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006 The PRESIDENT: Please be seated. The sitting is open and I immediately give the floor to Professor Eric David to continue the oral argument of the Kingdom of Belgium in the case between the Democratic Republic of the Congo and the Kingdom of Belgium. Professor, you have the floor.

The PRESIDENT: Please be seated. The sitting is open and I shall immediately give the floor to Professor Eric David to continue the oral arguments of the Kingdom of Belgium in the case between the Democratic Republic of the Congo and the Kingdom of Belgium. Professor David, you have the floor.

Mr. DAVID: Thank you, Mr. President. Mr. President, Members of the Court.

1. It is once again an honour for me to address this Court, an honour of which I am all the more conscious as it falls to me to expound the principles which are one of the keystones for the protection of human rights and fundamental freedoms, that is to say, the elimination of certain impediments to the protection of these rights under the criminal law, whilst observing the requirements of international law.

2. I am particularly appreciative of the fact that there seems to be, in this case, not only considerable misunderstanding on the part of the Democratic Republic of the Congo as to the real significance of the acts imputed to Belgium, but almost as much misunderstanding on the part of Belgium as to the exact claims made against it by the Democratic Republic of the Congo, at least as regards one of the two parts of its initial Application, namely the question of universal jurisdiction. "Sunlight and shade", as Victor Hugo would have said: for the moment there is far more shade than sunlight and I fear that much effort will be needed to disperse the former.

3. In any case, what remains clear is that the questions of merit will need to be dealt with in a necessarily abstract and theoretical manner since, as Belgium has already demonstrated — *ad nauseam*, as Professor François Rigaux would have it[1] — Mr. Yerodia is no longer a member of the Government of the Congo and the dispute before the Court today — namely, the issue in

[1] CR 2001/5, 15 Oct. 2001, F. Rigaux, p. 15.

Belgium of an arrest warrant against a minister *in office* — this dispute appears more akin to a request for an advisory opinion on a legal question within the meaning of Article 96 of the Charter of the United Nations, rather than a dispute on precise and tangible rights.

007 4. However, conscious of the limits which the Court generally imposes upon itself in the exercise of its judicial function, and out of respect for the other Party, whilst having regard to the fact that the issues of jurisdiction, admissibility and the merits had to be dealt with at the same time, Belgium analysed the merits of these matters in its Counter-Memorial. It is in that spirit that Belgium will continue to consider those issues, even though it feels itself to be playing less the role of a State involved in a dispute, rather than that of a delegate defending a point of view at a diplomatic conference or at a colloquy of experts in international law. If the Court follows its case law, there will be no need for it to enter into a debate which it may well come to see as essentially an academic exercise.

The Court will, of course, decide whether it falls to it to tackle these issues, the merits of which, in any event, Belgium — I stress this point — has no fear whatsoever of addressing.

5. This oral statement, as the Court is aware, will deal with the two issues lying at the root of the Application filed by the Democratic Republic of the Congo: the exercise of universal jurisdiction by default and the alleged violation of the immunity of Mr. Yerodia through the issue of the arrest warrant of 11 April 2000 under the Belgian Law on the punishment of serious violations of international humanitarian law, namely the Law of 16 June 1993, as amended on 10 February 1999. I would remind the Court that these issues are dealt with only by way of alternative argument, should the Court find that it has jurisdiction and that the plaintiff's Application is admissible.

6. In accordance with Article 60 of the Rules of Court, my presentation will be limited to the issues that still divide the Parties and will attempt, as much as possible, not go over the whole ground again already covered by the written and oral arguments on the matter, whether in the provisional measures phase, or in Belgium's Counter-Memorial. In order not to overburden the Court and to adhere to what is essential, Belgium therefore will merely present a summary of the argument given in detail in its Counter-Memorial. Belgium would like to stress that it adheres to what was said in its written pleadings, albeit that certain points require clarification in order to

reply to the oral arguments made by counsel for the Democratic Republic of the Congo. Further, I should like to point out that the oral arguments made by counsel for the Democratic Republic of the Congo on the merits are noticeably different from those made in its Memorial. As a result, I have been obliged to redraft my statement from top to bottom and to deplore the fact that there are only 24 hours in a day. I would therefore beg the Court's indulgence if there is the occasional hesitation in the course of my speech.

7. Mr. President, Members of the Court, it will doubtless be no surprise to you that I am beginning by addressing the issue of universal jurisdiction (I), before subsequently examining, at much greater length, the issue of the immunity of members of foreign governments (II).

I. In exercising universal jurisdiction on account of war crimes and crimes against humanity, Belgium, by issuing the arrest warrant of 11 April 2000, is not in violation of any sovereign right of the Democratic Republic of the Congo

Mr. President, Members of the Court,

8. I would remind the Court that the Application of the Democratic Republic of the Congo instituting proceedings contended that the arrest warrant of 11 April 2000 violated international law in that, on the one hand, Belgium claimed to exercise universal jurisdiction over individuals not present on Belgian territory and, on the other, the warrant failed to take account of the immunity from criminal proceedings of the individual against whom it was issued, given that he was a Minister in office. The Application of the Democratic Republic of the Congo thus contained two distinct claims: it contested the universal jurisdiction *in absentia* exercised by Belgium and Belgium's refusal to recognize the immunity of Ministers for Foreign Affairs.

9. In its Memorial filed on 15 May 2001, the Democratic Republic of the Congo did indeed address both issues, but it failed to present any submission at all on universal jurisdiction. Belgium noted this in its Counter-Memorial[2], but now — lo and behold! — in its oral arguments, counsel for the Democratic Republic of the Congo has returned to the issue and criticized the extent of the universal jurisdiction provided for by the Belgian Law[3]. Thus, in this phase of the proceedings,

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[2]Counter-Memorial of Belgium, paras. 3.2.36-3.2.37.

[3]CR 2001/6, 16 Oct. 2001, Ms Chemillier-Gendreau, pp. 32 *et seq.*

Belgium is not exactly sure whether the Democratic Republic of the Congo intends to lodge formal submissions on this matter or not.

10. Be that as it may, Belgium is nevertheless in a position to make the following seven points:

(1) In its Memorial, the Democratic Republic of the Congo dealt in some detail with the issue of genocide[4], whereas the arrest warrant issued against Mr. Yerodia accuses him only of incitement to commit war crimes and crimes against humanity, not crimes of genocide[5]. Counsel for the Democratic Republic of the Congo correctly stated that this matter had no bearing on the present dispute and, on this occasion, they did not return to it; Belgium takes note of this[6].

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(2) In its Memorial[7], the Democratic Republic of the Congo devoted much effort to demonstrating a point which Belgium was in no way contesting, namely, that States are *not* obliged to exercise universal jurisdiction by default for such crimes[8]. The Democratic Republic of the Congo did not return to this point during the oral phase of the proceedings. Belgium likewise notes this.

(3) In its Memorial, the Democratic Republic of the Congo admitted that the Geneva Conventions of 12 August 1949 obliged all Contracting States to prosecute the perpetrators of crimes covered by these Conventions, irrespective of their nationality or the place of commission of the offence, provided they are present on the territory of the forum State[9]. This obligation to prosecute is in effect expressed in Articles 49/50/129/146, common to the four Geneva Conventions of 1949. The Democratic Republic of the Congo has not challenged this point. Belgium takes note of this too.

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[4]Memorial of the Democratic Republic of the Congo, para. 78.

[5]Counter-Memorial of Belgium (hereinafter "CMB"), Ann. 3 (unless otherwise indicated, the Annexes cited are those of the CMB).

