

JOINT SEPARATE OPINION OF JUDGES HIGGINS,
KOOIJMANS AND BUERGENTHAL

Necessity of a finding on jurisdiction — Reasoning on jurisdiction not precluded by ultra petita rule.

Status of universal jurisdiction to be tested by reference to the sources of international law — Few examples of universal jurisdiction within national legislation or case law of national courts — Examination of jurisdictional basis of multilateral treaties on grave offences do not evidence established practice of either obligatory or voluntary universal criminal jurisdiction — Aut dedere aut prosequi — Contemporary trends suggesting universal jurisdiction in absentia not precluded — The “Lotus” case — Evidence that national courts and international tribunals intended to have parallel roles in acting against impunity — Universal jurisdiction not predicated upon presence of accused in territory, nor limited to piracy — Necessary safeguards in exercising such a jurisdiction — Rejection of Belgium’s argument that it had in fact exercised no extraterritorial criminal jurisdiction.

The immunities of an incumbent Minister for Foreign Affairs and their role in society — Rejection of assimilation with Head of State immunities — Trend to preclude immunity when charged with international crimes — Immunity not precluded in the particular circumstances of this case — Role of international law to balance values it seeks to protect — Narrow interpretation to be given to “official acts” when immunities of an ex-Minister for Foreign Affairs under review.

No basis in international law for Court’s order to withdraw warrant.

1. We generally agree with what the Court has to say on the issues of jurisdiction and admissibility and also with the conclusions it reaches. There are, however, reservations that we find it necessary to make, both on what the Court has said and what it has chosen not to say when it deals with the merits. Moreover, we consider that the Court erred in ordering Belgium to cancel the outstanding arrest warrant.

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2. In its Judgment the Court says nothing on the question of whether — quite apart from the status of Mr. Yerodia at the relevant time — the Belgian magistracy was entitled under international law to issue an arrest warrant for someone not at that time within its territory and pass it to Interpol. It has, in effect, acceded to the common wish of the Parties that

the Court should not pronounce upon the key issue of jurisdiction that divided them, but should rather pass immediately to the question of immunity as it applied to the facts of this case.

3. In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. “Immunity” is the common shorthand phrase for “immunity from jurisdiction”. If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that “immunity” is a free-standing topic of international law. It is not. “Immunity” and “jurisdiction” are inextricably linked. Whether there is “immunity” in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.

4. While the notion of “immunity” depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In by-passing the issue of jurisdiction the Court has encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to conflate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one — immunity — can arise only if the other — jurisdiction — exists) can the larger picture be seen. One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it. But through choosing to look at half the story — immunity — it is not in a position to do so.

6. As Mr. Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction. Indeed, both it and the enabling legislation of 1993 and 1999 expressly say so. Moreover, Mr. Yerodia himself was outside of Belgium at the time the warrant was issued.

7. In its Application instituting proceedings (p. 7), the Democratic Republic of the Congo complained that Article 7 of the Belgian Law:

“establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of ‘serious violations of international humanitarian law’, without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory.

It is clearly this unlimited jurisdiction which the Belgian State confers upon itself which explains the issue of the arrest warrant against Mr. Yerodia Ndombasi, against whom it is patently evident that no basis of territorial or in personam jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked.”

In its Memorial, the Congo denied that

“international law recognized such an enlarged criminal jurisdiction as that which Belgium purported to exercise, namely in respect of incidents of international humanitarian law when the accused was not within the prosecuting State’s territory” (Memorial of Congo, para. 87). [Translation by the Registry.]

In its oral submissions the Congo once again stated that it was not opposed to the principle of universal jurisdiction *per se*. But the assertion of a universal jurisdiction over perpetrators of crimes was not an obligation under international law, only an option. The exercise of universal jurisdiction required, in the Congo’s view, that the sovereignty of the other State be not infringed and an absence of any breach of an obligation founded in international law (CR 2001/6, p. 33). Further, according to the Congo, States who are not under any obligation to prosecute if the perpetrator is not present on their territory, nonetheless are free to do so in so far as this exercise of jurisdiction does not infringe the sovereignty of another State and is not in breach of international law (*ibid.*). The Congo stated that it had no intention of discussing the existence of the principle of universal jurisdiction, nor of placing obstacles in the way of any emerging custom regarding universal jurisdiction (*ibid.*, p. 30). As the oral proceedings drew to a close, the Congo acknowledged that the Court might have to pronounce on certain aspects of universal jurisdiction, but it did not request the Court to do so, as the question did not interest it directly (CR 2001/10, p. 11). It was interested to have a ruling from the Court on Belgium’s obligations to the Congo in the light of Mr. Yerodia’s immunity at the relevant time. The final submissions as contained in the Application were amended so as to remove any request for the Court to make a determination on the issue of universal jurisdiction.

