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006 The PRESIDENT: Please be seated. The sitting is open. We meet this morning to hear the second round of oral argument in the case between the Democratic Republic of the Congo and the Kingdom of Belgium, and this morning we shall hear the representatives of the Democratic Republic of the Congo, to whom I shall give the floor without further ado. I believe that Professor Rigaux will open the arguments. Professor, you have the floor.

Mr. RIGAUX: Mr. President, Members of the Court, after the two half-days of oral argument on behalf of Belgium, counsel for the Democratic Republic of the Congo are both reassured and disappointed. Reassured, because it would seem that what we have heard was nothing more than a paraphrase of the Counter-Memorial and that the arguments expounded by counsel for the Democratic Republic of the Congo, highly pertinent arguments as I believe, were not really addressed. Yet disappointed, at an intellectual level of course, since ultimately nothing very significant has emerged from these two half-days.

I would submit the following seven points to the Court:

I. One matter was highlighted in the oral arguments, indeed in the opening statement by the Agent of the Belgian Government, a matter which was somewhat less in evidence in the Counter-Memorial, more particularly in paragraph 1.7. The Belgian Government is said to have invited the Congolese Government, on several occasions, to take over the prosecution, and, had the Government accepted, it is said that the case file would have been transmitted to the Congolese Government. We have scant information concerning the form of the proposal, and the exact time when it was made and, as I said in the first round, the Government of Belgium and its counsel have a somewhat confused notion of time. It is plainly essential to know when this proposal was made. And it might be imagined that a cautious investigating judge, having before him a complaint against an incumbent Minister for Foreign Affairs of a friendly country, would pause for thought. And were he to have the idea of transmitting the case file to the Congolese judicial authorities, he would have done so through hierarchical channels: the Prosecutor-General, the Minister for Justice, the Minister for Foreign Affairs. However, true to his maverick reputation, the investigating judge, Mr. Vandermeersch, certainly did not do this. And these proposals thus appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been

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issued. Are we to assume that the Application of the Democratic Republic of the Congo was already before the Court? If so, I find that the Belgian proposal aggravates Belgium's case, for it would appear that some sort of pressure was exercised on the Congolese authorities through the issue of an arrest warrant. And had the Congolese Government accepted the offer, would this not in a sense have endorsed and legitimized the wrong committed when the arrest warrant was issued?

II. Second observation. Mr. President, Members of the Court, the Court has been invited to make a distinction between the exercise of jurisdiction and of a power of enforcement. And what appears to be said is that, in any event, only enforcement is covered by immunity from suit. I would simply like to re-read the operative part of the arrest warrant. I shall not invite Members of the Court to rummage in their papers for this item of evidence, I shall read it out, and you will be able to say whether or not it is a measure of enforcement:

> "We issue a warrant for the arrest of the accused.
>
> We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;
>
> We require the governor of the prison to receive the accused and keep him in the detention centre pursuant to this arrest warrant;
>
> We require all those in whom public authority has been invested and to whom this arrest warrant shall be shown to lend all assistance to its execution.
>
> So pronounced and our seal adhibited in Brussels on 11 April 2000."
>
> Followed by the signature and the seal.

If I have understood the position of counsel for Belgium, enforcement could only have been said to occur if the individual concerned had actually been imprisoned in the detention centre at Forest. Yet the same arrest warrant declares such a scenario to be impossible were the Minister to be present in Belgium on an official visit. I believe that an arrest warrant is a measure of enforcement by its very nature and that consequently the distinction which counsel for Belgium endeavour to introduce simply shows that they are somewhat unsure of their position of principle on the absence of immunity.

III. Third element. In developing this line of reasoning, counsel for Belgium have adopted an oddly contradictory stance: either the immunity of members of a foreign government is

restricted to measures of enforcement alone, or else it applies also to earlier acts of jurisdiction. The Court is aware that the second interpretation is that commonly adopted by a unanimous body of scholarly opinion and that the French Court of Cassation upheld this interpretation in the *Qaddafi* case. If counsel for Belgium are falling back to the position that measures of enforcement alone are prohibited, it is also because they are aware of the weakness of their stance.

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IV. Fourth point. Mention was made yesterday, on several occasions, of the proceedings brought by the Prosecutor-General before the Indictments Chamber of the Brussels Appeal Court. For the benefit of Members of the Court who are not Belgian, I would explain that under Belgium's Code of Criminal Investigation it is the Prosecutor-General *(procureur général)* within the jurisdiction of the Appeal Court in question who has overall responsibility for prosecutions, the Crown Prosecutors *(procureurs du roi)* being, as it were, no more than deputies to the Prosecutor-General who conduct criminal prosecutions by delegation. Two points may be made which indicate that the Prosecutor-General's initiative was belated and selective.