[6]CR 2001/16, 16 Oct. 2001, *per* P. d'Argent, p. 16.

[7]*Ibid.*

[8]Counter-Memorial of Belgium, para. 3.3.5 *et seq.*.

[9]Memorial of the Democratic Republic of the Congo, para. 76.

(4) In its Counter-Memorial, Belgium demonstrated that each State was also under an obligation to prosecute the perpetrators of crimes against humanity who are present on its territory[10]. In Belgium's view, this obligation derived from custom as embodied, in particular, in resolutions of the General Assembly of the United Nations[11], of the Economic and Social Council[12], of the Security Council[13], and the Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (1996 version, Art. 9)[14]. As far as conventions are concerned, the rule also appears in the Statute of the International Criminal Court, notably in its preamble[15]. The fact that the Statute of the International Criminal Court is not yet in force in no way detracts from the argument based on the preamble, given that the preamble refers to existing rules[16] and that the customary nature of the substantive law of the Statute has already been recognized by international jurisprudence[17]. For its part, the Democratic Republic of the Congo considered in its Memorial that there was no conventional rule obliging States to prosecute the perpetrator of a crime against humanity present on their territory[18]. It has maintained this position during the present phase of the proceedings, but it has also stated that it does not wish to oppose a custom in process of establishment[19]. The Court will judge whether the Statute of the International Criminal Court is or is not a conventional rule, even though that Statute is not yet in force, but for the moment Belgium need merely note that the Democratic Republic of the Congo does not wish "to impede the establishment of this custom". Belgium considers that to be an acceptance of its own position and takes note of this also.

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[10]Counter-Memorial of Belgium, paras. 3.3.10-3.3.22.

[11]A/res. 2840 (XXVI), 18 Dec. 1971, para. 4; 3074 (XXVIII), 3 Dec. 1973, para. 1 (Ann. 93).

[12]E/res. 1986/65, 29 May 1989, principle 18 (Ann. 93).

[13]S/res. 978, 27 Feb. 1995, para. 1; 1234, 9 April 1999, para. 7; 1291, 24 Feb. 2000, para. 14; 1304, 16 June 2000, para. 13 (Anns. 84-86); 1366, 30 Aug. 2001, preamble, 17th consid.

[14]Ann. 96.

[15]Ann. 92.

[16]Counter-Memorial of Belgium, paras. 3.3.12/18.

[17]International Criminal Tribunal for the former Yugoslavia, case IT-95-17/1-T, *Furundzia*, 10 Dec. 1998, para. 227; *ibid.*, App., case IT-94-1-A, *Tadic*, 15 July 1999, para. 223.

[18]Memorial of the Democratic Republic of the Congo, para. 79.

[19]CR 2001/6, 16 Oct. 2001, *per* Ms Chemillier-Gendreau, p. 30.

(5) In any event, the arrest warrant of 11 April 2000 was also concerned with incitement to commit war crimes[20] and, from this point of view alone, the warrant was legally founded in light of the rules also accepted by the Democratic Republic of the Congo. This, too, Belgium is bound to note.

(6) In its Counter-Memorial, Belgium explained at some length why the exercise of universal jurisdiction *in absentia* or by default did not violate any rule of international law. In particular, it referred to the *Lotus* case, to the historical background of the drafting of Article 3, paragraph 3, of the Tokyo Convention of 14 September 1963, to the fact that a

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provision of this kind has been incorporated in the majority of subsequent conventions of international criminal law, to the practice of prosecutions by default in States with a civil-Roman or Germano-Roman tradition, and to certain examples of legislation similar to Belgium's[21]. The Democratic Republic of the Congo has not contested any of these sources in the present phase of the proceedings. Once again, Belgium takes note of this.

(7) Finally, both during the provisional measures phase of the proceedings and in its Memorial, the Democratic Republic of the Congo criticized the Belgian Law of 1993/1999 on account of the proliferation of conflicts of jurisdiction to which implementation of this Law might lead. In its Counter-Memorial, Belgium demonstrated that this risk was inherent in the structure of the international community, but that it was a very slim risk[22], as the present case moreover shows. This point was not addressed again by the Democratic Republic of the Congo in its oral arguments. Belgium takes note accordingly.

11. In concluding this first part, Belgium notes that, if it has correctly followed the arguments put by plaintiff's counsel, the Democratic Republic of the Congo thus no longer contests, at the legal level, the arrest warrant of 11 April 2000 in so far as it involves the exercise of universal jurisdiction by default, as provided for by the Belgian Law of 1993/1999. Further, Belgium considers it significant that the Democratic Republic of the Congo appears to adopt the

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[20]Counter-Memorial of Belgium, Ann. 3, pp. 17-18.

[21]Counter-Memorial of Belgium, paras. 3.3.28/74.

[22]Counter-Memorial of Belgium, paras. 3.3.77/88; the case of cybercrime is a good example; however, the draft convention of the Council of Europe makes no attempt to resolve these conflicts of jurisdiction; see Art. 22, para. 4 of the draft, in conventions.coe.int/treaty/fr/projets/FinalCybercrime.htm.

doctrinal position of the Belgian *ministère public* with regard to universal jurisdiction, which mirrors precisely what is happening in the present case. On Monday morning, Professor François Rigaux welcomed the point of view expressed by the Belgian Advocate-General, Mr. Winants, when the latter suggested, some weeks ago, during a speech at the opening of the new term of the Brussels Appeal Court, a jurisdictional hierarchy in relation to crimes under international humanitarian law: this hierarchy was as follows: first, jurisdictions of international criminal courts, next courts *loci delicti*, next courts of the perpetrator's nationality and, finally, the universal jurisdiction of any State entitled to exercise it[23].

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Mr. President, Members of the Court, this is an exact reflection of what happened in the Yerodia case: there was no international jurisdiction to adjudicate on acts which occurred in the territory of the Democratic Republic of the Congo in August 1998; the State where the acts took place and the State of which the accused was a national were one and the same, it was the Democratic Republic of the Congo, and it did nothing to exercise its jurisdiction. Therefore there only remained, in fourth place, the State which accepted that it should exercise its universal jurisdiction. It was under such conditions that the Belgian investigating judge took action.

12. Admittedly, the Democratic Republic of the Congo maintains certain reservations with regard to this jurisdiction, yet such reservations are either more political than legal or are irrelevant to the issue of universal jurisdiction as such.

Thus, on the political front, Professor Monique Chemillier-Gendreau asked how Belgium or France would have reacted

> "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?"[24]

An excellent question! And, in the case of Rwanda, Belgium is in a position to reply citing specific facts: as a result of certain errors which might have played a role in the massacre of ten Belgian para-commandos at Kigali, on the morning of 7 April 1994, a colonel in the Belgian army

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[23]CR 2001/5, 15 Oct. 2001, *per* F. Rigaux, p. 22.

[24]CR 2001/6, 16 Oct. 2001, Ms Chemillier-Gendreau, p. 28.

was duly court-martialled[25]. What is more, complaints were filed by the victims of genocide against the then Belgian Minister for Foreign Affairs and Minister for National Defence on account of their abandonment of the Rwandan population, not only under the provisions of the Belgian Criminal Code concerning failure to assist a person in danger, but also on the basis of the 1993 Law which is so derided by the Applicant. These complaints, filed by Belgian, Rwandan and Zairian victims in 1995 and 1997, were mentioned before the Belgian Senate's parliamentary commission of inquiry[26], and are currently the subject of a judicial investigation, in accordance with Article 3 of the Law of 17 November 1996 on ministerial responsibility. While these complaints have not yet led to a formal result, Belgium has no hesitation, Mr. President, Members of the Court, in saying that it would find it quite legitimate for a third State to take an interest in the matter. Belgium would merely observe that there are crimes and crimes, and that failure to assist a person in peril is not the same thing as incitement to commit crimes against international humanitarian law.

