as that which Belgium conferred upon itself and made use of, I will summarise the general comments that I have just made by saying that Belgium, in rushing through the stages of a process which may just be beginning, has ventured recklessly down the radically new path of an international criminal law without frontiers. Now, the logic of inter-State international law, which still produces legal effects, has caught up with it.

II. OBLIGATIONS AND FREEDOMS

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I come now to the need to set out what is common ground between the Parties and what is not. I shall summarize the answers of the Democratic Republic of the Congo to the three questions which must be asked in order to resolve our discussion:

— Does contemporary international law impose on States an obligation of universal jurisdiction for the purpose of prosecuting international crimes?

— Does this obligation also apply if the persons presumed guilty are not present in the territory of the prosecuting State?

— If it is not an obligation but merely a freedom, under what conditions can such a freedom be exercised?

There is no disagreement of principle with regard to the first question. Yes, States do have an obligation of universal jurisdiction, which arises in response to another obligation, that of contributing to the suppression of international crimes. Naturally, however, there must be identifiable grounds for the latter obligation.

We shall not take up the Court's time by re-opening the question of genocide, since it has no bearing on this case.

We shall merely say that Article 146 of the Geneva Conventions imposes a clear obligation on all States both to enact appropriate legislation and to search for persons having committed grave breaches of the said Conventions. At this stage, I shall reserve for my next point the question whether Article 146 imposes an obligation to prosecute persons not present in the territory of a State.

We would add here that Article 5 of the 1984 Convention Against Torture imposes an obligation on States to establish their jurisdiction, albeit subject to a number of conditions which limit the obligation.

Lastly, with regard to crimes against humanity, Belgium contends that a customary norm has now been sufficiently crystallized for it to be said that there is an obligation for States to establish their universal jurisdiction for the purposes of prosecuting such crimes. Belgium refers to the documents cited before the Court during the proceedings on provisional measures.

030 The Democratic Republic of the Congo has no intention of discussing here the existence of a custom which is still emerging, just as it does not wish to appear to be placing obstacles to the emergence of such a custom. In its written pleadings, it has advanced two contentions only, contentions which it maintains: the first is that, in respect of crimes against humanity, there is no treaty creating an obligation for States to establish their universal jurisdiction for this purpose. The second is that the factors cited by Belgium as constituting a customary obligation do not extend such an obligation to cover situations in which the accused persons are not present in the territory of the State. In paragraph 3.3.13 of its Counter-Memorial, Belgium reproduces a truncated quotation from the pleadings of the Democratic Republic of the Congo, which allows it to misrepresent the position of the applicant State.

For the applicant State, there is no evidence that every State has an obligation to punish crimes against humanity "even when those accused thereof are not present on its territory". These are the exact words used in the Memorial of the Democratic Republic of the Congo, words which need reiterating since Belgium has omitted to do so. This brings us to the second question which must be answered:

— When there is an obligation on States to exercise their universal jurisdiction, does such an obligation extend to cases in which the suspect is not present in the territory of the State? Here again, there is no disagreement between the Applicant State and the Respondent State. Moreover, the Democratic Republic of the Congo takes note of the fact that Belgium does not claim that it indicted the Congo's Minister for Foreign Affairs when he was not present in the territory of Belgium as a result of an obligation on Belgium to do so. It is evident that the obligation of States to extend their universal jurisdiction to encompass the punishment of some international crimes does not go so far as to include such an eventuality. Neither legislation nor practice provides grounds for such an extension.

Article 146 of the Geneva Conventions, without being fully explicit, would appear to confirm our view. It stipulates that the States Parties must search for, hand over or judge the guilty persons. Professor Lombois reviewed this provision in the following commentary:

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> "Wherever that condition is not put into words [he writes (the condition being the presence of the suspect in the territory)] it must be taken to be implied: how could a State search for a criminal in a territory other than its own? How could it hand a

> criminal over if he were not present in its territory? Both searching and handing over presuppose acts of restraint, linked to the prerogatives of sovereign authority, the spatial limits of which are constituted by the territory."

It is therefore indeed the logic of international law which prevents the obligation on a State to establish its universal jurisdiction for the punishment of international crimes from being extended to encompass an obligation to exercise jurisdiction in all cases, including those in which the suspect is not present in its territory.

The Convention on Torture (Art. 5, para. 2) explicitly states that presence is a necessity. Moreover, the legislative or judicial practice of States shows that in the great majority of cases the courts are not authorized to prosecute if the suspect's presence in the territory has not been established. When the Danish High Court, on 25 November 1994, had recourse to the principle of universal jurisdiction to prosecute and try Refik Saric for war crimes in Bosnia, the accused had taken refuge in Denmark and the condition of presence had thus been met. As for French law, the condition that the perpetrators be present in French territory triggered wide-ranging debate at the time when French criminal legislation was amended to bring it into line with the provisions of the Security Council resolutions establishing the International Criminal Tribunals for ex-Yugoslavia and for Rwanda.