It is significant that the four cases which are currently before the Indictments Chamber all concern foreign dignitaries, heads of State, heads of government or ministers for foreign affairs, who are entitled to claim total immunity from suit. It is however significant, and merits reiteration, that the Prosecutor-General only began to concern himself with the lawfulness of the arrest or other warrants issued when the Head of Government of the State of Israel also became the subject of a complaint, an affair which aroused massive media interest in Belgium. It was in this case that the Prosecutor-General first took the matter to the Indictments Chamber. Subsequently, it was realized that the African dignitaries in the same situation could not simply be forgotten about, and the cases were therefore joined. The Court will accordingly note that the principle of the sovereign equality of States was not particularly respected here. In one case it was deemed worthwhile to examine the lawfulness of the prosecution, and the other cases were only joined incidentally. This is a first indication of selectivity.

The other element of selectivity lies in the questions of law submitted to the Indictments Chamber by the Prosecutor-General. What is at issue, according to the information available to counsel for the Democratic Republic of the Congo? The Chamber is simply being asked to settle a point of interpretation of the Belgian Statute, a point concerning universal jurisdiction — namely

009 must the accused be present in Belgian territory for prosecution to take place. In the *travaux préparatoires* of the 1993 Law — the matter did not come up again in 1999 — we find it stated that a prosecution might be instituted in the case of crimes under international law, even if the suspect could not be found in Belgium, though it was later said that it was not deemed necessary to spell out this point in the actual text of the Law. It is thus in relation to this interpretation of the Law — apparently now a controversial one — that the matter has been placed before the Indictments Chamber.

The Court will note that — though the coincidence is a surprising one — only cases in which immunity is also an issue have been referred to the Chamber. The issue of immunities as such has not been raised. However, as I said in the first round, in accordance with a long line of decisions by the Court of Cassation, the Belgian courts are obliged to apply the directly applicable principles of international law and of international custom. Thus it is an issue which should have been raised automatically.

Be that as it may, Members of the Court, you will observe that it was somewhat irresponsible on the part of the investigating judges to have brought prosecutions, and even to have issued an arrest warrant, pursuant to a Law whose interpretation is now found to be open to doubt, this being the point submitted to the Indictments Chamber. You will see, moreover, that there is a degree of contradiction in the Counter-Memorial. I invite the Court to compare paragraphs 2.67 and 3.2.35, which contain two somewhat differing views as to the meaning of the famous Article 12 of the Law of 1878.

V. What is the significance of the information thus given to the Court? It would clearly be presumptuous of the Belgian Government to expect the Court to stay pronouncement of its judgment until the Indictments Chamber decides whether to annul the arrest warrant. It would be annulled through the operation of Belgian domestic law, which would not at all satisfy the Democratic Republic of the Congo. What is important to the Democratic Republic of the Congo is that the immunity of its Minister for Foreign Affairs should have been respected and that the violation of that obligation must be made good by the recognition of the internationally wrongful character of the warrant, and it is surely somewhat insulting — I have to say it — that the

010 Prosecutor-General hopes perhaps to secure the annulment of the arrest warrant solely on the basis of a reinterpretation of the Belgian Statute.

Here again we find that Belgium has got itself confused about time. At what moment in time should the validity of an act be judged? At the time the document is issued, no matter that the individual concerned subsequently lost his status as Minister for Foreign Affairs; and it is also as of the time when proceedings were instituted that the Court's jurisdiction must be determined.

VI. Counsel for Belgium persevere with their endeavours, already apparent in the Counter-Memorial, to mischaracterize the international legal proceedings brought by the Democratic Republic of the Congo as proceedings by way of diplomatic protection. Their aim in so doing, of course, is to be able to rely on the defence of failure to exhaust domestic remedies.

The answer to this argument is threefold:

(a) The Democratic Republic of the Congo brings the proceedings in its own right. It is the rights of the Congo which have been violated by the violation of the immunity of its diplomat; this is not an action on behalf of an individual national.

(b) We are told that the accused — and we are obliged to call him this in accordance with Belgian law — could have appealed. What appeal? No channel of appeal is available until the investigating judge forwards the case file to the Crown Prosecutor. The latter makes submissions to the *Chambre du conseil* and at that time, for the first time, the accused may ask the *Chambre du conseil* to dismiss the charge. Let there be no mistake, the proceedings brought by the Prosecutor-General are proceedings which he alone is authorized to bring. The only course of action open to the accused in criminal proceedings against him, I reiterate, is to defend himself before the *Chambre du conseil.*

(c) Lastly, and this third consideration may be the most decisive one, what would remain of immunity, Mr. President, Members of the Court, if the person entitled to such immunity were obliged to defend himself against acts contrary to international law carried out within the internal legal order of a State by addressing himself to the authorities of that State? It is a vicious circle. What it would mean is that a person entitled to immunity would have to

011 address himself to authorities which he is simultaneously claiming have no jurisdiction in the matter. That is thus a notion which appears to me to be totally unacceptable.