14. Furthermore, in legal terms, if Belgium has correctly understood her argument, Professor Chemillier-Gendreau criticized a universal jurisdiction which failed to observe certain principles of international law, in particular the immunity from suit of Heads of State and Ministers for Foreign Affairs in office[27]. However that is no longer a matter of universal jurisdiction by default, *as such*; what is contested is violation of the immunity of members of foreign governments, which we shall come to in a moment.

15. Thus, unless it is much mistaken, Belgium believes that it may consider the question of universal jurisdiction by default to be no longer under challenge by the Applicant and that, from this standpoint, the international lawfulness of the arrest warrant of 11 April 2000 is accepted. Although we are no longer in "the heart of darkness" (as Joseph Conrad might have said) on this point, we shall however come back to it, at least provisionally, in the second part of this statement.

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[25]Brussels Court Martial, 4 July 1996, *RDPC*, 1997, p. 115.

[26]Parliamentary documents, Senate, 1997-1998, No. 1/611/7.

[27]CR 2001/6, 16 Oct. 2001, Ms Chemillier-Gendreau, p. 34.

II. MR. YERODIA'S IMMUNITY FROM CRIMINAL JURISDICTION DOES NOT APPLY IN THE CASE OF WAR CRIMES OR CRIMES AGAINST HUMANITY

Mr. President, Members of the Court.

16. An extremely classic way of opening a statement — as the Court will often have seen — consists in saying: "Mr. President, the question before the Court today is extremely simple." That is one way for the speaker to indicate that the opposing party understands nothing of the matter, that it is complicating the case deliberately, but that the speaker, as a good lawyer, will explain it in words of one syllable, and that since a clear concept requires only simple language, the Court will be obliged to conclude that the speaker is right.

014 With this introduction, honourable Members of the Court, you will certainly have guessed that I am not going to claim that this case is simple and that our opponents have understood nothing. Belgium does indeed believe, echoing Léon-Paul Fargue, "that there is no true simplicity, only simplifications".

17. The question of Mr. Yerodia's immunity from criminal process in respect of the arrest warrant of 11 April 2000 is a difficult question, but this is so less by reason of the applicable law and more by reason of its political aspects. The political aspects must therefore be disregarded in order to concentrate on the law alone. This I shall now endeavour to do.

18. The Democratic Republic of the Congo has submitted oral arguments covering many points. Belgium will endeavour to review the principal points.

In essence, the arguments of the opposite Party may be grouped around four main planks:

— the statutes of the various international criminal courts provide no grounds for national courts to disregard the immunity of the perpetrators of grave breaches against international humanitarian law (A);

— Belgium has misinterpreted the sources it cites to justify the arrest warrant of 11 April 2000 (B);

— certain sources do not warrant discussion (C);

— in any event, there is no practice which justifies the lifting of the immunity of leaders in office (D).

Mr. President, these four points will underpin this part of my statement.

A. The statutes of the various international criminal courts provide no grounds for national courts to disregard immunity of the perpetrators of grave breaches against international humanitarian law

19. If the Belgian Counter-Memorial offered counsel for the opposite Party some problems of digestion (*supra*, para. 3), and Belgium would apologize for this, some of their oral statements produced the same effect in the Belgian camp. Mr. President, fashions come and go, and the
015 autumn-winter trend for this year is the notion of "conceptual confusion". Thus, the Democratic Republic of the Congo stated, and repeated *ad nauseam*, at least half a dozen times, that the Belgian Counter-Memorial has perpetrated a conceptual confusion between official State capacity as a substantive defence, and the procedural defence based on ministerial immunity[28]. According to the Applicant, Belgium erroneously relies on the statutes of international criminal courts (Nuremberg International Military Tribunal, Art. 7; Tokyo International Military Tribunal, Art. 6; Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27[29], — to which might be added the Statute of the Special Tribunal for Sierra Leone, Article 6, para. 2[30]). For the Democratic Republic of the Congo, Belgium thus erroneously relies on the statutes of international criminal courts, which exclude only the substantive defence, the question of criminal responsibility, and not the procedural defence of immunity.

20. Mr. President, Members of the Court, if we take the language of these statutes literally, counsel for the Democratic Republic of the Congo appears to be correct: these texts (with the exception of Article 27, paragraph 2, of the Statute of the International Criminal Court) preclude not so much ministerial immunity from criminal suit — a procedural defence — as the notion that the accused cannot be criminally liable because he was acting on behalf of the State — a substantive defence.

It is true that immunity is primarily founded on the principle *par in parem*, and that this only serves any purpose before a domestic court, not before an international tribunal. Belgium agrees with the Democratic Republic of the Congo on this point.

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[28]CR 2001/5, 15 Oct. 2001, P. d'Argent, p. 4; CR 2001/6, 16 Oct. 2001, p. 9, pp. 11-13, pp. 16-17; see also the Memorial of the Democratic Republic of the Congo, paras. 42 and 67.

[29]Counter-Memorial of Belgium, para. 3.5.21/33.

[30]United Nations document S/2000/915 and 1234, 4 Oct. and 22 Dec. 2000; S/2001/40 and 95, 12 and 31 Jan. 2001.

21. Nevertheless, the step from the substantive defence based on State sovereignty to the procedural one based on immunity is not a long one, since the common basis of both defences is State sovereignty. That is no doubt why Justice Jackson used both concepts simultaneously in the
016 extract quoted by Belgium and recalled by Professor Pierre d'Argent[31]. It would, moreover, have been surprising if so eminent a jurist had fallen prey to the confusion which our opponents have denounced. In reality, contrary to what is suggested by the Democratic Republic of the Congo, Justice Jackson certainly was aware of the meaning of the words he used when he spoke of both immunity and responsibility. We must remember that some 25 years earlier at the Versailles Peace Conference — and Professor François Rigaux did allude to this in his first statement[32] — the United States had steadfastly opposed the idea of putting Kaiser Wilhelm II on trial. For the United States, such a trial would indeed have breached the immunity of the German Emperor. It was in fact "immunity" that was in issue, rather than any substantive exemption from responsibility[33]. It was therefore no accident that the future prosecutor at the Nuremberg International Military Tribunal submitted his report to the President of the United States (the report which Belgium quotes) using both the concepts of "immunity" and of "responsibility".

22. There is a further point, however, and, unlike our opponents, Belgium holds that its interpretation of the cited provisions of international criminal tribunals totally confirms the applicability of these provisions to the procedural defence. Mr. President, Members of the Court, let us return to the *obiter dictum* of the Nuremberg judgment, where, according to the Democratic Republic of the Congo, Belgium "distorts the sense of the text."[34].

23. The Nuremberg Tribunal stated:

> "The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment."[35]

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[31]CR 2001/6, 16 Oct. 2001, p. 13.

[32]CR 2001/5, 15 Oct. 2001, p. 21.

[33]Counter-Memorial of Belgium, Ann. 33.

[34]CR 2001/6, 16 Oct. 2001, Mr. Pierre d'Argent, p. 17.

[35]Judgment of 30 September/1 October 1946, official document, I, p. 223.

24. According to the Democratic Republic of the Congo, the text concerns the Nuremberg Tribunal alone and the facts before that Tribunal, and in no way does it have the general application which Belgium attributes to it.