8. Belgium in its Counter-Memorial insisted that there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option (Counter-Memorial of Belgium, para. 3.3.25). No

territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community (Counter-Memorial of Belgium, paras. 3.3.44-3.3.52). In Belgium's view an investigation or prosecution mounted against a person outside its territory did not violate any rule of international law, and was accepted both in international practice and in the internal practice of States, being a necessary means of fighting impunity (Counter-Memorial of Belgium, paras. 3.3.28-3.3.74).

9. These submissions were reprised in oral argument, while noting that the Congo "no longer contest[ed] the exercise of universal jurisdiction by default" (CR 2001/9, pp. 8-13). Belgium, too, was eventually content that the Court should pronounce simply on the immunity issue.

10. That the Congo should have gradually come to the view that its interests were best served by reliance on its arguments on immunity, was understandable. So was Belgium's satisfaction that the Court was being asked to pronounce on immunity and not on whether the issue and circulations of an international arrest warrant required the presence of the accused on its territory. Whether the Court should accommodate this consensus is another matter.

11. Certainly it is not required to do so by virtue of the *ultra petita* rule. In the Counter-Memorial Belgium quotes the *locus classicus* for the *non ultra petita* rule, the *Asylum (Interpretation)* case:

"it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from *deciding* points not included in those submissions" (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402; Counter-Memorial of Belgium, para. 2.75; emphasis added).

It also quotes Rosenne who said: "It does not confer jurisdiction on the Court or detract jurisdiction from it. It limits the extent to which the Court may go in its decision." (Counter-Memorial of Belgium, para. 2.77.)

12. Close reading of these quotations shows that Belgium is wrong if it wishes to convey to the Court that the *non ultra petita* rule would bar it from *addressing* matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions. As Sir Gerald Fitzmaurice said:

“unless certain distinctions are drawn, there is a danger that [the *non ultra petita* rule] might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by compelling it to neglect juridically relevant factors” (*The Law and Procedure of the International Court of Justice*, 1986, Vol. II, pp. 529-530).

13. Thus the *ultra petita* rule can operate to preclude a finding of the Court, in the *dispositif*, on a question not asked in the final submissions by a party. But the Court should not, because one or more of the parties finds it more comfortable for its position, forfeit necessary steps on the way to the finding it *does* make in the *dispositif*. The Court has acknowledged this in paragraph 43 of the present Judgment. But having reserved the right to deal with aspects of universal jurisdiction in its reasoning, “should it deem this necessary or desirable”, the Court says nothing more on the matter.

14. This may be contrasted with the approach of the Court in the Advisory Opinion request put to it in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (*I.C.J. Reports 1962*, pp. 156-157). (The Court was constrained by the request put to it, rather than by the final submissions of the Applicant, but the point of principle remains the same.) The Court was asked by the General Assembly whether the expenditures incurred in connection with UNEF and ONUC constituted “expenses of the organization” for purposes of Article 17, paragraph 2, of the Charter.

15. France had in fact proposed an amendment to this request, whereby the Court would have been asked to consider whether the expenditures in question were made in conformity with the provisions of the Charter, before proceeding to the question asked. This proposal was rejected. The Court stated

“The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were ‘decided on in conformity with the Charter’, if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.” (*Ibid.*, p. 157.)

The Court further stated that it

“has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked” (*ibid.*, p. 158).

16. For all the reasons expounded above, the Court should have “found it appropriate” to deal with the question of whether the issue and international circulation of a warrant based on universal jurisdiction in the absence of Mr. Yerodia’s presence on Belgian territory was unlawful. This should have been done before making a finding on immunity from jurisdiction, and the Court should indeed have “examined in some detail various problems raised” by the request as formulated by the Congo in its final submissions.