VII. One final observation, Mr. President, Members of the Court. Counsel for Belgium suggested yesterday that the Court should use its powers with "judicial restraint". *Inter alia* because the questions of law which must be considered in this case are not yet fully settled. It was said that there has been a shift in opinion, chiefly with regard to the issue of universal jurisdiction. Opinion, it was said, is moving towards broadening the jurisdiction of States, particularly in respect of persons accused of having committed crimes against international law.

Apparent surprise was expressed that the Democratic Republic of the Congo should be withdrawing from the terrain of universal jurisdiction. In reality, that is an area of no interest to us. It was mentioned of course in the initial Application, but what interests the Democratic Republic of the Congo is a finding that its Minister for Foreign Affairs has been the victim of an internationally wrongful act. Whether this occurred in the course of the exercise of an over-extensive universal jurisdiction seems to us to be an entirely secondary consideration. This is not say that the Court should not examine the issues of international law raised by universal jurisdiction, but it will not do so at the request of the Applicant: it will, as it were, have the issue forced upon it as a result of the defence strategy adopted by the Respondent, since the Respondent appears to contend not only that it is lawful to exercise such jurisdiction but that it is moreover obligatory to do so, and therefore that the exercise of such jurisdiction can represent a valid counterweight to the observance of immunities. I accordingly believe that the Court will in any event be obliged to adjudicate on certain aspects of universal jurisdiction, but I would stress that this is not at the request of the Applicant, which is not directly interested in the issue. What does interest us of course, as you already know, and as you will see shortly when the Agent of the Democratic Republic of the Congo reads out our submissions, is that the Court should make a finding of the wrongfulness under international law of the issue of an arrest warrant against the Minister for Foreign Affairs of the applicant State. Thank you.

012 The PRESIDENT: Thank you, Professor Rigaux. I shall now give the floor to Professor Chemillier-Gendreau.

Ms CHEMILLIER-GENDREAU: Mr. President, Members of the Court.

The second rounds of oral argument so patiently listened to by the Court have no doubt frequently produced the impression that the Parties have been engaged in a dialogue of the deaf. The representatives of the Democratic Republic of the Congo have a very keen sense after hearing Belgium's oral argument that a deaf ear has been turned to a number of points which we tried to get across.

That is the case in respect of the two matters about which I shall be speaking this morning: the Kingdom of Belgium's desire to raise preliminary objections and the question of universal jurisdiction, to which I shall briefly return.

I. Challenging the Court's jurisdiction and the admissibility of the Congo's claim, Belgium sets out four arguments which are barely distinguishable from one another and are all founded on the change in the situation.

Underlying the dispute is Belgium's interpretation of two factual considerations: in its view, the change in Mr. Yerodia's position undoes the violation of immunity, and the arrest warrant, described as being free of all dangerous effects, causes no prejudice to the Democratic Republic of the Congo, which wrongly complains that its sovereignty has been violated. As the Democratic Republic of the Congo considers the interpretation advanced by Belgium to be mistaken, we must return for a moment to these two considerations.

A. In respect of Mr. Yerodia's career, Belgium's interpretation is founded on faulty reasoning from the perspective of time. The arrest warrant is a legal instrument vitiated from the outset by the violation inherent in it of an immunity which, for a sitting Minister for Foreign Affairs, could not in the context be diminished by any exception. This nullity *ab initio* is the root of the prejudice. The subsequent change in post of the individual concerned does not extinguish the legal defect. The only way that can be achieved is by withdrawing the instrument. It is the

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warrant of 11 April 2000 which is at issue here, not another warrant issued at another time. What may have become of Mr. Yerodia after that date has no bearing on the case before the Court. His having ceased to hold any ministerial post is of no consequence, nor would be his leaving the

territory of the Congo, his residence in another country, a change of nationality, or even his death. The wrong took place, and has not been redressed.

Belgium has ignored certain arguments raised in our earlier oral statements. For example, while the arrest warrant recognizes that Mr. Yerodia's arrest in Belgium would engage Belgium's international responsibility, that statement is incomplete. The arrest would obviously engage Belgium's international responsibility, but first it is the instrument leading to that arrest, i.e., the arrest warrant, which engages its international responsibility. The Democratic Republic of the Congo filed its Application in order to obtain a ruling by the Court that such international responsibility has been incurred.