017 I would make two remarks:

(1) the Democratic Republic of the Congo does not deny that this text concerns immunity, nor does it claim that it is limited to the ground of defence referred to in Article 7 of the Statute of the Nuremberg Tribunal when read literally;

(2) "[A] reasonable, practical interpretation of this passage", to echo the words of my colleague and friend Professor Pierre d'Argent, does not preclude its manifestly general nature; on the one hand, unlike other passages in the judgment, the Nuremberg Tribunal makes no allusion here to its specific position as an international tribunal and, on the other hand, it stresses only the international criminality of the acts; let us re-read the text together, if you will. The Tribunal states:

> "The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts *which are condemned as criminal by international law*." (Emphasis added.)

What matters here is the serious nature of the crime, not whether the court hearing the case is a domestic or international one.

25. Similarly when the International Military Tribunal of Tokyo rejected the defence of diplomatic immunity relied on by the accused, Oshima, the Tribunal said:

> "Oshima's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an 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."[36]

26. In Professor d'Argent's opinion, the end of this excerpt means that immunity is lifted only "before tribunals having jurisdiction in the case", by implication only the Tokyo International

018 Military Tribunal. This interpretation is debatable, because it adds elements to the text. It seems to Belgium to be more consistent to say that this text applies to any tribunal, domestic or international, entitled to take cognisance of crimes against international law. The Tokyo Tribunal in fact said:

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[36]The Tokyo Judgment, ed. Roling and Ruter, Amsterdam University Press, 1977, Vol. I, p. 456; Annex . . .

"In any event, this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction"; the Tokyo Tribunal did not say (I cite the passage with appropriate changes): *"In any event, this immunity has no relation to* the *crimes against international law charged before* this *tribunal"!*

Thus these are indeed, in the case of the Nuremberg Tribunal as in the case of the Tokyo Tribunal, general statements of principle in no way confined to cases of individuals appearing before international criminal jurisdictions. They may apply to domestic proceedings as well as to international proceedings and are therefore equally precedents that can be invoked by domestic tribunals.

27. Not only that, Mr. President, Members of the Court, let us look at the work of the International Law Commission on the Nuremberg principles[37], on which counsel for the Democratic Republic of the Congo have kept very quiet. Principle III, adopted in 1950, was very similar to Article 7 of the Statute of the Nuremberg Tribunal. However, it no longer spoke, as did the latter, of "freeing from responsibility" or "mitigating punishment" resulting from the "official position of defendants". It said, in more general terms, that the fact of acting as a head of State or responsible Government official did not relieve the person so acting "from responsibility under international law"[38]. In fact, during the preparatory work on this provision one of the members of the International Law Commission, none other than Georges Scelle, had suggested the following text, which I cite in an unofficial French version; unfortunately I did not have the original French text available: *«La situation de chef d'Etat, de dirigeant ou d'agent public ne confère aucune immunité en matière pénale ni n'atténue la responsabilité.»* ["The office of head of state, ruler or civil servant , does not confer any immunity in penal matters nor mitigate responsibility."][39]

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28. Excuse me for repeating here what Belgium wrote in its Counter-Memorial, namely that this text had the merit of clearly covering both aspects of the exception based on the defendant's official capacity: the question of "immunity" *stricto sensu* of the official and that of his substantive liability. The amendment was, however, rejected due to the fact that Georges Scelle's text

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[37]Counter-Memorial of Belgium, paras. 3.5.107/110.

[38]Counter-Memorial of Belgium, para. 3.5.105.

[39]Counter-Memorial of Belgium, para. 3.5.109.

corresponded to the one on which the Commission was working. We read in the Commission report

> "The Chairman said that that paragraph [the one proposed by Georges Scelle] corresponded to paragraph 3 provisionally adopted by the Commission, according to which the official position of a Head of State or responsible civil servant did not confer *any immunity in penal matters nor mitigate responsibility.*"[40] (Emphasis added.)

29. In other words, rather than go into detail on the issue the International Law Commission preferred to retain a general formulation, but, given that it covered both the substantive defence relating to liability and the procedural defence based on immunity. This position has never varied, and we find it again *inter alia* in the commentary adopted in 1996 by the International Law Commission on the final text of the draft Code of Crimes against Peace and Security of Mankind. Relevant excerpts have been reproduced and analysed in the Belgian Counter-Memorial[41], and if it were necessary I could very easily repeat the exercise in interpretative analysis that I have just completed regarding the preparatory work on the Nuremberg principles.

30. The Court may set its mind at ease; I will spare it that penance. It is enough simply to state here that this work has not been discussed by the Democratic Republic of the Congo. It is nevertheless essential, because the famous "conceptual confusion" that is laid at Belgium's door in fact has its source in these texts, which were intended to cover, by a terminological abridgment that is convenient but perhaps regrettable from the layman's point of view, the two aspects of a defence based on the official position of the individual concerned.

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31. One more word on the alleged conceptual confusion laid at Belgium's door. Belgium is not the only victim; five of the members of the House of Lords who, in the Judgment of 25 March 1999, rejected the immunity invoked by Pinochet, referred, among other sources, to the statutes of international criminal jurisdictions[42] and thus took no account of the fact that the letter of these texts referred only to the substantive defence.

32. Belgium accordingly feels that it is in good company in concluding that the statutes of international criminal jurisdictions may legitimately be regarded as one of the foundations of

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[40]Counter-Memorial of Belgium, para. 3.5.110.

[41]Counter-Memorial of Belgium, paras. 3.5.111/114.

[42]*ILM*, 1999, pp. 594 (Browne-Wilkinson), 599 (Goff of Chieveley), 624 (Craighead), 634-635 (Hutton), 647-650 (Millet), 660 (Philips of Worth Matravers).

exclusion of the immunity of a foreign government official before domestic courts. Whether we like it or not, these statutes are a part of practice, and since they are found in texts prepared and accepted by the *entire* international community of States they clearly represent the expression of their *opinio juris*. States, including their domestic courts, are obviously justified in taking them into account. As you have just been reminded, the House of Lords judges in the *Pinochet* case did not deny themselves this option.

B. Belgium is said to have misinterpreted the sources that it cites to justify the legality of the arrest warrant of 11 April 2000

33. On several points Belgium is said to have misinterpreted the sources that it cites in support of the exclusion of immunity. This allegedly concerns the Treaty of Versailles, Article IV of the 1948 Convention on the Crime of Genocide, complementarity in the Statute of the International Criminal Tribunal, and the *Pinochet* and *Qaddafi* decisions.

The list is a long one, but it reflects the many points raised by our learned adversaries.

1. The Treaty of Versailles

34. In the opinion of the Democratic Republic of the Congo, the position of Belgium with respect to the Treaty of Versailles is weak, because William II was not prosecuted, and in any event he was no longer the Kaiser[43]. Belgium maintains, however, that the precedent of the Treaty of Versailles is relevant because the principle of a prosecution of William II, as I have already pointed

021 out (*supra*, p. 21) gave rise to a famous controversy between States advocating the trial of William II — principally France and Great Britain — and the United States, which was strongly opposed to it, precisely for reasons of immunity! Yet the American position remained isolated and the Franco-British argument prevailed. Even though the solution finally adopted was an international tribunal (Treaty of Versailles, Art. 227), this was a compromise suggested by N. Politis[44]. The wish expressed by the member States of the conference, with the exception of the United States, was nevertheless to exclude any defence based on immunity, and on that ground Belgium claims that the use of this precedent is fully justified.

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[43]CR 2001/6, 16 Oct. 2001, P. d'Argent, p. 12.