With the aim of making punishment effective, an amendment was tabled — and debated with fervour -- to broaden the jurisdiction of French courts to cover situations where the perpetrator was absent, thus allowing victims to have recourse to the French courts. In its Counter-Memorial, Belgium pares down those debates, citing only one of the arguments put to the Chamber by the French Minister, that relating to the threat of seeing the French courts overwhelmed as a result of the number of complaints. Scrutiny of the verbatim records of the debate in the French National Assembly reveals that the Minister did not confine himself to that argument. He also referred to the territorial logic which has to date dominated the French concept of universal jurisdiction.

Such territorial logic is found in French case-law, which does not deviate from the line that the perpetrators of offences must be present in France for prosecution to be possible.

0 3 2 In a judgment of 24 November 1994, in the *Javor et autres* case, the Paris Appeal Court refused to establish its universal jurisdiction, since the condition that the perpetrators be present had not been met.

One of the grounds for the appeal to the Court of Cassation which prolonged that case was that any victim of an international crime should be entitled to bring proceedings. The plaintiffs contended that it was for the courts hearing the case to undertake the verifications necessary in order to find out whether the accused was or was not present in French territory. In a judgment of 26 March 1996, the Court of Cassation (Criminal Chamber) refused to bring a public prosecution because the suspects had not been found to be present in French territory. In the *Bouterse* case, which Belgium appears to use to support its reasoning, the decision of the High Court of the Netherlands of 18 September 2001, which ended the case, confirmed that the presence of the accused in Dutch territory was a limiting condition of universal jurisdiction.

Moreover, to seize on a few — very few (ten or so) — examples of domestic legislation, in which prosecution in the domestic courts is authorized under domestic law even if the perpetrator is not present in the territory, is that not simply a diversion on Belgium's part?

Belgium has abandoned the idea (Counter-Memorial, para. 3.3.25) that there is an obligation to exercise universal jurisdiction extending to situations in which the perpetrator is not present in the territory. It seeks to establish that what remains is the freedom to do so, and that it availed itself of such freedom in a proper manner.

We will now return, and this is my last point, to the necessity for such prosecution to be in conformity with international law.

The Democratic Republic of the Congo is not seeking to debate out of context the purported freedom of States to extend their universal jurisdiction as widely as possible. Belgium maintains that a universal social disorder must be met with universal punishment (Counter-Memorial, para. 3.3.53). And its representatives write that in such a case "it is vain to try to find a *ratione loci* limit in international law for the punishment of crimes which are among those that offend the conscience of the world". This impulse is contagious and it may fire the imagination.

Yet now Belgium itself is considering a review of its legislation, and the cases currently pending are to be submitted to the competent judicial authorities for them to decide whether a territorial link may be necessary — an issue on which the Belgian position no longer seems so assured.

The fact is that we jurists on both sides and the States that we represent cannot, with the world legal system as it is now, settle this issue in a peremptory manner. States doubtless retain a freedom, which they exercise in different ways according to their view of their responsibilities regarding the necessary punishment of international crimes. If they push this freedom to its limits, they may well run into difficulties. It is these that are at the heart of the third and last point that needs to be elucidated now, and which is:

— the crux of the very real dispute that is submitted to the Court for decision. While States are not obliged to extend their universal jurisdiction to situations in which the perpetrator of the offence is absent, but retain the freedom to do so, they must use that freedom under conditions of strict equality *inter se* — taking care that this does not violate any other sovereignty or any obligation arising from the application of international law. For this is really the whole point of the arguments of the Parties seeking to establish the exact nature and scope of the obligation to assume universal jurisdiction.

That this obligation exists in the case of certain crimes and when the guilty parties are present on the territory of the prosecuting State is one thing. The fact that this obligation does not extend, whether by treaty or by custom, to the situation where the perpetrator of the offence is not present leaves room for argument: the fact that no expressly worded obligation to prosecute can be found where the offender is absent may open the way to a freedom to prosecute which each State might use as it pleased. But that also serves to show that present international law cannot go so far as to formulate an obligation to prosecute in such cases because its territorial foundations would bar it from doing so.

034 Moreover, assuming that each State does have freedom in this area, account must also be taken of the possible presence of another requirement of international law with which the application of universal jurisdiction *in abstentia* would come into conflict.

If universal jurisdiction *in abstentia* were derived from an obligation, we would be in the presence of two conflicting norms: one requiring prosecution and, for example, one preventing prosecution by reason of immunity. An order of precedence would need to be established between them, and this the Court would have to do in order to decide the dispute.