Belgium also refrains from responding to the argument we made to counter the assertion that it was merely prosecuting a private individual for acts committed outside the scope of his office. Admittedly, the alleged crimes were not committed by Mr. Yerodia, the Minister, but by Mr. Yerodia, Director of the Office of the President of the Republic. But I pointed out in this regard that the accusation names a public figure and could not be aimed at a private individual, because he is accused of acts and omissions which do not lie within a private individual's power, notably preventing acts of violence. And as the public figure pursues his career by becoming Minister for Foreign Affairs, the arrest warrant issued against him names the Minister and is addressed to his residence.

B. In respect of the contention that the arrest warrant causes no prejudice to the Democratic Republic of the Congo, Belgium's interpretation is just as tendentious.

The constant attempt to understate the significance of the warrant has no basis in reality. The terms of the warrant are there to be seen, and they go so far as to identify the prison to which Mr. Yerodia would be sent, as Professor Rigaux noted. They include the executory formula. The act violating the Democratic Republic of the Congo's sovereignty is thus characterized, in these few pages, which are not simply one text like any other, but a text designed to result in the incarceration of a sitting Minister.

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Thus, nothing about this case is abstract. Mr. Yerodia's position was concrete and corresponded to the reality of his power as Minister for Foreign Affairs within the Congolese Government. By means of this warrant, the Belgian judge decided on his arrest, another concrete

act. Belgium regards the issuance of one of the most powerful instruments of criminal procedure against an individual with particular responsibility for representing the State as insignificant in the context of relations between States. The Democratic Republic of the Congo, whose most sensitive interests have been prejudiced, respectfully looks to the Court to rule on whether or not there is a dispute in this respect, and it places its trust in the Court's response on this point.

Showing that there is in fact a dispute is the response to Belgium's first argument concerning the preliminary objections. Is it also necessary to recall that, under the well-settled jurisprudence, the Court's jurisdiction is to be determined at the time of its seisin? The other arguments are closely related. In support of the second point, seeking a ruling that the case is moot, Belgium returns to two precedents on which it relies. We do not find the arguments advanced during the oral statements to be persuasive.

In the Judgments of 20 December 1974 in the *Nuclear Tests* cases, the Court stated that the Applicants were not seeking a declaratory judgment but that their "original and ultimate objective . . . was and has remained to obtain a termination of those tests". Belgium draws an unfounded parallel, interpreting the Democratic Republic of the Congo's action as an attempt to obtain a declaratory judgment. But France had publicly announced its intention to cease conducting nuclear tests. Has Belgium publicly stated its intention to have the arrest warrant cancelled? Until that happens, there can be no comparison with the *Nuclear Tests* case.

Nor does the case concerning *Northern Cameroons* have any greater relevance to the present proceedings. The Court's jurisdiction in that case was founded upon Article 19 of the Trusteeship Agreement, which provided for such jurisdiction in the event of a dispute over the Agreement. The Court first found that there was a dispute between Cameroon and the United Kingdom; it then ascertained that the claim did indeed have a subject-matter complying with Article 32, paragraph 2, of the Rules of Court. And while the Court ultimately held, despite its affirmative responses on those two points, that it could not rule on the merits, that was because the Trust had ceased to exist.

015 The United Nations General Assembly had acknowledged that and Cameroon had not disputed it. Thus, to find that there had been a breach of the law, as requested by Cameroon, would have led the Court to "revise" the United Nations resolution. There is absolutely no basis for comparison between that case and the case we are dealing with today. The Northern Cameroons precedent

contributes nothing to the argument that the case is now moot. Belgium acknowledges moreover that the Democratic Republic of the Congo has not submitted a new claim. And a judgment holding that an arrest warrant issued against a sitting Minister for Foreign Affairs is without basis in the law, which is what the Democratic Republic of the Congo is seeking, cannot be considered to be a declaratory judgment.

Belgium attempts to re-cast its argument — still the same argument — by maintaining that the case now before the Court is different from the one presented in the Application. So as not to weary the Court, the only response to be given is that the same warrant, still in effect, lies at the heart of a claim which remains unchanged.

Finally, Belgium makes this out to be a diplomatic protection action in disguise, but Professor Rigaux has dealt sufficiently with that point.

This line of argument in its various permutations cannot prevail in the face of an enduring dispute.