[44]Counter-Memorial of Belgium, Ann. 33.

2. The 1948 Convention on the Crime of Genocide

35. The discussion is theoretical — our opponents have so stated and we share their opinion — since there is no accusation of genocide in the arrest warrant. The 1948 Convention is nonetheless interesting and its analysis is relevant if we wish to establish the existence of exceptions to the rule of immunity of foreign governments. If the Court takes the trouble to re-read Article IV of a Convention that it knows well, it will find that this Article excludes all immunity, whatever the Democratic Republic of the Congo may think[45]. It is true that exclusion of this immunity concerns only the State *loci delicti* (Art. VI). However, this limitation on the criminal jurisdiction of the States parties prescribed by the text of the Convention no longer has much meaning today because it is accepted that the punishment of genocide is an obligation *erga omnes*[46]. Thus, again quite rightly, Belgium is entitled to cite this Convention as an example, and as a precedent for the exclusion of immunity before foreign domestic courts.

3. The Statute of the International Criminal Court and the principle of complementarity

36. Belgium has taken the view that the principle of complementarity prescribed by the Statute of the International Criminal Court (Preamble, Arts. 1 and 17) meant that, if national courts genuinely wished to prosecute the crimes provided for in the Statute, they should not take account of any immunity of suspects; otherwise, in practice, this principle of complementarity would become a principle of exclusivity of jurisdiction on the part of the International Criminal Court, with the latter being obliged to have systematic recourse to the provision in Article 17, paragraph 1, concerning the inability of a State with jurisdiction in the case in question "genuinely to carry out the investigation or prosecution". And yet, since this was not the intention of the authors of the Statute, and since the extent of the crimes covered by the Statute almost always implies the involvement of State authorities, it must be inferred that complementarity of necessity excludes any immunity of the latter[47].

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[45]CR 2001/6, 16 Oct. 2001, P. d'Argent, p. 16.

[46]*I.C.J. Reports 1996*, p. 661, para. 31.

[47]Counter-Memorial of Belgium, paras. 3.5.31/38.

Our opponents doubt that any time should be wasted on such an argument, because it is said to be based on a "quantifiable" concept, of merely "statistical significance"[48].

37. Belgium cannot see in what respect the "quantification" cited by our opponents refutes its argument. Apart from the arguments on this point in the Counter-Memorial — to which we will not return — I would point out that the Statute of the International Criminal Court indeed provides for a criterion of scale in the exercise of its jurisdiction, even if it is not precisely quantifiable. It should be stressed, Mr. President, Members of the Court, that the Statute of the International Criminal Court limits its jurisdiction to the gravest of serious crimes: the crimes of aggression (Art. 5), genocide (Art. 6), crimes against humanity (Art. 7) and war crimes, but not just any war crimes, only those that are "part of a plan or policy or . . . a large-scale commission of such crimes" (Art. 8, para. 1).

38. It is thus clear that the Statute restricts the jurisdiction of the Court to crimes on a large scale, of such magnitude that it is difficult to see how they could be committed without the involvement of State authorities. If immunity were to bar prosecutions, the Statute would lose all point. It is unlikely that this is what States wanted. Moreover, doctrine confirms this analysis[49].

023 39. However, there is one point on which Belgium is prepared to meet the Democratic Republic of the Congo: in its interpretation of the work of the Venice Commission[50]: it is true that this work deals with the compatibility of domestic constitutional immunities with the Statute of the International Criminal Court. The fact nonetheless remains that that quotation included by Belgium in its Counter-Memorial admits of a much wider interpretation[51] and that this quotation, contrary to the assertion by the Democratic Republic of the Congo, is strictly accurate, since Belgium has simply cited the authentic French text, which can, moreover, be found in its

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[48]CR 2001/6, 16 Oct. 2001, P. d'Argent, p. 15.

[49]Triffterer, O., in *Commentary on the Rome Statute of the International Criminal Court*, ed. O. Triffterer, Baden Baden, Nomos, 1999, pp. 502, 509, 512-513.

[50]CR 2001/6, 16 Oct. 2001, P. d'Argent, p. 15.

[51]Counter-Memorial of Belgium, para. 3.5.32 (4).

Annexes[52]. Belgium nevertheless acknowledges that, having regard to the context of that Commission's work, the excerpt cited could also be given a narrower meaning that which Belgium feels might be derived from it.

4. The *Pinochet* and *Qaddafi* decisions

40. The Democratic Republic of the Congo seems to be surprised that Belgium is citing lengthy excerpts from the *Pinochet* decision[53]. Belgium knows perfectly well that the House of Lords dealt only with the case of a former Head of State and that obviously that decision must not be made to say what it does not say. The fact remains that, as the Democratic Republic of the Congo cannot surely help but admit, the excerpts cited show that the Law Lords' reasoning, taken literally, could certainly lead to exclusion of the immunity of an incumbent Head of State. Allow me to read one such excerpt:

> "Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its official immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention — to provide a system under which there is no safe haven for torturers — will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention."

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What Belgium simply wishes to demonstrate, Mr. President, is that with such perfectly correct premises Lord Browne-Wilkinson, the author of this excerpt, could equally well have concluded that immunity could not apply, in the case of such acts, to an incumbent head of State. It is the logic of his reasoning that leads to this conclusion — which, however, I hasten to acknowledge that he did not draw.

41. As for the *Qaddafi* Judgment, Belgium drew the inference from that case that the French Court of Cassation recognized the existence of exceptions to the principle of criminal immunity for members of foreign governments[54], since the Court excluded terrorism from "the exceptions to the

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[52]Counter-Memorial of Belgium, Ann. 34, French version.

[53]CR 2001/6, 16 Oct. 2001, P. d'Argent, p. 18.

[54]Counter-Memorial of Belgium, paras. 3.5.91-3.5.97.

principle of immunity of a foreign head of State in power"[55]. Belgium is pleased to see that the Applicant acknowledges that "[t]he exception recognized by the *Cour de cassation* no doubt concerns the Statutes of the International Criminal Court and the international criminal tribunals"[56]. However, we have shown that these Statutes are elements of practice applicable to national courts. Furthermore, and once again this is significant, neither the Court of Cassation nor the Prosecutor-General in his application for cassation claimed to set aside the immunity on the ground that the Libyan Head of State was in power and/or that the court seised of the case was a domestic court[57].

42. It will be noted in passing that the Democratic Republic of the Congo appears to accuse Belgium of inconsistency in not arguing that exclusion of immunity extends to all crimes under international law since exclusion of immunity is said to represent an obligation of *jus cogens*[58]. Belgium does not really see the point of the objection. While the Nuremberg Tribunal did speak of excluding immunity for all crimes under international law[59], it is nevertheless the case that the sources cited by Belgium confine themselves to excluding immunity for the three categories of crimes against peace, war crimes and crimes against humanity.

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Sometimes opposing counsel accuse Belgium of being overzealous, sometimes they accuse it of not being zealous enough. All things considered, Belgium is perhaps not the one guilty of inconsistency!

C. According to the Democratic Republic of the Congo, certain sources cited by Belgium do not merit discussion

43. The Democratic Republic of the Congo appears to contest the worth of certain sources cited by Belgium, while it virtually ignores others.

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[55]Counter-Memorial of Belgium, para. 3.5.92.

[56]CR 2001/6, 16 Oct. 2001, p. 20 (P. d'Argent).

[57]Counter-Memorial of Belgium, Ann. 50.

[58]CR 2001/6, 16 Oct. 2001, p. 20 (P. d'Argent).