17. In agreeing to pronounce upon the question of immunity without addressing the question of a jurisdiction from which there could be immunity, the Court has allowed itself to be manoeuvred into answering a hypothetical question. During the course of the oral pleadings Belgium drew attention to the fact that Mr. Yerodia had ceased to hold any ministerial office in the Government of the Democratic Republic of the Congo. In Belgium’s view, this meant that the Court should declare the request to pronounce upon immunity to be inadmissible. In Belgium’s view the case had become one “about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge” (CR 2001/8, p. 26, para. 43). The dispute was “a difference of opinion of an abstract nature” (CR 2001/8, p. 36, para. 71). The Court should not “enter into a debate which it may well come to see as essentially an academic exercise” (CR 2001/9, p. 7, para. 4 [*translation by the Registry*]).

18. In its Judgment the Court rightly rejects those contentions (see Judgment, paras. 30-32). But nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist. It is regrettable that the Court has not followed the logic of its own findings in the *Certain Expenses* case, and in this Judgment addressed in the necessary depth the question of whether the Belgian authorities could legitimately have invoked universal jurisdiction in issuing and circulating the arrest warrant for the charges contained therein, and for a person outside the territorial jurisdiction at the moment of the issue of the warrant. Only if the answer to these is in the affirmative does the question arise: “Nevertheless, was Mr. Yerodia immune from such exercise of jurisdiction, and by reference to what moment of time is that question to be answered?”

* * *

19. We therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State’s territory. The necessary point of departure must be the sources of international law identified in Article 38, paragraph 1 (*c*), of the Statute of the Court, together with obligations imposed upon all United Nations Members by Security Council resolutions, or by such General Assembly resolutions as meet the

criteria enunciated by the Court in the case concerning *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion (I.C.J. Reports 1996, p. 226, para. 70)*.

20. Our analysis may begin with national legislation, to see if it evidences a State practice. Save for the Belgian legislation of 10 February 1999, national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences. Various examples typify the more qualified practice. The Australian War Crimes Act of 1945, as amended in 1988, provides for the prosecution in Australia of crimes committed between 1 September 1939 and 8 May 1945 by persons who were Australian citizens or residents at the times of being charged with the offences (Arts. 9 and 11). The United Kingdom War Crimes Act of 1991 enables proceedings to be brought for murder, manslaughter or culpable homicide, committed between 1 September 1935 and 5 June 1945, in a place that was part of Germany or under German occupation, and in circumstances where the accused was at the time, or has become, a British citizen or resident of the United Kingdom. The statutory jurisdiction provided for by France, Germany and (in even broader terms) the Netherlands, refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect. It should be noted, however, that the German Government on 16 January 2002 has submitted a legislative proposal to the German Parliament, section 1 of which provides:

“This Code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany].”

The Criminal Code of Canada 1985 allows the execution of jurisdiction when at the time of the act or omission the accused was a Canadian citizen or “employed by Canada in a civilian or military capacity”; or the “victim is a Canadian citizen or a citizen of a State that is allied with Canada in an armed conflict”, or when “at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person’s presence in Canada” (Art. 7).

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so

far as reliance on universal jurisdiction is concerned. In the *Pinochet* case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule required for extradition being met by English legislation in September 1988, after which date torture committed abroad was a crime in the United Kingdom as it already was in Spain. In Australia the Federal Court referred to a group of crimes over which international law granted universal jurisdiction, even though national enabling legislation would also be needed (*Nulyarimma*, 1999: genocide). The High Court confirmed the authority of the legislature to confer jurisdiction on the courts to exercise a universal jurisdiction over war crimes (*Polyukhovich*, 1991). In Austria (whose Penal Code emphasizes the double-criminality requirement), the Supreme Court found that it had jurisdiction over persons charged with genocide, given that there was not a functioning legal system in the State where the crimes had been committed nor a functioning international criminal tribunal at that point in time (*Cvijetkovic*, 1994). In France it has been held by a juge d'instruction that the Genocide Convention does not provide for universal jurisdiction (*in re Javor*, reversed in the Cour d'Appel on other grounds. The Cour de Cassation ruling equally does not suggest universal jurisdiction). The *Munyeshyaka* finding by the Cour d'Appel (1998) relies for a finding — at first sight inconsistent — upon cross-reference into the Statute of the International Tribunal for Rwanda as the jurisdictional basis. In the *Qaddafi* case the Cour d'Appel relied on passive personality and not on universal jurisdiction (in the Cour de Cassation it was immunity that assumed central importance).