But this would serve no purpose, since Belgium agrees with the Democratic Republic of the Congo that in the present case universal jurisdiction is a freedom, not an obligation. But it is still necessary to check that the exercise of that freedom does not infringe the sovereignty of another State and is not a breach of an obligation founded in international law. Otherwise there is no alternative but to find that the freedom has been exercised without due consideration.

That was the conclusion of the French *Cour de cassation* in the *Khadafi* case (Judgment of 13 March 2001).

In that case, although the crimes were committed abroad and imputed to a foreigner, the issue of the scope of the jurisdiction of the French courts caused no difficulty in so far as the victims were French. But the judge's jurisdiction did not allow him to disregard the rule that the heads of foreign States are immune from suit.

In the same way, and although the context is very different, in the present case what should have barred the arrest warrant issued without due consideration by the Belgian judge against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo are not the limits on his jurisdiction *per se,* but the limits on his jurisdiction, viewed in the context of international law based on the territorial sovereignty of States and in light of its conflict with a rule of international law to which no exception was applicable here. This is the rule that heads of State and incumbent Ministers for Foreign Affairs are immune from suit. It is true that it no longer has the impregnable character that it once enjoyed when sovereignty was an absolute concept. This is to be welcomed, because many crimes have been committed in the name of sovereignty and many criminals have been protected for too long by immunities diverted from their proper function.

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Today international law is constructing restrictions on sovereignty, and thus exceptions to immunity from suit. This is not a cause for regret, for the protection of individuals is the goal of these developments. It is to be hoped that international law will consolidate on and extend its endeavours in this regard. Doctrine can contribute to this, and States and international organizations can do their best too.

However, Mr. President, Members of the Court, the best can often be the enemy of the good, and for a State, in the name of a humanitarian ideal that it assumes alone as Atlas bore the world on his shoulders, to transform its courts into agencies of a justice without frontiers and without

regulation in defiance of the sovereignty of another State is something that the Democratic Republic of the Congo could not accept. These are the terms of the very real dispute that it asks the Court to decide and in respect of which it seeks redress for the injury that it has suffered.

Thank you.

The PRESIDENT: Thank you Professor, and I now give the floor to Professor François Rigaux.

Mr. RIGAUX: Thank you Mr. President. Mr. President, Members of the Court, first I would like to revert briefly to the arguments on universal jurisdiction. You heard yesterday that serious consideration is being given in Belgium to approaching the exercise of this jurisdiction from a moral angle and making it subject to criteria of ties with Belgian territory and Belgium. And Professor Chemillier-Gendreau has just stressed the importance of the possibility of the accused being on national territory, and even of the requirement that he should be on national territory. There is a procedural reason for this. How can a case of this kind be investigated properly, and with due respect for the rights of the defence, in the absence of the accused? But there seems to me a more fundamental reason. For a person accused of grave crimes under international law to be able to live peaceably within the territory of a State is a real affront to *ordre public* in that State. A State cannot tolerate a situation within its territory in which an individual can be the subject of grave accusations of crimes under international law and that State remain powerless as regards that accusation. Therefore the condition of presence on the territory appears to me to be directly linked to a requirement of national *ordre public*. It is not on behalf of a universal human community that the State will prosecute that individual; it is because of the affront to that State's *ordre public* that would result from the ability of an individual accused of serious crimes to "live the life of Riley" — if I may use a somewhat colloquial expression — on the territory of a democratic State.

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The second observation relates to another criterion of connection: the nationality of the victim. And I fear that here again the Counter-Memorial confuses two concepts: complainant and victim. We are told, in words or in writing, that five of the complainants in the case at present before the Court are of Belgian nationality. But it is not the nationality of the complainants that

matters; what matters and must be taken into account is the nationality of the victims. So that the principle of passive personality can operate, it must be shown that a national of the State which is exercising its criminal jurisdiction has himself been a victim of the act, in person. Moreover, I would add that compliance with the rules of Belgian law relating to the filing of a civil complaint would have rendered the complaint inadmissible unless the complainant could show that he himself, in person, was a victim of the offence. Were that not the case, the way would be open to a kind of class action whereby anyone, by virtue of his nationality, could complain of a serious violation of international law committed abroad. And so you see how without these two elements — the location but also the nationality of the victim, and I stress, of a person who is shown to be a victim — the court has no jurisdiction, where its jurisdiction is subject to the principles of passive personality.

I wish to make a second observation regarding the difference between the status of a member of a foreign government and that of diplomatic agents.

There has been talk in the press of a complaint brought in Denmark against the ambassador of a foreign Power, and in the case of diplomatic immunity two observations need to be made.

The first is that it is limited in spatial terms. Diplomatic immunity protects the diplomat only in the State to which he is accredited, whereas the immunity of a member of a government is effective worldwide.