II. I shall now briefly turn to the concern expressed by Belgium that the Court could rule *ultra petita* vis-à-vis the Congo's claim. Thereby, it seeks, as it were, an endorsement of its policy and an assurance that universal jurisdiction will not be called into question. The Democratic Republic of the Congo's position remains focused on respect for the sovereign equality of States. Belgium adopts a strange approach in its attempt to justify its legislation and the warrant deriving from it. It happily mixes examples from international courts with others based on the practice of domestic courts, cases of former Heads of State with cases of Heads of State in power, the general obligation to assume universal jurisdiction with the possibility of doing so specifically when the named individual is not on the territory. And, to the question I raised last Tuesday concerning the reaction to be had by Belgium or France if a Congolese judge issued an arrest warrant against the Head of State in power or the sitting Minister for Foreign Affairs of Belgium or France for acts committed in Rwanda, my friend Eric David replies without answering. He cites the example of a

016 Belgian colonel prosecuted in Belgium for acts committed in Rwanda or of Belgian ministers placed under judicial investigation in Belgium. But this disregards the argument of foreign nationality and that of absence from the territory and, as far as the colonel is concerned, that concerning immunities of the highest category. Thus, I find no confirmation that Belgium or

France would accept that the same steps be taken in their regard which the Democratic Republic of the Congo has rightly seen as a violation of its sovereignty.

If the law is to progress, it needs to be better assured than this of the ground on which its rules rest and of their exact content. It is as close as possible to what international law says to assert:

1. That rules developed for international courts must be distinguished from those which apply to actions before domestic courts. In the former case, the sovereignty of all States is subject to one and the same limitation and, directly or indirectly, has been accepted by them. In the latter, mutual respect for their sovereignties must be absolute. Nothing, therefore, justifies the view that what has been prescribed in the case of international criminal courts extends automatically to domestic courts. How could criminal law be satisfied with approximations of this kind?
2. That the international criminal jurisdiction of domestic courts in respect of acts committed by foreigners abroad, including international crimes, inevitably conflicts with the sovereignty of another State and must therefore have grounds in treaty or customary law authorizing those courts to act; and that a set of grounds exists in this respect which should not be given an extensive interpretation.
3. That the extension of this jurisdiction to the case where the person concerned is not within the territory has at present no confirmed legal basis, which is very different from saying, as Professor David would have us say, that we no longer challenge universal jurisdiction *in absentia*. The active trend towards punishment of international crimes operates in favour of extending it in this way, but the need to protect the territorial sovereignty of States which are equals tends to limit any such expansion. In the light of this case, Belgium would like the Court, by finding in favour of a universal jurisdiction which possesses those broader bounds, to intervene in the lawmaking process and thereby endorse the validity of its policy. But this is not the place for the Court to do that, nor is it helpful in this case for it to go so far.

4. For our part, we contend that the point to which the Court should confine its ruling in regard to universal jurisdiction is, as Professor Rigaux has just said, its use where it infringes an immunity from suit of an incumbent Minister for Foreign Affairs. And we then request the

Court to declare that its use in these circumstances, as embodied in Belgium's action, is contrary to international law.

Mr. President, Members of the Court, thank you.

The PRESIDENT: Thank you, Professor, and I now give the floor to Mr. d'Argent.

Mr. d'ARGENT: Mr. President, Members of the Court, my reply will deal with three points, all of which relate to the central question of the violation of the immunity of the Minister for Foreign Affairs by the disputed warrant.

Let me return first to Belgium's assertion that the arrest warrant was not liable to cause any such violation; I shall then deal briefly with the alleged exception to immunity before domestic courts where the accusation concerns crimes under international law; and I shall conclude with a few details about the subject-matter of the claim and the incorrect statements by Belgium on that point.

I. According to Belgium, the arrest warrant did not violate the immunity of the incumbent Minister for Foreign Affairs of the Congo, and consequently did not injure the sovereign rights of the Democratic Republic of the Congo. In an attempt to substantiate this assertion, Belgium puts forward three main arguments: first, the fact that the arrest warrant was directed against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo is "purely incidental", to use the words employed by Mr. Bethlehem yesterday; second, the arrest warrant was devoid of effect abroad and its effect would be suspended in Belgium in the case of an official visit; finally, the violation of the sovereignty of the Democratic Republic of the Congo is not sufficiently proved, which ties up with the argument relating to the absence of a claim for material injury.

Let us examine these arguments for a few moments, if you will permit.

(i) It is incorrect to claim that the fact that the warrant was directed against the incumbent Minister for Foreign Affairs was purely fortuitous. As I have already pointed out and as Professor Chemillier-Gendreau reminded the Court yesterday, the official status of the accused and the place of exercise of his official duties are referred to in the warrant. What is more, and what counts, is not a claim that such official status was purely incidental or fortuitous; what

counts is the fact that the investigating judge was fully aware of the official status of the accused, who is clearly identified as such, and that he did not draw the conclusions he should have done from that in regard to his lack of jurisdiction *ratione personae.*

(ii) No violation of the sovereign rights of the Congo existed, it is said, since the arrest warrant did not have the effect which the Congo attributes to it. The warrant, it is asserted, is devoid of any mandatory scope in third States and would not be executed in Belgium, since the investigating judge would suspend it in the event of an official visit by the Minister.