23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an “extraterritorial jurisdiction” could be exercised over a non-national. However, in the Hoge Raad, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany). And the case law of the United States has been somewhat more ready to invoke “universal jurisdiction”, though considerations of passive personality have also been of key importance (*Yunis*, 1988; *Bin Laden*, 2000).

25. An even more ambiguous answer is to be derived from a study of the provisions of certain important treaties of the last 30 years, and the obligations imposed by the parties themselves.

26. In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. (See the interesting recent article of Luis Benavides, “The Universal Juris-

diction Principle: Nature and Scope”, *Anuario Mexicano de Derecho Internacional*, Vol. 1, p. 58 (2001).) This is doubtful.

27. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, provides:

“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

This is an obligation to assert territorial jurisdiction, though the *travaux préparatoires* do reveal an understanding that this obligation was not intended to affect the right of a State to exercise criminal jurisdiction on its own nationals for acts committed outside the State (A/C.6/SR.134, p. 5). Article VI also provides a potential grant of non-territorial competence to a possible future international tribunal — even this not being automatic under the Genocide Convention but being restricted to those Contracting Parties which would accept its jurisdiction. In recent years it has been suggested in the literature that Article VI does not prevent a State from exercising universal jurisdiction in a genocide case. (And see, more generally, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §404.)

28. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

29. Article 85, paragraph 1, of the First Additional Protocol to the 1949 Geneva Convention incorporates this provision by reference.

30. The stated purpose of the provision was that the offences would not be left unpunished (the extradition provisions playing their role in this objective). It may immediately be noted that this is an early form of the *aut dedere aut prosequi* to be seen in later conventions. But the obligation to prosecute is primary, making it even stronger.

31. No territorial or nationality linkage is envisaged, suggesting a true

universality principle (see also Henzelin, *Le principe de l'universalité en droit pénal international: droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, 2000, pp. 354-356). But a different interpretation is given in the authoritative Pictet Commentary: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply a permission to prosecute *in absentia*, if the search had no result?

32. As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I.

33. The Single Convention on Narcotics and Drugs, 1961, provides in Article 36, paragraph 2, that:

“(a) (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.”

34. Diverse views were expressed as to whether the State where the offence was committed should have first right to prosecute the offender (E/CN.7/AC.3/9, 11 September 1958, p. 17, fn. 43; cf. E/CN.7/AC.3/9 and Add.1, E/CONF.34/1/Add.1, 6 January 1961, p. 32). Nevertheless, the principle of “primary universal repression” found its way into the text, notwithstanding the strong objections of States such as the United States, New Zealand and India that their national laws only envisaged the prosecution of persons for offences occurring within their national borders. (The development of the concept of “impact jurisdiction” or “effects jurisdiction” has in more recent years allowed continued reliance on territoriality while stretching far the jurisdictional arm.) The compromise reached was to make the provisions of Article 36, paragraph 2 (iv), “subject to the constitutional limitations of a Party, its legal system and domestic law”. But the possibility of a universal jurisdiction was not denounced as contrary to international law.

35. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, making preambular reference to the “urgent need” to make such acts “punishable as an offence and to provide for appropriate measures with respect to prosecution and extradition of

offenders”, provided in Article 4 (1) for an obligation to take such measures as may be necessary to establish jurisdiction over these offences and other acts of violence against passengers or crew:

- “(a) when the offence is committed on board an aircraft registered in that State;
- (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State”.

Article 4 (2) provided for a comparable obligation to establish jurisdiction where the alleged offender was present in the territory and if he was not extradited pursuant to Article 8 by the territory. Thus here too was a treaty provision for *aut dedere aut prosequi*, of which the limb was in turn based on the principle of “primary universal repression”. The jurisdictional bases provided for in Article 4 (1) (b) and 4 (2), requiring no territorial connection beyond the landing of the aircraft or the presence of the accused, were adopted only after prolonged discussion. The *travaux préparatoires* show States for whom mere presence was an insufficient ground for jurisdiction beginning reluctantly to support this particular type of formula *because of the gravity of the offence*. Thus the representative of the United Kingdom stated that his country “would see great difficulty in assuming jurisdiction merely on the ground that an aircraft carrying a hijacker had landed in United Kingdom territory”. Further,

“normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence . . . he was prepared to support . . . [the proposal on mandatory jurisdiction on the part of the State where a hijacker is found].” (Hague Conference, p. 75, para. 18.)