[59]Counter-Memorial of Belgium, para. 3.5.61.

Of the sources cited by it, Belgium made particular reference to resolutions adopted by the United Nations General Assembly and by the Economic and Social Council and to a declaration by the President of the Security Council[60]. The Democratic Republic of the Congo queries whether "reliance [can] seriously be placed on resolutions by United Nations organs when their legal scope is not otherwise made clear"[61]. These texts were cited by Belgium. If the Democratic Republic of the Congo disputes their legal worth, it is for it to show that they are without legal value, if that is what it means: just saying so is not enough.

Belgium, for its part, is aware that the Court does not dismiss out of hand the legal value of a resolution by the United Nations General Assembly[62].

44. Belgium also cited national sources[63] to which the Democratic Republic of the Congo refuses to accord any significance[64]. The Democratic Republic of the Congo cannot however deny that these sources are aspects of practice and, as such, must be taken into consideration.

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45. As for the American case law cited by Belgium concerning the Alien Tort Claims Act and the Act of State doctrine[65], our opponents simply dismiss it because it appears to them "from the conceptual point of view [to be] far removed from the subject under discussion"[66]. Mr. President, asserting something is not the same as demonstrating it: the Court will determine whether these sources are so removed from the issue in dispute.

46. Finally, the writings of publicists: our opponents in their Memorial cite nine authors who, in their view, affirm the principle that a foreign Head of State enjoys absolute criminal immunity. They added a tenth in their oral statement and also cited the *Institut de droit international*[67].

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[60]Counter-Memorial of Belgium, paras. 3.5.46-3.5.55.

[61]CR 2001/6, 16 Oct. 2001, p. 17 (P. d'Argent).

[62]For example, *I.C.J. Reports 1986, Judgment of 27 June 1986*, p. 106, para. 203; *Namibia, I.C.J. Reports 1971, Advisory Opinion of 21 June 1971*, p. 50.

[63]Counter-Memorial of Belgium, paras. 3.5.56-3.5.60.

[64]CR 2001/6, 16 Oct. 2001, p. 17 (P. d'Argent).

[65]Counter-Memorial of Belgium, paras. 3.5.72-3.5.80.

[66]CR 2001/6, 16 Oct. 2001, p. 18 (P. d'Argent).

[67]CR 2001/5, 15 Oct. 2001, p. 49 (P. d'Argent).

Aside from the fact that this case concerns a Minister, not the Head of State, it will be observed that, of these ten authors, five do not raise the question of immunity in the case of serious crimes under international humanitarian law and are therefore not significant; on the other hand, three do address the question of crimes under international law and, contrary to the Democratic Republic of the Congo's assertion, these three authors explicitly recognize that immunity might not be effective in the case of crimes of this kind; one author does not take a stand one way or the other[68]. The tenth author, cited during the oral statement, does in fact support the Congo's argument, but Belgium will point out that the passage quoted in the oral statement concerns solely Heads of State, not members of a government — which is what Mr. Yerodia was.

47. There remains the resolution adopted by the *Institut de droit international* in August 2001; the Court is quite familiar with it. Belgium will simply ask the Court to re-read its Counter-Memorial[69] to ascertain whether, as its honourable opponent, Professor Pierre d'Argent, contends, Belgium has indulged in "remarkable mental acrobatics . . . in order to demonstrate the
027 alleged compatibility of the resolution with its own position and at the same time vainly to establish its irrelevance to the present proceedings"[70]. Mr. President, Members of the Court, denigrating is not demonstrating, and Belgium will therefore not dwell any further on this point.

48. The more basic point is that there is one simple fact to be found in the writings of publicists. a fact proved by excerpts, all of which are included in the annexes to Belgium's Counter-Memorial, where we find over 30 authors of the view that immunity does not protect from prosecution perpetrators of serious crimes under international humanitarian law. If we add to that the members of the International Law Commission, of which there were 15 in 1950 and 34 — obviously different individuals — in 1996, plus all those who participated in turn in the work on the Draft Code of Crimes Against Peace and Security of Mankind, we find over 80 authors, including some of the century's most eminent, whose position supports the argument advanced by my country.

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[68]Counter-Memorial of Belgium, para. 3.5.119.

[69]Counter-Memorial of Belgium, paras. 3.5.116-3.5.117.

[70]CR 2001/5, 15 Oct. 2001, p. 49 (P. d'Argent).

D. The argument that there is no practice justifying the exclusion of immunity for incumbent government members

49. Mr. President, honourable Members of the Court, now, approaching the end of this overly lengthy statement, we come to two arguments which I must still rebut: first, according to the Democratic Republic of the Congo, most of the sources cited by Belgium concern individuals who are not, or were no longer, in office; and, second, there is said to be no practice by national courts concerning sitting members of foreign governments.

1. The argument that the sources cited by Belgium are irrelevant because the members of government in question were no longer in office

50. The Applicant has repeatedly laid stress on the fact that the sources cited by Belgium (the Versailles Treaty, the statutes of past international criminal tribunals, Law No. 10) concern members of government who were no longer in office and that, accordingly, these sources are not relevant[71]. Rather, it is that argument which has no bearing for the following reasons:

(1) Most of the sources cited by Belgium make no mention of the fact that the member of government in question was no longer in office. While the defendants were no longer acting in their official capacities at the time of the Nuremberg and Tokyo trials, there is nothing in the statutes of those tribunals or in their judgments raising this point as a justification for the prosecution of the individuals who had been at the helm of the State.

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(2) If the termination of office was sufficient by itself to justify disregarding official capacity, it served no purpose to state that specifically in the statutes of those tribunals. Since those statutes contained specific provisions removing the defendant's official capacity as a bar to prosecution and since, as we have seen, those provisions covered any and all possible immunity, this was a general rule unaffected by the incidental issue of whether or not the individual to whom the rule applied was still in office. Once again, the lengthy discussions held in 1919 over Wilhelm II's immunity under the Treaty of Versailles, at a time when he was already out of power, prove that the factual question — Wilhelm II was no longer in power — was independent of the legal question — that of immunity.

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[71]CR 2001/5, 15 Oct. 2001, p. 19 (F. Rigaux); CR 2001/6, 16 Oct. 2001, p. 16 (P. d'Argent).

(3) In the case of the International Criminal Court, it goes without saying that the argument based on the fact that the accused is no longer in office obviously has no bearing, because that Court is intended to be a permanent one.

2. The absence of practice

51. It is undeniable, Mr. President, Members of the Court, that examples of criminal proceedings brought by a State against a sitting Minister are not legion. It is true that no court tried to prosecute Wilhelm II during the first world war or Hitler during the second[72]. This observation, although accurate, does not however settle the issue: what interest, Mr. President, Members of the Court, what interest could there have been, what benefit could have been derived from criminal proceedings against men against whom the international community was waging war at the time? Even if "absurdity is no obstacle in politics", as Napoleon said, in law every sensible judge had a sufficient understanding of the absurd, if not the ludicrous, to know not to try to bring justice to bear on men whom the most powerful armies were unable to check.

029 The idea of doing justice, without taking account of the immunities of the future defendants, was, however, already to be found in the legal thinking of the time. The authors cited by Belgium in its Counter-Memorial, like Gardner and Merignhac, provide evidence of this[73]. I shall take the liberty of respectfully referring the Court to them.

52. But that is not all. In truth, there is a practice. Mr. President, Members of the Court, when Belgium refers to the above-quoted passages from the jurisprudence of the Nuremberg and Tokyo Tribunals, what is this if not practice? It is the practice of international criminal tribunals, but it is practice and there is no legal text stating that this practice is a monopoly reserved for those tribunals. Quite to the contrary, we have seen that the quoted excerpts have a scope of application which is in no way limited exclusively to the confines of those tribunals.