The arrest warrant, if devoid of any legal effect, is it not a mere whim of the investigating judge, a mere plaything? Do not these various assertions by Belgium actually worsen its position once again, because if the arrest warrant is totally devoid of effect — which is not the case — is it not even more reprehensible to take judicial steps whose sole purpose is then to cast blame on another State by publicising the fact to the rest of the world?

As regards the legal effect of the arrest warrant, Mr. Bethlehem stated: "The warrant is a *national* arrest warrant" (CR 2001/8, p. 55, para. 131). This is not true, unless we are to believe that the investigating judge himself is unaware of what he is doing: the arrest warrant of 11 April 2000 is headed: "International *arrest warrant by default*". The fact that the arrest warrant is allegedly of no effect in the territory of the Democratic Republic of the Congo or in third States is irrelevant in this respect, as well as being open to question. The discussion here about the lack of an Interpol Red Notice is a smokescreen. Again, what counts is the claim in

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the arrest warrant that a person is subject to Belgium's criminal jurisdiction when his office places him totally beyond its reach.

Moreover, do I need to remind the Court again that in the *Qaddafi* case the French Court of Cassation held that the mere fact of opening an investigation — into facts that may speak both for and against the accused — concerning an incumbent Head of State sufficed to constitute a violation of the immunity from suit enjoyed by incumbent foreign Heads of State? The opening of an investigation is a preparatory step, preceding the arrest warrant, which is a coercive judicial act of a far more serious kind.

I shall not dwell further on the claim regarding the lack of effect of the warrant in Belgium following an official invitation to the Minister. Professor Rigaux has dealt perfectly clearly

and adequately with that point. If necessary, though, I would invite you, Mr. President, Members of the Court, to look again at the relevant passages in the Congo's Memorial. I must point out, however, that, contrary to Mr. Bethlehem's statement, there was nothing which required (CR 2001/8, p. 22, para. 28) that the investigating judge should suspend the arrest warrant; he merely expressed the personal opinion that, and I quote, "in our view", an "immunity from enforcement" should be accorded in the case of an official visit. The distinction between immunity from jurisdiction/immunity from enforcement underlying this "opinion" of the investigating judge is obviously a false one in the present case, as Professor Rigaux has pointed out, as well as being questionable conceptually, since in principle immunity from enforcement is "an immunity which bars execution against property, in particular in order to give effect to a judgment" *[translation by the Registry]* (J. Verhoeven, *L'immunité de juridiction et d'exécution des chefs d'Etats et anciens chefs d'Etats*, Institute of International Law, Thirteenth Commission, p. 55, para. 29). The issue which the investigating judge raises is more one of personal inviolability than immunity. Furthermore, as Professor Rigaux has also pointed out, there is no avoiding the flagrant contradiction which exists on this point in the arrest warrant, just before it talks about the suspension of the warrant in case of official visits: "Hence, the office of Minister for Foreign Affairs that is currently occupied by the accused does not entail any immunity from jurisdiction and *enforcement* and this Court is consequently competent to take the present decision" (arrest warrant, translation, p. 63).

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At all events, Mr. President, Members of the Court, a more fundamental point is that the existence of an internationally wrongful act cannot depend on the domestic legal effect of a judicial step which itself constitutes the internationally wrongful act. The presentation of arguments about the legal effect produced domestically by the act which constitutes the violation of international law — the act which *is* the internationally wrongful act — is thus a way of diverting the Court's attention from the reality of that wrongful act.

(iii) Moreover, contrary to Belgium's assertion, the violation of sovereignty is an established one, something which has taken place. Contrary to what has been stated, what constitutes the violation of immunity and of the Congo's sovereign rights is not the fear of being arrested

abroad, but the coercive legal step represented by the arrest warrant itself, which violates that immunity and those rights in claiming that a member of a foreign government is subject to a domestic criminal jurisdiction when in principle he is beyond its reach. What is more, this fear of arrest abroad clearly resulted, among other things, from the fact that various extradition treaties operate in a particular way in the European sphere. It is highly significant in this respect that, once the warrant had been issued internationally, Minister Yerodia made no further visits to any member State of the European Union and that his aircraft made its technical stops at Dakar, where his father comes from. When Minister Yerodia went to New York at the invitation of the United Nations he was careful not to leave its Headquarters, to which he took the shortest possible route from the airport. To claim that the sovereignty of the Democratic Republic of the Congo was not violated by the arrest warrant, a document which totally negates the immunity from jurisdiction of the Minister for Foreign Affairs, is obviously to misunderstand the reality of the facts and their wrongful character.