36. It is also to be noted that Article 4, paragraphs 1 and 2, provides for the mandatory exercise of jurisdiction in the absence of extradition; but does not preclude criminal jurisdiction exercised on alternative grounds of jurisdiction in accordance with national law (though those possibilities are not made compulsory under the Convention).

37. Comparable jurisdictional provisions are to be found in Articles 5 and 8 of the International Convention against the Taking of Hostages of 17 December 1979. The obligation enunciated in Article 8 whereby a State party shall “without exception whatsoever and whether or not the offence was committed in its territory” submit the case for prosecution if

it does not extradite the alleged offender, was again regarded as necessary by the majority, given the nature of the crimes (Summary Record, *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages (A/AC.188/SR.5, 7, 8, 11, 14, 15, 16, 17, 23, 24 and 35)). The United Kingdom cautioned against moving to universal criminal jurisdiction (*ibid.*, A/AC.188/SR.24, para. 27) while others (Poland, A/AC.188/SR.23, para. 18; Mexico, A/AC.188/SR.16, para. 11) felt the introduction of the principle of universal jurisdiction to be essential. The USSR observed that no State could exercise jurisdiction over crimes committed in another State by nationals of that State without contravening Article 2, paragraph 7, of the Charter. The Convention provisions were in its view to apply only to hostage taking that was a manifestation of international terrorism — another example of initial and understandable positions on jurisdiction being modified in the face of the exceptional gravity of the offence.

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

- “(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.”

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted *a contrario*. (See J. H. Burgers and H. Danelius, *The United Nations Convention against Torture*, 1988, p. 133.)

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of “primary universal repression” came now to be widely referred to by delegates as “universal jurisdiction” — moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an “offence against the law of nations” (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United Kingdom eventually dropped their objection that “universal jurisdiction” over torture would create problems under their domestic legal systems. (See E/CN.4/1984/72.)

40. This short historical survey may be summarized as follows.

41. The parties to these treaties agreed both to grounds of jurisdiction

and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4 (1), Hague Convention; Article 3 (1), Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as “universal jurisdiction”, though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

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42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, *inter partes*, or whether it is now, *at least as regards the offences articulated in the treaties*, an obligation of customary international law was pleaded by the Parties in this case but not addressed in any great detail.

43. Nor was the question of whether any such general obligation applies to crimes against humanity, given that those too are regarded everywhere as comparably heinous crimes. Accordingly, we offer no view on these aspects.

44. However, we note that the inaccurately termed “universal jurisdiction principle” in these treaties is a principle of *obligation*, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose.

If a dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised, the writings of eminent jurists are much more mixed. The large literature contains vigorous exchanges of views (which have been duly studied by the Court) suggesting profound differences of opinion. But these writings, important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom. And the policy arguments advanced in some of the writings can certainly suggest why a practice or a court decision should be regarded as desirable, or indeed

lawful; but contrary arguments are advanced, too, and in any event these also cannot serve to substantiate an international practice where virtually none exists.

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. Further, many countries have no national legislation for the exercise of well recognized forms of extraterritorial jurisdiction, sometimes notwithstanding treaty obligations to enable themselves so to act. National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law — that is, State practice — is neutral as to exercise of universal jurisdiction.

46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. (See, for example, Cherif Bassiouni, *International Criminal Law*, Vol. III: *Enforcement*, 2nd ed., 1999, p. 228; Theodor Meron, “International Criminalization of Internal Atrocities”, 89 *AJIL* (1995), p. 576.)

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. “Effects” or “impact” jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in

the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

48. In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.

49. Belgium — and also many writers on this subject — find support for the exercise of a universal criminal jurisdiction *in absentia* in the “*Lotus*” case. Although the case was clearly decided on the basis of jurisdiction over damage to a vessel of the Turkish navy and to Turkish nationals, it is the famous dictum of the Permanent Court which has attracted particular attention. The Court stated that:

“[T]he first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only

limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." (*P.C.I.J., Series A, No. 10*, pp. 18-19.)