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[72]CR 2001/5, 15 Oct. 2001, p. 19 (F. Rigaux).

[73]Counter-Memorial of Belgium, paras. 3.5.121-3.5.125.

53. If the doctrine of the International Law Commission and the consequences of the imminent entry into effect of the International Criminal Court are added to that, what we have is perhaps not yet genuine precedents but we do have a body of thought and a system in favour of lifting the immunity of individuals accused of the gravest of grave crimes.

54. That fact that no national court has yet applied the rule, except for the *Markovic* precedent cited by the Applicant[74], is of no particular weight. There is a first time for everything. The court which was to try the Kaiser was to be the first of its type. It remained on the drawing board, but it had progeny, a posterity that can be described as glorious. Can it be claimed that Nuremberg was not an outstanding event in the history of mankind and of international relations?

55. The pace of history is quickening today. There is moreover an example of an indictment of a Head of State in power: Slobodan Milosevic was still in office as President of the Federal Republic of Yugoslavia when he was indicted on 24 May 1999 by the Prosecutor of the Criminal Tribunal for the former Yugoslavia. True, this was an indictment by an organ of the United Nations, not a national judicial authority. What matters is that it is an element to be added to a process in constant evolution. According to some, the Statute of the International Criminal Court

030 could enter into force within less than a year, and the Democratic Republic of the Congo itself makes a contribution to the writing of history when it asserts in its Memorial: "the . . . thing which could counterbalance, and even take precedence over, the protective régime of immunities would be a rule of international law requiring the exercise of 'universal' jurisdiction"[75].

The Democratic Republic of the Congo acknowledges that war crimes allow the exercise of universal jurisdiction[76] and Belgium obviously cannot but share that conclusion. If the terms of the arrest warrant of 11 April 2000, which *inter alia* accused Mr. Yerodia of incitement to commit war crimes are seen in the light of that conclusion, we find that we have come full circle. The Applicant and the Respondent are in agreement, at least on the question of war crimes, that immunity cannot constitute a bar to their prosecution. Since there is, moreover, agreement on

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[74]CR 2001/5, 15 Oct. 2001, p. 47 (P. d'Argent).

[75]Memorial of the Democratic Republic of the Congo, para. 15.

[76]Memorial of the Democratic Republic of the Congo, para. 76.

universal jurisdiction as well, it may be asked, honourable Members of the Court, whether there remains any dispute on the merits between the Democratic Republic of the Congo and Belgium.

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We can now conclude, Mr. President, Members of the Court, that "the darkling gleam falling from the stars" begins to give way to the dawn and the giant Atlas no longer stands alone in carrying, if not the weight of the world, then at least the "unbearable lightness" of international criminal justice.

I thank you for your patient attention, Members of the Court, and would ask you, Mr. President, kindly to give the floor to Mr. Bethlehem.

The PRESIDENT: Thank you, Professor David. Je donne maintenant la parole à M[e] Daniël Bethlehem.

031 M. BETHLEHEM :

LE FOND DE L'AFFAIRE

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, je reviens très brièvement à la barre ce matin pour achever l'exposé des conclusions de la Belgique sur le fond de l'affaire. Comme je l'ai dit hier lors des mes observations liminaires sur ce volet de notre argumentation, les conclusions de la Belgique sur le fond se divisent en un certain nombre de parties — la nature et l'effet du mandat d'arrêt, la compétence universelle et la question de l'immunité — qui ont été développées devant vous ce matin et, pour terminer, à présent, cette très brève section. A titre subsidiaire, au cas où vous estimeriez d'abord que la Cour a compétence en l'espèce et que la requête est recevable et, ensuite, que l'émission et la diffusion du mandat d'arrêt violaient effectivement l'immunité du ministre des affaires étrangères de la RDC, se pose alors la question des mesures de réparation. J'en ai déjà dit un mot hier, la RDC prie la Cour de dire et juger :

1) qu'en émettant et en diffusant le mandat d'arrêt, la Belgique a violé l'immunité dont bénéficiait le ministre des affaires étrangères en exercice de la RDC;

2) que la constatation de ce fait constitue une forme adéquate de réparation;

3) qu'il est interdit à la Belgique ainsi qu'à d'autres Etats d'exécuter le mandat d'arrêt; et

4) que la Belgique doit retirer et mettre à néant le mandat d'arrêt.

2. Hier, dans mon exposé sur la compétence et la recevabilité, j'ai attiré votre attention sur le fait que les troisième et quatrième demandes adressées à la Cour concernaient en pratique les effets juridiques du mandat d'arrêt à l'égard d'un simple citoyen de la RDC et qu'à ce titre ces demandes n'ont pas leur place dans la présente instance. Il en est ainsi parce que le mandat n'est pas du tout lié, — ni quant au fond, ni quant à la procédure — au statut de ministre des affaires étrangères de la RDC de M. Yerodia Ndombasi. Il n'y a aucun lien impératif, par conséquent, entre les deux premières demandes dont la Cour est saisie, qui concernent l'allégation selon laquelle l'émission et la diffusion du mandat violaient l'immunité du ministre des affaires étrangères de la RDC, et les troisième et quatrième demandes, qui aujourd'hui, dans les circonstances où tout le monde s'accorde à reconnaître que M. Yerodia Ndombasi ne bénéficie pas de l'immunité, tendent à obtenir l'annulation du mandat et l'interdiction de l'exécuter.

3. Eu égard à ces considérations, la Belgique a déjà conclu à l'irrecevabilité de ces demandes. J'aborderai maintenant, s'agissant toujours de ces demandes, une autre question. Il

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s'agit de savoir, au cas où la Cour conclut qu'elles sont recevables et qu'il y a effectivement lieu de les examiner lors de la phase sur le fond, s'il y a lieu pour la Cour d'en connaître. Plus clairement, il s'agit de savoir si des demandes invitant la Cour à ordonner le retrait et l'annulation d'un mandat d'arrêt national et à interdire son exécution entrent à bon droit dans le cadre de la fonction judiciaire reconnue à la Cour. La Belgique conclut à l'irrecevabilité de ces demandes et soutient qu'elles ne devraient par conséquent pas faire l'objet d'une décision quelconque de la part de la Cour.

4. Le conseil de la RDC a examiné brièvement cette question mardi[77]. Il a pour l'essentiel soutenu que la RDC ne priait pas la Cour par ces demandes d'indiquer à la Belgique les mesures

[77] CR 2001/6, p. 38-39.

que celle-ci devra prendre pour donner effet à un arrêt déclarant que l'émission et la diffusion du mandat d'arrêt ont violé l'immunité du ministre des affaires étrangères de la RDC. Le choix des moyens, a-t-il dit, resterait ouvert à la Belgique. Mais, a-t-il fait valoir, la conséquence logique de la constatation de la violation de l'immunité d'un ministre des affaires étrangères, la conséquence logique serait que le mandat soit annulé et qu'il soit interdit à la Belgique et à tous les autres Etats de l'exécuter.

5. La Belgique estime quant à elle qu'à supposer que la Cour constate qu'il a eu violation de l'immunité du ministre des affaires étrangères, il ne s'ensuit pas du tout que le mandat d'arrêt doive être annulé. Celui-ci produit ses effets aujourd'hui. Rien n'indique qu'il porte aujourd'hui atteinte à l'immunité du ministre des affaires étrangères de la RDC. Aussi la Belgique estime-t-elle que l'analyse développée par les conseils de la RDC est erronée. Ce que la RDC sollicite en réalité par ses troisième et quatrième demandes, c'est que la Cour dicte à la Belgique la manière selon laquelle celle-ci devrait donner effet à l'arrêt de la Cour constatant que le mandat d'arrêt a violé l'immunité du ministre des affaires étrangères de la RDC.

6. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, la Charte des Nations Unies règle la question de l'obligation de se conformer aux arrêts de la Cour. Au paragraphe 1 de l'article 94, tous les Membres des Nations Unies s'engagent à se conformer aux décisions de la Cour dans tous les litiges auxquels ils sont parties. Au paragraphe 2 de l'article 94, il est prévu que si un Etat ne satisfait pas aux obligations qui lui incombent en vertu d'un arrêt rendu par la Cour l'autre Etat peut recourir au Conseil de sécurité. Il faut toutefois présumer par principe que les décisions de la Cour seront respectées. Comme la Cour permanente l'a fait observer dans l'affaire de l'*Usine de Chorzów*, un tribunal, dans l'exercice de sa fonction judiciaire, «ne peut ni ne doit envisager l'éventualité qu'[un] arrêt resterait inexécuté»[78]. Cette idée a été reprise par la Cour actuelle dans l'arrêt qu'elle a rendu sur la compétence et la recevabilité en l'affaire du *Nicaragua*[79].

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[78] *Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*, p. 63.

[79] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis), compétence et recevabilité, arrêt, C.I.J. Recueil 1994*, p. 437, par. 101.

7. Comme la Belgique l'a relevé dans son contre-mémoire, le règlement des différends par les cours et tribunaux internationaux repose sur un partage des fonctions communément admis entre la cour ou le tribunal en question et les Etats dont les intérêts sont en cause. La fonction de la cour ou du tribunal est de se prononcer sur le droit. Il appartient à l'Etat en question de mettre en œuvre le droit ainsi défini.

8. Ce partage des fonctions traduit à la fois le principe consacré par la Cour permanente dans l'affaire de l'*Usine de Chorzów* — selon lequel un tribunal ne doit pas présumer que ses décisions ne seront pas respectées — et l'idée selon laquelle il peut y avoir pour un Etat plusieurs manières de se conformer à la décision d'un tribunal qui lui est adressée. Elle reflète aussi un équilibre entre le rôle des tribunaux qui est de se prononcer sur le droit, la responsabilité incombant aux Etats de se conformer au droit et la souveraineté des Etats grâce à laquelle ils organisent leurs affaires comme bon leur semble, à la seule condition de respecter le droit.

9. Ce partage des compétences et l'équilibre qu'il exprime sont si bien acceptés que ces questions ne se sont en fait posées que rarement devant Cour. Elles se sont néanmoins posées et la Cour a alors clairement confirmé la distinction entre son rôle, qui est de dire le droit, et la responsabilité incombant aux Etats, qui est de se conformer à ses décisions.

10. C'est ainsi, par exemple, que dans l'affaire *Haya de la Torre*, qui est mentionnée dans notre contre-mémoire, la Cour avait été priée d'indiquer comment l'arrêt qu'elle avait rendu dans l'affaire du *Droit d'asile* devait être mis en œuvre. La Cour a rejeté cette demande en ces termes :

> «Ayant ... défini, conformément à la Convention de La Havane, les rapports de droit entre Parties relativement aux questions qui lui ont été soumises [dans l'affaire du *Droit d'asile*], la Cour a rempli sa mission. Elle ne saurait donner aucun conseil pratique quant aux voies qu'il conviendrait de suivre pour mettre fin à l'asile, car, ce faisant [et c'est là le point clé], elle sortirait du cadre de sa fonction judiciaire.»[80]

033 11. En parvenant à cette conclusion, la Cour a également noté qu'il n'entrait pas dans sa fonction judiciaire d'opérer un choix entre les diverses voies qui s'ouvrent à un Etat pour se conformer à sa décision.

12. La Cour a confirmé par la suite dans l'affaire du *Cameroun septentrional* le raisonnement qu'elle avait développé dans l'affaire *Haya de la Torre*.

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[80] *Haya de la Torre, arrêt, C.I.J. Recueil 1951*, p. 82.

13. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, la Belgique soutient que le principe énoncé dans ces affaires ne prête guère à controverse. Le partage des fonctions qu'il consacre est une caractéristique communément admise du règlement international des litiges. Il incombe simplement à la Cour en l'espèce de déterminer si, comme l'affirme clairement la Belgique, les troisième et quatrième demandes que la RDC a soumises à la Cour portent sur la question de l'obligation de se conformer à un arrêt qui déclarerait que le mandat d'arrêt a violé l'immunité du ministre des affaires étrangères. Dans l'affirmative, il s'ensuit nécessairement, selon nous, que ces demandes sortent du cadre de la fonction judiciaire reconnue à la Cour et ne devraient par conséquent pas donner lieu à un quelconque prononcé de la Cour.

14. Une décision ou déclaration de la Cour ordonnant l'annulation du mandat d'arrêt et interdisant de procéder à son exécution peut être envisagée dans une double perspective. Ou bien elle constituerait une injonction adressée par la Cour à la Belgique, lui indiquant comment se conformer à un arrêt constatant que le mandat d'arrêt a violé l'immunité du ministre des affaires étrangères de la RDC, ou bien ce serait en fait une décision tranchant au fond une question dont la Cour n'est pas saisie en l'espèce, qui est celle de savoir si un mandat d'arrêt accusant un simple particulier de violations graves du droit international humanitaire commises ailleurs est valable. Dans un cas comme dans l'autre, la décision ou la déclaration sortirait du cadre de la fonction judiciaire reconnue à la Cour et n'a pas sa place selon nous en l'espèce. Aussi la Belgique soutient-elle que les troisième et quatrième demandes de la RDC ne devraient pas donner lieu en l'espèce à une quelconque décision de la Cour sur le fond.

15. Monsieur le président, Mesdames et Messieurs de la Cour, ainsi se termine l'exposé de la Belgique sur le fond de l'affaire. La Belgique formulera ses observations finales tant sur la compétence et la recevabilité que sur le fond et exposera officiellement ses conclusions finales lors de sa réplique demain après-midi.

Le PRESIDENT : Je vous remercie beaucoup. Je donne la parole au juge Fleischhauer qui voudrait poser une question.

M. FLEISCHHAUER : Merci, Monsieur le président, ma question s'adresse aux représentants de la Belgique en l'espèce et est la suivante. Dans l'exposé qu'il a fait hier sur la suite donnée au mandat d'arrêt, M. Bethlehem a indiqué que jusqu'à une date très récente aucun Etat n'avait réagi au mandat d'arrêt. Il a toutefois ajouté qu'Interpol avait été saisi d'une demande de publication d'une notice rouge mais qu'aucune décision n'avait encore été prise à ce sujet. Puis-je demander aux représentants de la Belgique de donner des précisions sur ce point ?

The PRESIDENT: Thank you. I would remind the representatives of Belgium that their reply to this question may be given either, and preferably, in the course of tomorrow's oral proceedings, or in writing after the close of the oral proceedings. That ends this morning's sitting and the first round of the oral presentation of the Kingdom of Belgium. The Court will meet tomorrow, Friday 19 October at 9.30 a.m., to hear the second round of oral argument of the Democratic Republic of the Congo, and at 4.30 p.m. to hear the second round of oral argument of the Kingdom of Belgium. Thank you. The sitting is closed.

The Court rose at 11.35 a.m.