II. Regarding the alleged exception to immunity from suit of Ministers for Foreign Affairs in office before domestic courts, I do not think, Mr. President, Members of the Court, that there is a need to return to this point at length. It clearly concerns an issue of law, a fundamental issue that the Court will have to settle. The Democratic Republic of the Congo maintains in this respect all that it has set out in its written and oral arguments.

However, I am anxious to emphasise some points in relation to Professor David's arguments. As he said himself, he has made an "interpretative analysis" (CR 2001/9, p. 19, para. 29) of the various sources cited by Belgium in support of its position. It think it sufficient to state, once more, that this "interpretative analysis" is nothing but the improper use of the texts cited, a process that feeds on the conceptual confusion, exposed but still pursued, between personal criminal liability and immunity, between the jurisdiction of international courts and the jurisdiction of domestic courts. Not a single precedent cited by Professor David relates to our situation, i.e., to a domestic criminal process against a member of a foreign government in office. However, we are told: no matter, it is not the same thing; but all the same, it is the same thing! To be sure, they tell us at the same time that there is no real precedent, but the rule is nonetheless certain, and has been certain since Nuremberg, or even since the Treaty of Versailles, and, anyway, there must always be a first

time! I venture, however, to doubt the existence of a rule which is not clearly stated but is the result of the improper use of texts covering other situations, a rule which in addition has not been applied for nearly 60 years, or even 80 years! But that is not all: to allay our astonishment when confronted by an alleged rule that has never been applied for over half a century but is nonetheless certain, we receive an explanation that, if the rule has never been applied, this is doubtless because it was a concealed one. And Professor David — no layman he! — reveals it to us. He has told us that the statutes of international courts that he cites in support of Belgium's position "were intended to cover, by a terminological abridgment that is convenient but perhaps regrettable in the case of the layman, the two aspects of a defence based on the official position of the individual" (CR 2001/9, p. 19, para. 30).

Is it not time to wake up? The dream may give pleasure to the dreamer, but nonetheless it remains a dream, and, let me tell you, it makes wearisome listening. One wonders why, on such important issues of principle, such a terminological abridgement has been systematically applied, leaving the "layman" ignorant of the real will of the authors of the rule.

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Here is yet another example, quite significant, of this method of "interpretative analysis" that I consider improper. Concerning the Pinochet ruling in the House of Lords, Professor David cites an excerpt from Lord Browne-Wilkinson's opinion. While conceding that this excerpt relates to a former foreign Head of State, one no longer in office, he nevertheless asserts: "with such perfectly correct premises Lord Browne-Wilkinson, the author of this excerpt, could equally well have concluded that immunity might 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" (CR 2001/9, p. 24, para. 40).

What is this logic? Is it not enough to say that Lord Browne-Wilkinson did *not* draw the conclusion that Professor David asserts that he could have drawn? To make a text say something that it does *not* say is even less convincing when the same text expressly says the opposite of what it is claimed it might have said! It should be remembered that, in his opinion in support of the House of Lords ruling of 24 March 1999, Lord Browne-Wilkinson himself wrote this about a Head of State in office, adding his voice to the explicit statement by Lord Nicholls on this point that I have already cited:

> "This immunity enjoyed by a head of state in power and an ambassador in post is a *complete immunity* attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state." (See Memorial, p. 41, para. 63) (emphasis added).

III. I still have to say a few words about the request made by the Congo in its submissions, which will be restated shortly by the Agent. The subject of the request, properly understood, in itself justifies the dismissal of all the preliminary objections put forward by Belgium regarding jurisdiction and admissibility and to which Professor Chemillier-Gendreau has already replied. In other words, if the subject of the request is properly understood, it becomes clear that the claims by Belgium that the dispute does not exist or is without object, or has become an action of diplomatic protection, that all these claims regarding the subject of the dispute, fall at a stroke.

023 What is the Democratic Republic of the Congo actually asking for? It is asking for reparation for the injury caused to its sovereign rights by an unlawful act. This reparation is sought as a combination of two forms: a measure of satisfaction, aimed at redressing the moral injury to the Democratic Republic of the Congo, and a measure of reparation in the form of legal restitution, that is to say, the withdrawal and cancellation of the disputed arrest warrant and notification of the States to which the warrant was circulated that it has been withdrawn. These three measures, satisfaction, legal restitution in kind and notification of third parties, are necessary in order to redress the injury caused to the Democratic Republic of the Congo, that is, in order "as far as possible, [to] wipe out all the consequences of the unlawful act and re-establish the situation which would, in all probability, have existed if that act had not been committed", according to the celebrated words of the Judgment in the case concerning the *Factory at Chorzów* (*P.C.I.J., Series A, No. 17*, p. 47, 13 September 1928). Even if the warrant were liable to cancellation by the Indictments Chamber of the Brussels Court of Appeal, the fact would remain that a measure of satisfaction should be granted, as already stressed by Professor Rigaux. Belgium does not, moreover, appear to contest this request for satisfaction by a formal declaration of the unlawful nature of the act committed, but rather the third and fourth requests by the Democratic Republic of the Congo, concerning the withdrawal and cancellation of the arrest warrant. Several arguments are advanced in this connection. Allow me to examine them briefly.