The Permanent Court acknowledged that consideration had to be given as to whether these principles would apply equally in the field of criminal jurisdiction, or whether closer connections might there be required. The Court noted the importance of the territorial character of criminal law but also the fact that all or nearly all systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. After examining the issue the Court finally concluded that for an exercise of extraterritorial criminal jurisdiction (other than within the territory of another State) it was equally necessary to "prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation".

50. The application of this celebrated dictum would have clear attendant dangers in some fields of international law. (See, on this point, Judge Shahabuddeen's dissenting opinion in the case concerning *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 394-396.) Nevertheless, it represents a continuing potential in the context of jurisdiction over international crimes.

51. That being said, the dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies. The underlying idea of universal jurisdiction properly so-called (as in the case of piracy, and possibly in the Geneva Conventions of 1949), as well as the *aut dedere aut prosequi* variation, is a common endeavour in the face of atrocities. The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted. And those States and academic writers who claim the right to act unilaterally to assert a universal criminal jurisdiction over persons committing such acts, invoke the concept of acting as "agents for the international community". This vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the "*Lotus*" case.

At the same time, the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no com-

petence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis. (See Article 4 (3), Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Article 5 (3), International Convention against Taking of Hostages, 1979; Article 5 (3), Convention against Torture; Article 9, Statute of the International Criminal Tribunal for the former Yugoslavia; and Article 19, Rome Statute of the International Criminal Court.)

52. We may thus agree with the authors of *Oppenheim's International Law* (9th ed., p. 998), that:

“While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.”

* * *

53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. The fact that in the past the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy, *outside of any territorial jurisdiction*, is not determinative. The only prohibitive rule (repeated by the Permanent Court in the “*Lotus*” case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.

55. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to *any* extraterritoriality, including those that are well established and not just to universal jurisdiction.

56. Some jurisdictions provide for trial *in absentia*; others do not. If it

is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.

57. On what basis is it claimed, alternatively, that an arrest warrant may not be issued for non-nationals in respect of offences occurring outside the jurisdiction? The textual provisions themselves of the 1949 Geneva Convention and the First Additional Protocol give no support to this view. The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of *aut dedere aut prosequi*. *Definitionally, this envisages presence on the territory.* There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario so as to exclude a voluntary exercise of a universal jurisdiction.*

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

* * *

59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction *in absentia*, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or juge d'instruction who acts in full independence, without links to or control

by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or juge d'instruction. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

* * *

60. It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.

61. Piracy is the classical example. This jurisdiction was, of course, exercised on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State. But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas. War crimes (already since 1949 perhaps a treaty-based provision for universal jurisdiction) may be added to the list. The specification of their content is largely based upon the 1949 Conventions and those parts of the 1977 Additional Protocols that reflect general international law. Recent years have also seen the phenomenon of an alignment of national jurisdictional legislation on war crimes, specifying those crimes under the statutes of the ICTY, ICTR and the intended ICC.

62. The substantive content of the concept of crimes against humanity, and its status as crimes warranting the exercise of universal jurisdiction, is undergoing change. Article 6 (c) of the Charter of the International Military Tribunal of 8 August 1945 envisaged them as a category linked with those crimes over which the Tribunal had jurisdiction (war crimes, crimes against the peace). In 1950 the International Law Commission defined them as murder, extermination, enslavement, deportation or other inhuman acts perpetrated on the citizen population, or persecutions on political, racial or religious grounds if in exercise of, or connection with, any crime against peace or a war crime (*Yearbook of the International Law Commission*, 1950, Principle VI (c), pp. 374-377). Later definitions of crimes against humanity both widened the subject-matter, to include such offences as torture and rape, and de-coupled the link to other earlier established crimes. Crimes against humanity are now regarded as a distinct category. Thus the 1996 Draft Code of Crimes

against the Peace and Security of Mankind, adopted by the International Law Commission at its 48th session, provides that crimes against humanity

“means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group:

- (a) Murder;
- (b) Extermination;
- (c) Torture;
- (d) Enslavement;
- (e) Persecution on political, racial, religious or ethnic grounds;

- (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) Arbitrary deportation or forcible transfer of population;

- (h) Arbitrary imprisonment;
- (i) Forced disappearance of persons;
- (j) Rape, enforced prostitution and other forms of sexual abuse;

- (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”.