037 The second observation concerns the possible reaction of the territorial State. One of two things: either a State seeks the accreditation as ambassador of a person against whom serious charges are outstanding relating to crimes under international law, and the territorial State must obviously and can then refuse its *agrément* to that diplomat. Or, secondly, if after *agrément* has been given to the diplomat, he is found to have committed or is accused of having committed serious crimes under international law, I think that the only attitude consonant with international law is for the territorial State to request the State which has sent that diplomat to recall him, although it would obviously be contrary to international law to take advantage of his presence on the national territory to charge him, bring proceedings against him and, if appropriate, take him into custody.

I should now like to remind the Court — since my essential task this morning was to talk about the *dispositif* which the Congo seeks — of the terms of the claim as presented in the Application instituting proceedings, in order to demonstrate clearly to the Court that there has been no change in the applicant Party's position in this respect:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels *tribunal de première instance* against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

Mr. President, Members of the Court, we stand by that initial application. The only way of remedying the insult to the Congo, the *iniuria* as I termed it yesterday, is to expunge the wrongful act. And in this respect I would remind the Court that we are in fact dealing here with a matter of honour. The Court will be aware that in the past, when an insult was offered to the honour of an individual, the solution was to fight a duel, and duelling was practised for a long time even in civilized countries. Similarly, in the case of States, where there was a serious insult to the honour of a State, it would seem that the only possible response — and even Vitoria says as much — was war. Well, in this regard, we are now living in a more pacific world, by no means totally so, of course, but sometimes so in certain respects. In the same way that, in the domestic legal order, a

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person who is the victim of defamation or an insult to his honour is no longer able to have his accuser done away with, as used to happen in Rome — and it was precisely to put an end to such violence, to this type of private vendetta, that lawsuits came into being in Roman law — the Court is asked to intervene today. It is precisely because there has been an insult, a serious insult to the honour of the Democratic Republic of the Congo, that the Court is requested to award reparation for the moral prejudice which the Congo has suffered.

It is argued in the Counter-Memorial that the Court would exceed its authority in seeking to decide — and that we ourselves are asking the Court to decide — what action should be taken by Belgium within its own legal order. This is not at all what we ask. Belgium may satisfy as it wishes, within its domestic order, the request we have submitted to the Court. And no doubt there are various ways for it to do so; acts incompatible with international law might be invalidated by

means of a retroactive law. A judicial authority might decide that such acts must be invalidated, and there might be legislation to impose that obligation on the judicial authorities, were there any problems with the separation of powers. The choice of means is thus entirely a matter for Belgium, and in this respect I would refer to two Judgments of the Court, quoted in the Counter-Memorial on pages 204 *et seq.* In the *Haya de la Torre* case, the Court stated that it was unable "to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function". Similarly, in the *Northern Cameroons* case, and I quote the Judgment of the Court again, repeating what it said in the *Haya de la Torre* case, "the Court . . . cannot concern itself with the choice among various practical steps which a State may take to comply with a judgment". We also accept, as counsel for the Applicant has said, that once a judgment has been given the use made of it by the successful party is a political matter, not a judicial one.

Consequently, what we ask the Court to do is exactly what the Court is able to do in keeping with its own jurisprudence in the matter; in other words, we are not in any sense asking the Court to decide what Belgium should do within its own legal order. What we do ask is that:

039 (1) The Court should find the issue of the arrest warrant to be incompatible with international law;

(2) As the logical consequence of the arrest warrant being deemed incompatible with international law, Belgium should take the appropriate action, the normal consequence obviously being that the arrest warrant should be revoked and rendered of no effect for the future, but also that it should be revoked *ab initio,* since quite evidently a void act is void *ab initia.* It suffers from a fundamental defect and thus I believe that the *dispositif* which we respectfully request from the Court is fully within its powers, and that the Court will not exceed them in requesting or ordering Belgium to remedy the injury to the applicant Party.

Mr. President, Members of the Court, thank you for your kind attention in this latter part of this morning. Mr. President, I believe that you can therefore now let us all go, unless the Agent still has a few words to say.

The PRESIDENT: Thank you, Professor. May I ask the Agent if he has anything to add, or does this mark the end of the hearing for this morning?

Mr. MASANGU-a-MWANZA: No, Mr. President, I have nothing further to say at this point. I will take the floor when our Belgian friends speak at the end of the next round.

The PRESIDENT: Thank you very much. These statements conclude the first round of oral argument of the Democratic Republic of the Congo. The oral proceedings in this case will resume tomorrow, at 3 p.m., to hear the Kingdom of Belgium. In the meantime, at 12.30 p.m. today, the Court will hold a brief public hearing in another case, during which Messrs. Joe Verhoeven and James L. Kateka, the Judges *ad hoc* chosen by the Democratic Republic of the Congo and the Republic of Uganda respectively, will make the solemn declaration provided for in Article 20 of the Statute of the Court, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*.

040 With that announcement, the sitting in this case is now closed. Thank you.

The Court rose at 11.50 a.m.