First, it is said that the arrest warrant is no longer unlawful in view of the fact that at present the accused has no official duties, so that the third and fourth requests by the Democratic Republic of the Congo seek to protect its accused national.

There are two replies to this argument:

(1) the arrest warrant is unlawful *ab initio,* and can no longer have any legal force, as Professor Chemillier-Gendreau has already stated. It is fundamentally flawed, and must therefore be withdrawn. It is open to Belgium to issue a fresh warrant against Mr. Yerodia. The question of diplomatic protection will arise then, and only then.

(2) The sole impact of the termination of Mr. Yerodia's official duties is to deprive the wrongful act by Belgium of its character as a continuing internationally wrongful act. The termination of official duties in no way operates to efface the wrongful act and the injury that flows from it. These continue to exist. The only difference is that, since there is no longer any continuing internationally wrongful act, the request by the Congo is not a request that this act should cease, as Belgium's arguments might erroneously imply. The request by the Congo is a request for reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if that act had not been committed. It is clear that, since the wrongful act consisted in an internal legal instrument, only the withdrawal and cancellation of the latter can provide due reparation, in the form of juridical restitution in kind. There is nothing extraordinary in this. As Professor Arangio-Ruiz stressed in his preliminary report to the International Law Commission on State responsibility: "In practice, any international restitution in kind will be an essentially juridical *restitutio* within the legal system of the author State, accompanying or preceding material *restitutio*" (*ILC Yearbook* 1988, Vol. II (Part One), p. 27, para. 80).

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Belgium's second argument is that the request goes beyond the powers of the Court. The argument seems to assert both that the Court lacks the power to annul an internal legal act and that it cannot decide on the means whereby a State should comply with its judgment. The decisions of the Court cited by Belgium on this point in reality in no way gainsay the Democratic Republic of the Congo's request. In no sense is the Court asked to determine the means whereby Belgium is to comply with its decision. Belgium remains perfectly free in this respect. The withdrawal and

cancellation of the warrant, by the means that Belgium deems most suitable, are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution in itself. Moreover, in no respect is the Court itself asked to withdraw and cancel the disputed warrant: the request is that the Court adjudge and declare that Belgium, by way of reparation for the injury to the rights of the Democratic Republic of the Congo, be required to withdraw and cancel this warrant by the means of its choice. Again, there is nothing extraordinary in this. To conclude, I venture to cite Professor Arangio-Ruiz again, in the same report to the International Law Commission:

025 "It is submitted that all that international law — and international bodies — are normally fit or enabled to do with regard to internal legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation, such reparation requiring, *le cas échéant*, invalidation or annulment of internal legal acts on the part of the author State itself." (*ILC Yearbook* 1988, Vol. II (Part One), p. 28, para. 84 *(a)*.)

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

The PRESIDENT: Thank you, Professor. I now give the floor to the Agent of the Democratic Republic of the Congo.

Mr. MASANGU-a-MWANZA: Mr. President, Members of the Court. Mr. President, before my final submissions, allow me to express to the Court on behalf of the Congolese delegation led by His Excellency Maître Ngele Masudi, Minister of Justice and Keeper of the Seals, and of the counsel who have assisted us, our most respectful gratitude for most patiently following the arguments developed during these five days of sittings. I will also take this opportunity to express my sincere thanks to the Registrar, who has facilitated the grant of travel visas to our delegation through the Netherlands Ministry of Foreign Affairs, because our Belgian diplomat friends present in this room know that it is not easy to obtain a travel visa in the chanceries of Western countries accredited to Kinshasa. Philippe Cahier, in accordance with present-day diplomatic law, defines diplomacy as the way of conducting the foreign affairs of a subject of international law by peaceful means. This being so, I now wish to thank counsel on both sides for the diplomatic way in which

they have conducted their arguments, with a proper regard for the good relations that happily exist here between the Kingdom of Belgium and the Democratic Republic of the Congo, my country.

FINAL SUBMISSIONS

In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. By issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of international customary law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;

2. A formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant.

Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Ambassador. That ends the second round of arguments by the Democratic Republic of the Congo. The Court will meet this afternoon at 4.30 p.m. for the second round of arguments by the Kingdom of Belgium. The sitting is closed.

The Court rose at 10.40 a.m.