63. The Belgian legislation of 1999 asserts a universal jurisdiction over acts broadly defined as “grave breaches of international humanitarian law”, and the list is a compendium of war crimes and the Draft Codes of Offences listing of crimes against humanity, with genocide being added. Genocide is also included as a listed “crime against humanity” in the 1968 Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, as well as being included in the ICTY, ICTR and ICC Statutes.

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. “Racial hatred” would need to be assimilated to “persecution on racial grounds”, or, on the particular facts, to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome

Statute for the ICC. However, Article 7 (1) of the ICTY and Article 6 (1) of the ICTR do stipulate that

“any person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to [in the relevant articles: crimes against humanity being among them] shall be individually responsible for the crime”.

In the *Akayesu* Judgment (96-4-T) a Chamber of the ICTR has held that liability for a crime against humanity includes liability through incitement to commit the crime concerned (paras. 481-482). The matter is dealt with in a comparable way in Article 25 (3) of the Rome Statute.

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of “crimes against humanity” and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

* * *

66. A related point can usefully be dealt with at this juncture. Belgium contended that, regardless of how international law stood on the matter of universal jurisdiction, it had in fact exercised no such jurisdiction. Thus, according to Belgium, there was neither a violation of any immunities that Mr. Yerodia might have, nor any infringement of the sovereignty of the Congo. To this end, Belgium, in its Counter-Memorial, observed that immunity from enforcement of the warrant was carefully provided for “representatives of foreign States who visit Belgium on the basis of any official invitation. In such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium” (Counter-Memorial of Belgium, para. 1.12). Belgium further observed that the arrest warrant

“has no legal effect at all either in or as regards the DRC. Although the warrant was circulated internationally for information by Interpol in June 2000, it was not the subject of a Red Notice. Even had it been, the legal effect of Red Notices is such that, for the DRC, it would not have amounted to a request for provisional arrest, let alone a formal request for extradition.” (Counter-Memorial of Belgium, para. 3.1.12.) [*Translation by the Registry.*]

67. It was explained to the Court that a primary purpose in issuing an international warrant was to learn the whereabouts of a person. Mr. Yerodia’s whereabouts were known at all times.

68. We have not found persuasive the answers offered by Belgium to a question put to it by Judge Koroma, as to what the *purpose* of the warrant was, if it was indeed so carefully formulated as to render it unenforceable.

69. We do not feel it can be said that, given these explanations by Belgium, there was no exercise of jurisdiction as such that could attract immunity or infringe the Congo's sovereignty. If a State issues an arrest warrant against the national of another State, that other State is entitled to treat it as such — certainly unless the issuing State draws to the attention of the national State the clauses and provisions said to vacate the warrant of all efficacy. Belgium has conceded that the purpose of the international circulation of the warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". An international arrest warrant, even though a Red Notice has not yet been linked, is analogous to the locking-on of radar to an aircraft: it is already a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium's choosing. Even if the action of a third State is required, the ground has been prepared.

* * *

70. We now turn to the findings of the Court on the impact of the issue of circulation of the warrant on the inviolability and immunity of Mr. Yerodia.

71. As to the matter of immunity, although we agree in general with what has been said in the Court's Judgment with regard to the specific issue put before it, we nevertheless feel that the approach chosen by the Court has to a certain extent transformed the character of the case before it. By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.

72. An example is the evolution the concept of State immunity in civil law matters has undergone over time. The original concept of absolute immunity, based on status (*par in parem non habet imperium*) has been replaced by that of restrictive immunity; within the latter a distinction was made between *acta jure imperii* and *acta jure gestionis* but immunity is granted only for the former. The meaning of these two notions is not carved in stone, however; it is subject to a continuously changing inter-

pretation which varies with time reflecting the changing priorities of society.

73. A comparable development can be observed in the field of international criminal law. As we said in paragraph 49, a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extra-territorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development not only has led to the establishment of new international tribunals and treaty systems in which new competences are attributed to national courts but also to the recognition of other, non-territorially based grounds of national jurisdiction (see paragraph 51 above).

74. The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.

75. These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.

76. Such is the backdrop of the case submitted to the Court. Belgium claims that under international law it is permitted to initiate criminal proceedings against a State official who is under suspicion of having committed crimes which are generally condemned by the international community; and it contends that because of the nature of these crimes the individual in question is no longer shielded by personal immunity. The Congo does not deny that a Foreign Minister is responsible in international law for all of his acts. It asserts instead that he has absolute personal immunity from criminal jurisdiction as long as he is in office and that his status must be assimilated in this respect to that of a Head of State (Memorial of Congo, p. 30).

77. Each of the Parties, therefore, gives particular emphasis in its argument to one set of interests referred to above: Belgium to that of the prevention of impunity, the Congo to that of the prevention of unwarranted outside interference as the result of an excessive curtailment of immunities and an excessive extension of jurisdiction.

78. In the Judgment, the Court diminishes somewhat the significance of Belgium's arguments. After having emphasized — and we could not agree more — that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed (para. 60), the Court goes on to say that these immunities do not represent a bar to criminal prosecution in certain circumstances (para. 61). We feel less than sanguine about examples given by the Court of such circumstances. The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare; moreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister. This alternative, however, can also be easily forestalled by an unco-operative government that keeps the Minister in office for an as yet indeterminate period.

79. We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law

seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.

80. Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he or she symbolized. Whereas State practice in this regard is extremely scarce, the immunities to which other high State officials (like Heads of Government and Ministers for Foreign Affairs) are entitled have generally been considered in the literature as merely functional. (Cf. Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, pp. 102-103.)

81. We have found no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State. In this respect, it should be pointed out that paragraph 3.2 of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property of 1991, which contained a saving clause for the privileges and immunities of Heads of State, failed to include a similar provision for those of Ministers for Foreign Affairs (or Heads of Government). In its commentary, the ILC stated that mentioning the privileges and immunities of Ministers for Foreign Affairs would raise the issues of the basis and the extent of their jurisdictional immunity. In the opinion of the ILC these immunities were clearly not identical to those of Heads of State.

82. The Institut de droit international took a similar position in 2001 with regard to Foreign Ministers. Its resolution on the Immunity of Heads of State, based on a thorough report on all relevant State practice, states expressly that these "shall enjoy, in criminal matters, immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity". But the Institut, which in this resolution did assimilate the position of Head of Government to that of Head of State, carefully avoided doing the same with regard to the Foreign Minister.

83. We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States (Judgment, para. 53). During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and wherever engaged in the functions required by his office and when in transit therefor.

84. Whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear. Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled. The arrest warrant of 11 April 2000 was directly enforceable in Belgium and would have obliged the police authorities to arrest Mr. Yerodia had he visited that country for non-official reasons. The very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minister for Foreign Affairs of the Congo.

85. Nonetheless, that immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for "official" acts. It is now increasingly claimed in the literature (see for example, Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", 46 *Austrian Journal of Public and International Law* (1994), pp. 227-228) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of *1° Congreso del Partido* (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case; Supreme Court, 29 May 1962, 36 *International Law Reports*, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet* ("*Pinochet III*"); and of Lords Steyn and Nicholls of Birkenhead in "*Pinochet I*", as well as the

judgment of the Court of Appeal of Amsterdam in the *Bouterse* case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.)

* * *

86. We have voted against paragraph (3) of the *dispositif* for several reasons.

87. In paragraph (3) of the *dispositif*, the Court “[f]inds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated”. In making this finding, the Court relies on the proposition enunciated in the *Factory at Chorzów* case pursuant to which “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would . . . have existed if that act had not been committed” (*P.C.I.J., Series A, No. 17*, p. 47). Having previously found that the issuance and circulation of the warrant by Belgium was illegal under international law, the Court concludes that it must be withdrawn because “the warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs”.

88. We have been puzzled by the Court’s reliance on the *Factory at Chorzów* case to support its finding in paragraph (3) of the *dispositif*. It would seem that the Court regards its order for the cancellation of the warrant as a form of *restitutio in integrum*. Even in the very different circumstances which faced the Permanent Court in the *Factory at Chorzów* case, *restitutio* in the event proved impossible. Nor do we believe that restoration of the *status quo ante* is possible here, given that Mr. Yerodia is no longer Minister for Foreign Affairs.

89. Moreover — and this is more important — the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility, A/56/10 (2001), p. 216). However, the Court’s finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law, although it may well be that a misnamed arrest warrant, which is all it now is, may be deemed to be defective as a matter of Belgian domestic law; but that

is not and cannot be of concern to this Court. Accordingly, we consider that the Court erred in its finding on this point.

(Signed) Rosalyn HIGGINS.

(Signed) Pieter KOOIJMANS.

(Signed) Thomas BUERGENTHAL.
